AANTEKENING

COMPANY RECORDS AND INFORMATION – AN OPEN BOOK?

OPSOMMING

Maatskappyrekords en -inligting – 'n oop boek?

Die reg om inligting te bekom is, uit die aard van die saak, onontbeerlik tot die bevordering van 'n kultuur van deursigtigheid en verantwoordbaarheid. Die howe het in onlangse regspraak die geleentheid gehad om te beslis oor die reg op toegang tot die inligting en rekords van maatskappye. Dit is interessant om die verskillende benaderings van die onderskeie howe te ontleed betreffende, enersyds, die hoedanighede van die applikante en, andersyds, die aard van die inligting versoek. Onlangse beslissings dui onteenseglik op 'n beweging na transformerende konstitusionalisme en die beginsels van subsidiariteit, eerder as 'n rigiede toepassing van die bepalings van spesifieke wetgewing. In hierdie aantekening word die wetgewing wat die reg ten opsigte van toegang tot maatskappyrekords en -inligting reguleer in die lig van onlangse regspraak, asook die verskillende benaderings van die onderskeie howe, bespreek.

1 Introduction

The right to access information is imperative in cultivating a culture of transparency and accountability (*Goosen-Joubert v Women4Women NPC* (16325/2021) [2022] ZAWCHC 82 (16 May 2022) para 69). The right to access information held by the state and other persons is provided for in section 32 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). National legislation in the form of the Promotion of Access to Information Act 2 of 2000 ("PAIA") was promulgated to give effect to the right to reasonable access to records and information held by the state and private bodies, as intended in section 32 of the Constitution. The Companies Act 71 of 2008 ("CA") makes further provision for specific rights in terms of which company records and information can be accessed (see s 26 read with s 24). Section 5 of the CA requires that these provisions be interpreted in a manner that promotes the purposes of the Act, which include the promotion of "compliance with the Bill of Rights as provided for in the Constitution, in the application of company law" (s 7(*a*) of the CA). The right to access records and information is essential to enable a person to make informed decisions and/or to protect or exercise his rights, and is in line with the purpose stated in section 7(*b*)(iii) – to encourage transparency and high standards of corporate governance. An important relationship exists, with regard to records and information held by companies, between the right of access to records and information provided for in terms of the CA, and these rights in terms of the PAIA.

The courts have recently delivered several important judgments dealing with the right to access company records and information. It is interesting to note how the respective courts, in the first instance, addressed the capacity in which the applicants requested access to information held by the companies involved, and,

secondly, the nature of the information requested. Notably, these recent requests and subsequent court applications were, in the main, based on the PAIA (*Tiso Blackstar Group (Pty) Ltd v Steinhoff International Holdings NV* 2023 1 SA 283 (WCC); *Goosen-Joubert*); while the court in *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as* amicus curiae*)* 2016 4 SA 317 (SCA) dealt with section 26 of the CA. These judgments are relevant when considering the capacity of the person requesting company records and/or information, the nature of the information requested, and the legal grounds upon which the request or application is based. The latest judgments may, furthermore, signal a shift towards transformative constitutionalism and the principle of subsidiarity in the context of company law and the right to access company records or information.

The judgments considered must be evaluated and understood against the background of the judgments delivered by the Supreme Court of Appeal in *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA) and *Nova Property*. From the outset, it is important to highlight that although the court in *Clutchco* (SCA) decided the matter in terms of the PAIA, it stressed the protection and rights the shareholder enjoyed in terms of the CA in its interpretation of a shareholder's right to access company records and information. While the PAIA did not come into play in *Nova Property*, because the court adjudicated the matter in terms of section 26 of the CA, the court considered the application of the PAIA when it held expressly that reliance could not be placed on the defences and requirements of the PAIA when access to company records or information was requested in terms of section 26.

We conclude that, based on the express reference to the PAIA in the CA and the liberal interpretational approaches in *Tiso Blackstar* and *Goosen-Joubert*, the effect of these cases aligns with the approach that the High Court adopted in *Davis v Clutchco (Pty) Ltd* 2004 1 SA 75 (C) as opposed to the that of *Clutchco* (SCA). In this matter, the approach of the High Court differed from the approach of the Supreme Court of Appeal on appeal. Consequently, the right to access company records and information is not restricted to the provisions of the CA, which are specifically aimed at regulating and restricting access to company information and records, and the protection of shareholders.

In this note we also discuss the legislative regulation of access to information and company records in the context of these recent judgments. We consider and discuss the interpretational philosophy that each of these cases adopted.

2 Legislative framework regarding the right to access company records and information

2.1 *Constitution*

The right to access information held by the state or a private body is a constitutional right (s 32(1)(*a*)–(*b*) of the Constitution). Both the PAIA and the CA give effect to this constitutional right in various ways. However, the right to access information in terms of section 32 of the Constitution is not unqualified as it may be limited or restricted, provided that the limitation or restriction complies with section 36 of the Constitution (s 7(3) of the CA read with s 36 of the Constitution). The right to access to information is also restricted by section 68(1) of the PAIA, which provides that a request for a record relating to trade secrets, financial, commercial, and other similar information, may be refused if

the disclosure thereof would cause harm to the financial or commercial interests of the body (s 68 of the PAIA; *Nova Property* para 22).

2.2 *Promotion of Access to Information Act*

The constitutional right to access records and information held by the state or by another person is recognised in the long title of the PAIA. One of the objectives of the PAIA is to foster a culture of transparency and accountability (*Goosen-Joubert* para 69). For purposes of this analysis, only the right in terms of part 3 of the PAIA to access information held by a person other than the state, is considered.

A person is entitled to access a record held by a private body. Section 1 of the PAIA provides that the definition of "private body" includes "(*c*) any former or existing juristic person; …. but excludes a public body". Furthermore, a person is entitled to access to the record only if it is required to protect or exercise a right (s 50(1)(*a*)); the requester has complied with the prescribed procedural requirements in terms of the PAIA (s 50(1)(*b*)); and the request has not justifiably been refused based on any of the grounds in chapter 4 of the PAIA (s 50(1)(*c*)). The person who requests access to a record held by a private body must provide reasons or an explanation why the requested record is required to protect or exercise a right (s 53(2)(*d*)). Further, provision is made to levy a maximum prescribed fee, payable by the requester, before access will be granted (s 54). Sections 62–69 of the PAIA contain the grounds on which a private body may refuse access to a record. A request to access a record may be refused to protect the privacy of a natural person who is a third party (s 63); to protect a third party's commercial information (s 64) or confidential information (s 65); to protect the property or the safety of an individual (s 66); if the information is covered by legal privilege (s 67); if the information constitutes commercial information (s 68); or if the information is research information (s 69). Section 70 imposes a legal duty on a private body to grant access to information in the public interest. The *onus* rests on the private body to prove that a refusal to grant access to records in terms of the PAIA (s 81(3)(*a*)) is justified.

2 3 *Companies Act*

A company acquires a separate juristic personality when its incorporation is registered in terms of the CA (s 19(1)(*a*)). As a juristic person, a company has a duty to disclose certain specific information to protect the public and other possible stakeholders (Delport "Companies Act 71 of 2008 and the *Turquand* rule" 2011 *THRHR* 133; see also Cilliers & Benade *Corporate law* (2000) 188–189). Section 26 of the CA provides for a person's right to access certain company information or records referred to in section 24. Regarding the interpretation of section 26, the Supreme Court of Appeal stated in *Nova Property* (para 16) that

> "[t]he role that companies play in our society and their obligations of disclosure that arise from the right of access to information in s 32 of the Constitution, is central to the interpretation of s 26(2) of the Companies Act. Both this court and the Constitutional Court recognised that how companies operate and conduct their affairs is not a private matter".

In *Bernstein v Bester NO* 1996 2 SA 751 (CC) para 85, the court stressed that

> "[t]he establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws from a legal framework endorsed by the community and operated through the mobilisation of funds

> belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. It is clear that any information pertaining to the participation in such a public sphere cannot rightly be held to be inhering in the person, and it cannot consequently be said in relation to such information a reasonable expectation of privacy exists."

The promotion of, and compliance with, the Bill of Rights in the application of company law is expressly included as a purpose of the CA (s 7(*a*)). Section 26 differentiates between a person who holds a beneficial interest (here referred to as a shareholder for ease of reference and fluency), and a person who does not hold a beneficial interest in the securities of a company (here referred to as a member of the public for ease of reference and fluency) (s 26(1) read with s 26(2)). The capacity of the applicant – whether a shareholder or a member of the public – will determine whether he is entitled to access different types of company information or records. Further, the capacity of the applicant will be a determinant of whether he will have to pay the maximum prescribed fee to inspect and/or copy the records. While a shareholder is entitled to inspect and copy company records, which must be maintained in terms of section 24(3) and (4) of the CA at no cost (s 26(1)), a member of the public is entitled only to inspect or copy the securities register of the company and the register of directors upon payment of a prescribed maximum fee (s 26(2)). (However, this note will not deal with the payment of these prescribed fees.)

In addition to these provisions, section 26(7) stipulates that a person's rights to information in terms of section 26, do not replace any rights ascribed to him by the Constitution, the PAIA, or any public regulation, but are additional to the rights a person may have to access information. The rights in section 26 are aimed at underpinning the rights of a person to company information and, consequently, the PAIA cannot be used to frustrate a person's rights to company information and records (*Nova Property* paras 21–23). The rights in the section are unqualified and not subject to the requirements of the PAIA (*Nova Property* para 21). If a person requires access to company information or records for which the CA provides, he will have to rely on the requirements and procedures in the PAIA. He will have to prove that the records or information requested are required to exercise or protect his rights. We submit that, in determining whether a person is entitled to access company information and records, a court will consider the person's right to access such information in terms of the CA by balancing the rights of the company and other possible stakeholders against the rights of the person requesting the information or records in terms of the PAIA.

3 Judicial approach to the right to access company information or records

3.1 *Rights of shareholders*

Clutchco (SCA) was one of the first judgments (and certainly the most prominent judgment) in which the relationship between the provisions of the PAIA and the Companies Act 61 of 1973 was considered. In *Clutchco* (SCA), a shareholder, Davis, requested access to records relating to a private company's books of first entry (para 3). These records were requested in addition to the audited annual financial statements provided to the shareholder (para 3). The request was made in terms of section 53 of the PAIA (*ibid*). Davis stated that he needed the records and information in the books of first entry to protect his

commercial and financial interests in the company and to enable him to determine the value of his shareholding in the company (para 4). The company denied Davis's request (para 5) and he approached the court for an order compelling the company to furnish him with copies of the requested records (para 6). The shareholder was partially successful in his application to the High Court (para 6), but the company's appeal to the Supreme Court of Appeal against the judgment of the High Court succeeded (para 20; see the judgment of the court *a quo* in *Davis v Clutchco* (C)). In overturning the judgment of the High Court, the Supreme Court of Appeal held that a shareholder was not as a rule entitled in terms of the PAIA to records and/or information in addition to those to which he was entitled in terms of the 1973 Act (*Clutchco* (SCA) paras 17–18; for an analysis of the High Court judgment, see Locke "Access to a company's accounting records by means of the Promotion of Access to Information Act 2 of 2000" 2005 *SA Merc LJ* 221). The court emphasised that, in certain circumstances, a request for additional company records and information may be justified in terms of the PAIA, but found that the records that the shareholder requested were not required to protect or exercise his right(s) (*Clutchco* (SCA) paras 17–18).

In the context of company law, the right to access information plays a fundamental role in the protection of investors and the public (see Cilliers & Benade 188–189; Cassim *Contemporary company law* (2021) 17)). The right to access information is regulated by section 32(1)(*b*) of the Constitution, which provides for the right to access information held by a person other than the state when such information is necessary to exercise or protect "any rights". The Supreme Court of Appeal in *Clutchco* (para 11) makes it clear that the right to access a record held by a private body is not "untrammelled" in that a person is entitled to access only that information when it is reasonably required to exercise or to protect a right (para 18). However, the information requested does not have to be essential for the exercise or the protection of a right but should at least be reasonably required to exercise or protect a right (*Clutchco* (SCA) paras 11–13).

To determine whether the shareholder is entitled to the information relating to the books of first entry, the Supreme Court of Appeal considered the information to which the shareholder was entitled in terms of the 1973 Companies Act (paras 14–15). The provisions of the 1973 Act were aimed at the protection of shareholders (para 15). Consequently, the directors had strict duties regarding the keeping of accounting records and financial statements (para 15). When the financial statements were audited, the auditor had very specific rights and duties (para 16). He had the right to access and inspect the accounting records (para 16) and could also request any explanation (*ibid*). Against this background to the 1973 Act, the court held that the objective of the PAIA could not have been to grant shareholders access to the accounting records of the company based on a suspicion or in reaction to the occurrence of "minor errors or irregularities" (para 17).

To gain access successfully to the accounting records of a company, an applicant had to lay the foundation for a serious complaint or provide detailed criticism of the auditors (para 18). A person requesting information had to specify how the information sought would have enabled him to exercise or protect the right he relied on (*ibid*). Although the court ruled that the 1973 Act did not provide access to inspect books of first entry, and accordingly the provisions of the PAIA had to be relied on, it also cautioned against a

shareholder relying on the PAIA to access the books of first entry of a company because such an interpretation would have been contrary to the objectives of PAIA. The court's approach in the judgment is interesting because the shareholder's right in terms of the PAIA was determined with reference to the information to which a shareholder was entitled in terms of the 1973 Act.

By implication, the court in *Clutchco* (SCA) applied the principles of subsidiarity. For a shareholder to rely successfully on the PAIA to obtain company records or information where the 1973 Act did not afford a shareholder any rights in relation to the requested company information; the shareholder had to provide a substantial and detailed explanation of why and how the requested information would be used to protect or exercise a right. Such "substantial foundation" had to be based on allegations of a serious nature and contain "detailed criticism" of the way auditors performed their role and functions (*Clutchco* (SCA) para 18). An applicant's request should, depending on the nature of the request and the assertions he makes, also be supported by an affidavit from an expert to lay the foundation for the request for information (para 18).

3.2 *Legal position of members of the media and public*

It is significant to note from the cases dealing with members of the media acting as applicants that they are, of course, generally not shareholders in the company from which the records and information are requested. However, such persons are still entitled to request company records and information in terms of the Act or the PAIA. Section 26(2) of the CA provides that such persons are entitled to access the securities register and the register of directors (see *Nova Property* paras 21 38−40).

In *Tiso Blackstar*, the court granted the applicants (media houses and journalists, not shareholders of the respondent, Steinhoff) access to a forensic report requisitioned by it in terms of the PAIA. The objective of the report was to document findings by the audit firm PricewaterhouseCoopers International Limited ("PwC") during its investigation into alleged accounting irregularities in Steinhoff's annual financial statements (para 6). This would suggest that the report could be viewed as management information to which, in principle, only directors are entitled to the extent that it is required to execute their legal duties. The *onus* rested on Steinhoff to justify the refusal of the report (para 41; see also s 67 of the PAIA). Steinhoff denied the applicants access to the forensic report and argued, in the first instance, that the report was not required for the applicants to exercise their right to freedom of expression, and secondly, that the report was legally privileged, because it was commissioned to obtain legal advice (paras 37 43).

The court rejected Steinhoff's first argument on the basis that the applicant was unable to exercise its right to freedom of expression under section 16 of the Constitution because the information available in the public domain was incomplete. It held that Steinhoff had failed to prove that the refusal was justified on the grounds provided for in section 67 (paras 38–40). The court also rejected Steinhoff's second argument on the basis that it had failed to prove on a factual basis that the report was protected by legal privilege (paras 65–66, 70). Based on the letter of engagement, which stated that the purpose of PwC's appointment was to investigate accounting irregularities in Steinhoff's financial statements, the court held that the report had been requested for purposes of the production

of financial statements (paras 57, 59). Before receiving the applicants' request for access to the report, Steinhoff had not publicly referred to the purpose of the report as obtaining legal advice for purposes of actual or contemplated litigation (para 59). The court's finding (paras 55, 64) was further based on Steinhoff's failure to mention in its SENS announcement (a SENS announcement is an announcement on the Stock Exchange News Service, which provides access to company announcements that directly affect the market) to the market that the report was requisitioned for purposes of actual or contemplated litigation or that the report had been requested by its attorneys.

Consequently, the court found in favour of the applicants and granted them access to the forensic report to enable access to correct information, which would allow them to report accurately on matters of public interest. The right of the media entails the right to press freedom, the right to receive information or ideas, and the constitutional right to freedom of expression (para 31). Although no reliance was placed on the CA to obtain access to the forensic report, the judgment and its effects raise interesting questions about the rights of the media and other stakeholders to access information deemed to be in the public interest, as opposed to the rights of shareholders and members of the public to company records and information under the provisions of section 26(1) and 26(2), respectively, of the CA.

The *Tiso Blackstar* judgment was widely welcomed and is regarded as a breakthrough for the promotion and realisation of effective corporate governance (https://www.businesslive.co.za/bd/opinion/2022-07-11-court-limits-legal-privilege-in-favour-of-media-rights-to-freedom-of-expression/ (accessed 25-02-2023); https://www.dailymaverick.co.za/article/2022-05-11-amabhungane-and-arena-win-court-bid-for-access-to-steinhoff-report/ (accessed 25-02-2023)). From a company-law perspective, the decision challenges previous approaches to the right of access to company records and information, especially considering the *Clutchco* (SCA) judgment.

The right of members of the media to company records and information was also considered in *Nova Property*. This case differed from *Tiso Blackstar* in that the respondents in *Nova Property* relied on the provisions of the CA rather than the provisions of the PAIA. The respondents in *Nova Property*, a financial journalist and a media house, did not hold a beneficial interest in the appellant's securities. The respondents argued that they were entitled to access the securities register of three different companies in terms of section 26 of the CA. The Supreme Court of Appeal held that when the media reports on matters, it must do so accurately, and the accuracy of the reporting depends on the ability to exercise its right to access records and information (para 37). When the right to access information is hindered, the right to freedom of expression is restricted (*ibid*). The violation of the right to freedom of expression is not only a violation of the rights of the journalists involved but extends to those who rely on the media for information (paras 37–38).

The court in *Nova Property* held that the rights in section 26 of the CA are additional to any rights to access information provided for in the PAIA, and the PAIA is, therefore, an alternative method to access the share register of a company (*Nova Property* para 20). Although the court found that the right under section 26 is unqualified, and by implication absolute, it emphasised that this unqualified right to access is limited to very specific information (*Nova Property* para 18; Madlela "The unqualified right to access to company records by non-holders

of the company's securities under South African company law" 2019 *Obiter* 173, 179, 181). Madlela emphasises proper regulation and control over the exercise of the right to access company information and records to protect a company against the abuse of such rights (*idem* 182–183).

It is interesting to note that section 26(3) confirms that a person may be afforded additional rights to company information or records in the memorandum of incorporation of the company, provided that the rights in the memorandum of incorporation do not negate or diminish any protection in terms of part 3 of the PAIA. In terms of section 15(6), a company's memorandum of incorporation is binding on the directors, shareholders, prescribed officers, and persons serving as members of board committees. Although rights can be created for third parties, the rights of a person who is not bound to a memorandum of incorporation cannot be negated or diminished in the company's memorandum of incorporation (Cassim 524).

Recently, in *Goosen-Joubert*, the High Court considered the rights of an applicant who was not a member of the non-profit company ("NPC") to such company's financial information. The court considered the fact that the respondent was a NPC with the object of empowering and supporting married women (para 57). Also, the applicant had invested considerable time and effort in the activities of the respondent and assisted it to raise funds (paras 57–58). The court, in terms of the PAIA, granted the applicant access to all the company's general ledgers and other documentation used in the preparation of the company's financial statements. The applicant argued (para 45) that the information and documents were required to protect or exercise her right to just administrative action, the promotion of public interest, and her right to equality before the law (*ibid*). In her request the applicant also indicated that she required the documents and information to lay a charge of theft (*ibid*). In dealing with the legal aspects of the application, the court referred to the judgment in *Fortuin v Cobra Promotions CC* 2010 5 SA 288 (ECP) para 15, where the remedy, in the form of an order granting access to information or records in terms of the PAIA, was described as an extraordinary remedy (*Goosen-Joubert* para 44). Consequently, the information sought must be reasonably necessary to assist the applicant in the exercise of his rights, or in the protection of a right (*Goosen-Joubert* para 46 with reference to *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* (10/99) 2001 ZASCA 56 (30 March 2001) para 28).

This means that when access to records or information held by a private body is requested, the applicant must first stipulate which right is to be protected or exercised; then clearly describe the information or records required; and, finally, show how the information will assist in the exercise and protection of the requester's right (*Goosen-Joubert* para 46). The information must be required reasonably (*Goosen-Joubert* para 47 with reference to *Clutchco* (SCA) para 13) but need not be essential, nor necessary to protect or assist the applicant to exercise his rights (*Goosen-Joubert* para 47). The court referred to *Unitas Hospital v Van Wyk* 2006 4 SA 436 (SCA) para 16 and emphasised that the fact that the requested information would be useful or relevant to the applicant is not sufficient to grant access to the record or information requested (para 48). Whether the information or record requested is required reasonably to protect a right or exercise a right, is a question of fact (paras 49–50; *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* 2015 1 SA 515 (SCA) para 50; *My Vote Counts NPC v Speaker of the National Assembly* (CCT121/14) [2015] ZACC 31 (30 September 2015) para 31).

The court held that it is in the public interest to ensure that funds raised by and for the respondent are used for its stated purpose (para 69). The right to access information fosters a culture of transparency and accountability in both public and private bodies (*ibid*). The court emphasised that a body to which a request for access to records is made, must deal with the specific request even though the requested records or information may already be available to the applicant (para 66). The fact that the information that the applicant requested was available on the respondent's website, attached to the founding papers of the application, or the fact that the applicant was invited to a roundtable discussion, is no defence to not formally dealing with a request for access to records in a proper manner (paras 66 67). A body has a duty to respond formally to a request for access to records or information as detailed in section 56 of the PAIA (para 55). In a bold and innovative judgment, the court granted the applicant access to the accounting records and bank statements of the respondent (paras 18 73).

This remark in *Goosen-Joubert* (para 69) by Mantame J is significant: "Even if she was a member of the public, and had a reason to believe that the respondent's funds were not being used in a manner that [they were] intended, she was entitled to invoke the provisions of PAIA." This is an interesting statement because members of the public do not have financial interests in the company, nor are they members of the media. Accordingly, this appears to be a very liberal interpretation, especially since the court referred to the remedy as an "extraordinary remedy" (para 44). Perhaps this remark should be interpreted in light of the fact that the company in question was a NPC, and, consequently, its expenditure could be regarded as being in the public interest. It could also be indicative of the court's interpretation and application of transformative constitutionalism. However, if this development is pursued and applied in future judgments, it could lead to significant problems regarding the confidentiality of company meetings, bank statements, and company financial records, because companies are also entitled to privacy in terms of section 14 of the Constitution (Delport *et al Henochsberg on the Companies Act 71 of 2008* (2022) in s 19; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 461–463). It could be argued that such an interpretation ignores the provisions of section 26(1) and 26(2) of the CA, which expressly limit a person's right to access company information or records.

The judgment in *Goosen-Joubert* makes for interesting reading when compared to the judgment by the Supreme Court of Appeal in *Clutchco*.

3.3 *Function and rights of board members and auditors regarding company information and records*

The further distinction between the records that a shareholder (or member) is entitled access to and records to which only members of the board are privy, is also relevant (see *Motale v Abahlobo Transport Services (Pty) Limited* [2015] JOL 34696 (WCC) 11). A company "must be managed by or under the direction of the board" (s 66(1) of the CA). Therefore, every director has a duty to participate in the management and affairs of a company and must do so by exercising the required duty of care, skill, and diligence, and by acting in the best interests of the company (s 76(3) read with s 76(4) of the CA). A director is entitled, at common law, to receive all the records and information reasonably necessary to exercise an informed and independent judgment to enable him to participate meaningfully in the business and affairs of a company and to properly execute

his duties as a director (Cassim 530; s 76(4)(*a*)(i) read with s 76(3)(*c*) of the CA; see also Delport *et al* on ss 76 and 66; *Wes-Transvaalse Boeresake (Edms) Bpk v Pieterse* 1955 2 SA 464 (T) 468; *Conway v Petronius Clothing Co Ltd* 1978 1 All ER 185 (Ch) 201).

In relation to the right to access the accounting records of a company, the Supreme Court of Appeal in *Clutchco* stressed that the mechanisms in the 1973 Act were aimed at the protection of shareholders. One such protective measure is the disclosure of information in the form of financial statements. The financial statements are based on the books of entry or accounting records that must be kept. Persons, such as shareholders, who hold a beneficial interest in the securities of the company, are entitled to receive the company's annual financial statements (s 31 of the CA). The rights of auditors to access company information are also specifically regulated (s 93 of the CA). The nature of the information to which a shareholder, a director, and an auditor are entitled differs based on the statutory role that each plays in the company structure. The accuracy of the information on financial statements is verified by the auditor executing his duties and exercising his rights in terms of legislation, which includes company legislation. On this basis, a shareholder is not entitled to access a company's accounting records unless serious and detailed criticism can be levelled against the execution of the auditor's duties (*Clutchco* (SCA) 18). It must be noted that, in the context of the CA, not all companies are compelled to have their financial statements audited (s 30(2) of the CA).

4 Evaluation of interpretational approaches

The interpretation of statutes and the common law play an important role in the application and development of the law. Courts are pivotal in this process and must develop the law by promoting the constitutional goals through their application of the principles of interpretation when adjudicating on legislation, the common law, and agreements (s 39(2) of the Constitution). The judiciary needs to balance the aims and objects of legislation while applying common-law principles, and simultaneously consider fairness, justice, and public policy. Therefore, the philosophical approach of courts is important in the development of legal culture. In this light, it is important to note that section 7 of the CA provides that one of its purposes is to balance the rights and interests of various stakeholders of a company.

The right of access to information held by a public or private body is a constitutional right. However, no single right in the Constitution is absolute. Consequently, effect must be given to this right in national legislation subject to any restrictions or limitations on it in accordance with the limitation clause in section 36 of the Constitution. This means that a person cannot rely directly on the Bill of Rights when there is national legislation that gives effect to the relevant right. Both the CA and the PAIA deal with the rights of persons in respect of information or records held by a company or private body, respectively. In terms of the CA, persons have direct access to certain company information or records. However, the CA distinguishes between the information or records to which shareholders and the public are respectively entitled.

As discussed, members of the public have limited rights to access company information and records compared to shareholders. The rights of a person to obtain company information or records in terms of the PAIA cannot be

determined without considering that person's rights in terms of the CA. We submit that such an approach reflects the correct application of the principle of subsidiarity. This is supported by the approach of the court in the *obiter* remark by the Supreme Court of Appeal in *Nova Property* (paras 19, 25) that a person's rights in terms of section 26 of the CA supplement his rights under the PAIA.

The practical effect of this approach is that a person will not automatically have any rights in terms of the PAIA to access company information or records merely because he does not have the relevant rights in terms of the CA. This approach is underscored by section 26(7) (see also *Nova Property* para 25). The purposes of subsidiarity in law are, in the first instance, that when courts allow litigants to rely on the Constitution itself rather than on special legislation enacted under the Constitution to give effect to the right in question, it undermines the purpose and authority of the Constitution to regulate that right by means of specialised legislation. Secondly, courts should honour the mutual and official recognition between the different "arms of government" to fulfil constitutional rights (*My Vote Counts* para 160). Thirdly, where courts allow litigants to rely directly on the provisions of the Constitution instead of the specialised legislation enacted under the provisions of the Constitution, two "parallel systems of law" develop (*ibid*). The court in *My Vote Counts* referred to the *dictum* of O'Regan J in *Mazibuko v City of Johannesburg* (2010 4 SA 1 (CC) para 73), which goes to the heart of the matter:

> "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."

This means that a litigant cannot base his claim or action on the provisions of the Constitution where special legislation exists that regulate the action or application in question unless the validity of that special legislation is challenged (*My Vote Counts* paras 164–181).

Subsidiarity originated in Catholic social doctrine and implies that functions that can be performed at a subordinate or lower level should not be performed at a higher level (https://www.merriam-webster.com/dictionary/subsidiarity (accessed 21-01-2023)). Constitutional subsidiarity was discussed at length in *My Vote Counts* and has developed through court decisions (amongst others, *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998 4 SA 1157 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC); *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC); *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC); *MEC for Education, Kwa-Zulu Nata v Pillay* 2008 1 SA 474 (CC)). In contrast to transformative constitutionalism, which strives for a liberal approach to legislative interpretation, the principle of subsidiarity appears to adopt a rather more conservative approach.

It may be argued that this conservative approach to legislative interpretation in terms of the principles of subsidiarity limits transformative constitutionalism, which involves a liberal interpretation and application of the Constitution, not only to effect justice, but also political and socio-economic change and transformation in a constitutional democracy (see, generally, Moseneke "Transformative constitutionalism: Its implications for the law of contract" 2009 *Stell LR* 3–13; Tladi "Breathing constitutional values into the law of contract: Freedom of contract and the Constitution" 2002 *De Jure* 306–317; Langa "Transformative

constitutionalism" 2006 *Stell LR* 351–360; Van der Walt "Transformative constitutionalism and the development of South African property law (part 1)" 2005 *TSAR* 655–689; Van der Walt "Transformative constitutionalism and the development of South African Property Law (part 2)" 2006 *TSAR* 1–31). Klare stresses that this interpretation should aim to give effect to the hopes and ideals of the Constitution ("Legal culture and transformative constitutionalism" 1998 *SAJHR* 150–151, 146–147, 188). He emphasises that the judiciary should have a wide and liberal approach to legal interpretation and that judges should strive to balance judicial method and constitutional interpretation (s 39(2) of the Constitution provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". See also Bhana *Constitutionalising contract law: Ideology, judicial method and contractual autonomy* (PhD thesis, University of the Witwatersrand 2013) 36–38, 241–242.) Davis has criticised the courts for their conservative approach to transformative constitutionalism (such as *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA)). He argues that courts in many cases provide a general constitutional background in judgments, but then continue to adjudicate the "real" law as they know it ("Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution" 2011 *Stell LR* 845–864). Davis encourages courts to show a conviction to implement transformative constitutionalism. (In contrast to the conservative approach in *Afrox Healthcare*, the Constitutional Court in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) developed the common law to limit a lessor's contractual right to cancel a lease agreement entered into with lessees. In practice, such a liberal development could prove to be counterproductive, as, in the long run, it could disadvantage the very people the court intended to assist.)

In *Davis v Clutchco* (C) 85, Meer J ruled that the 1973 Companies Act could not limit access to information contrary to the provisions of the Constitution, thus applying transformative constitutionalism in his order (for a wide-ranging and sound critique and discussion of this judgment, see Locke 221–234). The High Court's judgment was overturned by the Supreme Court of Appeal on appeal. We submit that the interpretative approach of the appeal court was based on the principles of subsidiarity. In contrast to this judgment, the High Court's remark in *Goosen-Joubert* (para 69) about the right of members of the public to invoke the provisions of the PAIA, indicates that the court implemented transformative constitutionalism. This finding extends beyond the wording and interpretation of section 50(1) of the PAIA, since it is unclear which rights are to be protected if the member of public does not have a financial interest in the private body. This points to an interpretation of the PAIA informed by the spirit and purport of the Constitution as intended in *Phumelela Gaming and Leisure Limited v Gründlingh* 2006 8 BCLR 883 (CC) para 27.

A litigant cannot base his claim or action directly and primarily on the provisions of the Constitution where special legislation exists to regulate the relevant action or application, unless the validity of that special legislation is challenged (*My Vote Counts* paras 164–181). Therefore, a shareholder who requires information based on facts similar to those in *Clutchco* (SCA), will have to rely on section 26 of the CA to obtain that information. The Supreme Court of Appeal in *Clutchco* applied the principle of subsidiarity when it found that the 1973 Act does not give a shareholder the right to the information that Davis

sought (para 14). The court further held that "the machinery established by legislation and the common law for the protection of shareholders is … not lightly to be disregarded" (*Clutchco* (SCA) para 17). The court also correctly emphasised that, by enacting PAIA, the legislature could not have intended that the books of a company should be made available to members "on a whiff of impropriety…" (*ibid*).

Although the principles of transformative constitutionalism and subsidiarity, at first blush, appear to conflict somewhat, they are mutually supportive when used and interpreted coherently and correctly. Litigants are expected to employ specific legislation that regulate the matter at hand. When the matter is adjudicated, the court must interpret that specific legislation, the common law, or an agreement in accordance with the purpose, substance, character, and scope of the Bill of Rights (Van Rensburg & Van der Merwe *Law of contract* (2005) 11; *Phumelela Gaming and Leisure Limited v Gründlingh* 2006 8 BCLR 883 (CC) paras 26–27), unless the validity of the provision in the specific legislation has been challenged. In such a case the action or application can be based on either the PAIA or the Constitution.

5 Conclusion

Section 26 of the CA distinguishes between a person who has a beneficial interest in the securities of a company and a person who does not. A person's capacity (depending on whether he is a shareholder or a member of the public) determines the nature of the company records or information to which he has a right of access. Provided that the requirements of section 26 are met, a person's rights in terms of the section are unqualified (*Nova Property* para 21; Madlela 177–178). A shareholder's right of access to information under section 26 is far wider than the rights of a member of the public. This differentiation is justified since the holder of a beneficial interest in the securities of a company has a direct financial interest in the company. However, it should be noted that the records and information to which a shareholder is entitled under section 26 exclude management information. Neither shareholders nor members are entitled to management records.

Compared to the interpretational approach adopted in *Clutchco* (SCA), it appears at first glance that the court in *Tiso Blackstar* followed a diametrically opposite approach. It may be argued that the approach in the latter case is preferable because it advances and promotes transformative constitutionalism and gives effect to the constitutional right of access to information. Although the interpretational approach in *Tiso Blackstar* differs from that in *Clutchco* (SCA), the approach cannot be faulted as it can be applied to promote the rights entrenched in the Constitution. When the provisions of the CA are to be interpreted, the interpretation must promote the purposes in section 7, which include the promotion of transparency and good corporate governance, and balancing the rights and interests of all stakeholders. The interrelation between the CA and the PAIA becomes relevant when the CA does not allow a person a right to access company information or records. In such a case the person will have to resort to the provisions of the PAIA. Amongst other requirements, an applicant will have to prove that the information is required to exercise or protect a right.

The *Tiso Blackstar* judgment has some possible practical repercussions because persons who were not even holders of a beneficial interest in a

company's securities, successfully obtained access to an internal report of the company to which, in terms of fundamental company law principles, only the board and management of the company are privy. It is doubtful whether a shareholder would have succeeded in obtaining the forensic report into the financial irregularities of Steinhoff, as holders of securities cannot recover a reflective loss (for the legal position regarding the claims of shareholders for a reduction in share value, see *Hlumisa Investment Holdings RF Ltd v Kirkinis* 2020 5 SA 419 (SCA); *De Bruyn v Steinhoff International Holdings NV* 2022 1 SA 442 (GJ)). The shareholder should be unsuccessful in such a scenario since the report will not assist him in protecting or exercising his rights because the report involves the financial statements of the company, which the board is legally obliged to compile for the company. Consequently, Steinhoff's shareholders would not be able to take action against Steinhoff or its directors based on the findings in the report. The only other option available to such a shareholder would be to institute a derivative action after meeting all the requirements under section 165 of the CA. The potential effect of *Tiso Blackstar* is that those who do not have a direct legal relationship with the company, may be entitled to a wider scope of company information and records relative to a person who holds a beneficial interest in the company's securities. This is highlighted in the judgment in *Goosen-Joubert* where the court granted the applicant, who was not a member of the media or a member of an NPC, access to accounting records and bank statements of the company.

It appears that our courts have clearly signalled a change in direction from the approach adopted in *Clutchco* (SCA), and that the provisions in section 26(1) and 26(2) of the CA are virtually obsolete, especially from the perspective of the holder of a beneficial interest in a company under section 26(1). We support the notion that transparency within companies must be promoted, but the effect should not be that a company is prejudiced by the granting of access to company information or records required to protect its own legitimate interests, or that the holders of beneficial interests are disadvantaged or their access to information and company records limited when compared to members of the public (*Goosen-Joubert*) or the media (*Tiso Blackstar*). Therefore, we recommend that, considering the aims and principles of the CA, the PAIA, and the Constitution, either the legislature or the courts should create order and clarity regarding the rights of shareholders, the media, and members of the public.

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