



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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Ibex RSA Holdco Limited and Another v Tiso Blackstar Group (Pty) Ltd and Others (Case no 862/2022) [2024] ZASCA 166 (4 December 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment, dismissing an appeal by the appellants, Ibex RSA Holdco Limited and Ibex Topco BV, which were substituted for Steinhoff International Holdings NV (Steinhoff) as a result of the restructuring of the Steinhoff Group in 2023, against an order of the Western Cape Division of the High Court, Cape Town (the High Court). The High Court ordered Steinhoff to grant the respondents, Tiso Blackstar Group (Pty) Ltd and amaBhungane Centre for Investigative Journalism (the media respondents), access to a report on accounting irregularities within Steinhoff (the Report), in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). The Report was prepared by PricewaterhouseCoopers Advisory Services Proprietary Limited (PwC), pursuant to a forensic investigation that revealed fraud and accounting irregularities within the Steinhoff Group.

In December 2017 Deloitte, Steinhoff's external auditors in the Netherlands, refused to sign off on its annual financial statements due to serious accounting irregularities. Consequently, Steinhoff could not release its audited consolidated financial statements as required by the Johannesburg Stock Exchange (JSE) and the Frankfurt Stock Exchange, for the financial year ending 30 September 2017. On 6 December 2017 Steinhoff issued a Stock Exchange News Service (SENS) announcement that it had engaged PwC to conduct an independent forensic investigation into the accounting irregularities. Following its investigation, PwC provided Steinhoff with the Report.

Subsequently, Steinhoff published an overview of the Report entitled, 'Overview of the Forensic Investigation', comprising 11 pages and containing PwC's key findings. The media respondents sought access to the Report. Steinhoff declined to disclose it. On appeal Steinhoff contended that disclosure was protected by legal professional privilege as contemplated in section 67 of the PAIA; that it had not waived privilege; and that the public interest override in

section 70 of the PAIA, which authorises disclosure of the record if it is in the public interest, did not apply.

The SCA held that these contentions were unsustainable. As regards privilege, the SCA rejected Steinhoff's claim that the purpose of the investigation and Report was to furnish Steinhoff with legal advice and to assist it in assessing its position in light of the claims made against it. The SCA held that the dominant purpose of the PwC investigation was to enable Steinhoff to produce its financial statements for 2017 and 2018. This was confirmed by objective facts, namely the SENS announcement of 6 December 2017 stating that Steinhoff – and not its attorneys as alleged in the papers – had in consultation with Deloitte instructed PwC; and the engagement letter by PwC which states that its brief was to analyse and investigate the allegations of potential accounting irregularities and the concerns raised by Deloitte. These facts, the SCA found, are underscored by (i) Steinhoff's presentation to shareholders at an AGM in April 2018 in which it stated that the purpose of the forensic investigation was to determine what happened, the financial impact of those events, and who was responsible; (ii) the overview in which Steinhoff itself states that the Report "is being used to assist production of the group's financial statements for FY 2017 and FY 2018 and to assist decision-making in areas for further investigation and remedial work"; and (iii) further SENS announcements by Steinhoff that it was meeting with its lenders and creditors.

Moreover, the SCA found that Steinhoff had impliedly waived any privilege that may have existed in respect of the Report, by publishing the overview containing PwC's key findings. PwC essentially found that a small group of former and non-executives, led by a senior management executive (the wrongdoers) had structured and implemented fictitious and irregular transactions over several years, which substantially inflated the profit and asset values of the Steinhoff Group. The overview describes these transactions as profit and asset creation; asset overstatement and reclassification; asset and entity support; and contributions (the irregular transactions). Three principal third party entities involved in the irregular transactions are identified in the overview, which also explains the modus operandi of the wrongdoers. The overview also states that the irregular transactions are complex, and are supported by documents created after the fact and backdated.

The SCA held that the effect of the disclosure was, and was intended to be, a short, clear description of the irregular transactions in which the wrongdoers had engaged; and their impact on the Steinhoff Group as contained in the Report. The SCA concluded that having chosen to disclose the overview in the form that it did, it would not only be unfair to allow Steinhoff to use part of the Report while claiming privilege over the remainder of it, but also inconsistent with the confidence preserved by any privilege, since Steinhoff had voluntarily disclosed the gist of PwC's findings – the irregular transactions and their impact – the very reasons for the forensic investigation and the existence of the Report.

The SCA held that this was a classic case where the public interest override applied. Section 70 of the PAIA provides that a private body must grant access to a record if its disclosure would reveal evidence of a contravention of, or failure to comply with, the law. The irregular transactions, and the manner in which they were perpetrated and concealed by the wrongdoers for nearly a decade, are clear indications that they were committing fraud on a large scale, designed to inflate the profits and asset values of the Steinhoff Group. Steinhoff itself in the overview states that the inflation of profits and asset values "were effected through a cycle of income creation"; that "[v]arious transactions were entered into to obscure the extent of the overstatement of the assets"; and that "the facts identified in the PwC report raises serious allegations, against the senior executive in particular".

The disclosure of the Report, the SCA further held, was plainly in the public interest. The harm which Steinhoff alleged if the Report were to be published, comprised superficial assertions. These were that disclosure would alert the wrongdoers to the information held by Steinhoff which, in turn, would be used to determine the strategic approach that Steinhoff would take in respect of the litigation; that it would place regulatory and enforcement action at risk; and that it would allow the wrongdoers to take pre-emptive action.

By contrast, the public interest in the disclosure of the Report outweighed any potential harm to Steinhoff. In November 2017 it enjoyed a market capitalisation of approximately R242.4 billion and was one of the ten largest companies listed on the JSE. Steinhoff had approximately 65 000 shareholders representing a broad swathe of institutional and retail investors around the world, when its CEO, Mr Markus Jooste, resigned in December 2017. The fraud that took place at Steinhoff led to an overstatement of assets and profits in a staggering amount – some R200 billion. This led to a massive drop in its share price – about 98% – and affected a large majority of South Africans with some form of retirement savings invested in Steinhoff. The pension funds of millions of ordinary South Africans suffered huge losses, including the Government Employees Pension Fund (GEPF), which in December 2017 was the second largest shareholder in Steinhoff, holding shares worth some R32 billion. Employers who contribute to the GEPF, pensioners and members of the public have an interest in the fraud that took place at Steinhoff. The right of South African society at large to know the facts about the Steinhoff scandal, goes beyond the narrow interests of Steinhoff and is best served by exposing the nation's biggest corporate scandal through complete transparency, to avoid a recurrence. Indeed, Steinhoff itself, in its presentation to the Standing Committee of Parliament stated that “Steinhoff was deeply aware of the impact the debacle has had on pension funds, the Steinhoff brand and the nation at large”; and the importance of sharing the key findings in the Report, “so that lessons are learnt from these events and processes can be applied”.

The SCA concluded that there was simply no basis to shield the Report from public scrutiny and that Parliament intended that the public interest override should apply in the case such as this. The appeal was accordingly dismissed and the appellants were ordered to pay the costs of the appeal, including the costs of two counsel.

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