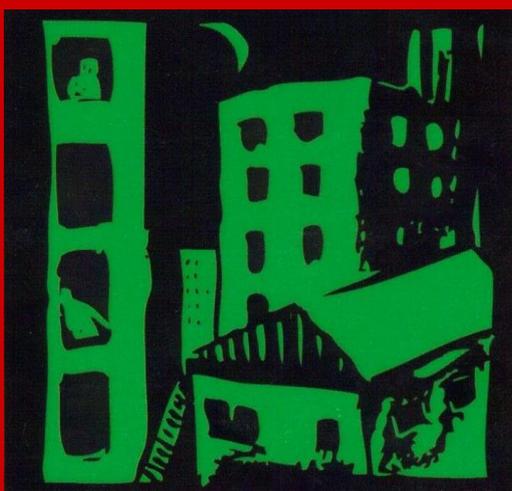


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## The right of access to information vs the right to privacy in *Tiso Blackstar Group (Pty) Ltd & Others v Steinhoff International Holdings N.V. (18706/2019) [2022] ZAWCHC 265 (10 May 2022)*

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### ABSTRACT

*The Bill of Rights in chapter 2 of the Constitution of the Republic of South Africa of 1996 (the Constitution) guarantees everyone a number of fundamental rights and freedoms, inter alia the right to privacy and the right of access to information, as envisaged in sections 14 and 32, respectively. The right to privacy and the right of access to information are the obverse and reverse sides of the same coin that the courts often deliberate on. The Promotion of Access to Information Act 2 of 2000 (PAIA) was promulgated in terms of section 32(2) of the Constitution. In Tiso Blackstar Group (Pty) Ltd and Others (the applicants) v Steinhoff International Holdings N.V. (the respondent) (18706/2019) [2022] ZAWCHC 265 (10 May 2022) (Tiso), the applicants approached the Western Cape High Court Division in terms of the Constitution and PAIA to enforce the right of access to information against the respondent's right to privacy on the alleged ground of legal privilege. This article examines the manner*

*in which the court addressed the question of the fulfilment of the applicants' right of access to information as per the Constitution and the provisions of PAIA vis-à-vis the protection of the right to privacy of the respondent company as guaranteed by the Constitution. This article demonstrates that the courts do not hesitate to limit the right to privacy where the statutory requirements justifying the limitation and the burden of proof lie on the party alleging the existence of the right.*

**Keywords:** Constitution; companies; PAIA; right of access to information; right to privacy.

## 1 INTRODUCTION

The right to privacy and the right of access to information are both fundamental rights specified in the Bill of Rights (BoR).<sup>1</sup> These rights have a binding effect on both natural and juristic persons.<sup>2</sup> The sections of the Constitution related to the application of these rights use the word “everyone”. This reinforces the application of these rights both to natural and juristic persons, as envisaged in the application clause of the Constitution.<sup>3</sup> This article analyses how the court has dealt with the application of these competing rights between legal subjects as equals, that is, the horizontal application of the BoR. The right to privacy is a personal right which applies to one’s being or property.<sup>4</sup> This includes the information held by another person required for the exercise or the protection of any other rights, as stipulated in section 32(1)(b) of the Constitution,<sup>5</sup> which portrays a horizontal application of the right to privacy.<sup>6</sup> This implies that the right to privacy, apart from being enforceable against the state by legal subjects,<sup>7</sup> can be enforceable between legal subjects as equals.<sup>8</sup> It is important to highlight that certain provisions of the BoR have an explicit horizontal application.<sup>9</sup> This means that in certain cases the BoR not only limits the power of the state to interfere in the lives of individuals or citizens, but also binds individuals and institutions and, in some cases, requires them to respect the rights of others.

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<sup>1</sup> Sections 14 & 32 of the Constitution, respectively.

<sup>2</sup> Section 8(2) of the Constitution.

<sup>3</sup> Section 8(2) of the Constitution.

<sup>4</sup> Section 14 of the Constitution states: “Everyone has the right to privacy, which includes the right not to have—(a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.”

<sup>5</sup> “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.”

<sup>6</sup> Section 8(2) of the Constitution. See also Phiri S *An examination of the inclusion of certain transformative constitutionalism principles and values in the South African corporate law* (unpublished LLD thesis, University of South Africa, 2021) at 41.

<sup>7</sup> Direct vertical application of the right to privacy: section 32(1)(a) of the Constitution.

<sup>8</sup> Section 32(1)(b) of the Constitution.

<sup>9</sup> De Vos P et al. (eds) *South African constitutional law in context* Cape Town: Oxford University Press (2014) at 28.

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On the other hand, to give effect to the Constitutional right of access to information<sup>10</sup> national legislation was promulgated as per the constitutional requirement.<sup>11</sup> The Promotion of Access to Information Act 2 of 2000 is the national legislation promulgated in terms of section 32(2) of the Constitution.<sup>12</sup> To access information held by the state or another person, certain requirements must be complied with. The Constitution, for instance, requires that the said information must be required for the exercise or protection of any rights,<sup>13</sup> and it is the responsibility of the person making the request to identify the right(s) seeking to be exercised or protected.<sup>14</sup> Section 50 of PAIA sets out the requirements of access to information held by a private body.<sup>15</sup> It stipulates that, when a public body as defined in section 1 of PAIA requests access to a record held by a private body for the exercise or protection of any rights other than its own rights, it must do so in the interest of the public.<sup>16</sup> The interests of the public must outweigh the contemplated harm of disclosure.<sup>17</sup>

Therefore, in terms of PAIA, public interest consideration is a requirement for the exercise or protection of the right of access to information in such circumstances. To fulfil the constitutional requirements of the right of access to information, the requester is required to prove, furthermore, that such access is in the interest of the public. The importance of the public-interest consideration in giving effect to the right of access to information was confirmed in *Arena Holdings (Pty) Ltd t/a Financial Mail & Others v South African Revenue Services & Others*,<sup>18</sup> where the court ordered that the “public interest override” provided for in section 46 of PAIA be read into the Tax Administration Act.<sup>19</sup>

PAIA is a regulatory statute to the right of access to information and a limitation statute to the right to privacy. This is so because, in granting the right of access to

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<sup>10</sup> See section 32 of the Constitution.

<sup>11</sup> Section 32(2) of the Constitution states: “National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.” See also the short title of PAIA.

<sup>12</sup> See the long title and the preamble to PAIA.

<sup>13</sup> Section 32(1)(b) of the Constitution.

<sup>14</sup> Section 53(2)(d) of PAIA.

<sup>15</sup> Section 50 (1) of PAIA states: “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.”

<sup>16</sup> Section 50(1) of PAIA.

<sup>17</sup> Section 70(b) of PAIA.

<sup>18</sup> *Arena Holdings (Pty) Ltd t/a Financial Mail & Others v South African Revenue Services & Others* (88359/2019) [2021] ZAGPPHC 779; 2022 (2) SA 485 (GP); 84 SATC 153 (16 November 2021) at para 10.3.

<sup>19</sup> Tax Administration Act 28 of 2011.

information, the right to privacy is automatically limited due to the competing nature of the application of the right to privacy *vis-à-vis* the right of access to information. For one right to be exercised or protected, the other right must be limited; these two rights may not be applied simultaneously. Nonetheless, the limitation format of either right must always meet the standards set out in section 36 of the Constitution, which entails that such a limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>20</sup> The limitation of any fundamental right or freedom must be made in accordance with the provisions of section 36(1) or any other provision in the Constitution.<sup>21</sup> Any limitation beyond this scope is unconstitutional.

## 2 BRIEF OVERVIEW OF THE CASE

The applicants are in the media industry<sup>22</sup> and the respondent is a public company incorporated in the Netherlands, primarily listed on the Frankfurt Stock Exchange (FSE) and secondarily listed on the Johannesburg Stock Exchange (JSE).<sup>23</sup> The respondent is a global retailer with more than 12,000 stores in over 30 countries, owning a number of retail assets including Ackermans, Pep, BuCo, Unitrans, Poundland, Pep & Co and Pepco.<sup>24</sup> In December 2017, the public became aware that the external auditors of the respondent company had refused to sign off its annual financial statements due to alleged accounting irregularities.<sup>25</sup> As such, the respondent failed to release its audited consolidated financial statements for the financial year ending September 2017 within the prescribed time limits of the JSE and FSE, leading to a rapid decline in the respondent's share price. To correct the error, PricewaterhouseCoopers Advisory Services Proprietary Ltd (PwC) was appointed to undertake an independent investigation of the alleged accounting irregularities. The public was advised of this appointment through the Stock Exchange News Services (SENS) announcement on the JSE.<sup>26</sup>

The investigation was concluded and handed to the respondent in March 2019. On 15 March 2019, the respondent gave the public an overview of the forensic investigation. Thereafter, the applicants requested access to the PwC report in terms of section 53(1) of PAIA,<sup>27</sup> seeking to exercise their right to freedom of expression envisaged in section 16 of the Constitution.<sup>28</sup> The applicants submitted further that, as

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<sup>20</sup> Section 36(1) of the Constitution.

<sup>21</sup> Section 36(2) of the Constitution.

<sup>22</sup> *Tiso Blackstar Group (Pty) Ltd and Others [the applicants] v Steinhoff International Holdings N.V. [the respondent]* (18706/2019) [2022] ZAWCHC 265 (10 May 2022) at para 3.

<sup>23</sup> *Tiso* (2022) at para 4.

<sup>24</sup> *Tiso* (2022) at para 4.

<sup>25</sup> *Tiso* (2022) at para 5.

<sup>26</sup> *Tiso* (2022) at para 6.

<sup>27</sup> *Tiso* (2022) at paras 10 & 12.

<sup>28</sup> *Tiso* (2022) at para 31.

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members of the media that investigate and expose corporate scandals, they have a mandate to provide the public with accurate information regarding issues of public interest.<sup>29</sup> Therefore, public interest considerations support the applicants' access to the PwC report. The respondent rejected both requests on the basis that the PwC report is legally privileged as contemplated in section 67 of PAIA.<sup>30</sup> The applicants then instituted an action against the respondent<sup>31</sup> in terms of section 78(2)(d)(i) of PAIA.<sup>32</sup> In the alternative, the applicants requested a judicial peek at the PwC report.<sup>33</sup> The applicants' argument was that "the PwC report cannot be refused on the ground of litigation privilege because: (a) the PwC report was never subject to legal privilege, and (b) Steinhoff had waived any privilege, if any privilege applied".<sup>34</sup> Reliance was also had on section 70(b) of PAIA, which provides that a request made in terms of PAIA must be granted where the public interest outweighs the contemplated harm of making a disclosure.<sup>35</sup>

To support their submission, the applicants referred to the echoing Constitutional case of *Brümmer v Minister for Social Development and Others*<sup>36</sup> (*Brümmer case*), where it was held as follows:

"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 .... The role of the media in a democratic society cannot be gainsaid .... 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."

The respondent rejected the application of the *Brümmer* case on the basis that the case relates to the right of access to information held by a public body and not by a private body,<sup>37</sup> as in the current case.<sup>38</sup> Responding to the respondent's rejection, the applicants

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<sup>29</sup> *Tiso* (2022) at para 10.

<sup>30</sup> *Tiso* (2022) at para 11 and 13. Section 67 of PAIA states: "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."

<sup>31</sup> *Tiso* (2022) at paras 1 & 14

<sup>32</sup> Section 78(2) (d)(i) of PAIA states: "A requester aggrieved by a decision of the head of a private body— (i) to refuse a request for access; may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82."

<sup>33</sup> *Tiso* (2022) at para 17.

<sup>34</sup> *Tiso* (2022) at para 15.

<sup>35</sup> *Tiso* (2022) at para 16.

<sup>36</sup> *Brümmer v Minister for Social Development and Others* 2009(6) SA 323 (CC) at para 63.

<sup>37</sup> Section 1(c) of Promotion of Access to Information Amendment Act 31 of 2019 (PAIAA) defines a private body as including a juristic person.

<sup>38</sup> *Tiso* (2022) at para 33.

referred the Court to the decision in *M&G Media Ltd and Other v 2010 FIFA World Organising Committee South Africa*,<sup>39</sup> where Morrison AJ concluded that the right to freedom of expression also applies in respect of private bodies. The court, per Nuku J, confirmed that the right to freedom of expression entitles a requester to access a record held by a private body.<sup>40</sup> Nuku J, stated further that, section 50 of PAIA only requires proof that such access is required for the exercise or the protection of any rights.

### 3 ANALYSIS OF THE COURT'S REASONING

The case at hand deals with the enforcement of the right of access to information *vis-à-vis* the right to privacy in a horizontal relationship. It is crucial to highlight that horizontal application of constitutional rights can be either direct or indirect.<sup>41</sup> Indirect application of the BoR applies to the ordinary laws, that is, statutes, common law and customary law, relating to a right contained in the BoR which applies in a horizontal relationship.<sup>42</sup> In an indirect application, the courts determine whether the ordinary law promote the values of the BoR.<sup>43</sup> If the ordinary law fails to promote the values of the BoR, the court applies the values of the BoR to develop the ordinary law to amend any inconsistency between the ordinary law and the BoR.<sup>44</sup>

Scholars support the indirect horizontal application of the BoR in that it “has proven to be extremely robust and remains the preferred judicial method for dealing with rights claims in the horizontal dimension”.<sup>45</sup> To demonstrate their support for the indirect horizontal application of the BoR, they postulate that:

“[i]n most cases, the remedies that apply to such disputes (horizontal disputes) particularly common law remedies, appear to be sufficiently flexible to be considered appropriate for a horizontal infringement of the Bill of Rights. It is, in any event, difficult to imagine alternative and more appropriate remedies for these types of infringements.”<sup>46</sup>

Indirect horizontal application of the BoR, on the other hand, necessitates the development of the common law to the advancement of the realisation and enjoyment of the fundamental rights and freedoms provided for in the BoR. Therefore, its importance cannot be gainsaid. Section 8(3)(b) of the Constitution permits a court, when applying a provision of the BoR either to a natural or juristic person, to develop the rules of the common law to limit a right, provided that the limitation is in accordance with section 36(1). However, it remains a constitutional requirement that

<sup>39</sup> *M&G Media Ltd and Other v 2010 FIFA World Organising Committee South Africa* 2011 (5) SA163(GSJ) at para 163.

<sup>40</sup> *Tiso* (2022) at para 36.

<sup>41</sup> See section 8(3) of the Constitution.

<sup>42</sup> For instance, in this case PAIA, which regulates the right to access to information.

<sup>43</sup> *De Vos et al.* (2021) at 375.

<sup>44</sup> *De Vos et al.* (2021) at 375; section 39(2) of the Constitution.

<sup>45</sup> Currie I & De Waal J *Bill of rights handbook* 5<sup>th</sup> ed Cape Town: Juta & Co (2005) at 46.

<sup>46</sup> Emphasis added.

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such limitation must comply with the standards laid down in the limitation clause of the Constitution.<sup>47</sup>

In this matter, the court unequivocally ruled in favour of the applicants and ordered that the applicants be granted access to the PwC report within 10 days of the date of judgment.<sup>48</sup> The court, in reaching its judgment, considered whether the refusal of access to the PwC report was justifiable in terms of section 67 of PAIA, as alleged by the respondent.<sup>49</sup> For a report to qualify as legally privileged it must meet the established statutory requirements. Thus, reference was made by the court to *Competition Commission v Arcelormittal South Africa and Others*,<sup>50</sup> where it was held:

“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.<sup>51</sup>

The first requirement 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; the second is that the litigation was pending or contemplated as likely at the time of preparing the document.<sup>52</sup> The court further noted that, in addressing the question of legal privilege, the intention that matters is that of the person or authority under whose direction, whether in particular or in general, the document was produced or brought into existence. Consequently, it is the intention of the person who procured the document, and not that of the author, which matters for a document to qualify as legally privileged.<sup>53</sup> This implies that it is the intention of the person who acquired the document, and not that of the author, which is of relevance in establishing the purpose of the document.<sup>54</sup> It is not a requirement that the author be aware of the purpose of the document.<sup>55</sup> The court per Nuku J found that, even though the PwC report is headed

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<sup>47</sup> Section 8(3)(b) of the Constitution.

<sup>48</sup> *Tiso* (2022) at para 76.2.

<sup>49</sup> *Tiso* (2022) at para 39.

<sup>50</sup> *Competition Commission of South Africa v Arcelormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013).

<sup>51</sup> *Competition Commission of South Africa* (2013) at para 21.

<sup>52</sup> Zeffertt DT & Paizes AP *The South African law of evidence* 2<sup>nd</sup> ed Durban: LexisNexis: Butterworths (2009) at 674, 688; *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 70A.

<sup>53</sup> *Tiso* (2022) at para 48; *Grant v Downs* (1976) 135 CLR 674 at 677; *Waugh V British Railways Board* [1979] 2 All ER 1169 at 1174.

<sup>54</sup> See also *Guinness Peat Properties Ltd & others v Fitzroy Robinson Partnership (a firm)* [1987] 2 All ER 716 at 723.

<sup>55</sup> Tapper C *Cross & Tapper on evidence* 12<sup>th</sup> ed United Kingdom: Oxford University Press (2010) at 454.

“privileged in contemplation of litigation”, this does not qualify the report to be legally privileged because the intention expressed is that of PwC and not of the respondent.<sup>56</sup>

The court also found that the submissions of legal privilege by the respondent, namely that the PwC report was prepared for the “express” purpose of obtaining legal advice and in respect of actual or contemplated litigation,<sup>57</sup> lacked any supporting facts as

“[t]here was 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.<sup>58</sup>

It was also stated by the court that the respondent’s SENS announcement, made on 6 December 2017,<sup>59</sup> waived any privilege that might have existed;<sup>60</sup> and that the mere interposition of a law firm between PwC and the respondent is not enough to establish legal privilege.<sup>61</sup> However, there are uncertainties as to whether documents prepared for litigation must have submission for legal advice as their sole purpose, substantial purpose, definite purpose or dominant purpose.<sup>62</sup> A suggestion that the document must have been prepared substantially for obtaining legal advice was rejected.<sup>63</sup> In *Sweiden & King v Zim Israel Navigation*,<sup>64</sup> it was held that a definite purpose is sufficient to qualify a document as legally privileged. In *Competition Commission of SA v Arcerlormittal SA Ltd*, the court found that the dominant-purpose test did not accord with South Africa’s practice.<sup>65</sup> The court in *Re Highgrade Traders Ltd*<sup>66</sup> held that there is always a thin line between the definite- and dominant-purpose test and that the two are quite inseparable, resulting in a duality of purpose.

On the other hand, waiver of legal privilege may be express, implied or imputed.<sup>67</sup> An implied waiver is one where the person claiming legal privilege discloses or relies on the contents of the document.<sup>68</sup> The reasonable person’s test is used to determine an implied waiver.<sup>69</sup> Legally privilege protection may be waived even if the disclosure were

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<sup>56</sup> *Tiso* (2022) at para 63.

<sup>57</sup> *Tiso* (2022) at para 43.

<sup>58</sup> *Tiso* (2022) at para 66.

<sup>59</sup> *Tiso* (2022) at para 47.

<sup>60</sup> *Tiso* (2022) at para 47.

<sup>61</sup> *Tiso* (2022) at para 58.

<sup>62</sup> *Competition Commission of South Africa* (2013) at para 22.

<sup>63</sup> Zeffertt & Paizes (2009) at 680.

<sup>64</sup> *Sweiden & King v Zim Israel Navigation* 1986 (1) SA 515 (D) at 519.

<sup>65</sup> *Competition Commission of South Africa* (2013) at para 22.

<sup>66</sup> *Re Highgrade Traders Ltd* [1984] BCLC 151 (CA) at 25E.

<sup>67</sup> *Competition Commission of South Africa* (2013) at para 33.

<sup>68</sup> *Competition Commission of South Africa* (2013) at para 37.

<sup>69</sup> *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 16.

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inadvertent or made in error.<sup>70</sup> An imputed waiver is one where justice requires the court to rule that privilege was abandoned.<sup>71</sup> It is implied by the court in *Tiso* that the respondent waived any legal privilege that might have existed in respect of the report in question by making the SENS announcement.<sup>72</sup> The decision of the court demonstrates the conflicting nature in the application of the right of access to information and the right to privacy. The two rights may not be applied concurrently. This is because, for one right to stand, the other right must be limited and vice versa.<sup>73</sup> The limitation of any fundamental right or freedom is permissible only if it complies with the provisions of section 36 of the Constitution. This must be done in terms of law of general application, provided it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom after taking into account a number of relevant factors.<sup>74</sup>

To uphold the constitutional requirement, the court considered and applied the relevant provisions of PAIA. In the present case, the respondent raised legal privilege as a ground to refuse access to information, as stipulated in section 67 of PAIA. Thus, as a result, it bore the burden of proving on a balance of probabilities that the report in question was protected from disclosure. However, the court found that there was no evidence adduced by the respondent to establish legal privilege in respect of the report in question. This is attributed to the fact that the evidence adduced by the respondent proved that the PwC report was made solely for the purposes of the finalisation of its financial reporting and that there was no evidence of pending or contemplated legal proceedings against the respondent. The refusal by the respondent to grant access to the PwC report was then found to be unjustifiable in terms of section 69 of PAIA, therefore, failing to satisfy the constitutional requirement that a limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>75</sup>

The current case confirms that the right to privacy, unlike the right to life, is not an absolute right. Rather, it may, in justifiable circumstances, be limited. The application of the right to privacy depends on other rights such as the right of access to information and freedom of expression as the question in hand, and these rights usually take

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<sup>70</sup> *Guinness Peat Properties Ltd & others v Fitzroy Robinson Partnership* [1987] 2 All ER 716 at 729

<sup>71</sup> *S v Tandwa* 2008 (1) SACR 613 (SCA) at paras 18-19.

<sup>72</sup> *S v Tandwa* (2008) at para 44.

<sup>73</sup> The right of access to information and the right to privacy were said to be rightfully labelled as “competing” constitutional rights in *Arena Holdings (Pty) Ltd t/a Financial Mail & Others v South African Revenue Services & Others* (88359/2019) [2021] ZAGPPHC 779; 2022 (2) SA 485 (GP); 84 SATC 153 (16 November 2021) at para 6.1.

<sup>74</sup> Section 36(1)(a)–(e) of the Constitution.

<sup>75</sup> Section 36(1) of the Constitution.

precedence over the right to privacy.<sup>76</sup> This was confirmed in *Bernstein & Others v Bester NO & Others*<sup>77</sup> by the Constitutional Court:

“The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”<sup>78</sup>

The ruling of the Constitutional Court that the right to privacy relates mainly to the personal realm upholds the widely accepted tenet of the law that the right to privacy is less intense when comes to juristic persons. Although companies enjoy the right to privacy, its protection is less intense than in the case of natural persons. This leads to the inference that, where a juristic person raises the protection of its right to privacy against a natural person’s demand for a certain right, for example the right of access to information or freedom of expression, the courts in such circumstances are likely to rule in favour of the natural person’s demands. This justifies the decision of the court in the current matter. This is premised on *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*, where it was held that:

“... privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows, as was said in *Bernstein*, from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The state might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This

<sup>76</sup> This statement is true when it comes to the right to privacy of juristic persons. In *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (25 August 2000) at para 18 it was held that “[p]rivacy becomes more intense the closer it moves to the intimate personal sphere of life of human beings and less intense as it moves away from that core”. Since companies lack an intimate personal sphere, it follows that the right to privacy is less intense in respect to companies.

<sup>77</sup> *Bernstein & Others v Bester NO & Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996).

<sup>78</sup> *Bernstein* (1996) at para 67.

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would obviously lead to grave disruptions and would undermine the very fabric of our democratic state. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons. The level of justification for any particular limitation of the right will have to be judged in the light of the circumstances of each case. Relevant circumstances would include whether the subject of the limitation is a natural person or a juristic person as well as the nature and effect of the invasion of privacy.<sup>79</sup>

### 4 CONCLUSION

The *Tiso* case demonstrates that, where it is justifiable and reasonable, the courts will not hesitate to limit the right to privacy of a juristic person in favour of the right of access to information of a media company. This is attributable to the fact that the right of access to information has a crucial influence in the new democratic era, as it promotes other constitutional principles such as transparency, accountability and the right to freedom of expression, coupled with the right to impart and receive information. This foregrounds the interconnectedness of constitutional rights and freedoms. As established in *Hyundai Motors Distributors*, discussed above, the right to privacy is an intimate personal right, which entails that the right to privacy of juristic persons may be easily limited. However, this does not erode the fact that juristic persons do enjoy the protection of the right to privacy as envisaged by the use of the term “everyone” in section 9 of the Constitution.

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<sup>79</sup> *Hyundai Motor Distributors* (2001) at para 18.

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### **Thesis**

Phiri S *An examination of the inclusion of certain transformative constitutionalism principles and values in the South African corporate law* (unpublished LL.D. thesis, University of South Africa, 2021)