THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 862/2022

In the matter between:

IBEX RSA HOLDCO LIMITED	**FIRST APPELLANT**
IBEX TOPCO B V	**SECOND APPELLANT**
and	
TISO BLACKSTAR GROUP (PTY) LTD	**FIRST RESPONDENT**
ROB ROSE	**SECOND RESPONDENT**
THE AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	**THIRD RESPONDENT**
KARABO MPHO LETTA RAJUILI	**FOURTH RESPONDENT**

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

Coram: ZONDI ADP, SCHIPPERS, HUGHES and MEYER JJA and TLALETSI AJA

Heard: 27 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 4 December 2024.

Summary: Constitutional Law – Promotion of Access to Information Act 2 of 2003 – access to report on forensic investigation – fraud and accounting

irregularities in public company – ensuing criminal prosecutions – report not subject to legal professional privilege – in any event privileged waived by publication of summary – disclosure of report in the public interest.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nuku J, sitting as court of first instance):

1 The application to adduce further evidence is refused with costs, including the costs of two counsel.

2 The appeal is dismissed with costs, including the costs of two counsel.

3 The cross-appeal is struck from the roll with no order as to costs.

JUDGMENT

Schippers JA (Zondi ADP, Hughes and Meyer JJA and Tlaletsi AJA concurring)

[1] The central issue in this appeal is the right of access by the media and the public, in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), to a report on a forensic investigation into fraud and accounting irregularities within Steinhoff International Holdings NV (Steinhoff), a public company incorporated in the Netherlands with its erstwhile principal place of business in Stellenbosch, Western Cape. That investigation was conducted by PricewaterhouseCoopers Advisory Services Proprietary Limited (PwC), which produced a report in March 2019 (the Report).

[2] In 2022 the Western Cape Division of the High Court, Cape Town (High Court) ordered Steinhoff to provide the media respondents with a copy of the Report. Steinhoff appeals that order with the leave of the High Court.

[3] The first appellant is Ibex RSA Holdco Limited (Ibex RSA), a company incorporated under the laws of England and Wales, with its registered office in London and its operating office at Steinhoff's former premises in Stellenbosch. Ibex RSA now has control of the Report and has unhindered access to certain books, documents and other data storage media of Steinhoff (the Records). The second appellant, Ibex Topco BV (Ibex Topco), is a company incorporated under the laws of the Netherlands with its official seat in Amsterdam and its office in Stellenbosch. It possesses the Records on behalf and on the instruction of Ibex RSA. Steinhoff was substituted in this appeal by the appellants as a result of the restructuring of the Steinhoff Group in 2023, which was approved by the Amsterdam (Netherlands) District Court (the Dutch Court).

[4] The first respondent, Tiso Blackstar Group (Pty) Ltd (Tiso Blackstar), owns various media assets including the Sunday Times, the Sowetan, the Herald, the Daily Despatch, the Business Day and the Financial Mail. The second respondent, Mr Rob Rose, is employed by Tiso Blackstar as the editor of the Financial Mail. The third respondent, amaBhungane Centre for Investigative Journalism (amaBhungane), is a journalism organisation. The fourth respondent, Ms Karabo Mpho Letta Rajuili, is employed by amaBhungane as its advocacy coordinator. Where appropriate, I refer to Tiso Blackstar and amaBhungane as the 'media respondents'. The respondents were granted leave to cross-appeal the High Court's order striking out certain paragraphs of the founding affidavit on the basis that they constitute inadmissible hearsay.

The facts

[5] Before its restructuring, Steinhoff was a global retailer with more than 12 000 stores in 30 countries and the owner of various global retail assets. Steinhoff was previously the holding company of the Steinhoff Group but has effectively been replaced by the appellants. It remains listed on the Frankfurt Stock Exchange and on the Johannesburg Stock Exchange (JSE), but has no subsidiaries or employees.

[6] 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 was unable to release its audited consolidated financial statements for the financial year ending 30 September 2017, within the prescribed time limits of the Johannesburg and Frankfurt Stock Exchanges.

[7] On 6 December 2017 Steinhoff made a Stock Exchange News Service (SENS) announcement that it had engaged PwC to conduct an independent forensic investigation into accounting irregularities within Steinhoff. It was also announced that Steinhoff would update the market as the investigation proceeded, and that its Chief Executive Officer (CEO), Mr Markus Jooste, had resigned with immediate effect.

[8] PwC commenced its investigation on 7 December 2017. Its brief was to investigate the concerns raised by Deloitte and potential accounting irregularities within Steinhoff, and its non-compliance with laws and regulations. PwC undertook to provide Steinhoff with an independent report detailing its assessment of the allegations investigated.

[9] On 30 January 2018 a SENS announcement on behalf of Steinhoff stated that PwC was working with Steinhoff and its legal advisers in relation to the accounting irregularities; that the investigation was ongoing; and that the company would provide an update on the progress of the accounting enquiries and the availability of its consolidated financial statements for the year ending 30 September 2017. The SENS announcement also stated that Steinhoff had received a compliance notice from the South African Companies and Intellectual Properties Commission (CIPC) to investigate the reported accounting irregularities in terms of the Companies Act 71 of 2008 (the Companies Act), within six months of the date of the compliance notice, and to take the necessary actions required under the Companies Act.

[10] On 20 April 2018 Steinhoff's Management Board made a presentation to its shareholders at the annual general meeting (AGM). They informed the shareholders that the key aims of the PwC independent forensic investigation were to determine what happened, the financial impact of those events and who was responsible for them. PwC was engaging regularly with the Audit Committee, executive management and Deloitte. There would be reports to Steinhoff's Supervisory Board and clarity would be provided to shareholders.

[11] Following the investigation, PwC provided Steinhoff with a report of its findings, comprising 4000 pages and 3000 pages of annexes – the Report. On 15 March 2019 Steinhoff published an overview of the Report entitled, 'Overview of the Forensic Investigation' (the overview), consisting of 11 pages.

[12] The overview describes PwC's brief. It states that the Report was being considered by Steinhoff and its advisers; and that it would be used in the production of the Group's financial statements for the 2017 and 2018 financial years, and to assist decision-making in areas that required further investigation and remedial

work. The overview also states that the Report 'is confidential and subject to legal privilege and other restrictions'; that former executives in the Steinhoff Group and other non-Steinhoff executives had structured and implemented various fictitious and irregular transactions over a number of years, which had substantially inflated the profits and asset values of the Group; and that PwC had established the quantum of the relevant transactions.

[13] As a result of extensive fraud and accounting irregularities within Steinhoff, its shares plummeted in value by over 98% since December 2017. Subsequently, Steinhoff's CEO, Mr Jooste, was ordered to report to the Directorate for Priority Crime Investigation (also known as the Hawks) where he was going to be charged with fraud, racketeering and a contravention of the Financial Markets Act 19 of 2012. That did not happen – Mr Jooste is reported to have committed suicide before he could be criminally charged.

[14] The fraud and accounting irregularities has resulted in investors – many of them pension funds – losing more than R200 billion. In the founding affidavit it is stated that the Government Employees Pension Fund (GEPF), in December 2017, was the second largest shareholder in Steinhoff. The GEPF has some 1.6 million active members and pensioners, and in November 2017 owned shares worth approximately R32.5 billion in Steinhoff. According to a summary attached to the answering affidavit, the litigation against Steinhoff in South Africa alone totals some R64.2 billion. The Steinhoff saga is arguably South Africa's biggest corporate fraud ever.

The PAIA requests

[15] On 28 March 2019 Tiso Blackstar, through its attorneys, requested access to the PwC Report in the prescribed form. This request was made on the following grounds. Tiso Blackstar is a member of the media which investigates and exposes

corporate scandals and access to the Report is crucial to the right of freedom of expression of the media. The Steinhoff fraud involves a large public listed company, is a matter of public importance and the disclosure of the Report is in the public interest. Apart from the overview, Steinhoff has not released any information about the Report and such information cannot be obtained from another source.

[16] The Tiso Blackstar request was accompanied by numerous articles and reports published in the media (the publicity pack). These included an article published in the Mail & Guardian newspaper, stating that the value of Steinhoff shares had plummeted by 98% after the accounting irregularities came to light; a summary of Mr Jooste's submissions to the Finance Standing Committee of Parliament; a report which states that Steinhoff is under investigation by the JSE; and various articles published on the news website of BusinessLIVE. These articles state that the Hawks had sought the assistance of the South African Reserve Bank (SARB) and the Financial Sector Conduct Authority (FSCA) in its investigation of Steinhoff, and that they are awaiting access to the Report. The publicity pack also contains a briefing by Steinhoff to Parliament, which refers to the Report and states that Steinhoff is cooperating with the CIPC, the FSCA, the Hawks, the National Prosecuting Authority (NPA), the JSE, the SARB and the Asset Forfeiture Unit (AFU).

[17] Steinhoff refused access to the Report on the basis that it is legally privileged as contemplated in s 67 of the PAIA. A letter by Steinhoff's attorneys, Werksmans, to the media respondents states that Werksmans commissioned the Report on Steinhoff's instructions,

'on the basis, directly, of providing legal advice to our client in contemplation of litigation on behalf of our client against a number of individuals both juristic and natural as well as to defend threatened claims against our client.'

[18] On 2 September 2019 amaBhungane also requested access to the Report (the amaBhungane request). The basis of this request is that amaBhungane is a member of the media which investigates and exposes corruption and corporate malfeasance, and is thus responsible to provide the public with accurate information concerning issues in the public interest. The amaBhungane request was based on similar grounds as the Tiso Blackstar request.

[19] On 30 September 2019 Steinhoff also refused the amaBhungane request on the basis of legal professional privilege. The letter by Werksmans refusing the amaBhungane request lists the claims against Steinhoff brought in the High Court, the Gauteng Local Division of the High Court, Johannesburg, and the Dutch Court.

The proceedings in the High Court

[20] On 23 October 2019 the respondents launched an application in the High Court for an order setting aside Steinhoff's decisions refusing their requests for access to the PwC Report; and directing Steinhoff within ten days of the order, to provide the media respondents with the records identified in each of their requests.

[21] Steinhoff opposed the application essentially on the grounds that the Report is privileged as envisaged in s 67 of the PAIA, which it had not waived, and that the public interest override in s 70*(b)* does not apply. Steinhoff also applied for the striking out of certain paragraphs in the founding affidavit on the basis that they constitute inadmissible hearsay.

[22] The High Court found that the only evidence which Steinhoff presented in support of its claim to privilege was the say-so of its main deponent and company secretary, Mr Nicholas Lewis; the SENS announcement of 6 December 2017; and the engagement letter prepared by PwC. The court concluded that the SENS

announcement makes no mention of PwC's appointment having been done through Steinhoff's attorneys; rather, this was asserted by Mr Lewis.

[23] The claim to litigation privilege, the High Court held, was a restatement of the requirements for privilege without providing the underlying facts to enable the court to assess that claim. The litigation alleged to have been in contemplation when Steinhoff's attorneys were appointed, was stated in the vaguest terms. There was no indication of the precise nature of that litigation, the person or persons against whom it was contemplated, or any facts to form the basis for an opinion that litigation was likely. Moreover, there were no facts to support the assertion that litigation was in contemplation when PwC was appointed.

[24] In the light of its finding that Steinhoff had failed to establish litigation privilege, the High Court did not consider it necessary to deal with the media respondents' alternative claims that Steinhoff had waived privilege; that the Report should be disclosed in the public interest; that there are parts of it that are severable; or that the court should examine the Report in terms of s 80(1) of the PAIA, to determine whether it should be disclosed.

The issues

[25] This appeal raises the following issues:

(a) Should Steinhoff be allowed to adduce further evidence on appeal?

(b) The test in the PAIA to give effect to the constitutional right of access to information.

(c) Has Steinhoff established legal privilege as a ground for refusal of access to the Report, as contemplated in s 67 of the PAIA?

(d) If the Report is privileged, has Steinhoff waived privilege by publishing the overview?

(e) Does the public interest override in s 70 of the PAIA apply?

(f) Should the cross-appeal by the media respondents against the High Court's order striking out certain paragraphs in the founding affidavit, on the basis that they constitute inadmissible hearsay, succeed?

The application to adduce further evidence

[26] This application is supported by affidavits made by Mr Lewis, Steinhoff's secretary, Mr Dirk Swart, its local attorney, and Ms Daniella Strik, an attorney practising in the Netherlands with expertise in data and privacy law. The founding affidavit in the application states that the new evidence concerns South African, Dutch and European data protection laws which, Steinhoff says, may have a bearing on the outcome of the appeal and if the appeal fails, on the order that this Court may issue.

[27] Steinhoff contends that the Report and its annexes contain personal information or data of the persons involved in, or who had knowledge of, the accounting irregularities. The disclosure of this information is regulated in South Africa by the Protection of Personal Information Act 4 of 2013 (POPIA); and in the European Union (EU), by the General Data Protection Regulation 2016/679 (GDPR). The GDPR applies, so it is contended, (a) because the disclosure of the Report will take place in the context of the activities of Steinhoff, incorporated in the Netherlands, which forms part of the EU; (b) despite the fact that the processing (disclosure) of the personal data in the Report would take place in South Africa; and (c) an order for disclosure without providing for redactions or safeguards, 'will likely have the effect of causing Steinhoff to breach its obligations' under the GDPR, and render it liable to serious sanctions.

[28] The cases make it clear that it is only in exceptional circumstances that evidence may be admitted on appeal.[1] As was held in *Coleman*,[2] an applicant must furnish a suitable explanation for the failure to adduce the evidence in the court below;[3] and demonstrate that the evidence is reliable, 'weighty and material and presumably to be believed'.[4]

[29] Steinhoff has not met these requirements. The rationale behind the first limb of the *Coleman* test is that a party should put up all the evidence on which it wishes to rely before the court of first instance. First, Steinhoff has not established exceptional circumstances. It is a well-resourced litigant as is evidenced by its engagement of PwC (which required a deposit of R20 million plus VAT) and Dutch lawyers; and no case has been made out that Steinhoff could not obtain the new evidence due to an unusual situation or one out of the ordinary course, or because of circumstances beyond its control.

[30] Second, there is no adequate explanation for Steinhoff's failure to adduce the new evidence in the High Court. It has not explained why it chose not to invoke s 63 of the PAIA in refusing access to the Report, in the answering affidavit. Section 63 provides that a request for access to information must be refused 'if its disclosure would involve the unreasonable disclosure of personal information about a third party'. Instead, Steinhoff relied squarely and solely only on s 67 – privilege. It cannot now alter that choice by mounting what, in effect, is a s 63 PAIA defence under the guise of the GDPR.

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[1] *S v N* 1988 (3) SA 450 (A) at 458I-459A; *De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67; 2011 (1) SA 16 (SCA); [2010] 4 All SA 459 (SCA) (*De Aguiar*) paras 10 and 11.

[2] *Coleman v Dunbar* 1933 AD 141, affirmed in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 4 BCLR 301 para 43;

[3] *Coleman* fn 2 at 162; *Dormell Properties 282 CC v Renasa Insurance CO Ltd and Others NO* [2010] ZASCA 137; 2011 (1) SA 70 (SCA); [2011] 1 All SA 557 (SCA) para 21.

[4] Id; *De Aguiar* para 11.

[31] Neither has Steinhoff explained why it did not raise any concerns about the GDPR (or s 63 of the PAIA) at the outset, and why the implications of the GDPR were appreciated only when the heads of argument in the appeal were being prepared, after being alerted to the GDPR by its Dutch lawyers. Steinhoff concedes that it has been remiss in tendering the new evidence only now, but says that European lawyers are grappling with the application of the GDPR given its recent introduction and novelty (it commenced in 2017). But this does not explain why Steinhoff's Dutch lawyers became involved only after the case was decided, or if they were involved from the outset, why the new evidence is tendered only now. Any remissness on the part of Steinhoff's legal representatives does not justify the admission of new evidence.

[32] And it is no answer to say that Steinhoff's failure to assess the risks of disclosure at the outset, cannot mean that it is now without a remedy. It is a basic principle of procedural fairness that a party is entitled to know what case it has to meet, particularly where, as here, there is a dispute as to whether the GDPR applies at all to the disclosure of the Report. This, in turn, depends on how Steinhoff operates, more specifically, whether the activities which are the context for the disclosure were being carried out by a controller in the EU – a factual question which Steinhoff has not addressed.

[33] Third, it cannot be said that the evidence is weighty, material and likely to be believed. It is founded on the opinions of Mr Swart and Ms Strik. Mr Swart is a certified information privacy professional (Europe) and a director of Werksmans, Steinhoff's attorneys. Ms Strik is a partner at the multinational law firm, Linklaters LLP, Amsterdam, and the head of its litigation and arbitration practice in the Netherlands. Linklaters also represents Steinhoff and Mr Richard Bussel, a solicitor based in its London office, furnished credit providers with an update on the audit and investigation into Steinhoff. The law firm representing the media

respondents is the alliance partner of Linklaters in South Africa. So, neither of Steinhoff's experts is independent of the parties to the proceedings. As this Court noted in *PricewaterhouseCoopers Incorporated*,[5] an expert is required to assist the court by way of an objective unbiased opinion on matters within his or her expertise and should never assume the role of advocate.

[34] Aside from this, the evidence concerning the GDPR is unreliable and unlikely to affect the outcome of the case. This is because there are sharp disagreements on the application of the GDPR between Ms Strik and the media respondents' expert, Ms Estelle Dehon KC, who has practised in data protection law in the United Kingdom and Europe since 2008, and is a member of the EU's Multistakeholder Expert Group which assists the EU in the implementation of the GDPR.

[35] These disagreements include the following. It is not correct, as Steinhoff contends, that if it were to comply with a South African court order directing it to disclose the Report to the media respondents, it would be processing personal data in breach of the GDPR. Even assuming that the GDPR is applicable, the extent of the grounds for lawful processing, and the exemptions that permit processing, depends on how the GDPR has been implemented in Dutch law. Steinhoff has not provided any detail of Dutch law in this regard and it is impossible to conclude, on the basis of what is contained in its affidavits, that Steinhoff would be in breach of its obligations under the GDPR if it were to disclose the Report. There are legal grounds for processing which have been omitted or underplayed in Steinhoff's affidavits. The potential regulatory risk to Steinhoff is overstated.

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[5] *PricewaterhouseCoopers Incorporated and Others v National Potato Co-operative Ltd and Another* [2015] ZASCA 2; [2015] 2 All SA 403 para 98.

[36] Fundamentally, whether the Report should be disclosed is required to be decided under South African Law – the PAIA. If this statute requires disclosure, the Report must be disclosed. This Court cannot apply foreign law – the GDPR – to limit the effect of the PAIA. For the above reasons, the application to adduce further evidence must fail.

The test in the PAIA

[37] Section 50 of the PAIA regulates the right of access to records of private bodies, such as Steinhoff. It provides:

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

(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

[38] The PAIA was enacted to give effect to the right of access to information in s 32 of the Constitution.[6] Any refusal of access to information is a limitation of that right and accordingly, 'the disclosure of information is the rule and exemption from disclosure is the exception'.[7] Stated differently, the default position is that access to records must be granted unless a ground for refusal in Chapter 4 of the PAIA is established.[8] Even if a refusal of access is justified on a ground in Chapter 4, s 70 provides for a 'public interest override', which authorises disclosure of a record in

[6] Section 32(1) of the Constitution provides:
'(1) Everyone has the right of access to—
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.'

[7] *President of the Republic of South Africa and Others v M & G Media Ltd* [2011] ZACC 32; 2012 2 BCLR 181; 2012 (2) SA 50 (CC) para 9.

[8] *South African History Archive Trust v South African Reserve Bank and Another* [2020] ZASCA 56; [2020] 3 All SA 380 (SCA); 2020 (6) SA 127 (SCA); 2020 (12) BCLR 1427 (SCA) para 6.

the public interest. The onus of establishing a ground for refusal rests on the party asserting it.[9]

[39] It is no longer in dispute that the media respondents require access to the Report for the exercise or protection of their rights nor that the procedural requirements under the PAIA have been met. However, Steinhoff contends that it is entitled to refuse access on the grounds of legal privilege and that the public interest override does not apply.

Is the Report privileged?

[40] Steinhoff relies on s 67 of the PAIA which 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.'

[41] Steinhoff asserts litigation privilege, which attaches to communications between a litigant or its legal adviser and third parties if those communications were made for the legal adviser's information for the purpose of pending or contemplated litigation.[10] There are two requirements for litigation privilege: (a) the document must have been obtained or brought into existence for the purpose of a litigant's submission to its legal adviser for legal advice; and (b) litigation must have been pending or contemplated as likely at the time.[11]

[42] The English cases establish that legal professional privilege is a single integral privilege, whose sub-heads are legal advice privilege (LAP) and litigation privilege.[12] These sub-heads were recently described in *Al Sadeq*,[13] as follows:

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[9] Section 81(3) of the PAIA; *President of the Republic of South Africa* fn 7 para 13.
[10] D T Zeffertt and A P Paizes *The South African Law of Evidence* 3 ed (2017) at 732.
[11] *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) para 21.
[12] *Three Rivers District Council and Others v Government and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610, [2005] 4 All ER 948 (*Three Rivers No 6*) para 105.
[13] *Al Sadeq v Dechert LLP and Others* 2024 EWCA Civ 28 para 52.

'As is well-known, legal professional privilege encompasses both legal advice privilege and litigation privilege. Broadly speaking, legal advice privilege applies to communications between a lawyer and its client for the sole or dominant purpose of giving or receiving legal advice, and documents which would reveal the contents of such communications; litigation privilege attaches to communications between a lawyer and its client or third parties which are brought into existence for the sole or dominant purpose of use in the conduct of existing or contemplated adversarial litigation.'

[43] In the answering affidavit made by Mr Lewis, the claim to privilege is founded on both LAP and litigation privilege. He states:

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

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

As it happens, the first legal demand and threat of claims came within days of 5 December 2017, and before PwC was even appointed, by way of a letter from the Dutch Investors' Association (Vereniging van Effectenbezitters) ("VEB") ("VEB letter") addressed to the members of the Management Board and Supervisory Board of SIHNV, dated 8 December 2017.'

[44] Mr Lewis then says that the SENS announcement of 6 December 2017 confirms that PwC had been approached, via Werksmans, to perform the forensic investigation into Steinhoff. Simultaneously with meetings and discussions held with Steinhoff during December 2017 – no precise dates are given –

'the supervisory board, in consultation with Steinhoff's statutory auditors, had approached PwC, *via* Werksmans, to perform an independent investigation in order to assist Steinhoff in assessing its position in light of the claims made against it;'

[45] According to Mr Lewis, litigation was pending or contemplated as likely when the Report was commissioned, which appears from PwC's letter of

engagement to Werksmans dated 7 December 2017 (the engagement letter), headed 'Privileged in contemplation of litigation'. He states that Werksmans were engaged at the outset and instrumental in the appointment of PwC, on the basis that the work performed by PwC would be privileged and in direct contemplation of litigation. Therefore, so it is contended, the Report was 'obtained and/or created for the purpose of a litigant's submission to a legal advisor'.

[46] But these assertions which, in my judgment, must be assessed in the light of the facts, are unsustainable. Mr Lewis' representation of the SENS announcement – made by Steinhoff itself – is a distortion. The announcement says nothing about an approach to PwC *via Werksmans*, or claims against Steinhoff:

'The Supervisory Board of Steinhoff wishes to advise shareholders that new information has come to light today which relates to accounting irregularities requiring further investigation. *The Supervisory Board, in consultation with the statutory auditors of the Company*, has approached PwC to perform an independent investigation.' (Emphasis added.)

[47] The SENS announcement does not refer to Werksmans at all, and there is no evidence that PwC understood that its services were being sought on account of any claim brought against Steinhoff, or for the purposes of legal advice sought by or given to Steinhoff. That much is clear from the announcement, which states:

'Steinhoff will update the market as the aforesaid investigation proceeds. The Company will publish the audited 2017 consolidated financial statements when it is in a position to do so. In addition, the Company will determine whether any prior years' financial statements will need to be restated.'

[48] In other words, the purpose of the PwC investigation was to enable Steinhoff to produce its financial statements for the 2017 and 2018 financial years. This is confirmed by the objective facts, more specifically, the purpose and scope of PwC's investigation, stated in the engagement letter as follows:

‘**Background and purpose**

2. Based on our discussions to date, we understand that Deloitte, the external auditors of Steinhoff, has received information that provides details of indications of potential accounting irregularities or potential non-compliance with laws and regulations impacting Steinhoff’s financial statements.

3. Your Client has requested [that] an independent investigation be undertaken by an accounting firm to investigate these alleged irregularities and breaches.

4. Deloitte will also communicate directly with PwC to discuss progress and findings.

Scope of and approach to the Services

5. The scope of the services is to analyse and investigate the allegations, especially:

   a. The indications of potential accounting irregularities and/or potential non-compliance with laws and regulations that were raised in allegations made against Steinhoff’s European based entities and its (current and former) executives by German authorities, and

   b. The concerns raised by Steinhoff’s external auditor, Deloitte.

6. At this stage the details of the allegations and the quantum are unknown. As a result it has been agreed that a phased approach to the investigation be undertaken.’

[49] There is no hint of any litigation, actually pending or contemplated, in the engagement letter, apart from the heading which refers to privilege. The statement by Mr Lewis that the Report was brought into existence, both for the express purpose of obtaining legal advice, and in relation to actual and contemplated litigation, is contradicted by the purpose and scope of PwC’s brief. The forensic investigation by PwC was not of a legal nature, nor undertaken for the purpose of providing legal advice to Steinhoff regarding contemplated litigation.

[50] Tellingly, the letter of engagement states that the details of the allegations and the quantum thereof are unknown. It is thus not surprising that when PwC was engaged, there was no litigation actually pending or contemplated: it is unlikely that any litigant would have instituted a claim against Steinhoff in a vacuum, without the basic facts concerning the accounting irregularities uncovered by PwC.

And the question is not who appointed PwC (according to the engagement letter it is Werksmans), but rather whether the Report was produced for the purposes of legal advice and in contemplation of litigation. The mere fact that a law firm has been interposed between PwC and Steinhoff, or that the engagement letter is headed 'privileged', does not establish those purposes; neither does it change the character and content of the letter.

[51] In short, PwC was employed on behalf of Steinhoff to do certain work (to investigate accounting irregularities and produce a report). But that work was not communicating with Steinhoff's attorneys to obtain legal advice, nor in contemplation of some litigation, nor for the purpose of giving advice with reference to that litigation. Consequently, the Report is not subject to LAP nor litigation privilege.

[52] It follows that the VEB letter of 8 December 2017 – the only evidence of contemplated litigation – does not assist Steinhoff. It merely confirms the fact that there was no litigation on the horizon when the Report was commissioned – by 6 December 2017 PwC had already been instructed by the Supervisory Board to investigate the accounting irregularities, to enable Steinhoff to publish its audited financial statements. Concerning the alleged contemplated litigation Mr Lewis makes vague and generalised allegations that Steinhoff, 'needed to ready itself to recover any damages which it might have suffered as a result of the accounting irregularities'. But he does not say precisely when that decision was taken, nor when Werksmans was engaged. Instead, Mr Lewis fudges the issue by stating that 'meetings and discussions were held during December 2017' in preparation for obtaining legal advice and defending potential legal claims.

[53] That the purpose of the Report was the investigation of accounting irregularities to enable the publication of Steinhoff's financial statements, is

underscored by Steinhoff's presentation to shareholders in April 2018. In that presentation Steinhoff stated that purpose of PwC's investigation was to determine what happened; the financial impact of those events; to provide clarity to stakeholders; and that PwC was engaging regularly with the audit committee, executive management and Deloitte. Then it is said that PwC's findings will assist management in the preparation of the unaudited interim financial statements for the period ending 31 March 2018, and the Steinhoff Group in determining the financial effect of the identified transactions. At no point in the presentation was obtaining legal advice or contemplated litigation, listed as a purpose of the PwC investigation.

[54] This is confirmed by the scope of PwC's brief, as described by Steinhoff itself in the overview. It states:

'The content of the PwC report is being considered by SIHNV and its advisers and is being used to assist production of the group's financial statements for FY2017 and FY2018 and to assist decision-making in areas for further investigation and remedial work.'

[55] That Steinhoff would appoint PwC for the purpose of enabling it to finalise its financial statements makes perfect sense. When PwC was appointed to conduct a forensic investigation, Steinhoff was under considerable pressure to report its financial results and to comply with its reporting obligations terms of the JSE listing requirements and the Companies Act. In this context, and as is demonstrated above, Steinhoff's claim that the Report was commissioned for the purpose of providing it to lawyers to give advice in contemplation of litigation, falls at the first hurdle because Steinhoff is unable to satisfy that test.

[56] This brings me to the question whether the dominant purpose of the Report was to obtain legal advice or to use it in conduct of pending or contemplated litigation. The test to determine whether a document that is brought into existence

for different purposes, only one of which is to obtain legal advice in pending or contemplated litigation, is protected by legal professional privilege, has not been decided by this Court.

[57] As noted by Zeffertt and Paizes,[14] there are two approaches. The first is that adopted in *A Sweidan and King*,[15] namely that there is 'an established rule of practice in this country that a document will be privileged if litigation is pending or thought likely and if *a* purpose for which the document was made was submission to a legal adviser as material upon which to enable him to advise'.[16] The court in *Sweidan* endorsed the views of Van Niekerk, Van der Merwe and Van Wyk,[17] that 'the indisputable position in South African law is that the purpose requirement is met even if the communication to the legal representative is but one of several purposes present';[18] and Schmidt[19] that 'if the statement is made with a view to litigation, it matters not that it is intended for another purpose;[20] and that '[h]ere, our law differs from English law in that litigation must at least be the dominant purpose'.

[58] The second approach is that the document must have been brought into existence for the dominant purpose of obtaining legal advice or for use in the conduct of existing or contemplated litigation. This approach was articulated by Barwick CJ in the High Court of Australia in *Grant*,[21] and followed by the House of Lords in *Waugh*.[22]

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[14] D T Zeffertt and A P Paizes *The South African Law of Evidence* 3 ed (2017) at p 742.
[15] *A Sweidan and King (Pty) Ltd and Others v Zim Israel Navigation CO Ltd* 1986 (1) SA 515 (D) (*Sweidan*).
[16] *Sweidan* fn 15 at 515E-F. (Emphasis added.)
[17] Van Niekerk, Van der Merwe and Van Wyk *Privilegies in die Bewysreg* at 75.
[18] Own translation. The Afrikaans text reads: 'Die posisie in die Suid-Afrikaanse reg is dan onbetwisbaar dat, wat die mededelings van derdes betref, daar aan die bedoelingsvereiste voldoen word selfs al is die bedoeling om die mededeling aan 'n regsverteenwoordiger voor te lê slegs een van meerdere bedoelings wat aanwesig is.'
[19] C W H Schmidt and H Rademeyer *Bewysreg* 4 ed (2000) at 562.
[20] Own translation. The Afrikaans text reads: 'Indien die verklaring met die oog op gedingvoering gedoen is, maak dit nie saak as ook 'n ander doel daarmee beoog is nie.'
[21] *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674.
[22] *Waugh v British Railways Board* [1980] AC 520.

[59] In *Grant's* case the issue was whether legal professional privilege could be claimed in respect of certain reports required to be made, concerning an incident in which a patient at a psychiatric centre who managed to escape from his room, subsequently died of exposure. One of the purposes of the reports was submission to legal advisers in the event of litigation. The widow sought damages from the relevant authorities and discovery of the reports. The respondents successfully invoked privilege. The court of first instance held that a document is privileged if it came into existence for several purposes, provided that its submission to a legal adviser was one of those purposes.

[60] In the majority judgment on appeal, Stephen, Mason and Murphy JJ explained the rationale for legal professional privilege as follows:

'The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.[23]

[61] The majority held that the following are powerful considerations which suggest that the privilege should be confined within strict limits:

(a) The claim of privilege by companies for their records 'does little, if anything, to promote full and frank disclosure or truthfulness'.[24]

(b) If the purposive element of a submission to a legal adviser is too easily satisfied, privilege may be claimed in respect of the records of a company

[23] *Grant* fn 21 at 685.
[24] *Grant* fn 21 at 686.

which come into existence in the ordinary course of its business. This, in turn, would exclude those documents from production and inspection, or unfairly subject the other party to surprise when they are used.[25]

(c) The privilege makes it more difficult for the opposing party to test the veracity of the party claiming privilege, by preventing inspection of documents which may be inconsistent with that case. To this extent the privilege is an impediment, not an inducement to frank disclosure.[26]

(d) Litigants are obliged to disclose their own knowledge of the relevant facts of a case. This rule cannot be different if the litigant is a company; yet a company in possession of a report made by its employees informing it of those facts, may claim privilege if one of the purposes of that report is submission to a legal adviser should litigation ensue. As the majority put it:

> 'It is difficult to see why the principle which lies behind legal professional privilege should justify its extension to material obtained by a corporation from its agents with a double purpose. The second purpose, that of arming central management of the corporation with actual knowledge of what its agents have done, is quite unconnected with legal professional privilege; it is but a manifestation of the need of a corporation to acquire in actuality the knowledge that it is always deemed to possess and which lies initially in the minds of its agents. That cannot itself be privileged; quite the contrary. If the party were a natural person or, more accurately, an individual not acting through servants or agents, it would be precisely that knowledge which would be discoverable and the party cannot be better off by being a corporation.'[27]

(e) Unless the law confines legal professional privilege to documents brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings, 'the privilege will travel beyond the underlying rationale to which it is intended to give expression'. The privilege should not attach to the documents which, apart from the purpose of

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[25] *Grant* fn 21 at 686.
[26] *Grant* fn 21 at 686.
[27] *Grant* fn 21 at 687.

> submission to a legal adviser, would have been brought into existence for other purposes in any event, and then without attracting any privilege.[28]

[62] For these reasons the majority held that the sole purpose test should be adopted as the criterion for legal professional privilege, and that the reports should be disclosed.[29] Jacobs J put the test in the form of a question: '[D]oes the purpose of supplying the material to the legal adviser account for the existence of material?'[30] This, Jacobs J said, is a question of fact. The Judge found that there was nothing in the reports which suggested that legal advice was contemplated; that their structure and purpose was administrative; and that they should be produced.

[63] Barwick CJ proposed a dominant purpose test, which was stated thus:

> 'Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from protection.'[31]

[64] Barwick CJ said that he preferred 'dominant' to describe the relevant purpose; and that neither 'primary' nor 'substantial' satisfied the true basis of the privilege. The Chief Justice concluded that the relevant reports fell far short of the

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[28] *Grant* fn 21 at 688.
[29] *Grant* fn 21 at 688.
[30] *Grant* fn 21 at 693.
[31] *Grant* fn 21 at 677.

dominant purpose test and ordered its inspection. The dominant purpose test also applies in other jurisdictions, such as Canada,[32] New Zealand,[33] and Ireland.[34]

[65] The dominant purpose test was endorsed in *Waugh's* case. The facts, in summary, are these. The appellant's husband was an employee of the British Railways Board. He died of injuries sustained when a locomotive which he was driving collided with another. The appellant sought discovery of a report called the 'joint inquiry report', incorporating statements of witnesses, and prepared as a matter of practice by two officers of the Board, two days after the accident. The Board claimed that the report was privileged; it was prepared for a dual purpose: (a) railway operation and safety purposes; and (b) for the purpose of obtaining legal advice in anticipation of litigation. The first purpose was more immediate than the second, but both were described as of equal rank or weight.

[66] Lord Wilberforce held that the administration of justice strongly required disclosure of the report: it was contemporary; it contained statements by witnesses on the spot; and it was not merely relevant evidence but the best evidence as to the cause of the accident. While privilege may be required to induce candour in statements made for the purpose of litigation, it is not required in relation to statements whose purpose is different, for example, safety in the operation of a railway.[35]

[67] Lord Wilberforce went on to say:

'If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of

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[32] *Levin v Boyce* [1985] 4 WWR 702; *Milton Farms Ltd v Dow Chemical Canada Inc* (1986) 13 CPC (2d) 174; *Doiran v Embree* (1987) 16 CPC 2d 70; *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co [No 1]* (1988) 22 CPR (3d) 290.

[33] *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596.

[34] *Silver Hill Duckling v Minister for Agriculture* [1987] IR 289.

[35] *Waugh* fn 22 at 531.

preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available.'[36]

[68] Lord Wilberforce concluded that unless submission to the legal adviser in view of litigation was at least the dominant purpose for which the report was prepared, privilege cannot apply, and that the sole purpose test was unduly restrictive. He endorsed the dissenting judgment of Lord Denning MR in the court below, and agreed that the dominant purpose test applied by Barwick CJ in *Grant*, was the proper test.

[69] Lord Edmund-Davies also endorsed the dissent by Lord Denning MR, that where material comes into existence for a dual purpose – one to establish the cause of an accident and the other to furnish information to the legal adviser – it should be disclosed because its purpose is not then 'wholly or mainly' litigation. Lord Denning put the position thus:

'The main purpose of this inquiry and report was to ascertain the cause of the accident and to prevent further accidents or similar occurrences. Its nearby purpose was to put before the departmental inspectorate. Its far-off purpose was to put before the solicitors of the board, should a claim be made and litigation ensue.'[37]

[70] Lord Edmund-Davies concluded as follows:

'. . . I would certainly deny a claim to privilege when litigation was merely one of several purposes of equal or similar importance intended to be served by the material sought to be withheld from disclosure, and a fortiori where it was merely a minor purpose. On the other hand, I consider that it would be going too far to adopt the "*sole* purpose" test applied by the majority in *Grant v Downs*, which has been adopted in no United Kingdom decision nor, as far as we are

[36] *Waugh* fn 22 at 532.
[37] *Waugh* fn 22 at 541.

aware, elsewhere in the Commonwealth. Its adoption would deny privilege even to material whose outstanding purpose is to serve litigation, simply because another and very minor purpose was also being served. But, inasmuch as the *only* basis of the claim to privilege in such cases as the present one is that the material in question was brought into existence for use in legal proceedings, it is surely right to insist that, before the claim is conceded or upheld, such a purpose must be shown to have played a paramount part.'[38]

[71] To return to the present case. The reasoning in *Grant* and *Waugh* for rejecting the former approach that, as long as one of the purposes for the creation of a document is submission to a legal adviser or use in legal proceedings, it is protected by legal professional privilege, is compelling (albeit that in *Grant* the majority favoured the sole purpose test). The dominant purpose test advances the adversarial system of justice by broadening the discovery process, thus ensuring that the courts decide issues between parties on an evaluation of the full facts. The former approach clothes documents that would in any event have been produced and otherwise not privileged, with legal professional privilege; and is at odds with the object of discovery.

[72] In this regard, the observation by Lord Edmund-Davies in *Waugh* is apposite:

'[W]e should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression.'[39]

[73] For the above reasons, I have come to the conclusion that this Court should state what is the proper test. It is this. A document created with the dominant purpose of its author, or of the person or authority under whose direction it was created, of using it to obtain legal advice, or in the conduct of existing or contemplated adversarial litigation, is privileged and shielded from inspection and

[38] *Waugh* fn 22 at 543.
[39] *Waugh* fn 22 at 543.

production. Consequently, the decision in *Sweidan* is overruled and should not be followed.

[74] Applied to the present case, the dominant purpose in procuring the Report was the investigation of the accounting irregularities within Steinhoff, in order to finalise the consolidated financial statements of the Group for the 2017 and 2018 financial years. This is confirmed in the following documents: the SENS announcement of 6 December 2017; the engagement letter; a written presentation by Steinhoff dated 19 December 2017; the SENS announcement of 30 January 2018; the presentation to shareholders at the AGM on 20 April 2018; and the overview. Further, the SENS announcements on 19 December 2017 and 26 January 2018, informing the public that Steinhoff was meeting with its lenders and European-based creditors, are consistent with the dominant purpose in obtaining the Report.

[75] The assertion by Mr Lewis that PwC was engaged to obtain legal advice, 'to deal with the immediacy of legal demands, threats, and claims, and in due course for Steinhoff to institute legal proceedings against third parties', has no foundation in the evidence. Given the dominant purpose for which the Report was prepared, its disclosure is justified.

Has Steinhoff waived privilege?

[76] Even if the Report were legally privileged within the meaning of s 67 of the PAIA, Steinhoff has waived such privilege by publishing the overview. Although the overview states that the Report is confidential and subject to legal privilege, the mere assertion of privilege does not preclude a finding that privilege has been waived.[40] Consequently, Mr Lewis' statement that '[t]he Overview is accurate and

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[40] *Contango Trading SA and Others v Central Energy Fund SOC Ltd and Others* [2019] ZASCA 191; [2020] 1 All SA 613 (SCA); 2020 (3) SA 58 (SCA) (*Contango*) para 67.

contains the information which Steinhoff was comfortable to release at that time without waiving privilege', is not decisive.

[77] Waiver may be express or implied. Recently this Court explained implied waiver as follows:

'Implied waiver, as all the cases on the subject show, arises where the conduct of the person concerned is objectively inconsistent with the intention to maintain confidentiality and, if permitted, will unfairly fetter the opponent's ability to respond to the case or defence advanced in reliance on the privileged material. It arises notwithstanding any express reservation of the right to invoke privilege.'[41]

[78] The test is objective: whether there has been an implied waiver is judged by its outward manifestations – from the perspective of how a reasonable person would view it.[42] An implied waiver may be inferred from the objective conduct of the party claiming the privilege in disclosing part of the content or the gist of the material.[43] However, disclosure of part of a document does not necessarily mean that privilege over the full document is waived and in this regard, the nature, extent and purpose of the disclosure is fundamental.[44]

[79] Applied to the present case, the first inquiry is what, in essence, was disclosed in the overview. Steinhoff did not merely refer to the existence of the investigation or its outcome. It issued an 11-page overview of the Report, which states that the Supervisory Board and the Management Board of Steinhoff (the Boards) received a report from PwC setting out its findings, following an investigation (conducted over 14 months in South Africa and other jurisdictions) initiated at the request of the Supervisory Board.

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[41] *Contango* fn 40 para 51.

[42] *Competition Commission v Arcelormittal South Africa Ltd and Others* [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA); [2013] 1 CPLR 1 (SCA) (*Arcelormittal*) para 33.

[43] *Contango* fn 40 para 48.

[44] *Contango* fn 40 para 63.

[80] PwC's key findings stated in the overview, put simply, is that massive fraud has been perpetrated within the Steinhoff Group for many years, by a small group of former and non-executives, led by a senior management executive (the wrongdoers). The wrongdoers structured and implemented various transactions over a number of years, which substantially inflated the profit and asset values of the Steinhoff Group. Fictitious and irregular transactions were entered into with parties disguised as third party entities, apparently controlled by the wrongdoers. In many cases fictitious and irregular income was created at an intermediary Steinhoff Group holding company level, and then allocated to underperforming Steinhoff operating entities as so-called contributions, that either increased income or reduced expenses in those operating entities. These irregular transactions, supported by documents created after the fact and backdated, are complex, involve many entities and took place over a number of years.

[81] Three principal third party entities involved in the fictitious and irregular transactions where profit and asset values were inflated, are identified in the overview. It also describes these transactions, namely profit and asset creation; asset overstatement and reclassification; asset and entity support; and contributions (the irregular transactions), and goes on to explain the modus operandi of the wrongdoers in the design and implementation of these transactions. For example, PwC identified transactions that supposedly resulted in profit and asset creation involving brands, intellectual property and know-how. However, the 'income' from these and other transactions – totalling some R6.5 billion for the financial years 2009 to 2017 – was never paid to the Steinhoff Group, resulting in loans or other receivables with no economic substance. In the case of contributions, operating entities were made to appear more profitable than they actually were, which had the effect of inflating the Steinhoff Group profits.

[82] The overview states that the full financial impact of the findings in the Report is being determined by Steinhoff and would be reflected in (a) the restated closing balances for the 2015 financial year (forming part of the restated 2016 financial year accounts); and (b) the outstanding accounts for the 2017 and 2018 financial years, then still to be published. The overview also states how the various elements of the PwC investigation would be categorised in the financial restatements; and that the Steinhoff Group would inform the market if the restatements to the total equity position of the Group as reflected in the unaudited half-year results published on 29 June 2018, are materially out of line.

[83] The overview then summarises the remedial measures that Steinhoff would put in place. These measures relate to governance; remediation of accounting irregularities, non-compliance with laws and misappropriations; and an analysis of the PwC investigation to ensure, among other things, that all material aspects have been identified and evaluated; and to identify matters that would be dealt with in a Phase 2 of the investigation. It is also stated that following the key findings in the Report, the Boards have resolved to pursue claims against the individuals responsible for the unlawful conduct.

[84] Finally, the overview describes the next steps. These include ensuring that the findings in the Report are treated appropriately in the preparation of the Steinhoff Group's financial statements for the 2017 and 2018 financial years; recovery of losses incurred and damages suffered by the Group; assistance and cooperation in any criminal investigation against those who perpetrated the unlawful actions; finalisation and implementation of the remediation plan; and consideration of the options to address litigation initiated against the Steinhoff Group.

[85] I have outlined the main points raised in the overview, to show that the ineluctable inference to be drawn from the facts stated in that document and those relating to the procurement of the Report, is that the overview is a summary of the content of the Report. To begin with, the overview confirms the dominant purpose of the forensic investigation and the Report by PwC – to investigate, analyse and report on allegations of accounting irregularities, arising from the concerns of Deloitte, so that the consolidated financial statements could be completed. The overview states that the investigation was conducted in two phases: the Initial Phase comprising information-gathering and understanding the allegations; and Phase 1, a detailed investigation of the irregularities. The overview also states that a further phase of investigative work (Phase 2) will be requested, which Steinhoff says will not be material to its financial statements, but may be significant for other reasons. This again, underscores the dominant purpose of the Report.

[86] The purpose of the disclosure in the overview is consistent with Steinhoff's presentation to shareholders. The purpose of the Report was to determine what happened (the perpetration of the irregular transactions over several years, which substantially inflated the profit and asset values of the Steinhoff Group); the financial impact of those transactions (between 2009 and 2017 profit and asset values were inflated by some R6.5 billion); and the persons responsible (the wrongdoers).

[87] The overview describes the key findings in the Report; states that the facts raise serious allegations against the senior executive, and that PwC has established the quantum of the irregular transactions; and identifies the third party entities involved in those transactions. The nature of the irregular transactions and the manner in which the group implemented each transaction, are described in broad, but clear terms. The overview also illustrates the financial impact of the key findings by PwC, and explains the remedial measures and actions to be taken.

[88] Given the nature, extent and purpose of the voluntary disclosure in the overview, Steinhoff's submission that the overview is not a summary of the Report, is untenable. The effect of the disclosure was, and was intended to be, a short, clear description of the accounting irregularities and the irregular transactions in which the wrongdoers had engaged, and their impact on the Steinhoff Group, as contained in the Report.

[89] In my judgment, on the totality of the evidence, the inference must in fairness be drawn that Steinhoff impliedly waived privilege in relation to the Report. In this regard, the answer to the question in *Wigmore*,[45] approved in *Contango*,[46] as to what constitutes a waiver by implication, is apposite:

'Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.'[47]

[90] This is such a case. It was open to Steinhoff to elect to withhold, or to disclose the outcome of PwC's forensic investigation into the irregular transactions and wrongdoing within the Steinhoff Group. Having chosen disclosure by publishing the overview in the form that it did, its election became final; and fairness and consistency dictate that the media and the public are entitled to disclosure of the full Report. It would not only be unfair to allow Steinhoff to use part of the Report whilst claiming privilege over the remainder of it; but also

[45] J H Wigmore *Wigmore on Evidence* 3 ed Vol 8 para 2327.
[46] *Contango* fn 40 para 44.
[47] Cited in *Harksen v Attorney-General, Cape, and Others* 1999 (1) SA 718 (C), 1998 (2) SACR 602 para 62, and approved in *Contango* fn 40 para 44.

inconsistent with the confidence preserved by any privilege, since Steinhoff has voluntarily disclosed the gist or substance of PwC's findings – the irregular transactions and their impact – the very reasons for the forensic investigation and the existence of the Report.

[91] For the above reasons, I find that by publishing the overview, Steinhoff has impliedly waived any privilege that may have existed in respect of the Report. That being so, the s 67 defence cannot succeed: privilege is a ground for refusal 'unless the person entitled to the privilege has waived the privilege'. In the light of the above conclusions in relation to privilege, it is not necessary to consider the argument by the media respondents that the privilege claimed by Steinhoff has expired and was never lawfully transferred to Ibex RSA.

Does the public interest override apply?

[92] Section 70 of the PAIA provides:

'Despite any other provision of this Chapter, the head of a private body must grant a request for access to a record of the body contemplated in section 63 (1), 64 (1), 65, 66 *(a)* or *(b)*, 67, 68 (1) or 69 (1) or (2) if-

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

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

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

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

[93] The plain meaning and effect of s 70 is that despite the applicability of a ground of refusal (such as privilege in s 67), the record must nonetheless be disclosed.[48] This, unsurprisingly, is consistent with the common law principle that privilege cannot be invoked to commit or cover-up fraud or a crime.[49] Section 70

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[48] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) (*Qoboshiyane*) para 12.
[49] 18 *Lawsa* 3 ed para 180.

cuts across a ground for refusal such as privilege, in the sense that it in effect prevents privilege from being invoked in the first place.

[94] The founding affidavit states that disclosure of the Report would reveal evidence of fraud and accounting irregularities; and that Steinhoff is being investigated by and is cooperating with, among others, the JSE, the SARB, the Hawks, the NPA and the AFU. Steinhoff really has no answer to these allegations. That disclosure would reveal evidence of fraud was met with a bald denial. This is insufficient to create a genuine dispute of fact on this point.[50] Steinhoff however conceded that it was cooperating with various authorities in the investigations into what had occurred.

[95] In my view, the threshold for the public interest override is a balance of probabilities test: whether a record would reveal evidence of non-compliance with the law, must be more likely than not on the material before the decision-maker, whether that be a private or public body under the PAIA, or a court in an application in which the issue arises. Applied to the present case, there can be no question that the disclosure of the Report would reveal both evidence of a failure to comply with the law; and that its disclosure is in the public interest.

[96] 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. In fact, the overview states that '[t]he PwC Report refers, in the main, to the inflation of profits and asset values as being 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

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[50] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 13.

executive in particular'. On this basis alone, the public interest override applies and the Report must be disclosed.

[97] In addition, this is a classic case where the public interest in the disclosure of the Report clearly outweighs any potential harm to Steinhoff. The harm it alleges comprises superficial assertions, namely 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 will 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 so as to frustrate Steinhoff's efforts, which would not be in the interests of creditors, shareholders or the public at large'.

[98] These assertions do not bear scrutiny. Steinhoff's 'efforts' are not explained and it has given no details nor evidence of the litigation it intends to launch. The public interest, more specifically, 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. Steinhoff itself previously endorsed these propositions in its presentation to the Finance Standing Committee of Parliament: Its Acting Chairperson, Ms Sonn, 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 learnt from these events and processes can be applied'. Shareholders too, are better served by disclosure of the Report in the public arena – investors should be given the information necessary to protect their interests.

[99] Steinhoff's allegation that law enforcement would be placed at risk or that the wrongdoers would take pre-emptive action is illogical, and baseless. Steinhoff

has made the Report available to law enforcement agencies, and the persons investigated or prosecuted would be entitled to it. What is more, Steinhoff would be required to disclose information it has against the wrongdoers in the ordinary course of civil proceedings, through normal discovery processes.

[100] In contrast to the alleged harm to Steinhoff, disclosure of the Report is plainly in the public interest. The evidence shows the following. In November 2017 Steinhoff enjoyed a market capitalisation of approximately R242.4 billion and was one of the ten largest companies on the JSE at the time. It is a fair-sized company by European standards, owing to its listing on the Frankfurt Stock Exchange. Steinhoff had approximately 65 000 shareholders representing a broad swathe of institutional and retail investors around the world, when Mr Jooste resigned. The fraud that took place at Steinhoff led to an overstatement of assets and profits in a staggering amount – some R200 billion. The Steinhoff scandal led to a massive and precipitous drop in the its share price (98%) and affected a large majority of South Africans with some form of retirement savings invested in Steinhoff.

[101] Mr Lewis' answer to all of this is cagey, and one of avoidance. He simply says: 'I do not accept the applicants' summary', and contends that the media respondents assume that the causes and consequences of the accounting irregularities have already been determined. And this, after publication of the overview, which describes the irregular transactions that caused the profits and assets of the Steinhoff Group to be grossly inflated.

[102] Further, and as Steinhoff is aware, in 2017 the GEPF was the second largest shareholder in Steinhoff, holding shares worth some R32.5 billion. It is a known fact that every national and provincial employee in the public sector is a member of the GEPF, and will one day ultimately rely on the Fund to pay benefits. Employers who contribute to the GEPF, pensioners and members of the public

clearly have an interest in the fraud that took place at Steinhoff. Mr Lewis' denial of these facts – peculiarly within the knowledge of Steinhoff – and Steinhoff's application to have them struck out as inadmissible hearsay, is untenable.

[103] What all of this shows, is that Steinhoff used dishonest and illegal ways to maintain its businesses and deceived investors into believing that the company was more profitable than it actually was. Billions of Rands were wiped off the JSE and the pension funds of millions of ordinary South Africans suffered huge losses. Steinhoff was once regarded as one of the most successful companies in South Africa, with a strong commitment to corporate social responsibility. There is simply no basis to shield the Report from public scrutiny: Parliament has decreed that the public interest override must be applied in a case such as this. Accordingly, I conclude that the public interest override applies in relation to the Report.

The cross-appeal

[104] The High Court struck out paragraphs 31 to 36 of the founding affidavit on the ground that they constitute inadmissible hearsay. The media respondents appeal against the relevant portion of the judgment and order. They contend that what is stated in these paragraphs consists of publicly available evidence (some of which emanates from Steinhoff itself) or logical inferences drawn from publicly available information; or information tendered for the purpose of demonstrating the public interest in the Report.

[105] Section 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 provides:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'[51]

[51] *Legal Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA); *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* [2017] ZASCA 177; 2018 (4) SA 71 (SCA).

[106] Given the conclusions to which I have come regarding privilege and the public interest override, the cross-appeal will have no practical effect or result. Consequently, it must be struck from the roll with no order as to costs.

Order

[107] In the result I make the following order:

1 The application to adduce further evidence is refused with costs, including the costs of two counsel.

2 The appeal is dismissed with costs, including the costs of two counsel.

3 The cross-appeal is struck from the roll with no order as to costs.

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellants:	A M Smalberger SC with R M G Fitzgerald
Instructed by:	Werksmans Attorneys, Cape Town
	Symington & De Kok Attorneys, Bloemfontein
For respondents:	W H Trengove SC with P Maharaj-Pillay and I S Cloete
Instructed by:	Webber Wentzel, Cape Town
	Honey Attorneys, Bloemfontein