



Companies and Intellectual
Property Commission
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RULING BY THE HIGH COURT REGARDING A CLAIM OF CONFIDENTIALITY IN TERMS OF S212 OF THE COMPANIES ACT, ACT 71 OF 2008 AS AMENDED: G.U.D HOLDINGS HIGH COURT REVIEW RULING, CASE NO 26738/2022.

Background

The Gauteng High Court in the matter between CIPC, the Companies Tribunal and G.U.D Holdings (Pty) Ltd ruled in favour of CIPC. It was a review application lodged by CIPC for review of a decision taken by the Companies Tribunal relating to the Commission's response to G.U.D's claim of confidentiality. G.U.D had originally submitted its application on 14 September 2021 in which it claimed confidentiality of the entire contents of their annual financial statements for the financial year ending 30 June 2020. The Commission rejected the claim, and they filed an application for the review of the Commission's decision to the Companies Tribunal. The Companies Tribunal upheld the review and granted the entity (G.U.D Holdings) the claim of confidentiality. It is against this background that the Commission then took the matter for review in the High Court as it was not in agreement with how the Companies Tribunal arrived at its decision of granting G.U.D the claim of confidentiality.

Substantive Legal Issues determined

This matter involved differing interpretations of various provisions of the Companies Act, which will not be dealt with in detail in this document. The main section, which informed this application, was the role and power of CIPC in terms of section 187 (4) (c) with regard to making information kept in its registers publicly available. The other part related to whether a company can withhold information to the Commission on which it is expected to pronounce on, when making an application in terms of section 212 of the Act. The entity in its application, redacted information relating to disclosure of directors remuneration. In terms of s30(4) –(6), the inclusion of this information in the annual financial statements is mandatory for entities which are required to have their annual financial statements audited in terms of the Companies Act. The entity met the criteria and ought to have included this information so that the Commission could apply its mind in making

the dtic Campus (Block F - Entfutukweni), 77 Meintjies Street, Sunnyside, Pretoria | P O Box 429, Pretoria, 0001

Call Centre: 086 100 2472

Website: www.cipc.co.za

any ruling before it. The entity claimed confidentiality of the entire set of their annual financial statements which should include details on directors' remuneration which is a mandatory disclosure applicable to the entity. The Companies Tribunal as the reviewer of the CIPC's decision was however given the said information.

The entity seemed to have pronounced on the confidentiality of this information while they were making an application to the Commission as it was redacted. This formed one of the grounds for the review application in that the decision maker should be provided with the information in order to enable him to execute his role.

The ruling also touched on the issue of privacy in terms of the Constitution and confidentiality. It emphasized that the terms are different and should be dealt with in that way. The Court also touched on the application of Protection of Personal Information Act (POPIA) and the exceptions applicable when a public body is processing personal information in fulfillment of its powers, duties and functions in terms of the law.

Key points determined on review by the High Court:

That the Companies Tribunal made an error in law by making a decision on information, which was not given to the CIPC as the main decider of the fact. The court agreed with the CIPC and of the view that GUD did not comply with peremptory provisions of section 30(4)-(6) of the Act. The court was critical of GUD electing to redact parts of its AFS on its own, for purposes of claiming confidentiality. Material facts were absent when the decision was made by the Tribunal.

The Court also held that the Companies Tribunal erred by placing reverse onus on the Commission with regard to proving that the submitted information is not confidential. The onus was always on the applicant to prove that the information which related to the application they are making is confidential.

That the Companies Tribunal made an error in law by failing to differentiate between privacy and confidentiality of the information contained in the financial statements of GUD. That the quoted legislation supports the culture of openness and transparency and that disclosure of this information would not infringe upon those laws that the applicant is relying on, viz. (Constitution, Protection of Personal Information Act (POPIA), Promotion of Access to Information Act (PAIA) and Promotion of Administrative Justice Act (PAJA) (Para [j] on page 33).

The Court also held that, overwhelming factors favouring transparency, openness, democracy in our legal and constitutional dispensation outweighed the issue of privacy and confidentiality in this matter, (Para F [14] under conclusion.

The court is not convinced that the Tribunal gave the issue of corporate transparency and governance sufficient importance given the importance and prominence it is given in S7 and Part C of the Act, PIAA, the Constitution. The court found that the Tribunal overemphasized the privacy rights at the expense of transparency.

Conclusion

The Companies Act 2008, Act 71 of 2008 as amended advocates for high levels of transparency and high standards of corporate governance. Companies during their existence interfaces with various stakeholders, especially labour, which means legal entities who exist in the threshold where they have a public interest element, there is a higher expectation for corporate disclosure. The ruling aligns with the efforts of the CIPC as a regulator to ensure transparency amongst corporates.

Yours sincerely,



Adv. Rory Voller

Commissioner

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Annexure: High Court Ruling, G.U.D Holdings, Case No. 226738/2022