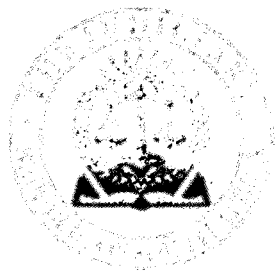


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. <u>18 DECEMBER 2023</u>
DATE	SIGNATURE

CASE NO: 26738/2022

IN THE MATTER BETWEEN

THE COMPANIES & INTELLECTUAL
PROPERTY COMMISSION

APPLICANT

and

COMPANIES TRIBUNAL
KHATIJA TOOTLA N.O
G.U.D HOLDINGS (PTY) LTD

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

JUDGMENT

CEYLON AJ

A. INTRODUCTION:

[1] This is an application in terms of which the following relief is sought by the Applicant:

"1. That the decision, that was taken on 13 December 2021 by the Second Respondent in her capacity as the presiding member of the First Respondent, is reviewed and set aside.

2. Ordering any Respondent opposing this application, to pay the Applicant's costs, such costs to include the costs consequent upon the employment of more than one counsel, one of whom is senior counsel.

3. Further and/or alternative relief."

[2] The application is opposed by the Third Respondent only. The First and Second Respondents elected to abide by the decision of court in terms of their notice to do so, dated 09 June 2022.

B. BRIEF BACKGROUND:

[3] The following is a broad background of the facts of this matter:

(a) The Applicant is the Companies and Intellectual Property Commission (the "CIPC"), an agency of the Department of Trade and Industry of South Africa, established under the Companies Act 71 of 2008 and is an organ of state.

(b) The First Respondent is the Companies Tribunal, an organ of state, established in terms of the Companies Act 71 of 2008, to provide speedy resolution of company disputes ("the Tribunal").

(c) The Second Respondent is K Tootla NO ("KT"), a member of the First Respondent, cited herein in her official capacity, and the person responsible for the decision of 13 December 2021 on behalf of the First Respondent.

(d) The Third Respondent is G.U.D. Holdings (Pty) Ltd, a private for profit company, duly incorporated in terms of the 1926 Companies Act and deemed to be a pre-existing company in terms of section 2(1)(b), schedule 5 of the Companies Act 71 of 2008 (also referred to as "GUD").

(e) GUD applied to the CIPC in terms of section 212 of the Companies Act 71 of 2008 ("the Act") for an order of confidentiality regarding its annual financial statements ("AFS") for the year ending 30 June 2020. This application was dismissed by the CIPC on 18 April 2019. GUD was permitted to renew the application, which it did. The CIPC also dismissed the renewed application on 27 September 2021.

(f) On 18 October 2021 GUD submitted an application in terms of section 212(4) read with section 172 of the Act with the Tribunal to have the decisions of the CIPC overturned as it was dissatisfied with the dismissal of its said applications.

(g) The Tribunal did overturn the CIPC's said decisions and granted GUD an order of confidentiality regarding GUD's 2020 annual financial statements. The Tribunal's order (per member KT) is as follows:

"ORDER:

[57] The application for review of the Respondent's decision is reviewed and set aside but the claim for confidentiality in respect of the AFS for the year ending 30 June 2020 is granted by the Tribunal.

[58] The registrar of the Tribunal is requested to bring the decision and the order to the attention of the Applicant and Respondent.

[59] The decision may only be published 10 days after the date it is brought to the attention of the Applicant.

[60] There is no order as to costs."

(h) It is against this order that this application for review and setting aside is brought.

C. COMMON CAUSE FACTS:

[4] The following are the common cause facts between the parties:

(a) the GUD submits its claim for confidentiality with the CIPC on 21 February 2019;

(b) the CIPC dismisses the GUD claim for confidentiality on 18 April 2019;

(c) GUD files a supplementary affidavit on 08 August 2019 with the CIPC in the GUD claim for confidentiality;

(d) on 11 September 2019 the CIPC dismisses the GUD supplemented claim for confidentiality;

(e) GUD files an application with the Tribunal for the review of the CIPC decisions of 18 April 2019 and 11 September 2019;

(f) on 25 November 2019 the Tribunal strikes GUD's application from the roll due to lack of jurisdiction of the Tribunal to adjudicate the application;

(g) GUD reviews its application to the Tribunal for a default order on 11 December 2019;

(h) on 04 August 2020 the GUD institutes a review application in this Court for a review of the CIPC decision of 25 November 2019;

(i) this Court, on 29 June 2021, reviews and set aside the CIPC's decision of 25 November 2019;

(j) GUD files claim for confidentiality with the CIPC on 14 September 2021;

(k) the CIPC dismisses GUD's application for confidentiality on 27 September 2021;

(l) GUD files its application to review the CIPC's decision of 27 September 2021 with the Tribunal on 18 October 2021;

(m) on 13 December 2021 the Tribunal upholds the GUD's review application;

(n) the CIPC institutes a review application against the Tribunal's decision on 16 May 2022 in this Court.

D. ISSUES TO BE DETERMINED:

[5] The issues to be determined are whether the grounds raised by the CIPC herein stands to be reviewed and set aside in terms of PAJA.

[6] These grounds are set out and assessed in the evaluation below.

E. POINT IN LIMINE:

[7] In paragraph 8 of its Answering affidavit, GUD denies that the deponent (RJ Mathekga) is authorised to represent the CIPC in this application and to do all things necessary in order to bring the application, which GUD submits, applies to both the Founding and supplementary Founding Affidavits.

[8] This allegation was disputed by the CIPC. The said deponent submitted that he requested and received the necessary authorisation from its Commissioner, Adv RW Voller, that the decision of the Tribunal be taken on review and which authorisation was given on 24 December 2021 and which was attached as annexure "A" to the replying papers of the CIPC.

[9] The said deponent submitted further that he has been involved in this matter and that the GUD was fully aware thereof, as appears from their email of 18 April 2019 to GUD's attorneys, that he is duly authorised to represent the CIPC in this application and to do all things necessary in order to bring this application.

[10] It is apparent from annexure "A" to the CIPC's replying papers that, following a request thereto, to institute these proceedings on behalf of the CIPC, the request was approved by the CIPC Commissioner on 24 December 2021.

[11] It further seems that the said deponent has been intimately involved in this matter and has been in direct contact in connection therewith with GUD's attorneys, as appears from the CIPC's correspondence dated 18 April 2019 with GUD's said attorneys [refer to annexure "CIPC 4" to the Founding Affidavit ("FA"), at pg 001-73, caselines].

[12] Accordingly, this Court is inclined to agree with contention of the CIPC that the deponent was duly authorised to represent the CIPC in this application. Accordingly, the point *in limine* of GUD cannot be sustained.

F. LEGAL PRINCIPLES/EVALUATION:

[13] The CIPC's grounds of review will be evaluated by way of assessment of the legal principles consulted and the contentions made by the parties.

(l) the first ground of review:

(i) the contentions of the parties:

(a) The CIPC submitted that the Tribunal's findings that the director's remuneration redacted in the AFS of GUD, is confidential, are reviewable and stands to be set aside in terms of sections 6(2)(a)(i), 6(2)(b) and 6(2)(f)(ii)(cc) [refer to para G1, paras 59-68 of the FA, pg 001-30, caselines].

(b) The CIPC refers to para 19.7 of GUD's affidavit, where GUD stated that the details of the director's remuneration is listed in the notes and it would appear in the present note 24 (p33) but has been redacted for the present purposes. According to the CIPC, the Tribunal in its decision (para 7) indicated that from the AFS that has been attached, it is clear from sections 30(4)-(6) which sets out the details that the director's remuneration must be disclosed in the AFS which GUD has also done. The CIPC indicated further that the Tribunal (at para 45 of its decision) stated that GUD has submitted its AFS together with the director's remuneration to the Tribunal.

(c) The CIPC contended that section 30(4)-(6) makes it peremptory for a company to furnish the director's remuneration in its AFS and that, in terms of section 212, a party, when submitting information to the CIPC, including its AFS, must comply with the Act and to include the director's remuneration, a party may then claim that information is confidential. The CIPC argued that it is a jurisdictional fact that section 212 of the Act and can only be invoked when the company submits the actual information to the CIPC and not a redacted representation of the facts.

(d) The CIPC contended that, in making a determination on the merits of the GUD's grounds for review, which is based on a factual enquiry, one needs to consider the nature and substance of the information in the AFS and that GUD's *ipse dixit* is not sufficient for a determination to be made by the CIPC, or even for the Tribunal for that matter, as the decider of fact.

(e) According to the CIPC, by presenting a redacted rendition of the director's remuneration in its AFS, GUD failed to comply with sections 30(4)-(6) and 212(1), and the Tribunal was not authorised in terms of section 212 to make a finding on the confidentiality concerning the director's remuneration. By presenting a redacted version of the director's remuneration, so the CIPC argues, GUD did not comply with a mandatory and material procedure in terms of section 212 and was not rationally connected to the information before the Tribunal.

(f) In light of the foregoing, the CIPC contended that the decision of the Tribunal is reviewable and should be set aside. It appears that the CIPC did not deal with the first ground of review any further in its supplementary affidavit, commissioned on 19 July 2022 [refer to pg 005-1].

(g) GUD contended that it did annex a copy of its AFS for the year ending 30 June 2020 to its claim for confidentiality to the CIPC, dated 14 September 2021, annexure "CIPC8" to the Founding affidavit, but that the said copy of the AFS has been removed by agreement between the parties from the record of proceedings and would have been put before this Court separately to this application. This said AFS, GUD submitted, complied in all respects with the peremptory provisions of section 30(4)-(6) of the Companies Act.

(h) GUD submitted that, for purposes of the application to the CIPC of 14 September 2021, the details of the director's remuneration as listed in note 24 of the said AFS, have been redacted. This, the GUD states, was pertinently brought to the attention of the CIPC in paragraph 19.7 of the supporting affidavit, being part of said annexure "CIPC8". In the view of GUD, the CIPC Commissioner Voller, had no difficulty with the redaction in note 24; did not raise the redaction in note 24 as an issue that disqualified GUD from obtaining relief; and the redaction in note 24 did not impede the CIPC's ability to adjudicate the application before it. This is evidenced by the content of the CIPC's response to the application dated 27 September 2021 [annexure "CIPC9"] wherein which no mention is made to the redaction.

(i) According to GUD, the redaction did not render the application to the CIPC non-compliant with the provisions of sections 30(4)-(6) of the Act. GUD submitted further that, whether or not the said AFS complied with the provisions of sections 30(4)-(6), is an entirely separate issue to whether or not GUD is entitled to an order of confidentiality in respect of same.

(j) GUD contended further, that as is evidenced by the content of the Tribunal's decision of 13 December 2021 (annexure "CIPC 1" to their FA), the Tribunal had no difficulty with the redaction in note 24; did not raise it as an issue that disqualified GUD from relief and that it did not impede the Tribunal's ability to adjudicate the application before it. Accordingly, GUD argued, that it is impermissible for the CIPC to raise the redaction as a point for the first time at this stage of the procedure where it was not raised by it before.

(k) GUD submitted that there is nothing to suggest that the Tribunal, as the decider of fact, did not engage itself on the issue of the confidential nature of the contents of the above mentioned AFS and it therefore denies that the Tribunal's decision is reviewable and falls to be set aside on any of the grounds raised by the CIPC, in terms of section 6(2)(a)(i), 6(2)(b) and 6(2)(f)(ii)(cc) of PAJA.

(l) In its replying affidavit, the CIPC contended that GUD admits, or does not deny, that sections 30 (4)-(6) of the Act makes it peremptory for a company, in preparing its AFS to include the director's remuneration, but it (GUD), at the same time, argues that its AFS complies in all respects with the peremptory provisions of section 30 (4)-(6) when it specifically states that its AFS was redacted.

(m) With regards to the allegation of GUD that its AFS for the year ending 30 June 2020 complied in all respects with the peremptory provisions of section 30 (4)-(6) of the Act, and that the director's remuneration was listed in note 24 of its AFS was redacted and brought to the attention of the Commission in paragraph 19.7 of its supporting affidavit, being part of annexure "CIPC8" of the founding affidavit, the CIPC contended that these allegations are factually incorrect and referred to the decision of 27 September 2021 (2nd and 3rd last paragraph) where it stated that the AFS did not comply with section 30 (4)-(6) of the Act in that the director's remuneration was excluded and that it is a deliberate non-compliance action and therefore the claim for confidentiality of the entire contents of the AFS could not be granted.

(n) Regarding GUD's contention that the CIPC had no difficulty with the said redaction and did not raise it as an issue that disqualified GUD from obtaining relief and that the redaction did not impede the CIPC's ability adjudicate the application before it, which GUD stated is evidenced by the CIPC's response to their (GUD's) application of 27 September 2021 [annexure "CIPC9" of the FA] wherein which no reference is made to the redaction in note 24, the CIPC contended that this issue did serve before the Commission and the allegation that the Commissioner had no difficulty with the redaction and did not raise it as an issue is completely incorrect for the reasons raised above, in its decision of 27 September 2021.

(o) The CIPC referred to the decision of Democratic Alliance v Acting Director of Public Prosecutions and Others [(2013) 4 ALL SA 610 (GNP) at para 29] with regards to the redaction by GUD as a party who decides what information not to produce due to a claim of confidentiality, where it was held that:

"In my view, it is not appropriate for a court exercising its powers of scrutiny and legality to have its powers limited by the "ipse dixit" of one party. A substantial prejudice will occur if reliance is placed on the value judgment of the first respondent. To permit the first respondent to be final arbiter and determine which documents must be produced, is illogical..."

(p) Relying on the above case authority, the CIPC submitted that GUD has out of its own accord determined that director's remuneration is confidential and elected to treat

it as such before a ruling was made. The CIPC submitted that GUD is not the adjudicator and cannot merely fail to comply with the section 30 (4)-(6) requirements before a ruling in terms of section 212 of the Act has been made.

(q) The CIPC further relied on the ABBM Printing & Publishing (Pty) Ltd v Transnet decision [1998 (2) SA 109 (W)] to emphasise the principle mentioned above regarding the GUD's redaction of information. In ABBM, *supra*, it was held that due to the fact that a copy of a tender document which might contain confidential information, was not before court, the court could not on the facts before it, decide whether any tender contained confidential information.

(r) The CIPC further referred to Potgieter and Another v Howie and Others NNO [2014 (3) SA 336(GP)] where the court referred to section 6 of PAJA, specifically section 6(2)(f)(i) and stated that said section must be read with section 6(2)(a)(i) and held that:

"This section deals with the authority of the administrator who takes the decision, whilst the other section quoted supra relates to the decision itself. On a proper reading of both sections of s6, the decision of the board does not pass muster. The board is a creature of statute and it cannot go beyond the parameters under which it operates.

[20]... A rationality review is based on the absence of rationality between the information before the decision-maker and which he relied on to form the basis of its decision. It does not refer to the rational connection between the reasons given and the decisions, but rather the information upon which the decision is based. Again, the finding was based on the provisions of s5.82 which had not formed part of the original JSE decision. The decision is therefore rendered reviewable in terms of s6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

[21]... In Pharmaceutical Manufacturers Association of SA and Another: in re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) 2000 (3) BCLR 241; [2000] ZACC 1, paras 85 and 86, the Constitutional Court approved rationality as a minimum-threshold requirement applicable to the exercise of all public power."

(s) Relying further on sections 6(2)(f)(i) and 6(2)(a)(i) of PAJA, the CIPC submitted that KT was not authorised to grant the claim for confidentiality in terms of section 212 if the full, unredacted version of its AFS was not furnished by GUD and KT was not authorised to do so by the empowering provision. By submitting the redacted version of its AFS, a jurisdictional fact upon which KT had to make the decision was absent and KT taking the decision on proper facts, could not have arrived at the conclusions reached and could not have entertained the application and is reviewable in terms of section 6(2)(e)(iii) of PAJA [referring to Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd 2012 (2) SA 16 (SCA) at paras 34 and 36, by way of comparison].

(t) The CIPC, relying on Pepcor Retirement Fund & Another v Financial Services Board & Another [2003 (6) SA 38 (SCA) at para 47] where it was held that:

"In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, the decision should be made on material facts which should have been available for the decision properly to be made."

(u) In light of the above, the CIPC contended that KT did not make a decision on material facts which should have been available and the decision is therefore reviewable in terms of sections 6(2)(e)(iii) and 6(2)(b) of PAJA.

(v) With regards to the allegation that the Tribunal was not authorised to take the decision by the empowering provision [section 6(2)(a)(i) of PAJA], GUD argued that the empowering provision under which the decision to grant it (GUD) the claim for confidentiality was taken is section 212(4) read with section 172 of the Act, which empowered the Tribunal to confirm, modify or cancel all or part of the CIPC's decision. Accordingly, GUD submitted, that the empowering provision did authorise the Tribunal to take the decision to grant GUD's claim for confidentiality, and therefore this ground of review cannot be sustained.

(x) GUD further rejected the CIPC's allegation that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with by it [section 6(2)(b), PAJA]. It (GUD) submitted that the argument of the CIPC that it is a mandatory procedure or condition of section 212 of the Act that it must first furnish a complete copy of the AFS of 2020 to the CIPC before the CIPC is permitted or allowed to make a decision concerning its claim for confidentiality, and by submitting a redacted version of such AFS to the CIPC, does not comply with this requirement.

(y) According to GUD, it is notable that the CIPC does not claim that this purported mandatory procedure or condition: (a) applies to the Tribunal (as opposed to the CIPC) and that the Tribunal's decision, in circumstances where decision concerns the Tribunal's decision (not the CIPC's decisions), and (b) is also material as required by said section 6(2)(b), nor explain why it is material. GUD submitted that on each of (a) and (b) above alone, this ground of review should be rejected. Further, GUD contended that, contrary to what the CIPC argues, on a proper interpretation thereof, section 212 does not contain the mandatory procedure or condition as alleged by the CIPC.

(z) GUD submitted further that the CIPC seems to argue it is a mandatory provision of section 212 that GUD must first submit a complete copy of its said AFS to the CIPC in terms of section 30(4) and (6) of the Act, before the CIPC is allowed or permitted to make a decision regarding its claim for confidentiality and that a redacted version thereof does not comply with this requirement. GUD argued that, on a proper interpretation, section 212 does not contain such mandatory procedure or condition as

alleged by the CIPC. Accordingly, this ground of review falls to be rejected in GUD's view.

(aa) As to the allegation by the CIPC that the decision itself of the Tribunal is not rationally connected to the information before it (Tribunal) [section 6(2)(f)(ii)(cc), PAJA] was also rejected by GUD. In the view of GUD its claim for confidentiality was upheld by the Tribunal and there must have been a rational connection between the Tribunal's decision and the information before it supported and justified the decision [relying on the Bapedi Marota Mamane v Commission on Traditional Leadership Disputes and Claims and Others 2015 (3) BCLR 268 (CC) at para 62 (of the minority judgment) as cited by Hoexter et al Administrative Law in South Africa (3rd ed) at 465, note 84]. According to GUD, if the papers and record before this Court is taken into consideration, there is no doubt that the information before the Tribunal offers support and justification for the Tribunal's decision and its reasons, sufficient for there to be a rational connection between the Tribunal's decision and reasons, and the information before it. Therefore, GUD submits, this ground of review should be rejected.

(ii) legal principles/evaluation:

(a) Sections 30(4)-(6) of the Act provides as follows:

"(4) The annual financial statements of each company that is required in terms of this Act to have its annual statements audited, must include particulars showing –

(a) the remuneration, as defined in subsection (6), and benefits received by each director, or individual holding any prescribed office in the company;

(b) the amount of –

(i) any pensions paid by the company to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company;

(ii) any amount paid or payable by the company to a pension scheme with respect to current or past directors or individuals who hold or have held any prescribed office in the company;

(c) the amount of any compensation paid in respect of loss of office in current or past directors or individuals who hold or have held any prescribed office in the company;

(d) the number and class of any securities issued to a director or person holding any prescribed office in the company, or any person related to any of them, and the consideration received by the company for those securities; and

(e) details of service contracts of current directors and individuals who hold any prescribed office in the company.

(5) The information to be disclosed under subsection (4) must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by persons in respect of –

(a) services rendered as directors or prescribed officers of the company;

(b) services rendered while being directors or prescribed officers of the company –

(i) as directors or prescribed officers of any other company within the same group of companies; or

(ii) otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies.

(6) For the purposes of subsection (4) and (5), remuneration includes –

(a) fees paid to directors for services rendered by them or on behalf of the company, including any amount paid to a person in respect of the person's accepting the office of director;

(b) salary, bonuses and performance-related payments;

(c) expense allowances, to the extent that the director is not required to account for the allowance;

(d) contributions paid under any pension scheme not otherwise required to be disclosed in terms of subsection (4)(b);

(e) the value of any option or right given directly or indirectly to a director, past director or future director, or a person related to any of them, as contemplated in section 42;

(f) financial assistance to a director, past director or future director, or person related to any of them, for the subscription of options or securities, or the purchase of securities, as contemplated in section 44; and

(g) with respect to any loan or other financial assistance by the company to a director, past director or future director, or a person related to any of them, or any loan made by a third party to any such person, as contemplated in section 45; if the company is a guarantor of that loan, the value of –

(i) any interest deferred, waived or forgiven; or

(ii) the difference in value between –

(aa) the interest that would reasonably be charged in comparable circumstances at fair market rates in an arm's length transaction; and

(bb) the interest actually charged to the borrower, if less."

(b) Section 212, with regards to confidential information, provides that:

"(1) When submitting information to the Commission, the Panel, the Companies Tribunal, the Council, or an inspector or investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential.

(2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.

(3) The Commission, Panel, Companies Tribunal, Council, inspector or investigator, as the case may be, must –

(a) consider a claim made in terms of subsection (1); and

(b) as soon as practicable, make a decision on the confidentiality of the information and access to that information, and provide written reasons for that decision.

(4) Section 172, read with the changes required by the context, applies to a decision in terms of subsection (3).

(5) When making any ruling, decision or order in terms of this Act, the Commission, the Panel, the Companies Tribunal or the Council may take confidential information into account.

(6) If any reasons for a decision in terms of this Act would reveal any confidential information, the Commission, the Panel, the Companies Tribunal or the Council, as the case may be, must provide a copy of the proposed reasons to the party claiming confidentiality at least 10 business days before publishing those reasons.

(7) Within five business days after receiving a copy of the proposed reasons in terms of subsection (6), a party may apply to court for an appropriate order to protect the confidentiality of the relevant information."

(c) Section 172 deals with the objection to notices and stipulates that:

"(1) Any person issued with a compliance notice in terms of this Act may apply to the Companies Tribunal in the case of a notice issued by the Commission, or to the Takeover Special Committee, in the case of a notice issued by the Executive Director, or to a court in either case, to review the notice within –

(a) 15 business days after receiving that notice; or

(b) such longer period as may be allowed on good cause shown.

(2) After considering any representations by the applicant or any other relevant information, the Companies Tribunal, the Takeover Special Committee, or a court may confirm, modify or cancel all or part of a compliance notice.

(3) If the Companies Tribunal, Takeover Special Committee or a court confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it, subject to subsection (4).

(4) A decision by the Companies Tribunal or the Takeover Special Committee in terms of this section is binding, subject to any right of review by or appeal to a court."

(d) The relevant subsections of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") are as follows, being the grounds of review upon which the CIPC rely on in this part of its application:

- Section 6(2)(a)(i) reads as follows:

"(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision."

- Section 6(2)(b) provides that:

(2) A court or tribunal has the power to judicially review an administrative action if -

"(b) a mandatory and material procedure and condition prescribed by an empowering provision was not complied with."

- Section 6(2)(e)(iii) reads:

(2) A court or tribunal has the power to judicially review an administrative action if –

(e) the action was taken –

...

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered.

- Section 6(2)(f)(ii)(cc) provides that:

"(f) the action itself –

(i)

(ii) is not rationally connected to –

(aa)

(bb)

(cc) the information before the administrator;

(e) It is clear that in terms of section 212 (1) of the Act that GUD, when submitting information to the CIPC, is entitled to claim that all or part of such information is confidential. In terms of section 172 of the Act, the CIPC must consider such claim

and make a decision as soon as practicable, on the confidentiality of the information and access to that information and provide written reasons or the decision.

(f) Section 30 (4) to (6) provides that the AFS of each company that is required to have said AFS audited, must include particulars showing the remuneration, as defined in subsection (6) and benefits received by each director or individual holding any prescribed office in the company, and certain amounts paid by the company to directors and pensions, etc.

(g) This remuneration includes, *inter alia*, directors' fees, salaries, bonuses, expense allowances, performance related payments, pension fund contributions, etc.

(h) From the wording of section 30(4)-(6), it appears to this Court that the CIPC's interpretation of same, namely that the said section makes it peremptory for a company to disclose and furnish the directors' remuneration in its AFS to the CIPC, is correct. The peremptory nature of said section is not disputed by GUD.

(i) The issue that the CIPC is taking with GUD regarding this ground of review is that, according to the CIPC, by presenting a redacted version of the directors' remuneration, GUD did not comply with a mandatory and material procedure in terms of section 212. According to the CIPC it is a jurisdictional fact that section 212 can only be invoked when the company (GUD) submits the actual information to the CIPC and not a redacted representation of the facts. Relying on the Democratic Alliance, Potgieter and ABBM decisions, the CIPC submitted that GUD unilaterally determined that the directors' remuneration is confidential and elected to treat it as such before a ruling on confidentiality could be made. According to the CIPC, GUD is not the adjudicator and cannot merely fail to comply with section 30 (4)-(6) requirements before a ruling in terms of section 212 has been made.

(j) GUD does not dispute that it submitted a redacted version of its AFS and director's remuneration. It contended that section 212 does not contain any mandatory procedure or condition that it must first provide a complete copy of its AFS including director's remuneration, to be submitted to the CIPC before it is permitted or allowed to make a decision regarding its claim for confidentiality. GUD contended further that its AFS complied with the peremptory provisions on section 30 (4)-(6).

(k) This Court is not persuaded by the argument of GUD in this regard. In the view of this Court, GUD did not comply with the peremptory provisions of sections 30 (4)-(6). GUD is obliged in terms of the said section to provide its AFS, which must include, *inter alia*, director's remuneration [section 30 (4)(a), in particular] and it (GUD) could not on its own, elect to redact parts of its AFS for purposes of a claim for confidentiality. It is the prerogative of the Tribunal to decide on the claim for confidentiality and it can only do so if the complete, unredacted AFS is provided. If regard is had to the Democratic Alliance decision, *supra*, it is clear that the Tribunal as decider of fact, cannot have its powers to decide on confidentiality limited by the "*ipse dixit*" of GUD, as substantial prejudice will occur if reliance is placed on the value judgment of GUD

and it (GUD) will be permitted to be final arbiter and determine which facts it elects to disclose and which to redact, which would be illogical [also refer to ABBM *supra* in this regard]. This is so irrespective that the CIPC, or even the Tribunal, initially had no difficulty with the redaction, did not raise it as an issue that disqualified GUD from obtaining relief or did not impede it to adjudicate the application before it or did not mention the redaction at the time. Accordingly, this Court is inclined to review and set aside this decision on ground of section 6(2)(b) in that a mandatory and material procedure and condition prescribed by an empowering provision was not complied with by GUD. [also refer to Potgieter, *supra*].

(l) Another issue raised by CIPC was that KT (for the Tribunal) could not make a decision on material facts which should have been available. According to the CIPC, by submitting a redacted version of the AFS, a jurisdictional fact upon which KT had to make a decision was absent and KT, if a decision was taken on proper facts, could not have arrived at the conclusions that were reached and could not have duly entertained the application or the claim for confidentiality. In this latter regard, the CIPC relied on SCA decision of Pepkor, *supra*, and concluded that KT did not make a decision on material facts which should have been available and the decision is reviewable under sections 6(2)(e)(iii) and 6(2)(b) of PAJA.

(m) GUD contended that the empowering provision under which KT decided to grant the claim for confidentiality is section 212, read with section 172 of the Act, which it argues, empowered the Tribunal to confirm, modify or cancel all or part of the CIPC's decision. Therefore, GUD submitted, the empowering provision did authorise KT to take the decision to grant the claim for confidentiality and accordingly this ground of review cannot be sustained.

(n) One other contention made by the CIPC was that the decision of the Tribunal is not rationally connected to the information before it. According to GUD, this contention should be rejected. GUD's argument is that its claim for confidentiality was upheld by the Tribunal and therefore there must have been a rational connection between the decision of the Tribunal and the information before it supported and justified its decision [relying on the Bapedi Marota decision, *supra*]. Accordingly, GUD submits, the ground of review relating hereto, should be rejected.

(o) With regards to the above submissions, this Court is of the view that by submitting the redacted version of the AFS, the Tribunal was making a decision without the benefit of information that would have been necessary to inform its decision on the claim for confidentiality. In the view of this Court, the redaction is in contrast of sections 30 (4)-(6) and the information so redacted is material to a proper decision on confidentiality. Accordingly, this Court is in agreement with the submissions made by the CIPC and the case authorities it relies on. Material facts were absent when the decision was taken because it was redacted and not available to KT. The information was absent and could not have been taken into account when the decision was made.

(p) As such, the decision could not be said to have been rationally connected to the information before the Tribunal.

(q) This Court, in light of the foregoing, is of the view that the decision of the Tribunal stands to be reviewed and set aside in terms of sections 6(2)(e)(iii) and 6(2)(f)(ii)(cc) and the principles in the decision of Potgieter, *supra*.

(II) the 2nd ground of review:

(iii) contentions of the parties:

(a) This ground of review appears to be aimed at paragraphs 28 and 29 of the Tribunal's findings that sections 26 and 31 of the Act provides for the only instances allowed for access to the AFS of a company.

(b) According to the CIPC, it is common cause between the parties that GUD is obliged to submit its AFS with its annual returns to the CIPC every financial year end in terms of section 33 of the Act. The CIPC submitted further that in terms of section 187 (4)(c) of the Act, information contained in documents and registers kept by it, should be made available to the public, subject to the regulations restricting information as provided for in regulations 176 and 177.

(c) The CIPC referred to section 187 (5), which provides the public may, upon payment of the prescribed fee, inspect a document under the Act and also to section 33 (1)(a) and submitted that the annual return, together with the AFS, is therefore obtainable by members of public in terms of said provisions. Accordingly, the CIPC contended that the Tribunal erred in concluding that section 26 and 31 are the only instances where the AFS of a company can be accessed.

(d) The CIPC refers to paragraph 28 of the Tribunal's decision which states that GUD claims that access to the said AFS in particular is restricted to only certain classes of persons by section 26 and 31 (re beneficial interest) of the Act and that the Tribunal agrees with this argument of GUD.

(e) According to the CIPC, section 26 relates to information in possession of the company in question and the information is contained in the company's memorandum of incorporation and any amendments thereto, rules made by the company, as mentioned in section 24(3)(a); the records relating to the company's directors, as per section 24(3)(b); the reports to annual meetings and annual financial statements, as indicated in section 24(3)(c)(i) and (ii); notices and minutes of meetings; and communications as set out in section 24(3)(d) and (e), but the reference in section 24(3)(d) to shareholder's meetings, and the reference in section 24(3)(e) to communications sent to holders of a company's securities, must be regarded in the case of a non-profit company as referring to a meeting of members, or communication to members respectively; and, the securities register of a profit company, or the members register of a non-profit company, or the member's register of a non-profit company that has members, as mentioned in section 24(4).

(f) The CIPC submitted that section 26 is not applicable to information held by the CIPC and applies to information held by the company itself, as confirmed by regulation 24(3).

(g) The CIPC contended further that, in terms of section 31, every person who holds or has a beneficial interest in any securities issued by a company, is entitled to receive a copy of the AFS without having to make a request therefore and this right is not limited to shareholders but also available to a person who holds or has a beneficial interest, and section 31(4) makes it an offence for a company for failing to satisfy any reasonable request thereto.

(h) The CIPC further referred to paragraph 29 of the Tribunal's decision, where it was stated that it can be clearly seen that these sections are the only instances deemed appropriate by the legislature for access to the AFS and that in the view of the Tribunal, this is all the more reason why the AFS cannot be handed out by the CIPC to members of the public as they will have to motivate their request and show that it falls within the categories listed in the sections mentioned in paragraph 14 of the decision of the Tribunal. According to the CIPC, the Tribunal held, in paragraph 30 of its decision, that access to the AFS is therefore in terms of the empowering legislation only available to those who have a legal interest in such information, which accords with the approach in the Protection of Personal Information Act 4 of 2013 ("POPIA") and the Promotion of Access to Information Act 2 of 2000 ("PAIA").

(i) The CIPC submitted that section 3(3) of POPIA provides that it must be interpreted in such a manner that:

"does not prevent any public or private body from exercising or performing its powers, duties and functions in terms of the law as far as such power, duties and functions relate to the processing of personal information and such processing is in accordance with this Act or any other legislation." In addition, so the CIPC contended, section 187(5)(a) of the Act provides that any person, on payment of the prescribed fee, may inspect a document filed under the Act, which include the said AFS. The CIPC argued that the Tribunal only dealt with section 187(4) and failed to consider the impact of section 187(5)(a). Accordingly, the CIPC submitted, the Tribunal's decision was materially influenced by an error of law, because relevant considerations were not considered and is not rationally connected to the reasons given for it, and therefore, the decision is reviewable and falls to be set aside in terms of sections 6(2)(d), 6(2)(e)(iii) and 6(2)(f)(ii)(dd) of PAJA.

(j) GUD, in opposing the above-mentioned submissions of the CIPC agrees with the contents of section 3(3)(b) of POPIA and further admits that the CIPC correctly note the wording of section 187(5)(a) of the Act save for the additional words "which would include the AFS" which it contends, is not part thereof, and further submits that section 187(5) is also subject to section 187(6) of the Act.

(k) GUD further took issue with the CIPC's submission that the Tribunal failed to consider the impact of section 187(5)(a) and submitted that said section was pertinently mentioned in paragraph 8.3 of the decision [in annexure "CIPC1" of the FA] and the argument regarding same was considered thereafter.

(l) In its replying papers, the CPIC argued that the contents of said paragraph 8.3 of the Tribunal's decision is a synopsis of GUD's claim for confidentiality and does not constitute a consideration of the impact of section 187(5)(a).

(m) According to the CIPC, the Tribunal was not called upon to determine in what instances the legislature deemed it appropriate for access to AFS but rather whether information was to be regarded as confidential or not. In this regard, the CIPC refers to the decision of Genesis Medical Aid Scheme v Registrar of Medical Schemes [2017 (6) SA 1 (CC)] and concluded that the Tribunal's decision was materially influenced by an error of law as contemplated in section 6(2)(d) of PAJA, in that the Tribunal was not called upon to make a determination in terms of section 26 and 31 and provide an interpretation, but rather to determine the confidentiality claimed in terms of section 212 by GUD.

(n) The CIPC then referenced the Allpay Consolidated Investment Holdings v Chief Executive Officer, South African Social Security Agency decision [2014 (1) SA 604 (CC)] to substantiate its submission that the Tribunal's decision pertaining to access to the AFS, took into account irrelevant considerations and failed to take into account relevant considerations, and did not take into consideration the provisions of section 33 read with section 187 (5) of the Act. Accordingly, the CIPC submitted that the said decision should be reviewed and set aside in terms of said sections 6(2)(d) and 6(2)(e)(iii).

(o) The CIPC, in submitting that the above finding by the Tribunal (KT) in relation to access to the AFS is not rationally connected to the reasons given by the Tribunal in that access to information is not rationally connected to the claim for confidentiality, and is therefore reviewable in terms of section 6(2)(f)(ii)(dd) of PAJA [relying also on the Democratic Alliance decision, *supra*, at para 36].

(p) With regards to the CIPC's contention that the Tribunal's decision was materially influenced by an error of law, and which error was that relevant considerations were not considered and that the decision is not rationally connected to the reasons provided for it by the Tribunal, GUD submitted that not considering relevant consideration and the lack of a rational connection to the reasons given for the decision are not errors in law but rather independent grounds of review under PAJA [section 6(2)(e)(iii) and 6(2)(f)(ii)(dd) thereof]. Further, according to GUD, the CIPC does not identify the alleged error in law that influenced the Tribunal's decision, and how it materially influenced the decision of the Tribunal. Accordingly, GUD argues that this ground of review stands to be rejected.

(q) Concerning the CIPS's submission that the Tribunal's decision was taken due thereto that irrelevant considerations were taken into account or relevant considerations were not considered [as per section 6(2)(e)(iii) of PAJA], GUD submitted that the CIPC does not identify the irrelevant considerations that were taken into account by the Tribunal nor why those considerations were irrelevant, and does not identify the relevant considerations that were not considered by the Tribunal nor why those considerations were relevant. Therefore, GUD contended, this ground of review should be rejected.

(r) GUD submitted that the allegation by the CIPC that the decision of the Tribunal itself is not rationally connected to the reasons given for it [as per section 6(2)(f)(ii)(dd) of PAJA], should be rejected on the same submissions made in relation to this ground of review set out above insofar as the reference is to the Tribunal's reasons.

(ii) legal principles and evaluation:

(a) Section 26 of the Act deals with access to a company's records in respect of a person who holds or has a beneficial interest in any securities issued by a section 40 company in certain instances, including the right to inspect and copy the information contained in the records of the company, to any other information to the extent granted by the Memorandum of Incorporation and access rights in terms of section 32 of the Constitution, PAIA and any other public regulation. Section 31 deals with access to financial statements or related information, in addition to the rights set out in section 26 of the Act and includes the right to demand to receive a notice of the publication of any AFS and copies thereof. These rights are also available to judgment creditors and trade unions in particular instances.

(b) In Section 187, the functions of the CIPC are detailed. Subsection 187(4) requires that the CIPC must establish and maintain a companies register or any other register required under the Act or other legislation, receive and deposit in the registry any documents to be filed in terms of the Act, make information in those registers effectively and efficiently available to the public and other organs of state, etc. Section 187(5)(a) states that any person may, on the payment of the prescribed fee, inspect a document filed under the Act. Section 187(6) reads that section 187(5) does not apply to any part of a filed document of that paragraph has been determined to be confidential, or contain confidential information in accordance with section 212.

(c) Section 3(3) of POPIA deals with how the provisions thereof must be interpreted, namely in a manner that:

"(a) gives effect to the purpose of the Act set out in section 2 thereof, and

(b) does not prevent any public or private body from exercising or performing its powers, duties and functions in terms of the law as far as such powers, duties and functions relate to the processing of personal information and such processing is in

accordance with this Act or any other legislation as referred to in subsection (2), that regulates the processing of personal information.”

(d) Section 6(2)(e)(iii) of PAJA stipulates that a court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered. In terms of section 6(2)(f)(ii)(dd) a review may be granted if the action itself is not rationally connected to the reasons given for it by the administrator.

(e) Regulation 24 to the Act provides for access to information of a company under section 26 of the Act or the regulation and may only be exercised in accordance with the provisions of PAIA, section 26 itself and subregulations (3) – (4). The Regulation further states that the access right to a record held by the company may not be claimed until a request to exercise that right has been made to the company in terms of sub regulation (3) or to the extent applicable, the person’s access right to the information has been confirmed in accordance with PAIA. Further, a person claiming such access right must do so by written request as contemplated in section 26(4), and the company that receives such a request must accede to same within 14 business days of receipt thereof.

(f) In the Genesis decision, *supra*, it was held as follows [as quoted by the CIPC in its HOA, at pg 009-61 to 62, caselines]:

“[98] With reference to some of the cases on this issue, Hira, Corbett CJ pointed out that our courts drew a distinction between error of law on the merits and the mistake which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result the power is not exercised. It was the latter error which was taken as amounting to a ground of review that justified interference. This accords with the distinction our law draws between a review and appeal. A court does not interfere merely because a decision was wrong in a review application.

[99] In Hira the test was reformulated in these words:

“Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal asked itself the wrong question, or applied the wrong test, or based its decision on some matter not prescribed for its decision, or failed to apply its mind to the relevant issues in accordance with the behest of the statute; and that as a result its decision should be set aside on review.”

[100] This statement reveals that at common law, for an error of law to constitute a ground for review, it must have materially influenced the challenged decision in the sense that it gave rise to one of the recognised grounds of review. The erroneous interpretation of a statute would vitiate the decision taken only if on the application of the correct construction, the facts do not support the decision. In terms of this standard, it is not to merely show that the empowering statute has been incorrectly interpreted. One must go further and apply the correct meaning to the relevant facts. If the decision is justified, interference is not permitted."

(g) The Court, in Allpay, *supra*, held that [as quoted by the CIPC in its HOA, at pg 009-63, caselines]:

"[62] ... What one is left with is non-compliance with what the request for proposals regarded as mandatory. This means that a mandatory condition prescribed by an empowering provision was not complied with, which is a ground for review under s2(b) of PAJA. But the subsection also requires that the non-compliance must be of a material nature.

...

[72] Given the central and fundamental importance of substantive empowerment under the constitution and the Procurement and Empowerment Acts, SASSA's failure to ensure that the claimed empowerment credentials were objectively confirmed, was fatally defective. It is difficult to think of a more fundamentally mandatory and material condition prescribed by the constitution and legislative procurement framework than objectively determined empowerment credentials. The failure to make that objective determination fell afoul of s6(2)(b) of PAJA (non-compliance with a mandatory and material condition) and s6(2)(e)(iii) (failure to consider a relevant consideration)."

(h) With regards to the Democratic Alliance decision, *supra*, the CIPC quoted the following in relation to its argument on this ground of review:

"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means of achieving the purpose for which power was conferred must include everything that was done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking the decision, constitute means towards the attainment of the purpose for which the power was conferred."

(i) Under this ground of review, the CIPC disputes the submission of the Tribunal (mentioned by GUD) that sections 26 and 31 of Act are the only instances where access to the AFS of GUD's is possible. In this regard, the CIPC notes instances outside those mentioned in said sections 26 and 31 where such access is possible,

for instance in terms of sections 187 (4)(c) and 187 (5). The CIPC therefore holds the view that the Tribunal erred by concluding that sections 26 and 31 are the only instances where public access to the AFS is possible. In addition, the CIPC argued that the Tribunal was not called upon to determine in which instances the legislature deemed it appropriate for access to a company's AFS, but was rather called upon to ascertain whether the information was regarded as confidential or not. The CIPC relied on the principles of the Genesis decision, as set out above, to substantiate its argument. It is for these reasons that the CIPC concluded that the Tribunal's decision was materially influenced by an error of law and thus reviewable in terms of PAJA.

(j) It is further the CIPC's submission that the Tribunal, in making a determination regarding access to the AFS of a company, took into account irrelevant considerations and overlooked relevant considerations, and in any event failed to consider the provisions of section 33 read with section 187 (5) of the Act, and therefore reviewable under PAJA [relying on Allpay, *supra*].

(k) The CIPC also contended, relying on the Democratic Alliance decision, *supra*, the contemplation and finding by the Tribunal, regarding access to AFS of companies is not rationally connected to the reasons given by the Tribunal (through KT) in that access to information is not rationally connected to the claim for confidentiality and stands to be set aside in terms of section 6 (2)(f)(ii)(dd).

(l) As indicated above, the GUD disputes the submissions by the CIPC. GUD disputes that the Tribunal's decisions are errors of law. Further it contended that the CIPC does not identify the alleged errors in law and how it materially influenced the Tribunal's decision. In addition, GUD submits that the CIPC does not identify the irrelevant considerations taken into account on the Tribunal, nor does it identify the relevant considerations that were ignored by it, nor why the alleged considerations were in fact relevant. GUD accordingly submitted that the grounds of review in these instances must be rejected.

(m) In the view of this Court, the CIPC does identify the error of law upon which the Tribunal's decision in this regard was made. The argument of the CIPC is that it is not only the instances indicated in sections 26 and 31 of the Act, that permits access to the AFS of GUD, but for example sections 187 (4)(c) and 187 (5) of the Act, but further that the Tribunal considered the issue of access to the AFS, rather than to ascertain the claim for confidentiality. Therein lies the error of law made by the Tribunal in its decision. In the opinion of this Court, and if regard is had to the cited principles in Genesis, *supra*, it is apparent that the Tribunal's decision was materially influenced by an error of law.

(n) The Tribunal considered in which instances access to AFS is legally permitted while it was supposed to consider the claim for confidentiality in terms of, *inter alia*, sections 30 (40)-(6) and 212 of the Act. In addition, it overlooked the provisions of section 33 and 187 (5). If regard is had to the principles cited above in Allpay and the

Democratic Alliance cases, *supra*, it is apparent that the Tribunal's decision (regarding access to the AFS) cannot be rationally connected to its decision regarding the claim to confidentiality, and, the decision was materially influenced by an error of law.

(o) Accordingly, the Tribunal's decision falls to be reviewed and set aside in terms of sections 6 (2)(d), section 6 (2)(e)(iii) and 6 (2)(f)(i)(dd) of PAJA.

(III) the third, fourth and fifth grounds of review:

(i) contentions of the parties:

(b) The third ground of review is directed at paragraph 33 of the Tribunal's decision, which is that if the AFS is provided to the public at a fee and making the personal and commercial information of GUD and its directors contained in the said AFS available, there is no protection of their privacy rights as provided for in the Constitution and under PAJA. According to the CIPC, this latter finding postulate the right to privacy of directors is akin to the right to privacy by GUD.

(c) In this latter regard, the CIPC submitted that, before dealing with the right to privacy, it is necessary to draw a distinction between the right to privacy and confidential information. The CIPC contended further that GUD's claim is in terms of section 212 for confidentiality and not for a claim in terms of the right to privacy. The term confidential information has been addressed in the decision of Natal Joint Municipal Pension Fund v Endumeni Municipality [2012 (4) SA 593 (SCA) at para 18].

(d) The CIPC relies on Townsend Productions (Pty) Ltd v Leach & Others [2001 (4) SA 33 (C), at 53J-54B] to explain the requirements of confidential information and concluded that if the wording of section 212 of the Act, the definition of confidential information under the Competition Act and the explanation set out in the Townsend decision, *supra*, is considered, that the information claimed by GUD as confidential, does not qualify as confidential information.

(e) The CIPC submitted further that the POPI Act emanates from section 14 of the Constitution, which provides that everyone has the right to privacy, which right includes the right to protection against unlawful collection, retention, dissemination and use of personal information. The CIPC referred to Gaertner & Others v Minister of Finance & Others [2014 (1) SA 442 (CC) at para 47] and contended that according to the Constitutional Court, in the latter case, the right to privacy "*embraces the right to be free from intrusion and interference by the state and others in one's personal life.*"

(f) The CIPC referred to the Bernstein decision, *supra*, and contended that it was held that the examples referred to related to either the private sphere or relations of legal privilege and confidentiality, but there is no indication that it may be extended to include the carrying on of business activities.

(g) According to the CIPC, GUD, submitted that PAIA recognises that the right to privacy of a company can only be trumped by the rights of a third party to exercise or protect its rights. This is disputed by the CIPC who refers to the preamble of PAIA, which reads:

"The right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution." Therefore, according to the CIPC, PAIA does not provide for this right to privacy as contended for by GUD.

(h) The CIPC went on to contend that section 8 of the Constitution, which deals with the horizontal application of the rights in the Bill of Rights to juristic persons, provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and that of the juristic person.

(i) According to the CIPC, GUD submitted *inter alia*, in relation to its right to privacy and potential harm the disclosure of the AFS is likely to cause to it:

- the quantum of dividends declared and paid are not for the public information;
- levels of outside funding in the business, how the business is financed, is not information that should or needs to be made known to the general public;
- revenue, cost of sales and gross profit information all the information contained in the profit and loss statement and other comprehensive income needs to be kept confidential and makes the assumption that knowing operating costs will put GUD at a disadvantage as they would know the price GUD needs to sell products at and then competitors could potentially undercut GUD with its own customers;
- cashflow statements contain information that should be kept confidential, which shows how business is being funded;
- the goodwill note provides information on how GUD has valued divisions within the company and risk each division or subsidiary is exposed to and states that this information is highly sensitive and could give competitors an edge if they knew what was needed from each division and what risks they were exposed to.

(j) In light of the above submissions by GUD, the CIPC contended that the Tribunal's decision failed to consider the right to privacy of juristic persons and private persons and failed to draw the distinction between the rights to privacy and confidential information, and the said decision was materially influenced by an error in law, did not take into account relevant considerations and is so unreasonable that a reasonable person could not have made the decision in granting the confidentiality claim. Accordingly, the wrong or mistaken interpretation of a legislative provision is a ground for review under section 6(2)(d) and ground for setting aside a decision in terms of

PAJA [referring to Scalabrini Centre, Cape Town v Minister of Home Affairs 2018 (4) SA 125 (SCA)], and the CIPC submitted that this is apart from the fact that Tribunal applied the wrong criterium when deciding whether to grant the application for confidentiality by GUD. In the opinion of the CIPC, the test is not whether GUD was entitled to protect the information on the basis of its privacy, but rather whether the AFS contained confidential information within the purview of section 212 of the Act.

(k) The CIPC submitted that a material error of law was also recognised as a ground for the setting aside a decision and refers in this regard to Longbeach Homeowners Association v Department of Agriculture, Forestry and Fisheries [2018 (2) SA 42 (SCA) at paras 15-16].

(l) In light of the foregoing, the CIPC submitted that the Tribunal's error of law and fact was material to the outcome of the decision, and therefore reviewable under section 6(2)(d) of PAJA [referring to Registrar of Medical Schemes v Genesis Medical Scheme 2016 (6) SA 472 (SCA) at para 21].

(m) The fourth ground of review deals with paragraph 33 of the Tribunal's decision, where according to the CIPC, it (Tribunal) held that the information contained in the AFS of GUD as required by section 30 (4)-(6) of the Act is declared as confidential otherwise confidential and commercial information will be made available and this constitutes an invasion of the rights to privacy as provided for in the Constitution and PAIA.

(n) With regard to this above issue, the CIPC referred to Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another [2016 (3) SA 1 (SCA) at para 44] to suggest that section 30 (4)-(6) are preemptory requirements under the Act and that the Tribunal dealt with these requirements in terms of the constitutionality thereof. The CIPC argued that the Tribunal were not authorised or called upon to rule upon the constitutionality (right to privacy) of section 30 (4)-(6), nor authorised to do so in terms of section 212 of the Act and section 6(2)(a)(i) of PAJA. According to the CIPC, the Tribunal reached its decision on the grounds of the right to privacy, which was not authorised by the empowering provision and took into account irrelevant considerations.

(o) The CIPC contended, as its fifth ground of review, that the Tribunal failed to take into account the question of corporate transparency and gave far greater value to the right to privacy, in the exposition set out above, and this is reviewable and stands to be set aside in terms of section 6(2)(e)(iii) of PAJA.

(p) The CIPC deals with the question of corporate transparency in its HOA [at paras 7-31, pg 009-38 – 009-46, caselines] and highlights that the Act gives specific recognition to a culture of openness and transparency in section 7, where the core objectives of the Act is listed. According to the CIPC, section 7(b)(iii) provides that a purpose of the Act is to encourage transparency and high standards of corporate

governance as appropriate, given the significant role of enterprises within the social and economic life of the nation [referring to Nova Property Group Holdings Ltd v Cobbett and Another 2016 (4) SA 317 (SCA) at para 18].

(q) According to the CIPC, neither the Act nor the regulations indicate what “confidential information” is. It argues that the Tribunal, relying on incorrect empowering provisions, sections 26 and 31 of the Act, was materially influenced by an error of law when it found, at paragraph 31 of its decision, that the CIPC disregarded the extensive statutory framework which protects the right to privacy of personal and commercial information of private individuals such as the company and its directors. The CIPC submits that the Tribunal, at paragraph 34 of said decision, found that the Act or the Regulations does not explain what constitutes “confidential information” and that it is of the view that each case is dependent on its own facts and circumstances and must therefore be assessed on its own merits. According to the CIPC this finding by the Tribunal postulates that what can be the meaning of “confidential information” in one case will essentially not be inevitably confidential in another matter: if director’s remuneration of GUD is confidential, as per the viewpoint of the Tribunal, then it is confidential for all other companies due to the finding at paragraph 33 that if the AFS is provided to the public at a fee making the personal and commercial information of the applicant (GUD in that case) and its directors, as contained in the AFS, there is no protection of rights to privacy as provided by the Constitution of the Republic of South Africa and PAIA.

(r) The CIPC went on to submit that the protections in place, in respect of disclosure and accessibility of confidential information are not unique to the Act, but, in fact, those in the Act seems to have been copied from preceding legislation such as the Competition Act 89 of 1988 (“Competition Act”) and the Consumer Protection Act 68 of 2008. This is evidenced by the content of the CIPC’s response to the application dated 27 September 2021 [annexure “CIPC9”], wherein which no mention is made to the redaction. The CIPC contended that, for example, section 44(1) of the Competition Act, provides that:

“(1)(a) A person, when submitting information to the Competition Commission Tribunal may identify information that the person claims to be confidential information.

(b) Any claim contemplated in paragraph (a) must be supported by a written statement in the prescribed form, explaining why the information is confidential.” The CIPC submitted that the terms “confidential information” in terms of the Competition Act, means *“trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others.”*

(s) The CIPC argued that every company that is required to submit their AFS would object on the basis of protection of their privacy rights. It went ahead to contend that the Tribunal failed to take into account that GUD, in redacting its AFS in relation to the director’s remuneration, is not just claiming that the information is confidential to the

“public” but also to the CIPC. GUD is obliged in terms of section 30(4)-(6) to include director’s remuneration in their AFS with the CIPC in terms of section 33, which is a peremptory statutory requirement.

(t) The CIPC submitted further that the Tribunal failed to consider that, when a company is elected as a vehicle for doing business on the basis of limited liability, it is not a private matter, but draws on a legal framework endorsed by the community and operates through funding belonging to members of the community. Further, so the CIPC submits, there exist a statutory obligation of proper disclosure and accountability on companies and it is clear that any information concerning participation in such public space cannot rightly be held to be inhering in the person and cannot consequently be said that in relation to such information a reasonable expectation of privacy exists.

(u) The CIPC contended that personal information of company directors can be obtained by any member of the public who has access of the CIPS’s search functions, including dates of birth and residential addresses of company directors. Their basic personal information is freely available to members of the public on the CIPC search function even through the ID-numbers of directors may be masked on certain other disclosure platforms. According to the CIPC, information contained in the AFS of a company, is either confidential or it is not, and it does not depend on the facts or particular circumstances of each case. The information contained in such AFS could be used, for example, for competition, trade unions to negotiate, etc. This is not a unique situation, deserving of its own consideration and evaluation, but it applies to each and every company. Therefore, the CIPC argues, that if the AFS of a particular company is to be regarded as “confidential information”, transparency would not be achieved.

(v) The CIPC submitted that the Tribunal, at paragraph 36 of its decision, held that the question regarding the importance of corporate transparency is separate from the question of whether information possesses qualities which makes it confidential and qualifies to be treated as such in terms of section 212 of the Act. According to the CIPC, the Tribunal in so deciding, did not fully appreciate and consider, or give the necessary weight to the purpose of the Act, which is, *inter alia*, encouraging transparency and high standards of corporate governance; part C of the Act, dealing with transparency, accountability and the integrity of companies (sections 23-34) and chapter 3 with regards to accountability and transparency (sections 84-94).

(w) It is the CIPC’s further submission that the question of corporate transparency is not separate from the one of whether information possesses qualities that makes it confidential, and by failing to have regard to the duty of transparency, failed to take relevant considerations into account as contemplated in section 6(2)(e)(iii) of PAJA. Also, the CIPC contended that where a factor of paramount importance is relegated to one of insignificance (i.e.; the question of transparency) and another is given for more weight in excess of its true value, (i.e. right to privacy, even though it is relevant),

this would amount to a failure to apply the mind properly and is arbitrary or capricious decision making, as contemplated in section 6 (2)(e)(vi) of PAJA.

(x) The CIPC submitted that the Tribunal treated confidential information in the same manner in which the right to privacy of individuals is treated. The CIPC argues in this latter regard that section 212 applies to companies and not to private individuals, taking into account irrelevant considerations, as contemplated in section 6(2)(e)(iii) of PAJA. The CIPC submitted that the incorrect interpretation of a statute vitiates the decision if the facts do not support the decision, as is the case here. The Tribunal's decision was materially influenced by an error of law because relevant considerations were not considered and is not rationally connected to the reasons given for it.

(y) The CIPC referred to the order granted by the Tribunal [paragraph 57] which reads:

"The application for the review of the Respondent's decision is reviewed and set aside but the claim for confidentiality in respect of the AFS for the year ending 30 June 2020 is granted by the Tribunal." According to the CIPC it cannot be ascertained whether GUD's application for review is "reviewed and set aside", i.e., a dismissal of the blanket claim for confidentiality or whether the CIPC's decision not to grant the blanket confidentiality is "reviewed and set aside." In the opinion of the CIPC, it must be the latter as the only review was that of GUD, and if not granted it would have been dismissed, not reviewed and set aside. This is a decision that was taken, that is so unreasonable that no reasonable person could have so exercised the power or performed the function, as contemplated in section 6(2)(h) of PAJA. Accordingly, the decision is reviewable and stands to be set aside in terms of sections 6(2)(d), 6(2)(e)(iii), 6(2)(f)(ii)(dd) and 6(2)(h).

(z) GUD admits that neither the Act or Regulations 2011 defines the term "confidential information." GUD denies that KT relied on the wrong empowering provisions (i.e., sections 26 and 31 of the Act) and that KT was materially influenced by an error of law.

(aa) GUD further confirmed that KT was correct in the view that each case is dependent on its own facts and circumstances and must be determined on its own merits. According to GUD the argument of the CIPC (in paragraph 83 of the FA) is incorrect. In the view of GUD, if each case is dependent on its own facts and merits, then it is possible that what is viewed as confidential in one case may not be considered the same in another case. GUD states that it is not concerned with the views of other companies as to what is confidential and as far as GUD is concerned the Tribunal does not operate on a precedent basis. According to GUD, the Act and Regulations does not restrict what information can be claimed as confidential and it can be anything which the company considers to be confidential in nature.

(bb) According to GUD, the CIPC does not disclose the source for its views nor the material on which they are based. GUD admitted the contents of section 44(1) of the Competitions Act and that it is similar to that of section 212(1) and (2) of the Act.

(cc) GUD contended that it never claimed that the redacted content of note 24 of its AFS for the year ended 30 June 2020 was also confidential to the CIPC, but rather claimed confidentiality in relation to the entire AFS. GUD further submitted that the fact that note 24 of said AFS was redacted for purposes of its application to the CIPC and the Tribunal, did not render the AFS non-compliant with section 30(4) – (6) of the Act, and whether or not GUD's AFS was compliant is an entirely separate issue to whether or not GUD is entitled to an order of confidentiality in relation to same.

(dd) GUD submitted that it rejects the allegation that KT failed to consider that the establishment of a company to conduct business on a limited liability basis is not a private matter, drawing on a legal framework endorsed by the community through mobilisation of public funding, and contended that KT considered all pertinent matters.

(ee) According to GUD, the Act makes provision that information such as its AFS to be declared confidential and it (GUD) is not aware of any provision in the Act that provides for or address a company's "reasonable expectation of privacy".

(ff) GUD contended that the review applications does not concern any personal information of its directors, such as their date of birth or residential addresses, that may or may not be freely available to members of the public on the CIPC's search function, but instead concerns its said AFS which is not freely available to members of public at all, let alone on the CIPC's search function.

(gg) GUD denies the CIPC's allegation (in paragraph 92 of the FA) that the information contained in the AFS of a company is either confidential or not and does not and does not depend on the facts or circumstances of a particular case, that information in any company's AFS could be used for, *inter alia*, competition, trade unions to negotiate, etc, and that this is not a unique situation deserving of its own consideration and evaluation, and which applies to all companies. GUD contended that the confidentiality or not of any information (AFS or any other information) does depend on the facts and circumstances of each case. According to GUD, it claimed confidentiality precisely because the information contained in its said AFS can be used by competitors and trade unions for competition or negotiations, as the case may be. GUD further stated that it cannot comment on the positions of other companies and its own position may not be unique, but its application is deserving of its own considerations and evaluation.

(hh) With regard to the CIPC's argument that if the AFS of GUD is confidential information, then transparency would not be achieved, GUD also denies this, submitting that the CIPC does not disclose the sources of its views, nor the material

on which they are based. GUD contends that there is nothing in the Act that precludes the AFS of a company from being declared confidential.

(ii) Concerning the Tribunal's finding on corporate transparency and confidential information (paragraph 36 of the decision) and the allegation that she (KT) did not appreciate or consider fully or given necessary weight to the purpose of the Act (eg encouraging transparency and high standard of corporate governance), the whole part C and Chapter 3 thereof dealing with transparency, accountability and integrity of companies, GUD submitted that whilst it admits the said findings of the Tribunal, it disagrees that KT did not take into consideration the purpose of the Act and the transparency, accountability and integrity considerations in terms of the Act. GUD submitted that KT considered all pertinent matters in a balanced manner.

(jj) According to GUD, the said pertinent issues were duly considered, including section 212, and the Tribunal did not approach the matter as if it concerned the right to privacy of an individual, and the reference to privacy made was done so for purposes of analogy only. GUD accordingly denies the allegation that confidential information was treated in the same manner as the right to privacy of individuals whereas section 212 does not find application to individuals and therefore taking into account irrelevant considerations. GUD therefore also rejected the CIPC's allegation that the erroneous interpretation of a statute vitiates the decision if on the facts do not support the decision which is alleged to be the case here, as the CIPC has not identified the incorrect interpretation of the Act allegedly applied by KT. According to GUD, the facts support KT's decision.

(kk) Regarding the CIPC's assertion that Tribunal's decision was materially influenced by an error of law because relevant considerations were not considered and is not rationally connected to the reasons given for it, GUD submitted that KT considered all pertinent matters, and her decision is rationally connected to the reasons given for it.

(ll) With regards to the Tribunal's findings in paragraph 57, according to the CIPC, it cannot be determined if GUD's review application is reviewed and set aside or whether the CIPC's refusal to grant blanket confidentiality is reviewed and set aside, which the CIPC view as so unreasonable that no reasonable person could have exercised the power or performed the function which decision should be reviewed and set aside in terms of sections 6(2)(d), 6(2)(e)(iii) and 6(2)(h). This submission is denied by GUD and it contended that the CIPC cannot be reasonably confused by the Tribunal's said findings. According to GUD all possible confusion is cleared up if the whole paragraph 57 of the decision of the Tribunal is read, being annexure "CIPC1" to the FA. Accordingly, GUD denies that the Tribunal's decision was unreasonable as alleged and that it is reviewable in term of the provisions of PAJA alleged by the CIPC.

(mm) According to the CIPC, GUD's claim is one of confidentiality and not a claim in terms of the right to privacy. The CIPC contends that in view of the wording of section

212 and the principles cited in the Townsend and Endumeni Municipality decisions, *supra*, the information GUD claims as confidential does not qualify as confidential.

(nn) With regard to the submissions by GUD that the disclosure of its AFS will cause potential harm (as indicated above) and infringe its right to privacy, the CIPC contended that the Tribunal, in its decision, failed to consider the right to privacy of juristic persons and private persons and also failed to draw the distinction between rights to privacy and confidential information, and as such, the Tribunal's decision was materially influenced by an error of law, did not take into account relevant considerations and is so unreasonable that a reasonable person could not have made the decision in granting the claim to confidentiality [refer to the Longbeach decision, *supra*].

(oo) The Tribunal, according to the CIPC, applies the wrong criterium when adjudicating on the claim for confidentiality – the test is not whether GUD was entitled to protect the information was on the basis of privacy, but rather whether the AFS contained confidential information as envisaged in section 212 of the Act.

(pp) Therefore, according to the CIPC, the error of law and fact on the part of the Tribunal, was material to the outcome of its decision and reviewable under section 6 (2)(d) of PAJA.

(qq) GUD, in its HOA, rejects the submission by the CIPC that the Tribunal made an error of law in that the Tribunal did not rely on the wrong empowering provision (ie sections 26 and 31) but on sections 212 (4) read with section 174 of the Act and therefore this particular ground of review falls to be rejected.

(rr) GUD submitted that PAIA recognises the right to privacy of companies but these can only be trumped by the rights of third parties to exercise or protect their rights. The CIPC disputed this argument and having regard to the preamble of PAIA, conclude that PAIA does not provide for this right to privacy as submitted by GUD. The preamble states that the right of access to any information held by a public or private body may be limited to the extent that such limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution.

(ss) In relation to the 5th ground, the CIPC maintains that the Tribunal failed to consider the question of corporate transparency and gave far greater value to the right to privacy (as per the contentions by the CIPC mentioned herein-above), as a result of which the decision of the Tribunal in this regard is reviewable in terms of section 6 (2)(e)(iii) of PAJA.

(tt) According to the CIPC, the Tribunal (at para 36 of its decision), decided that the importance of corporate transparency is separate from the question of whether information possesses qualities which makes it confidential in terms of section 212.

(uu) The CIPC argues that by making this decision, the Tribunal did not fully appreciate and consider of give the necessary weight to the purpose of the Act (which is, *inter alia*, encouraging transparency, the right standards of corporate governance, accountability and integrity of companies).

(vv) The CIPC further submitted further that where a relevant factor or consideration such as transparency is not taken into account when a decision is made, a relevant consideration is ignored and the decision is reviewable in terms of section 6 (2)(e)(iii), and similarly where a factor of paramount importance is relegated to one of insignificance (ie transparency) and another is gives more weight than its true value (ie right to privacy even though it may be relevant), this would amount to a failure by the Tribunal to apply its mind properly and is therefore arbitrary or capricious decision-making as envisaged in section 6 (2)(e)(vi) of PAJA and reviewable.

(xx) Further, the CIPC submitted that in light of its said decision, the Tribunal failed to consider the right to privacy of juristic persons and private persons, it failed to draw a distinction between privacy rights and confidential information, its decision was materially influenced by a error of law, relevant considerations were not taken into account and was so unreasonable that a reasonable person could not have made the decision to grant the claim for confidentiality.

(ii) legal principles/evaluation:

(a) Section 6(2)(d) of PAJA determines that review proceedings may be initiated where the administrative action was materially influenced by an error of law. Section 6(2)(e)(iv) may be utilised where a review of the administrative action is sought where said action was taken because of the unauthorised or unwarranted dictates of another person or body. Section 6(2)(h) of PAJA applies where the exercise of the power of the performance of the function authorised by the empowering provision in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power of performed the function.

(b) Section 33 of the Act deals with annual returns of companies and requires all companies to file such returns within the prescribed time period after the end of the anniversary of the incorporation date of such company, including the relevant AFS, if applicable, and such company must designate a director, employee or other person who is responsible for the company's compliance with the Act. This section is a statutory requirement for the company to file its audited AFS with its annual returns.

(c) In the view of this Court, the issue in this case, was for the Tribunal to decide on GUD's claim for confidentiality in terms of section 212 of the Act. In this regard, the CIPC correctly opined that the test is not done on the basis of the GUD's entitlement to its or its director's privacy but on whether the information contained in its AFS was confidential within the purview of section 212.

(d) According to this Court, the Tribunal decided on a wrong or mistaken interpretation of a legislative provision and its decision was accordingly influenced by a material error of law. Therefore, if regard is had to the principles of Scalabrini, Longbeach and Genisis, *supra*, the decision of the Tribunal is reviewable in terms of section 6 (2)(d) of PAJA and may be set aside.

(e) Regarding the 4th ground of review, the CIPC took issue with paragraph 33 of the decision of the Tribunal where it held that the information contained in the AFS of GUD as required by section 30 (4)-(6) of the Act is declared confidential, otherwise confidential and commercial information of GUD and its directors would be disclosed and this constitutes an invasion of the rights to privacy in terms of the Constitution and PAJA.

(f) In the opinion of the CIPC, said sections 30 (4)-(6) are peremptory provisions of the Act. However, the CIPC submitted that the Tribunal dealt with these requirements in terms of the constitutionality thereof, which it was not authorised to do or called upon to rule on its constitutionality (right to privacy) of section 30 (4)-(6), nor authorised to do so under section 212. Therefore, the CIPC argues, the Tribunal reached its decision on the grounds of the privacy rights, which it was not allowed to do by the empowering provision and further took into account irrelevant considerations. [see Westinghouse, *supra*].

(g) These contentions was denied by GUD as indicated above. GUD specifically rejected the submission that the Tribunal treated the issue of confidential information in the same manner as the right to privacy and that the Tribunal incorrectly interpreted the legal provision.

(h) From the contentions above the submissions in brief of the CIPC are that the Tribunal, in making its decision [at paragraph 33] that if the AFS of GUD is made available to the public and by so doing disclose the commercial information of GUD and its directors, there is no protection of their privacy rights as provided for in the Constitution and PAJA.

(i) In the opinion of this Court, the Tribunal failed to draw a distinction between privacy rights and confidential information. The Tribunal considered the submissions made by GUD, which relates to its privacy rights (eg quantum of dividends, levels of outside funding in the business, cashflow statements, etc) and the potential harm GUD would suffer if its AFS would be disclosed.

(j) This Court is in agreement that the Constitution, POPI, PAJA and PAIA Acts does not support the GUD's contention that its privacy would be infringed upon if the confidentiality claimed, is not granted by the Tribunal, as these pieces of legislation, in the opinion of the Court, supports openness and corporate transparency and governance in relation of companies and its business instead.

(k) In view of the above, the decision of the Tribunal was materially influenced by an error of law and did not take into account relevant considerations. The Tribunal based its decision on a wrong or mistaken interpretation of a legislative provision. Accordingly, this decision stands to be reviewed and set aside.

(l) The next part of the review grounds is that CIPC argued that since the Tribunal held that the information contained in the AFS of GUD as required by sections 30 (4)-(6) of the Act is declared confidential otherwise confidential and commercial information will be disclosed and this constitute an invasion the rights to privacy as provided for in the Constitution and PAIA. According to the CIPC the said section 30(4)-(6) are peremptory requirements under the Act and the Tribunal dealt with these requirements in terms of the constitutionality thereof when the Tribunal was not called upon to deal with the constitutionality (privacy rights) nor authorised to do so in terms of section 212 of the Act. CIPC submitted the Tribunal reached its decision on the grounds of the rights to privacy which it was not authorised in terms of section 212 and took into account irrelevant considerations.

(m) This Court is inclined to agree with the CIPC's submissions that the Tribunal incorrectly dealt with the peremptory requirements of sections 30(4)-(6) in terms of the constitutionality thereof. The Tribunal treated the issue of confidential information in the same manner as the right to privacy of GUD and its directors. The Tribunal reached its decision on grounds of the said privacy rights which it was not authorised to do by the empowering provision [section 212 of the Act] and took into account irrelevant considerations.

(n) Accordingly, this Court is convinced that the Tribunal was not authorised to engage on the constitutionality of the peremptory provisions [sections 30 (4)-(6) of the Act] or called upon to pronounce on these issues. This ground stands to be reviewed and set aside in the circumstances.

(o) Further, it was submitted that the Tribunal failed to take into account the question of corporate transparency and gave far greater value to the right to privacy.

(p) The Tribunal did consider the issue of corporate transparency in its decision [eg in paragraphs 9.1, 9.3, 11, 14 and 36]. It also mentioned the rights to privacy in its decision [eg paragraphs 8, 10, 16, 28, 45, 48, etc]. However, this 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 section 7 and Part C of the Act, PAIA, the Constitution [eg section 36] and various case authorities [eg Bernstein, etc].

(q) This Court is of the opinion that the Tribunal overemphasised the privacy rights at the expense of the transparency principles and relegated the latter to insignificance.

(r) Accordingly, this Court is of the view that the decision of the Tribunal should be reviewed and set aside.

(s) In light of the above, it is the view of this Court that the Tribunal's decision in the above instances should be reviewed and set aside in terms of sections 6 (2)(a)(i), 6 (2)(d) and 6 (2)(e)(iii) of PAJA.

(IV) the sixth and seventh grounds of review:

(i) contentions of the parties:

(a) According to the CIPC, GUD's application was concerning the CIPC's decision of 27 September 2021 to dismiss its (GUD's) claim for confidentiality. The CIPC submitted that the Tribunal, at paragraph 4 of its decision, held that:

"... The aforesaid claim for confidentiality was rejected by the CIPC on 27 September 2021 with a response as set out in its notice of 20 October 2021 ... Thus, the Applicant is desirous of reviewing the compliance notice issued by the CIPC dated 20 October 2021."

(b) The CIPC went on to cite the reasons the Tribunal attributes to the CIPC as the (the CIPC's) reasons for its decision regarding its refusal to grant GUD the requested confidentiality, which it argues are the following:

"9.1 The act has as one of its policy objectives, corporate transparency, and high standards of corporate governance. This entails that there should be widespread availability of relevant, reliable information about the periodic performance, financial position, investment opportunities, governance, value and risk of companies.

9.2 In terms of section 187(4)(c) of the Act, Respondent must make the information in its registers efficiently and effectively available to the public, and to other organs of state. Respondent also mentions the need to validate that annual return fees and turnover amounts are correct; its information sharing responsibility with law enforcement agencies combatting money-laundering and illicit financial flows; and our competition laws.

9.3 With a PIS above 350, Applicant has social and economic significance and owes accountability to the public, which includes creditors, employees, customers, potential investors, shareholders, directors, prescribed officers and regulators."

(c) The CIPC, contended that the said reasons set out by the Tribunal does not accord with the 27 September 2021 decision, as detailed in the founding affidavit, and it appears as if the Tribunal was dealing with reasons or decision of the 20th of October 2021, which was dated 2 days after the GUD's application was launched. According to the CIPC, in the decision of 27 September 2021 (which is the subject matter of GUD in terms of section 172), GUD did not refer to a decision or reasons, dated 20 October

2021 in its application, which is 2 days after its application was launched. Therefore, the CIPC submitted, on a proper reading of the section 172(2), the Tribunal was empowered to confirm, modify or cancel all or part of the 27 September 2021 decision.

(d) The CIPC accordingly contended that from the said reasons and the reference to the notice of 20 October 2021, it is clear that the Tribunal did not deal with the 27 September 2021 decision and made a material error of fact and law. Therefore the CIPC contended that the Tribunal's decision is reviewable and falls to be set aside in terms of section 6(2)(b), 6(2)(d), 6(2)(f)(i), 6(2)(f)(ii)(aa)-(dd) and 6(2)(h).

(e) According to GUD, the CIPC's argument that KT did not deal with the decision of 27 September 2021, is not correct because the contents of the Tribunal's decision dated 13 December 2021 (annexure "CIPC1" to the FA) evidence that KT did in fact deal with the decision of 27 September 2021.

(f) GUD submitted that the Tribunal's reference to the notice of 20 October 2021 in paragraph 4 of its decision was an obvious misnomer. GUD points out that the CIPC has not produced a notice of 20 October 2021 that would have served before KT when she made her decision. As far as GUD knows, no such notice exists, therefore no such notice could have served before KT when she made her decision and it follows from this that, contrary to what the CIPC alleges, KT was not dealing with reasons, or a decision dated 20 October 2021 and that nothing turns on that reference.

(g) GUD contended that insofar as KT dealt and rejected the reasons in support of the CIPC's response to its (GUD's) application of 27 September 2021 that are additional to those stated in the document, it submits that the CIPC cannot claim to be prejudiced thereby, and that the administrative proceedings concerning the Tribunal are not invalidated thereby. In the view of GUD, KT did consider the CIPC's response to the 27 September 2021 decision, which, upon consideration, she found lacking. Accordingly, GUD denies that the decision of KT is reviewable and falls to be set aside on any of the grounds alleged by the CIPC, in terms of sections 6(2)(b), 6(2)(d), 6(2)(f)(i), 6(2)(f)(ii)(aa) – (dd) and 6(2)(h) of PAJA.

(h) According to the CIPC, GUD's application was in relation to the CIPC's decision of 27 September 2021 in which the CIPC dismissed GUD's claim for confidentiality. The CIPC then submitted the Tribunal, in deciding on the confidentiality issue dealt with a response set out in a notice dated 20 October 2021 and stated that GUD is desirous of reviewing the compliance notice issued by the CIPC dated 20 October 2021.

(i) The CIPC accordingly submitted that the Tribunal was dealing in its decision, with reasons or a decision dated 20 October 2021. The CIPC contended that the said reason or decision simply does not exist or form part of the application by GUD, and moreover, the reasons recorded by the Tribunal does not accord with the reasons of the CIPC's decision dated 27 September 2021.

(j) The CIPC therefore contended that, from the said reasons and the reference to the notice of 20 October 2021, it is clear that the Tribunal did not deal with the decision of 27 September 2021, and made a material error of law and fact.

(k) The CIPC relies on the Bapedi Morota decision, *supra*, where it was held, with regards to the meaning of sections 6 (2)(f)(ii)(aa)-(dd) that it means that "the information on which the decision is based and the reasons given for the decision must support and justify the decision taken, if not the decision must be regarded as being arbitrary [at para 62 – minority decision of Jafta J].

(l) In light of the aforementioned, the CIPC submitted that the decision is reviewable in terms of sections 6 (2)(b), 6 (2)(f)(i), 6 (2)(f)(iii)(aa)-(dd) and 6 (2)(h) of PAJA.

(m) According to GUD, the above submission of the CIPC regarding the decision of 27 September 2021 cannot be correct because the decision of the Tribunal dated 13 December 2021 is evidence that it in fact dealt with the decision of the CIPC dated 27 September 2021.

(ii) legal principles/evaluation:

(a) Paragraph [4] of the Tribunal's decision reads as follows:

"[4] Michelle Raw, of the Applicant Company, being duly authorised thereto has deposed to an affidavit in support of the application. On 14 September 2021, the applicant submitted its claim for confidentiality in terms of section 212 in respect of the entire contents of its AFS for the year ending 30 June 2020. The aforesaid claim for confidentiality was rejected by the CIPC on 27 September 2021 with a response as set out in its notice of 20 October 2021. More than 15 days have expired since the CIPC decision. Since it was served on the Tribunal, the Applicant seeks a default order in terms of Regulation 153. Thus, the Applicant is desirous of reviewing the compliance notice issued of the CIPC dated 20 October 2021."

(b) It is common cause between the parties that the Tribunal in the above paragraph 4 of its decision makes reference to the CIPC's notice dated 20 October 2021 and that this notice does not exist.

(c) The main objection to the CIPC's submissions to these grounds of review are that reference to the notice of 20 October 2021 is a misnomer and that the Tribunal could not have considered the said notice (20 October 2021) as it was not before it as it did not exist. According to GUD, the CIPC was not prejudiced by the reference to the notice and the administrative proceedings concerning the Tribunal was not invalidated by it.

(d) Nowhere in the decision of the Tribunal does it mention the notice of 20 October 2021, other than in paragraph 4 thereof. The decision does not analyse or discuss the contents of the latter notice elsewhere in its decision.

(e) CIPC's view regarding this aspect is that the Tribunal was dealing with reasons or a decision dated 20 October 2021, which reason or decision does not exist or form part of GUD's application. In addition, the reasons advanced by the Tribunal does not accord with the reasons contained in the CIPC's decision of 27 September 2021, and as such, made a material error of law. This is disputed by GUD. According to GUD the CIPC's decision in the latter regard cannot be correct because the decision of the Tribunal is evidence that it (Tribunal) in fact dealt with the CIPC's decision dated 27 September 2021.

(f) In the response dated 27 September 2021, the CIPC dealt mainly with the provisions of section 7 of the Act, the functions of the CIPC, the reasons why GUD claims confidentiality, unfair competition, the case authorities that deals with transparency of companies [the Bernstein and Company Secretary of Arcelomittal SA decisions], that the GUD did not comply with sections 30 (4)-(6) of the Act and its decision not to grant the confidentiality to GUD.

(g) In paragraph 9.1 of the Tribunal's decision, it refers to the reasons for the rejection of the claim for confidentiality by the CIPC. This corresponds to some extent with the paragraph 2 of the CIPC's response where the purpose of the Act (ie transparency and corporate governance as well as efficient and responsible management of Companies are encouraged) are discussed.

(h) In paragraph 9.2 of the decision, the Tribunal mentions the section 187 (4) functions of the CIPC, namely making the information contained in the registry efficiently and effectively available to the public and other state organs (paragraph 3 of the response of the CIPC). Accordingly, the decision of the Tribunal corresponds with the response in this latter regard.

(i) Paragraph 11 of the response, regarding the public interest (PI) score of 350 and above and compliance with section 30 (4)-(6) of the Act largely accords with paragraph 9.3 of the decision of the Tribunal as being one of the reasons why the CIPC rejected GUD's claim for confidentiality.

(j) In addition, the CIPC's rejection of GUD's claim for confidentiality on the basis that corporate transparency outweighed the said claim for confidentiality as well as that the information must be made available to the public in terms of section 187 (4)(a) of the Act, as discussed in paragraphs 3 and 10 of the CIPC's response, accords with the contents of paragraphs 9.2 and 11 of the Tribunal's decision.

(k) Also, in paragraph 38 of its decision, the Tribunal refers to and quotes directly from the CIPC's response in paragraph 3 in relation to the CIPC's function in terms of section 187 (4).

(l) It is clear from the foregoing comparison of the CIPC's response and the decision of the Tribunal that the contention of GUD was correct in that it submitted that the

reference to the notice dated 20 October 2021 is a misnomer and the Tribunal in fact considered the response of the CIPC of 27 September 2021. This is the response that was before the Tribunal when it made its decision and not the alleged notice of 20 October 2021.

(m) Accordingly, this Court is not persuaded by the reasons for the grounds of review upon which the CIPC relies in this regard. Therefore, the grounds of review raised by the CIPC falls to be rejected.

(V) the eighth ground of review:

(i) contentions of the parties:

(a) The CIPC submitted that the Tribunal was required to review and set aside its decision, which decision has its genesis in specifically section 7(b)(iii) of the Act. According to the CIPC, the Tribunal found at paragraph 50 of its decision as follows:

"[50] Both the Respondent and the Tribunal are specifically enjoined from divulging confidential information or directed as to how to handle such information. The submission of AFS for private companies (with a public interest score above the designated threshold) is considered to be in the public interest (see section 7(b)(iii) and section 7(j) of the Companies Act respectively) and hence to claim confidentiality there has to be good reasons offered with an adequate explanation provided to the Tribunal.

I am of the view that the applicant has adequately explained and justified the reasons for its claim of confidentiality."

(b) The CIPC contended that the Tribunal had to determine whether GUD's claim for confidentiality of its entire AFS was based on solid grounds and outweighed the transparency principles in the Act and the requirement to submit the AFS with the CIPC. This weighing up exercise, which the Tribunal had to do against the reasons proved by GUD, was not done, so the CIPC argued.

(c) The CIPC further submitted that the Tribunal failed to consider that the Companies Act is pivoted, *inter alia*, on purposes aimed towards the promotion of the country's economy by encouraging transparency and high standards of corporate governance and in order to encourage the efficient and responsible management of companies. Accordingly, the CIPC argued that the Tribunal's decision is reviewable and stands to be set aside in terms of section 6(2)(d), 6(2)(e)(iii) and 6(2)(f)(ii)(aa)-(dd).

(d) GUD disputes the latter contention of the CIPC and argues that the Tribunal did take into account the principles of corporate governance and transparency and it is evident from its decision that it in fact weighted up GUD claim for confidentiality against the relevant provisions of the Act and concluded that the claim for confidentiality be allowed.

(e) GUD contended with regards to CIPC's submission under this 8th ground, that the decision of the Tribunal that the said decision was materially influenced by an error of law, and thus reviewable under section 6 (2)(d) of PAJA, this submission should be rejected. According to GUD the CIPC does not identify what the error of law was or how it influenced the Tribunal's decision.

(f) GUD then averred that the CIPC's contention that the decision was taken due to irrelevant considerations were considered or relevant considerations were not considered and therefore reviewable in terms of section 6 (2)(e)(iii) of PAJA, falls to be rejected. According to GUD, the CIPC does not identify the irrelevant considerations taken into account nor why those considerations were irrelevant.

(g) The further submission of GUD was that the CIPC's contention that the decision of the Tribunal is not rationally connected to the purpose for which it was taken and therefore reviewable under section 6 (2)(f)(ii)(aa) of PAJA, should not succeed. GUD submitted in this regard that the CIPC does not explain the purpose for which the Tribunal's decision was taken, nor why it allegedly not rationally connected to the purpose for which it was taken.

(h) According to GUD, the CIPC's submission that the decision of the Tribunal is not rationally connected to the purpose of the empowering provision and as such reviewable in terms of section 6 (2)(f)(ii)(bb) of PAJA, should be dismissed. The reason for GUD's argument is that the CIPC does not explain the purpose of the empowering provision nor why the Tribunal's decision is allegedly not connected to the purpose of the empowering provision.

(i) GUD further, contended that the CIPC's argument that the Tribunal's decision is not rationally connected to the information before it and thus reviewable in terms of section 6 (2)(f)(ii)(cc) of PAJA, has no merit. According to GUD, the CIPC does not explain why the decision is allegedly not rationally connected to the information before the Tribunal.

(j) It is GUD's submission, that the CIPC's argument that the decision of the Tribunal is not rationally connected to the reasons given for it and therefore reviewable under section 6 (2)(f)(ii)(dd) of PAJA, should fail. GUD argues in the latter regard that the CIPC does not explain why the decision is allegedly not rationally connected to the reasons given for it by the Tribunal.

(ii) legal principles and evaluation:

(a) Section 7 of the Act deals with the purpose of the Act, which is, *inter alia*, the following: to promote compliance with the Bill of Rights in the Constitution in the application of company law, to promote the development of the economy of the country, to promote innovation and investment in the country's markets; to reaffirm the concept of the company as a means of achieving economic and social benefits etc.

With regards to transparency and governance, the Act provides that, one of its purposes is to promote development of the economy by:

“encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.” [Section 7 (b)(iii)]

(b) According to the CIPC, part C of the Act deals with transparency, accountability and integrity of companies and contends that South Africa encourages fair competition.

(c) The CIPC makes reference to several case authorities to emphasise the importance of corporate transparency and governance, including Fayed v United Kingdom [(1994) 18 EHRR 393], Bernstein and Others v Bester and Others NNO [1996 (2) SA 751 (CC) at para 85] and Nova Property Group Holdings Ltd & Others v Corbett & Another [2016 (4) SA 317 (SCA)]. Reliance is further placed on legislation by the CIPC to substantiate its argument relating to transparency and the examples made in this regard is sections 26 and 30 of the Act.

(d) From the wording of section 7, which deals with the purpose of the Act, it is clear that transparency, corporate governance and compliance with the Bill of Rights under the Constitution are important aims of the Act. This is not in dispute between the parties. The requirement that for a claim of confidentiality, there has to be good reasons offered with an adequate explanation provided to the Tribunal, is also common cause between the parties.

(e) The Tribunal found that GUD has adequately explained and justified the reasons for its claim for such confidentiality [para 50 of its decision], whilst the CIPC argued that the Tribunal had to determine if GUD's claim for confidentiality of its AFS was based on solid grounds (good reasons) and outweighed the transparency principles in the Act. According to the CIPC this weighing up exercise the Tribunal had to do against the reasons provided by GUD, was not done. GUD argued that the Tribunal did the weighing up exercise and the Tribunal did take into account the principles of corporate governance and transparency.

(f) In paragraph 8 of its decision the Tribunal refers to some of the reasons GUD base its claim for confidentiality on and in paragraph 9 it sets out the reasons of the CIPC for its rejection of GUD's claim. In its evaluation, the Tribunal concluded that GUD adequately explained with reasons why the information is to be considered “confidential information” in both affidavits of Ms Raw and granted GUD's claim for confidentiality [refer to paragraph 50 of the decision].

(g) The issue of corporate transparency and governance was referred to in *inter alia* in paragraphs 9.1, 9.3, 11, 14, 36 and 55 of the Tribunal's decision. The privacy rights

of GUD and its directors were mentioned in paragraphs 8, 10, 16, 28, 29, 31, 33, 40, 41, 44, 45, 47, 48, 50, 52 and 56 of the Tribunal's decision.

(h) It is the opinion of this Court, that the Tribunal did consider the reasons advanced by GUD for its claim for confidentiality and the principles relating to corporate transparency and governance. This Court is not convinced that the Tribunal weighed up the two against each other. The Tribunal, in this Court's view, underemphasised the provisions of section 7 and Part C of the Act, the preamble to PAIA, the principles in the Fayed, Bernstein and Nova decisions, *supra*, the Bill of Rights in the Constitution, and the importance of these authorities have been relegated to insignificance. In the opinion of this Court, the Tribunal places more value and importance to the privacy rights of GUD and its directors in the decision. Accordingly, the Tribunal did not apply its mind properly. Accordingly, this Court finds that the decision of the Tribunal stands to be reviewed and set aside in terms of sections 6 (2)(d), 6 (2)(e)(iii) and 6 (2)(f)(dd) of PAJA.

(VI) the ninth and tenth grounds of review:

(i) contentions of the parties:

(a) The CIPC submitted that the Tribunal, at paragraph 55 of its decision, concluded as follows:

"[55] I submit, with respect, the Respondent, in making its decision in terms of section 212(3) has made an incorrect decision. Had the Respondent considered the claim of the Applicant more seriously and in-depth, it would have explained which parts of the AFS could not be regarded as confidential and which could. It simply made a blanket decision on the entire AFS and said that the information contained in the AFS was general information found in annual financial statements. The comments on fair competition, transparency and access is (sic) not reasonable and is improper." According to the CIPC, the initial application of 14 September 2021 is for the entire contents of the AFS, as evidenced by the letter from GUD's attorneys ("MR2", pg 0039-69 of caselines). This, according to the CIPC, was confirmed by one MM Raw in her affidavit where she requested the CIPC to confirm that the entire contents of such audited AFS will be kept confidential ("MR3", para 22, pg 003-86, caselines). In addition, GUD's section 172 application, dated 18 October 2021, is for the entire contents of the AFS, which is apparent from the letter from GUD's attorneys ("MR2", pg 003-69).

(b) The CIPC contended that the Tribunal's above findings were incorrect in fact and in law, on the information before it, presumably because it considered the document of 20 October 2021:

(i) the GUD's claim for confidentiality was in relation to the entire AFS, to be submitted and not for portions thereof. Therefore, the CIPC was called upon to decide on the entire contents, not portions of same. Accordingly, the Tribunal's finding that which

parts of the AFS could not be regarded as confidential, is incorrect in fact and law, and not justified on the information before it and was not a consideration which served before the CIPC.

(ii) the CIPC specifically states and gives reasons as to which parts of the AFS could not be regarded as confidential by indicating that:

"The reasons why the entity claims confidentiality are stated in para 17, which state that the financials contain extremely sensitive information, inter alia, relating to:

- The companies profitability;*
- The companies gross profit;*
- The companies annual turnover;*
- The companies asset base and liabilities; and*
- The companies ownership structure.*

It is of crucial importance to note that this information is of a general nature. These (sic) information is contained in the annual financial statements of all reporting entities mandated to report and this information is not out of the ordinary. It is in line with International Financial Reporting Standards (IFRS) and the Companies Act requirements."

(iii) even though the Tribunal correctly held at paragraph 50 that, for GUD to claim confidentiality, there has to be good reasons offered with an adequate explanation provided to the Tribunal, this places an onus on GUD to show why the information is confidential, the Tribunal placed a reverse onus the CIPC to explain which parts of the AFS could not be regarded as confidential.

(c) It appears that the main difficulty the CIPC have with regards to this part of the Tribunal's decision is that the Tribunal, at paragraph 55 of its decision, applied a reverse onus on the CIPC in that it stated that the CIPC should have explained which parts of the AFS could not be regarded as confidential. In this regard the CIPC submitted that in terms of section 212 (2) of the Act, a claim for confidentiality must be supported by a written statement [by the applicant for the claim] explaining why the information is confidential.

(d) According to the CIPC, said section 212 (2) places an onus on GUD to explain why the information is confidential. In addition, the GUD's claim for confidentiality is for the entire contents of its AFS and not certain parts. The Tribunal was not called upon to make a decision regarding certain portions of the AFS but to decide on the entire contents.

(e) The CIPC then referred to the Nersa v PG Group (Pty) Ltd [2020 (1) SA 450 (CC)], Democratic Alliance, supra [at para 36], Pharmaceutical Manufacturers Association of

SA & Another: In re: Ex Parte President of the RSA & Others [2000 (2) SA 674 (CC)
at paras 83-86] to substantiate its arguments relating to the foregoing submissions.

(f) GUD advanced the same points of opposition to these grounds of review as under the 8th ground above. GUD raised further opposition to a ground raised by the CIPC where the latter contended that the exercise of power or the performance of the function authorised by the empowering provision, in pursuance of which the decision was purportedly taken by the Tribunal, is so unreasonable that no reasonable person could have so exercised the power or performed the function and as such reviewable in terms of section 6 (2)(h) of PAJA and GUD submitted that it be rejected. According to GUD the CIPC does not explain why the exercise of power or the performance of the function authorised by the empowering provision in pursuance of which decision was purportedly taken by the Tribunal, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

(g) With regards to the CIPC's argument that the finding by the Tribunal that:

"... Had the Respondent (CIPC) considered the claim more seriously and in-depth, it would have explained which parts of the AFS could not be regarded as confidential and which could." was "in fact and in law wrong". This in the view of GUD, evidences that the purported ground of review is in fact an appeal disguised as a review. Therefore, the review on this ground should be rejected.

(h) GUD went on to argue that from a mere reading of the paragraph quoted by the CIPC from its decision of 27 September 2021, it is obvious that the CIPC does not state and give reasons about which parts of the AFS could not be regarded as confidential save for the insufficient and unconvincing statement that *"this information is of a general nature."* This criticism of the CIPC's approach that is made by the Tribunal and GUD still remains. Even if the CIPC intended to say that only the parts of the AFS that are mentioned are not worthy of confidentiality, it did not in fact limit its decision to those parts only but dismissed the claim entirely, so the GUD argued.

(i) With regards to CIPC's argument in relation to the reverse onus, GUD contended that on a mere reading of the Tribunal's decision, it is clear the Tribunal did not place such onus on the CIPC.

(j) In light of the above, GUD submitted that these purported grounds of review falls to be rejected.

(k) The CIPC submitted, in light of the aforementioned, that the Tribunal's decision was not rationally connected to the information before it or the reasons given for it and therefore reviewable and stands to be set aside in terms of sections 6(2)(d), 6(2)(e)(iii), 6(2)(f)(i), 6(2)(f)(ii)(aa) and (dd) and 6(2)(h).

(ii) legal principles/evaluation:

(a) GUD, for its claim for confidentiality to succeed has to provide good reasons with an adequate explanation to the Tribunal. The Tribunal found that GUD adequately explained and justified the reasons for its confidentiality claim [at paragraph 50 of its decision].

(b) The Tribunal, however, in paragraph 55 of its decision, placed a reverse onus on the CIPC to explain which parts of the AFS could not be regarded as confidential, this according to the CIPC.

(c) According to section 212 (2) of the Act the onus is on GUD to explain why the information is confidential, not on the CIPC to explain anything.

(d) Further, the CIPC contented that the GUD's claim for confidentiality is for the entire contents of its AFS, not for certain parts thereof. The Tribunal was not called upon to make a decision regarding certain parts of the AFS, but to decide on the entire AFS contents.

(e) This Court is of the view that the Tribunal placed a reverse onus on the CIPC, which is in contrast with the provisions of section 212 (2) of the Act, which require the GUD to file an affidavit to explain why the information should be regarded as confidential. This provision does not require from the CIPC to show anything.

(f) This Court is further inclined to agree with the submission of the CIPC that the Tribunal was not called upon to make a decision regarding certain parts of the AFS, but on the entire contents [refer also to the Nersa, Democratic Alliance and Pharmaceutical Manufacturers Association of SA decision, *supra*]. In the opinion of this Court, the contentions of GUD, in its regard, is not convincing and falls to be rejected.

(g) Accordingly, the decision of the Tribunal is reviewable and stands to be set aside in terms of sections 6 (2)(d), 6 (2)(e)(iii), 6 (2)(aa) and dd of PAJA.

(VII) the eleventh and twelfth grounds of review:

(i) contentions of the parties:

(a) The CIPC submitted that the Tribunal, at paragraphs 29 and 30 of its decision, made a legal finding on the interpretation of the Act, which it was not called upon to do, falling beyond its jurisdictional powers in terms of section 172 by finding that:

"[29] ... it can be clearly seen that these sections are the only instances deemed appropriate by the Legislature for access to the AFS. In my view, all the more reason why the AFS cannot be handed out by the Respondent to any member of the public as they will have to motivate their request and show that it falls within the categories listed in the sections mentioned in para 14 supra.

[30] Thus it can be concluded that the access to AFS is therefore in terms of the empowering legislation only available to those who have a legal interest in such information..."

(b) The CIPC went on to contend that the Tribunal was not authorised by the empowering provision to make a finding and, the Tribunal did consider, although it had no jurisdiction or to take into consideration sections 187(5) and (6) and was therefore materially influenced by an error of law as contemplated in section (6)(2)(d).

(c) The CIPC submitted that the Tribunals' decision was not authorised in terms of the empowering provision and that it (Tribunal) was only authorised to confirm, modify or cancel the decision of 27 September 2021, and is reviewable and stands to be set aside in terms of sections 6(2)(a)(i) and 6(2)(d).

(d) In short, the CIPC's submissions are that the Tribunal, in its findings at paragraphs 29 and 30 of its decision, made a legal finding on the interpretation of the Act but was not authorised by the empowering provision to do so, and it was not authorised to grant blanket confidentiality ruling in relation to all future AFS to be filed by GUD.

(e) GUD disputes the CIPC's contentions mentioned above. According to GUD the submission of the CIPC that the Tribunal was not authorised to take the decision by the empowering provision, is without merit, and falls to be rejected. GUD submits that the empowering provision whereunder the decision for claim for confidentiality was granted, was section 212 read with section 172 of Act, which empowered the Tribunal to confirm, modify or cancel all or part of the CIPC's decisions and therefore the Tribunal was authorised by the empowering provision to grant GUD's decision for confidentiality. Further, GUD submitted that, contrary to what the CIPC contended, there are no legal prescripts that prohibited the Tribunal from interpreting the Companies Act.

(f) Regarding the submission of the CIPC that the decision of the Tribunal concerning these grounds, that it was materially influenced by an error of law, GUD disputes this contention. GUD rejects the argument of the CIPC that the Tribunal did not take section 187 (5)(a) of the Act into account and argues that the Tribunal did take the said section into account when its decision was taken.

(ii) legal principles/evaluation:

(a) From the wording of the empowering provisions, section 212 of the Act, it is clear that the Tribunal was not authorised to make a legal finding on the interpretation of the Act. In terms of section 172 it was only empowered and authorised to confirm, modify or cancel the CIPC's decision of 27 September 2021. In any event, the Tribunal was only called to pronounce on the confidentiality claim of GUD, not on the interpretation of the Act. The Tribunal also was not authorised by section 212 to make such finding and it did so beyond its jurisdictional powers under section 172.

(b) Accordingly, the decision of the Tribunal in this regard, as argued by the CIPC, is materially influenced by an error of law and the Tribunal was not authorised by the empowering provision to do so. Therefore, the submissions of GUD in this instance cannot be sustained.

(c) In the view of this Court the Tribunal's decision is reviewable and stands to be set aside in terms of sections 6 (2)(a)(i) and 6 (2)(d) of PAJA.

(VIII) the thirteenth ground of review:

(i) contentions of the parties:

(a) The CIPC submitted that if the order in paragraph 57 is an order setting aside the 27 September 2021 decision by the CIPC and GUD has been granted blanket confidentiality for all future AFS to be filed, the Tribunal was not authorised to do so in terms of the empowering provision, namely section 212, which section provided that "when submitting" information a person may claim all or part of that information is confidential.

(b) Paragraph 57, the order of the Tribunal, reads as follows:

"[57] The application for review of Respondent's decision is reviewed and set aside but the claim for confidentiality in respect of the AFS for the year ending 30 June 2020 is granted by the Tribunal."

(c) The CIPC contended that from section 212(1) it is clear that a determination on whether or not information is confidential can only be made when the particular information is made available to the decider of that fact and the Tribunal was not authorised to grant a blanket confidentiality ruling for all further AFS to be filed by GUD. Accordingly, the CIPC argued that the Tribunal's decision is reviewable and stands to be set aside in terms of sections 6(2)(a)(i), 6(2)(b), 6(2)(d), 6(2)(e)(i) and 6(2)(f)(i).

(d) With regards to this 13th ground of review, GUD contended that the CIPC's submission, that the decision of the Tribunal is reviewable under section 6 (2)(a)(i) due to the fact that it was not authorised by the empowering provision to take such decision, should be rejected. According to GUD, the Tribunal did not grant it (GUD) blanket confidentiality in respect of all future AFS to be filed.

(e) As far as the CIPC's submission, that the Tribunal's decision is reviewable in terms of section 6 (2)(b) of PAJA because a mandatory and material procedure or condition prescribed by an empowering provision was not complied with, is concerned, GUD contended that this submission be rejected. GUD relies on its submissions at paragraphs 25.1 to 25.3 of its HOA to substantiate its arguments, that is, that the empowering provision was section 212 (4) read with section 172 of the Act, and that the CIPC does not identify what mandatory and material procedure or condition prescribed by the empowering provision was not complied with.

(f) The CIPC's contention that the Tribunal's decision was reviewable under section 6 (2)(d) of PAJA because the decision was materially influenced by an error of law, was also disputed by GUD. Again, it was submitted by GUD that CIPC does not identify what the error of law was made by the Tribunal when it took the decision nor how this error of law influenced the decision.

(g) Concerning the CIPC's contention that the Tribunal's decision was reviewable in terms of section 6 (2)(e)(i) of PAJA in that the decision was taken for a reason not authorised by the empowering provision, GUD argued that this submission should be rejected because the CIPC does not identify the unauthorised reason for taking the Tribunal's decision, nor does it explain how it caused the Tribunal's decision to be taken.

(h) GUD submitted that the CIPC's contention, that the Tribunal's decision is reviewable under section 6 (2)(f)(i) of PAJA in that the said decision contravenes a law or it not authorised by the empowering provision, should be rejected. According to GUD the CIPC does not identify what law was contravened nor how the law was allegedly contravened by the Tribunal when it took the decision with regards to the decision being authorised by the empowering provision, the GUD relies on paragraphs 9.1 to 9.3 of its HOA to dispute the CIPC's contentions which states that section 212 (4) read with section 172 was the empowering provision under which the Tribunal took its decision and which empowers it to confirm, modify or cancel all or part of the CIPC's decisions and that this provisions of the Act did empower the Tribunal to take the decision to grant GUD's claim for confidentiality.

(ii) legal principles/evaluation:

(a) In the understanding of this Court, the order of the Tribunal reviewed and set aside the CIPC's decision of 27 September 2021. The decision went further and granted GUD's claim for confidentiality, specifically in respect of its AFS for the year ending 30 June 2020. In the view of this Court, the CIPC's contention that blanket confidentiality was granted for all future AFS to be filed by GUD, cannot be sustained.

(b) This Court is further inclined to agree with GUD that the Tribunal made this decision on the empowering provision, which is section 212 read with section 172 of the Act, which empowers the Tribunal to confirm, modify or cancel all or part of the CIPC's decision and grant the claim for confidentiality.

(c) Further, this Court agrees, in this regard, that the CIPC did not identify which mandatory and material procedure or condition prescribed by the empowering provision was not complied with by the Tribunal when it took its decision, or identified what the error of law was or how this error influenced its decision, or identified the unauthorised reason for taking its decision or explained how it caused the decision to be taken or identify what law was contravened or how it has contravened. Accordingly, this submissions of the CIPC cannot succeed.

(d) In light of the aforementioned this Court is not persuaded that the grounds raised in this instance should succeed.

F. CONCLUSION:

[14] This Court is convinced that the Tribunal's decision to grant the claim for confidentiality was incorrect in view of the overwhelming factors and principles favouring transparency, openness, democracy in our legal and constitutional dispensation [for example in section 7 and Part C of the Act, PAJA, Section 36 of the Constitution, PAIA and PAJA].

[15] In terms of section 8(1)(c)(ii)(aa) of PAJA a court in review proceedings under PAJA may grant any order that is just and equitable including orders setting aside the administrative action in question and substituting and varying it, instead of remitting the matter back to the original decision maker under section 8(1)(c)(i). Exceptional circumstances must be present to justify substitution or variation. Section 172(1)(b) of the Constitution further grants the court the authority to make any order that is just and order when deciding a constitutional matter.

[16] A court may substitute a decision instead of remitting it and the requirements for same was explained in Trenton Constructions (Pty) Ltd v IDC of SA Ltd and Another [2015 (5) SA 245 (CC) at paras 47 to 54]. The first requirement is whether a court is in as good a position as the administrator to take the decision. The second is whether the decision of the administrator is a foregone conclusion. Thereafter a court should still consider other relevant factors, which may include delay, bias of the incompetence of the administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that account for all the relevant facts and circumstances.

[17] It is correct that remittal is considered to be generally the proper course to take, and each matter must be determined on its own merits, taking into account all the relevant facts and circumstances. In some instances, fairness to an applicant may demand that the Court should take a different view [Theron en Andere v Ring Van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A); ZA and Others v Minister of Home Affairs and Another 15279/2021 WCHC, at para 44].

[18] Having considered the relevant facts and circumstances of this matter, this Court is of the view that the substitution of the decision instead of remitting would be proper, indeed for the reasons below.

[19] It is the view of this Court that it is in as good a position as the Tribunal to make the decisions and has all the pertinent and important information before it. The record of the matter and the papers filed by the parties contains all the information required

to adjudicate this matter. In the opinion of the Court, the decision is a forgone conclusion, and it would merely be a waste of time to order the Tribunal to reconsider the matter. Neither of the parties provided any evidence or change of circumstances to make a reconsideration of matter necessary.

[20] Accordingly, a substitution order would be just and equitable in light of the above.

G. COSTS:

[21] The general rule is that costs follow the result unless there is good grounds upon which this rule can be deviated from [Myers v Abramson 1951 (3) SA 438 (C) at 455]. This Court finds no reason why it necessary to deviate from the said general principle.

H. ORDER:

[22] In the result, the following order is made:

(a) the application for review is granted.

(b) the decision (order) of the Tribunal is reviewed and set aside. It is substituted with the following order:

“That the claim for confidentiality of the AFS of the 3rd Respondent for the year ending 30 June 2020 is dismissed.”

(c) that the 3rd Respondent pay the costs, such costs to include costs consequent upon the employment of two counsel, one of whom is senior counsel.



B CEYLON

Acting Judge of The High Court
of South Africa
Gauteng Division,
Pretoria

APPEARANCES

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5. DATE OF HEARING: 22 February 2023
6. DATE OF JUDGMENT: 18 December 2023