

29th September 2023

Ms J Hermans
Chairperson
PC on Trade, Industry and Competition
P O Box 15
Parliament
Cape Town

Dear Madam

It is noted that while the Companies Amendment Bill (the bill) requires private companies to disclose ultimate beneficial ownership to the Companies and Intellectual Properties Commission (CIPC), it is a concern that the bill does not make this information available to the public for the following reasons;

1. The principle that the affairs of companies cannot be entirely private is well-established in our law. The foundation of this principle was iterated by Ackermann J in *Bernstein v Bester NO* as follows:

“The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute, will have concomitant responsibilities...”

- 1.1. The court went on to state that:

“It is clear that any information pertaining to participation in such a public sphere, cannot rightly be held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of privacy exists. Nor would such an expectation be recognised by society as objectively reasonable”.

“The theoretical foundation of company law acknowledges that companies do not exist in a vacuum – they are enmeshed in the communities within which they operate. While often they provide benefits to such communities, their activities have the potential to cause great harm.”

- 1.2. From an historical perspective, it bears considering that corporate secrecy was used to advance apartheid interests. Section 15a was introduced into the 1973 Companies Act to counter sanctions by enabling apartheid ministers of trade and industry to disallow the disclosure of certain categories of JSE listed company subsidiaries where this was deemed to be in the ‘public interest’. It was common knowledge that these undisclosed subsidiaries were engaged in sanctions busting or

supplying goods and services to the apartheid security establishment. Between the 1988 and 1992 editions of Who Owns Whom, 900 subsidiaries of JSE listed companies 'disappeared'.

- 1.3. In more recent times it can be argued that, had this legislation been in place 15 years ago, the Gupta malfeasance would not have reached the levels that it did as civil society, the media, academia, research organisations and credit companies would have disclosed the extent of their, and their collaborators', involvement in state capture. In this context, every available tool to curb such malfeasance is crucial. Beneficial ownership transparency is one such tool, because it reduces the attractiveness of using companies and legal arrangements as a means to obfuscate who is behind criminal activity.
- 1.4. It can also be argued the reasons for shareholders keeping beneficial ownership secret from the public is precisely the same reason the public requires transparency of ownership.
- 1.5. Open Ownership reports that 110 countries have committed to beneficial ownership transparency. In Africa, South Africa joins Ghana, Kenya, Nigeria, Senegal, and Zambia in making commitments to beneficial ownership transparency as part of the Open Government Partnership process. South Africa has in one respect been overtaken by Nigeria and Ghana, both of whom have extractives industries registers of beneficial ownership online.
- 1.6. In addition, the proposed amendments to Recommendation 24 that were published recently by the Financial Action Task Force show that it is moving towards requiring that all countries set up a beneficial ownership register (or an alternative mechanism) and consider facilitating public access to this information.
- 1.7. To the extent that South Africa wants to be considered a leading investment destination in Africa for clean business, it is falling behind in the global march towards beneficial ownership transparency as evidenced by the recent grey listing. Even within South African borders, beneficial ownership disclosure helps business interests, because by deterring corruption, it levels the playing field. This helps to ensure that companies that conduct themselves lawfully and on sound governance principles are able to succeed.
- 1.8. Companies and organisations operating in South Africa which are required to comply with the Financial Intelligence Centre Act need to conduct a due diligence to 'know your client' which includes beneficial ownership information yet the bill does not facilitate regulated access to this information which creates a potential clash of legislation.

Signed on the 29th of September 2023.



Maureen Mphatsoe



Mark Wells



Andrew McGregor

Please note that director Simon Rudman is away and uncontactable until after the October 2nd deadline but the three directors signing above represent the required board quorum.