IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2023-050131

In the matter between:

MAZETTI MANAGEMENT SERVICES (PTY) LTD	First Applicant
AMMETTI HOLDINGS (PTY) LTD	Second Applicant
and	
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	First Respondent
STEPHEN PATRICK SOLE	Second Respondent
ROSHAN MICAH REDDY	Third Respondent
DEWALD VAN RENSBURG	Fourth Respondent
and	
SOUTH AFRICAN NATIONAL EDITORS' FORUM	First *Amicus Curiae*
MEDIA MONITORING AFRICA TRUST	Second *Amicus Curiae*
CAMPAIGN FOR FREE EXPRESSION	Third *Amicus Curiae*
CORRUPTION WATCH	Fourth *Amicus Curiae*

FIRST TO THIRD *AMICI CURIAE'S* HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW

1. Journalism is the lifeblood of democracy. It is the way we learn what is happening in our world – what the government is doing, and what powerful corporations are doing.

2. Journalism that is limited to information that governments and corporations voluntarily supply is little better than a public relations exercise. The journalism that matters reveals what the rich and powerful want to remain secret and confidential.

3. Private companies are naturally entitled to try and preserve the confidentiality of their information. They are not required to conduct their business in public, and can demand confidentiality from their employees. But they have no blanket right to enforce their interests in secrecy on the media and the public. Where confidential information reveals illegal, unethical behaviour, journalists have not only a right, but a duty to publish it. And the public has a right to know. Corporations have no right in a democracy to object to publication of embarrassing information merely because they intended that information to be confidential.

4. For journalists to be able to report on matters of public interest, they require sources to whom they can give reasonable guarantees of confidentiality. People with information about unlawful or unethical behaviour by the state or a private actor will seldom reveal it unless they are assured they will not be punished. Few

people have the courage to accept those consequences to expose the truth. The world is made of far more Deep Throats than Edward Snowdens.

5. So for democracy to function, journalists must be able to protect – subject to reasonable exceptions – the confidentiality of their sources. That requires that courts will not order the disclosure of information that would reveal confidential sources. If sources can be disclosed, merely so they can be punished by the person whose secrets they revealed, the media cannot do its job. If journalists can be banned from publishing stories merely because they obtained information from confidential documents, the media cannot do its job. If the media cannot do its job, democracy will not function.

6. This matter concerns an urgent reconsideration application in terms of Rule 6(12)(c)[1] of the Uniform Rules of Court ("**Uniform Rules**") — alternatively the confirmation or discharge of a *rule nisi* — of an order by Holland-Muter J,[2] which was granted in camera and *ex parte* and which directed the Respondents to return certain documents to the Applicants and interdicted the Respondents from any further publication based on these documents. The Respondents, the subject of the order, are investigative journalists.[3]

7. These Heads of Argument are submitted on behalf of the South African National Editors' Forum ("**SANEF**"), the Media Monitoring Africa Trust ("**MMA**"), and the Campaign for Free Expression ("**CFE**") (collectively **the free expression *amici***).

[1] "A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order."
[2] Caselines Master Bundle, 001-8 – 001-14.
[3] Caselines Master Bundle, 09-49, paras 1-2.

The free expression *amici* are all not-for-profit organisations with a particular focus on the right to freedom of expression and media freedom. Operating in the public interest, they promote the development of a free, fair, ethical, and critical media culture in South Africa. They share a commitment to the promotion of human rights and the constitutional values of openness and accountability.[4]

8. The issues to be determined in this matter will have a significant impact on the constitutionally enshrined right to freedom of expression in general, and the freedom of the press and other media in particular.[5] The free expression *amici* seek to assist this Court by providing the context through which this matter should be considered, particularly in relation to the heightened protections which *must* be afforded to journalists in their own right *and* for the sake of their readers, audience, and the public-at-large.

9. The free expression *amici* advance three submissions to assist this Court with international and comparative foreign law guidance in interpreting section 16, read with section 39(1)(b) and (c),[6] of the Constitution:

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[4] Caselines Master Bundle, 11-5, para 4.

[5] Section 16 of the Constitution provides:

"(1) Everyone has the right to freedom of expression, which includes—
  (a) **freedom of the press and other media;**
  (b) freedom to receive or impart information or ideas;
  (c) freedom of artistic creativity; and
  (d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to—
  (a) propaganda for war;
  (b) incitement of imminent violence; or
  (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm." (Own emphasis.)

[6] Section 39(1) of the Constitution provides:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum—
  (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  (b) **must consider international law**; and

9.1. First, the obligations on States to ensure a favourable environment for media freedom that protects and enables journalism.

9.2. Second, the essential role of journalistic sources for effective newsgathering and timely reportage on public interest matters.

9.3. Third, the immense harm of in-camera *ex parte* applications and orders on investigative journalism.

10. We address each of these arguments in turn.

AN ENABLING ENVIRONMENT FOR MEDIA FREEDOM MUST BE CREATED

The importance of expressive rights and media freedom

11. Over the past two decades, the Constitutional Court has emphasised the importance of the right to freedom of expression, and the freedom of the press and other media, in section 16 of the Constitution, locating it "*at the heart of a democracy*" and identifying it as an "*instrumental function as a guarantor of democracy*".[7] More recently, the Constitutional Court has confirmed that freedom

(c) **may consider foreign law**." (Own emphasis.)
See, among others, *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28, 2021 (11) BCLR 1263 (CC) at para 114 ("***Zuma***"), on section 39(1)(b) of the Constitution which provides that Courts, when interpreting rights in the Bill of Rights, must consider international law.

[7] *South African National Defence Union v Minister of Defence* [1999] ZACC 7 (CC) at para 7 and *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11 (CC) at para 141.

of expression "*is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm*" because it "*is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability*".[8]

12. Importantly, our Courts have also emphasised the particular role of the media as "*key agents*" in the advancement of freedom of expression.[9] In *Print Media,* the Constitutional Court described the press as "*a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy, unimpeded media.*"[10]

13. In addition to the constitutional protection of the right to freedom of expression, and the primacy it is given by our courts, it is a right expressly recognised in a multitude of international treaties,[11] and the bodies tasked to interpret those treaties.

14. The United Nations Human Rights Committee ("**UNHRC**") – responsible for interpreting the International Covenant on Civil and Political Rights ("**ICCPR**"), observed that—

[8] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 (CC) ("***Qwelane***") at para 68, quoting Economic Freedom Fighters v Minister of Justice and Correctional Services [2020] ZACC 25 (CC) at para 1.
[9] *Khumalo and Others v Holomisa* [2002] ZACC 12 at para 22.
[10] *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22 ("***Print Media***") at paras 53-54.
[11] International Covenant on Civil and Political Rights (1976) at article 19; African Charter on Human and People's Rights (1986) at article 9; Declaration of the African Commission on Human and Peoples' Rights on Freedom of Expression and Access to Information (2019) at principle 1.

> "[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society."[12]

15. Most recently, a 2022 report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression ("**UNSR on Free Expression"**) highlighted that the—

> "societal relevance of independent, free and pluralistic news media – as a pillar of democracy, a tool to support accountability and transparency, and a means to sustain open deliberation and encourage the exchange of diverse views – underscores the importance of journalism as a public good."[13]

16. As a result, the right to freedom of expression, inclusive of the freedom of the press and other media and the right to receive and impart information,[14] is a constitutionally and internationally protected right, and the media's role in the advancement of these "expressive rights"[15] cannot be gainsaid.

The obligation to ensure an enabling environment

17. Owing to the critical role of the media in fostering open and democratic debate, states have an obligation to ensure that the media can operate in an enabling environment for media freedom. That environment must protect and enable

[12] United Nations Human Rights Committee, 'General Comment No. 34, Article 19: Freedoms of opinion and expression' CCPR/C/GC/34 (2011).
[13] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 'Reinforcing media freedom and the safety of journalists in the digital age' A/HRC/50/29 (2022).
[14] See above n 5.
[15] See *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 at para 40.

journalists, journalistic sources, and other media actors to contribute to public debate effectively and without fear of court processes that seek to intimidate, distract from, or silence public criticism. The fulfilment of this obligation is necessary for the realisation of the right to freedom of expression and the proper functioning of a democracy.

18. There are two overarching components to this obligation:

18.1. First, it must be fulfilled by the executive, legislative, and judicial branches of government, including in instances where acts by "*private persons or entities*" impair the enjoyment of the right to freedom of expression.[16]

18.2. Second, the ambit of this obligation is both positive and negative, requiring all branches of government, including the judiciary, not only to refrain from infringing on the right to freedom of expression but also to take positive steps to ensure that the right is realised.[17]

19. The content of the obligation is captured in two recent statements from international and regional human rights bodies.

[16] Section 8(1) of the Constitution. See further General Comment 34 above n 12 at para 7.
[17] *Qwelane* above n 8 at para 50.

Joint Declaration on Media Freedom and Democracy

20. Drawing on recent guidance from multiple key mandate holders in international fora, including the UNSR on Free Expression, in their *Joint Declaration on Media Freedom and Democracy*[18] ("**Joint Declaration**"), the scope of this obligation includes a positive obligation to create an enabling environment for media freedom, which includes:

20.1. Measures for the safety of journalists and media workers and for their protection from threats and harassment.[19]

20.2. Measures to "*protect journalists and media outlets from strategic lawsuits against public participation*" and the misuse of the "*judicial system to attack and silence the media*".[20] In particular, states should consider that legal proceedings against journalists that are brought in bad faith harm journalistic work and the operation of the media.[21]

20.3. Ensuring the full protection of confidentiality of journalistic sources in law and in practice. Any limitations on source confidentiality should be pursuant to clearly defined exceptions set out in the law, which apply only where necessary to protect an overriding interest, with judicial

[18] The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe ("**OSCE**") Representative on Freedom of the Media, the Organization of American States ("**OAS**") Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights ("**ACHPR**") Special Rapporteur on Freedom of Expression and Access to Information in Africa ("**mandate holders**"), Joint Declaration on Media Freedom and Democracy (2023).
[19] *Id* at Recommendation for States (e).
[20] *Id* at Recommendation for States, (f).
[21] *Id*.

authorisation, and in compliance with international human rights law.[22] Additionally, "*[w]histleblowers' ability to resort to the media should be correspondently protected*".[23]

21. In order for the media to fulfil their role and watchdog function in a democratic society, the Joint Declaration recommends that states should refrain from unduly interfering with the right to freedom of expression, in particular, states should "*ensure that any restrictions on the right to freedom of expression comply with international human rights standards*"[24] and that "*legal frameworks should not be abused to illegitimately obstruct the work of independent media*".[25]

The Declaration of Principles on Freedom of Expression and Access to Information in Africa

22. The African Commission on Human and Peoples' Rights recently released its *Declaration of Principles on Freedom of Expression and Access to Information in Africa*.[26] It provides that "*the right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.*"[27] In order to promote this right, states must take measures to prevent attacks on journalists and other media practitioners, including acts of intimidation or threats undertaken by State and non-State actors.[28]

[22] *Id* at Recommendation for States, (g).
[23] *Id*.
[24] *Id* at Obligation to refrain from violating media freedom, (a).
[25] *Id*.
[26] African Commission on Human and Peoples' Rights, 'Declaration of Principles on Freedom of Expression and Access to Information in Africa,' (2019).
[27] *Id* at principle 19(1).
[28] *Id* at principle 20(2).

23. In essence, the obligation to ensure an enabling environment is to ensure conditions in which expressive rights and vigorous public debate can thrive. This requires an environment in which the media are able to exercise the right to freedom of expression and report freely on matters of public interest without threats and without fear, intimidation, and harassment.[29] This requires that at a minimum, safety, security and protection are effectively guaranteed in practice for media actors, and there is an expectation that they can contribute to public debate without fear, and without having to modify their conduct due to fear.[30]

Conclusion

24. Proceedings brought *ex parte* and in-camera that require the handover of source material and that interdict journalistic reporting unquestionably limits the right to freedom of expression and is inconsistent with the state's obligation to ensure an enabling environment for media freedom.

25. The free expression *amici* submit that within the context of this matter the primacy of constitutionally-recognised expressive rights, read in terms of the international human rights framework, should be considered along with the corresponding obligation to ensure an enabling environment for the realisation of these rights.

[29] *Maughan v Zuma and Others* [2023] ZAKZPHC 59 ("***Maughan***") at para 133.
[30] Council of Europe, Recommendation of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (CM/Rec, 2016, 4) at paras 6, 11, and 18.

FREEDOM OF EXPRESSION AND INVESTIGATIVE JOURNALISM

26. According to the United Nations Educational, Scientific, and Cultural Organisation ("**UNESCO**"), investigative journalism involves systemic, in-depth research and reporting often linked to the unearthing of secrets. This category of journalism is primarily aimed at exposing public matters that concern people or groups in positions of power and involves secret, confidential, and open sources and documents.[31] The gathering and disclosure of information is a key component of investigative journalism and comprises three parts:

    26.1. A source capable of shedding light on what is hidden;

    26.2. A platform to disseminate information; and

    26.3. A legal and political environment that effectively protects both.[32]

The newsgathering-publication spectrum

27. In *Bizottság v Hungary*, the European Court of Human Rights ("**ECHR**") held that "*the gathering of information is an essential preparatory step in journalism and*

[31] UNESCO, 'Story-based inquiry: a manual for investigative journalists' (2011); and Global Investigative Journalism Network 'What is Investigative journalism' https://gijn.org/investigative-journalism-defining-the-craft/.
[32] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/70/361 (2015) at para 1.

an inherent, protected part of press freedom".[33] Further, a former UNSR on Free Expression, Frank La Rue, found that journalists—

> "observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole."[34]

28. In order to do so, journalists are required to make information available in a way that is understood. Throughout this process, and especially in matters involving the public interest, the ECHR held in *Társaság* that:

> "The most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern, even measures which merely make access to information more cumbersome."[35]

29. This heightened scrutiny is necessary for two reasons:

    29.1. First, in recognising the newsgathering-publication spectrum, courts should be slow to apply an overly rigorous approach to how journalists gather and publish information in order to avoid unduly deterring journalists from discharging their function as society's "watchdogs".

[33] Magyar Helsinki Bizottság v Hungary 18030/11 ECHR (2016) at para 130; and *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* 913/13 ECHR (2017) at para 128.
[34] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/20/17 (2012) at paras 3-4.
[35] *Társaság A Szabadságjogokért v Hungary* 37374/05 ECHR (2009) at para 50.

29.2. Second, interventionist or overly rigorous approaches may have the impact of deterring whistleblowers from disclosing information they may consider to be in the public interest. Without sources willing to disclose wrongdoing, investigative journalism cannot exist.

Whistle-blowing in the context of private actors

30. It is well established that sources and whistle-blower protection "*rest upon a core right to freedom of expression*" and that without protection "*many voices would remain silent and the public uninformed*", which is why "*keeping the identity of journalists' sources confidential is protected by the rights to freedom of expression and the media*".[36] This applies equally to whistle-blowing in both the public and private sectors.

31. The following factors are vital to appreciate the role and importance of investigative journalists' sources:

31.1. Obtaining information from private entities is often only enabled by whistle-blowers being able to disclose information in the public interest. This method of obtaining information only works when there are sufficient protections in place.

[36] *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3 (CC) at para 115.

31.2. When considering the balancing exercise to be conducted when competing interests are at stake, the full impact of disclosure on the private actor must be weighed against the interference of the whistle-blower's right to freedom of expression.[37] This requires balancing the relative weight of the disclosed information, having regard to its nature and the extent of the risk attached to its disclosure against the public interest in the disclosure of that information.[38]

31.3. In cases concerning the protection of whistle-blowers, in which the disclosure by an employee of a private party is in breach of an agreement not to disclose confidential information obtained in the workplace, Courts should focus on establishing whether the disclosed information is in the "public interest".[39]

31.4. Courts have recognised the duty of loyalty and discretion when assessing whistle-blower cases in the context of state employees. Given the distinction between state and non-state actors, the duty of loyalty and discretion to be taken into account in assessing whistle-blowing cases should apply to a lesser degree where the disclosure of information was by a private-sector employee.

[37] *Halet v Luxembourg* 21884/18 ECHR (2023) at para 148.
[38] *Id* at para 201.
[39] *Id* at para 133.

ECHR

32. In *Goodwin v United Kingdom*,[40] a journalist obtained information from a source regarding a private company. The journalist had no reason to believe that the information derived from a stolen or confidential document. It later emerged that the information derived from a draft of the company's confidential corporate plan. The company sought an *ex parte* interim injunction restraining the publication of any information derived from the corporate plan. The High Court ordered the journalist to disclose his notes on the grounds that it was in the interest of justice. He refused and the Court imposed a fine upon him. Following various appeals, the matter came before the ECHR. The journalist alleged that the disclosure order constituted a violation of the right to freedom of expression.

33. The ECHR, in considering whether the interference into freedom of expression was necessary in a democratic society emphasised that the "*protection of journalistic sources is one of the basic conditions for press freedom*" and "*without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest*" and "*as a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected*".[41]

34. The ECHR found that the private company's interests in eliminating the threat of damage through dissemination of the confidential information and the unmasking

[40] *Goodwin v United Kingdom* 28957/95 EHCR (2002).
[41] *Id* at para 39.

of the disloyal employee, even when considered cumulatively, did not outweigh the vital public interest in protecting the journalist's source.[42]

35. In the Court's view, there was not a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim. The restriction which the disclosure order entailed on the journalist's exercise of his freedom of expression could not be regarded as having been necessary in a democratic society, for the protection of the private company's rights. Accordingly, the Court ultimately held that the disclosure order and subsequent fine violated the journalist's right to freedom of expression.[43]

36. The ECHR reached a similar conclusion in *Financial Times Ltd v United Kingdom*[44] – a case with stark similarities to the present, and a South African flavour. Interbrew, a Belgian brewing company had brought civil proceedings to obtain leaked documents from the media. It claimed the documents had been doctored to suggest Interbrew intended to make a takeover bid for South African Breweries. The allegedly misleading information was published by the media. Thereafter Interbrew suffered a drop in the value of its shares. Interbrew sought production of the documents from the Financial Times and other newspapers on the basis that it needed to identify the "source" in order to launch a civil action for breach of confidence. The English Court of Appeal upheld the disclosure order.

[42] *Id* at para 45.
[43] *Id* at para 46.
[44] *Financial Times Ltd v United Kingdom* 821/03 ECHR; (2010).

37. The ECHR reversed it. It emphasised that disclosure orders are not only detrimental to the source, "*but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources*".[45] The disclosure will also negatively affect the public, "*who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves*".[46]

38. The ECHR held that the motive of the source and the reliability of the documents could be relevant, but had to be properly established. In this case, neither an improper motive nor doctored documents had been proven.[47] It also held that, where there had already been publication, "*the aim of preventing further leaks will only justify an order for disclosure of a source in exceptional circumstances where no reasonable and less invasive alternative means of averting the risk posed are available and where the risk threatened is sufficiently serious and defined to render such an order necessary*".[48]

39. Ultimately, the ECHR concluded that "*Interbrew's interests in eliminating, by proceedings against X, the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists' sources.*"[49]

[45] *Id* at para 63.
[46] *Id*.
[47] *Id* at paras 66-7.
[48] *Id* at para 69.
[49] *Id* at para 71.

40. In the two cases concerning the disclosure of confidential sources to corporations, the ECHR has come down on the side of journalists. Even in cases where disclosure is sought for criminal prosecution, as a result of the potential consequences of restrictions, the EHCR has required that any restrictions must be "*convincingly established*" and made within the context of the interests of a democratic society in ensuring and maintaining a free press.[50]

Canada

41. The Supreme Court of Canada has adopted a similar standard for the disclosure of journalists' confidential sources. In *R v National Post*,[51] the Court considered whether a journalist could be compelled to provide a letter to the police given to him by a confidential source which, through forensic investigation, could provide evidence in the investigation of a crime.

42. The Court accepted that "*an important element in the news gathering function (especially in the area of investigative journalism) is the ability of the media to make use of confidential sources.*"[52] It accepted expert evidence that, "*unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.*"[53] The same can be said of private corporations, that often wield as much power as

[50] *Fressoz & Roire v France* 29183/95 EHRC (1999) at 17.
[51] *R v National Post* [2010] 1 SCR 477.
[52] *Id* at para 33.
[53] *Id*.

government institutions, and are an inevitable partner in corrupt government behaviour.

43. The Court ultimately adopted a four-part test for whether journalists can rely on a promise of confidentiality to a source to resist disclosure in criminal proceedings:

    43.1. The communication must originate in confidence that the identity of the informant will not be disclosed.

    43.2. The confidence must be essential to the relationship in which the communication arises.

    43.3. The relationship must be one which should be diligently fostered in the public good.

    43.4. If all of these requirements are met, the Court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.[54]

44. In *National Post*, the majority (Abella J dissenting) concluded that, while the first three factors were satisfied, the public interest in disclosure outweighed the interest in preserving confidentiality.

[54] *Id* at para 53.

45. However, in *Globe and Mail*,[55] decided just a few months later, the Court ruled against the disclosure of a journalist's source in civil proceedings between the state and a corporation. The corporation – in a pre-trial dispute about prescription – sought to ask questions of a journalist that would compel him to reveal his confidential source. The trial court had allowed them. The trial court also banned the journalist from further reporting on the matter because it could interfere in confidential settlement negotiations between the corporation and the state. The newspaper appealed both the disclosure order, and the publication ban.

46. The Supreme Court reversed both orders. On the disclosure order, it applied the four-part test it had set in *National Post*. It held that the trial judge had erred because he had never asked whether the corporation's interest in disclosure outweighed the public interest in confidentiality. It emphasised that disclosure should only be ordered if the information is not available by other means: "*Requiring a journalist to breach a confidentiality undertaking with a source should be done only as a last resort.*"[56]

47. On the publication ban, the Court applied a two-part test it had developed in earlier cases:

> "(a) Is the order necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk?

[55] *Globe and Mail v Canada (Attorney General)* [2010] 2 SCR 592.
[56] *Id* at para 63.

(b) Do the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the right to free expression and the efficacy of the administration of justice?"

48. It held that further publication was unlikely to interfere with the corporation's ability to negotiate a settlement. More importantly, it held that even if it would, that could not outweigh the benefits of publication. This was litigation by the "*Government of Canada, which is seeking to recover a considerable amount of taxpayer money, on the basis of an alleged fraud against a government program.*"[57] The publication ban would "*stifle the media's exercise of their constitutionally mandated role.*"[58]

49. Lebel J ultimately concluded with the following observations that mere breach of confidentiality by a source cannot automatically be a basis to ban publication:

> "I am reluctant to endorse a situation where the media or individual journalists are automatically prevented from publishing information supplied to them by a source who is in breach of his or her confidentiality obligations. This would place too onerous an obligation on the journalist to verify the legality of the source's information. It would also invite considerable interference by the courts in the workings of the media. Furthermore, such an approach ignores the fact that the breach of a legal duty on the part of a source is often the only way that important stories, in the public interest, are brought to light. Imposing a publication ban in this case would be contrary to all these interests."[59]

[57] *Id* at para 97.
[58] *Id*.
[59] *Id* at para 98.

50. In the more recent case of *Vice Media*,[60] the Court upheld a search warrant for the provision of documents provided to journalists by a source suspected of terrorism. But one of the primary reasons is that the journalists had never given a guarantee of confidentiality to the source.

Conclusion

51. Investigative journalism – and the relationship between journalists and journalistic sources – extends beyond the newsgathering phase into the publication phase. All phases must be safeguarded by the right to freedom of expression.

IN-CAMERA *EX PARTE* APPLICATIONS VIOLATE MEDIA FREEDOM

Restraints on media freedom

52. The Committee to Protect Journalists ("**CPJ**") have expressed concern that if the interim interdict in this matter is made final it "*could imperil the country's investigative journalism, journalists' confidential sources, and whistleblowers.*"[61] Reporters without Boarders ("**RSF**") have similarly expressed concerns about the restricting impact of the first order in this matter, made *ex parte* and in-camera.[62]

[60] *R v Vice Media Canada Inc.* [2018] 3 SCR 374.
[61] CPJ, 'South African court's gag on amaBhungane raises fears for investigative journalism, sources' (7 June 2023) https://cpj.org/2023/06/south-african-courts-gag-of-investigative-outlet-amabhungane-raises-fears-for-journalists-and-sources/.
[62] RSF, 'South African court must overturn gag on media outlet's coverage of business group' (9 June 2023) https://rsf.org/en/south-african-court-must-overturn-gag-media-outlet-s-coverage-business-group.

53. These concerns, emanating from internationally renowned media freedom organisations, are warranted. Our courts, courts the world over, and international bodies have cautioned that efforts, inclusive of judicial processes that threaten or target journalists or demand the handover of sources or research material, have a chilling effect on the exercise of freedom of expression. This can discourage media participation in debates over matters of legitimate public interest.

54. As repeatedly held by the ECHR, there is significant danger in placing restrictions on a journalist's research and investigative activities (or their preparatory journalistic steps), which may hinder access to information, which is of public interest and which, in turn, may discourage those working in the media or related fields from pursuing such matters.[63]

55. There are also dangers inherent in prior restraints, where courts have cautioned that the "*news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.*"[64] Restrictions therefore require careful scrutiny and the justifications must be convincingly established in order to avoid the potential of the media "*no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely affected.*"[65]

[63] *Társaság* above n 36 at para 38 and *Amaghlobeli and Others v Georgia* 41192/11 ECHR (2011) at para 36.
[64] *The Sunday Times v The United Kingdom* (No. 2) 13166/87 (1991) at para 51.
[65] *Shapovalov v Ukraine* 45835/05 ECHR (2012) at para 68.

Weaponisation of the courts

56. An in-camera *ex parte* order that requires investigative journalists to hand over source material and which interdicts a journalistic publication raises concerns about the "weaponisation of courts" against journalists. This is compounded by the further application — the counter application — which seeks declaratory relief regarding a breach by the Respondents of the Press Code and/or the common law; an order compelling retractions or supplements to certain articles by the Respondents after the handover source documents; a defamation interdict prohibiting the publication of "speculative articles" by the Respondents; or an alternative order compelling "appropriate disclosures" to the applicants by the respondents.[66]

57. We refer this Court to a recent report presented to the United Nations Human Rights Council, by Irene Khan, the current UNSR on Free Expression.[67]

58. The report emphasises that states as well as private actors are increasingly targeting journalists and news outlets with litigation in an attempt to intimidate or exhaust the resources and morale of journalists.[68] Forum shopping, gagging journalists, legal action with the aim of intimidation, and excessive defamation suits fall within the realm of the legal and judicial harassment of journalists. This complex mesh of threats, legal restrictions, and orchestrated campaigns against

[66] Caselines Bundle, 10-1 onwards.
[67] UNSR Report on reinforcing media freedom and the safety of journalists in the digital age above n 13.
[68] *Id.*

journalists, among others, leads to a grim prognosis for media freedom and the safety of journalists.[69]

59. In an effort to mitigate against this ominous forecast, the UNSR on Free Expression has called for an end to the weaponisation of courts against journalists.[70] This report adopted by consensus at the Human Rights Council on October 2022 called on states to discourage frivolous or vexatious legal action against journalists and news outlets and take measures to protect journalists and media workers from strategic lawsuits against public participation ("**SLAPP**").

30. SLAPP suits are part of an eroding climate for media freedom. The Holland-Muter J order in this matter, coupled with the persistence of the litigation and the counter application, collectively amount to a weaponisation of our courts and pose serious threats to media freedom.

31. The recent findings in *Maughan* are also apposite to this matter: "*It is quintessential to the freedom of expression and freedom of the press to protect the abuse to intimidate, censor and silence journalists by means of SLAPP suits*".[71] These protections are required — including from the courts — to prevent such abuses.

[69] *Id* at paras 100 -103.
[70] *Id* at para 113.
[71] *Maughan* above n 29 at para 190.

32. South Africa's international obligations bind not only the executive and the legislature, but also the judiciary. It has an obligation to ensure that court processes cannot be used or abused in a way that undermines media freedom.

CONCLUSION

60. This case should never have been brought. But now that it has, it presents an important opportunity for our courts to discourage such conduct and enable an environment that allows media actors to contribute to public debate effectively and without fear of court processes that seek to intimidate, distract from, or silence public criticism. It concerns the heightened protections which *must* be afforded to journalists in their own right *and* for the sake of their readers, audience, and the public at large.

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