IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: **2023/050131**

In the urgent *ex parte* application of:	
	First Applicant
MAZETTI MANAGEMENT SERVICES (PTY) LTD	
AMMETTI HOLDINGS (PTY) LTD	Second Applicant
In *re*:	
	First Applicant
MAZETTI MANAGEMENT SERVICES (PTY) LTD	
AMMETTI HOLDINGS (PTY) LTD	Second Applicant
and	
	First Respondent
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	
STEPHEN PATRICK SOLE	Second Respondent
ROSHAN MICAH REDDY	Third Respondent
DEWALD VAN RENSBURG	Fourth Respondent

APPLICANTS' HEADS OF ARGUMENT
(MAZETTI & AMMETTI)

Contents

A. *Introduction and overview*

1. The respondents seek the reconsideration of a rule *nisi* granted *ex parte* by the Hon. Mr Justice Holland-Muter, on 1 June 2023 ("the Order"). The return date for the rule *Nisi* is 2 October 2023. However, by the direction of Sutherland DJP the application for reconsideration has been set down for hearing on 27 June 2023.

2. The issues in the reconsideration proceedings have now become wider and include the applicants' counter-application for further relief set out in the notice of counter-application and the respondents' objections thereto by way of their application for strike out.

3. In what follows we address all of the issues which arise both in the application for reconsideration, the counter-application and objections thereto. We do so consistent with the topics and sequence of topics described in the table of contents that precede the body of these submissions. We conclude our submissions with the appropriate order the applicants ask the Court to make.

4. We contend, up front, that the respondents' position is curious and unsustainable:-

    3.1. On one hand, the respondents, with respect, fail to engage with the underlying facts of the *ex parte* application, and also the counter-application. Instead, the respondents make bald allegations, unsupported by credible evidence to advance their main contention that their conduct

enjoys unremitting constitutional protection of section 16 of the Constitution, on the ground only of their reliance on a confidential source of information, not only to continue possession of stolen documents belonging to the applicants without the latter's consent, but also to a desire to continue publication of contents of such stolen material which includes publication of private, confidential and privileged information. In the light of the respondents' bald assertion, we respectfully ask the Court to apply the discipline of *Plascon-Evans*, where there is a dispute of fact, and resolve the application on the applicants' version.[1]

3.2. But, on the other hand, the respondents adopt a position of press exceptionalism that has already been rejected by our Courts.[2] In that regard, the respondents contend, in their words, that "… *journalists - and not the courts or the public - are primarily entrusted with assessing what publication is in the public interest and what information or records must remain confidential.*"[3]

5. Whereas the real point of contention in this matter ought to be a legitimate balancing of media freedom (including the protection confidential sources of information, where appropriate and established) against the right to privacy, dignity, and reputation (including the protection of personal, privileged,

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1 *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623.

2 See, for example, Cameron J in at *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) 610C-H.

3 Supplementary Supporting and Answering Affidavit ("AA (9 June 2023)"): cl 10-105, para 71.

proprietary, and confidential information). The purpose or effect of the respondents' attitude is that they believe they can, and wish to, operate in a Constitution-free zone.

6. By taking that approach, the respondents distract the Court from what this matter is truly about. It is about the:

6.1 Rule of Law, as the yardstick against which journalists' rights to retain and publish stolen information, ought to be measured;

6.2 Fairness, where subjects of adverse media are denied their effective right of reply because journalists refuse to disclose at all the material they intend to rely on; and

6.3 Constitutionally permissible limitations, to properly balance the competing rights of media freedom and, *inter alia*, the rights to privacy and dignity other applicable constitutional claims.

7. The applicants have sought nothing more than the return of their stolen documents (which includes personal, privileged, proprietary, and confidential documents).[4] They have also sought fair treatment in the reporting by the respondents based on the stolen documents, to the extent that the respondents are entitled to retain possession thereof, and publish their contents. The applicants now seek declaratory orders whose effect is not only to vindicate their

[4] This aspect is more fully canvassed in both of the applicants' confidential affidavits.

legitimate constitutional rights, but also to protect them against unfair reporting, going forward.

8. We respectfully ask the Court to immediately consider that, despite the respondents' bald assertions to the contrary, most of the stolen documents in the respondents' possession cannot serve any sensible journalistic purpose to justify the respondents' continued possession thereof with a view to publish them in due course.

9. The respondents have not denied that (a) the documentation in their possession belong to the applicants; (b) that they are exercising effective possession and control of the documentation; (c) they continue to retain possession and control without the applicants' consent; (d) the documents concerned have been stolen from the applicants or removed from their possession and control by their former employee without their prior consent; and (e) the documents were stolen and removed from the possession of the applicants for illicit purposes, and not with the bona fide purpose of disclosing commission of an offence or for any other public interest justification.

10. The respondents have conspicuously avoided telling the Court (even subject to a limited confidentiality regime) who their alleged confidential source is. But that, too, is a distraction. As we show, elsewhere in these submissions, this matter does not concern protection or disclosure of confidential media source(s) of information. Instead, what the applicants have been able to demonstrate (and which has not been contradicted by the respondents) is that:

10.1 The stolen documentation is the subject of ongoing criminal and civil proceedings against their former employee, Mr Clinton Van Niekerk ("Van Niekerk"). Van Niekerk was a former employee of the first applicant ("Mazetti").[5] He abused his access to the server owned by the second applicant ("Ammetti"), from which he unlawfully downloaded, stole, and then distributed the stolen information.[6]

10.2 Van Niekerk was able to do this pursuant to his employment as a legal advisor (formally in the employ of the first applicant, but functionally servicing the needs of the 250 odd companies comprising the Moti Group). In that role, he knew, or ought to have reasonably been aware, of the legal protections and importance of the documents stolen by him, commensurate with the general and specific needs to protect the privilege and confidentiality of that information. He did not and has not purported to seek lawful disclosure of stolen documentation by means of legitimate

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5 Van Niekerk's employment contract and annexure is DM4, cl 03-37 – 67.

6 As an aside, the respondents attempt to grab at a bargain by contending that the applicants have no standing because "*[t]he founding affidavit made the sweeping claim that all of the "stolen documents" belonged to the applicants. The second confidential affidavit now reveals that this was untrue. That affidavit refers to birth certificates and other documents that clearly do not belong to either of the applicants but to natural persons, who are not before the Court. It also refers to alleged "intellectual property" belonging to "a Moti Group company" other than the applicants*" (see, AA (20 June 2023): cl 10-103 para 62). But that misses the point. The original owners of the information (who are all related to or part of the Moti Group) caused the information to be stored on Ammetti's server. Van Niekerk stole the information from Ammetti's server and it is <u>that</u> information that is in the respondents' possession (which the applicants contend is pursuant to Van Niekerk's theft). It is that chain of causation that gives Ammetti standing in these proceedings to secure the return of the stolen information (a) in their own right and (b) on behalf of those natural and juristic persons who stored their information on Ammetti's server. This is over and above the standing attaching to the applicants in terms of section 38 of the Constitution.

protected disclosure processes, including the applicable provisions of the Companies Act and the Protected Disclosures Act.

10.3 Van Niekerk has clearly distributed the stolen documents. He has arguably done so to the respondents directly/indirectly,[7] as well as Mr Frederick Lutzkie ("Lutzkie"), a corporate rival of the Moti Group. Van Niekerk downloaded and distributed the stolen information without any right to do so, and in breach of the terms of his employment agreement and confidentiality undertakings therein contained.

11. The respondents have not denied this. Conspicuously, they have not even put up a version to explain how the stolen documents came into their possession. They have not put up any evidence to support their claim that their confidential source or sources are whistle-blowers within the contemplation of the applicable legislative provisions. That is significant, and the Court should, with respect, draw the appropriate adverse inference against them.

12. Beyond the return of their stolen documents, the applicants seek to prevent the respondents from publishing any further defamatory and unlawful articles based on stolen documents.

13. In the light of articles previously published by the respondents based on stolen documents there is well-founded apprehension that the future articles which the

[7] This is evident from the letter of the respondents' previous attorneys: see DM15, cl 03 – 98, para 4.1 They are referred to as "*leaked*" documents see cl 03 – 180.

respondents intend to publish are aimed at portraying the Moti Group and its founder Mr Zunaid Moti in a negative light, based on the contents of the stolen documents. They have recently done so in a particularly calculated way.[8] [9] [10] [11] [12]

14. The articles themselves, when viewed collectively and given their running commentary of the so-called "Moti Files" are suggestive that the Moti Group does business in an unlawful, corrupt, and unethical manner.

15. Significantly, it is the respondents' reliance on the stolen documents which contains information pertaining to the applicants and/or the Moti Group and/or its key personnel, that allows them to *ex post facto* create the defamatory and unlawful narrative they have previously and want to continue to advance.

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8 "*The documents show that he (Zunaid Moti) enjoyed a close personal relationship with Zimbabwe's president, Emmerson Mnangagwa and its vice president, General Constantine Chiwenga, and repeatedly leaned on them when he needed help in business and personal matters*" (see, Founding Affidavit ("FA"), annexure "DM22": cl 03-147 unnumbered para 3).

9 "*The sheer extent of the questionable business practices that the documents suggest, which lead right up to the most senior political post in Zimbabwe, go some way to explaining the Moti Group's frantic attempts to plug the leak.*" (see, FA, annexure "DM22": cl 03-148 unnumbered para 10).

10 "*Moti even threw in a request for Mnangagwa's assistance in helping him obtain a diplomatic passport, ostensibly so that he would be immune from having to make disclosures at a South African inquiry related to supposedly sensitive mineral processing technology….*" (see, FA, annexure "DM22": cl 03-155 unnumbered para 5).

11 "*The Moti group concluded a secret loan agreement that at best set up a glaring conflict of interest, and at worst might have been viewed as inducement.*" (see, FA, annexure "DM23": cl 03-174 unnumbered para 2).

16. It is particularly notable that despite their smears, the respondents have themselves not reported, let alone proved, any unlawfulness on the part of the applicants (or the wider Moti Group) to the appropriate authorities.

17. The reason the applicants seek to interdict the publication of further defamatory and unlawful articles based on the stolen documents arises exactly from that factual nexus – without any objective proof, of relying solely on the stolen information, self-servingly analysed by the respondents without affording the applicants a proper opportunity to comment thereupon, and purportedly making "fair comment" in the "public interest", despite not taking any action in respect thereof – that justifies same.

18. The asymmetrical power between the applicants and the respondents, the latter having a wide readership and reach, and the means and ability to publish prejudicial and unsubstantiated articles about the applicants and the wider Moti Group further justifies the applicants' approach to the Court.

19. Yet again, it is the respondents' insistence on being able to operate in a manner that is accountable to no one, despite the Constitution clearly determining that the opposite is true, which warrants the applicants' litigation to date.

20. Ironically, and despite what the respondents actually attempt to do, by arrogating for themselves unfettered and absolute rights to unilaterally decide what may or may not be in the public interest, it is the respondents' over-simplification of the true constitutional position that they fail to engage with at all.

21. Accordingly, this Court is faced with three enquiries which, with respect, all justify being resolved in the applicants' favour, namely whether:-

21.1 the application was urgent and ought to have been heard *ex parte* and *in camera*, which the applicants submit it was given the respondents' contradictory and evasive version regarding their effective control of the stolen information;

21.2 the applicants are entitled to the return of the stolen information, which the applicants submit they are given that they are undisputedly the owners thereof, and the respondents are unable to justify their continued possession of same in circumstances where their continued retention serves no legitimate journalistic purpose; and

21.3 the applicants are entitled to prevent the respondents from publishing any further defamatory articles based on the stolen documents, which the applicants submit they are, not least for the issues arising from the origin of the stolen documents, but also because of the opportunistic and prejudicial use thereof.

22. Against the above introductory remarks we now turn to consider the relevant factual matrix within which the application and the counter-application should be resolved.

B. *Relevant factual matrix and chronology*

23. The applicants will cause a detailed chronology to be filed simultaneously with these heads of argument. In the section below, we address the facts to the extent necessary to demonstrate that the respondents' opposition falls to be rejected.

24. Mazetti was the previous employer of Van Niekerk, who is an admitted attorney.[13] In this role, he serviced the Moti Group generally, and consequently had access to information emanating from across the entire Group.

25. Whilst employed by Mazetti, during September and October 2022, Van Niekerk stole approximately 4000 private, proprietary and confidential documents relating to Mazetti and other companies within the Moti Group.

26. Van Niekerk did so by downloading them from the Moti Group's One Drive System, which is owned by Ammetti. Ammetti is the representative and administrative agent on behalf of the companies in the Moti Group.[14]

    26.1 The One Drive System is where all the Moti Group's information is stored and accessed.

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13 FA, cl 02-20, para 27 as well as employment agreement referred to *supra*.

14 FA, cl 02-17, paras 24 to 26 and cl 02-25, para 33, see AA (9 June 2023) , cl 09-86, paras 91 to 95 and cl 09-87, paras 98 to 100.

26.2 The One Drive System permit an authorised and licensed person with the relevant log-on credentials (like Van Niekerk) to access and utilise, work on, edit and download documents remotely.

26.3 This means that the One Drive System is potentially accessible from any device and do not have a copy stored on a single computer.[15]

27. Ammetti owns all the information contained on the One Drive System and is entrusted with integrity of the information, but other companies and (duly authorised) employees have access relevant to the performance of their duties.[16]

28. Van Niekerk stole documents in breach of the confidentiality undertakings he provided in his agreement of employment with Mazetti.[17]

29. Van Niekerk resigned with immediate effect on 7 October 2022.[18]

30. Prior to his resignation, Van Niekerk did not once raise any issues of alleged unlawfulness or impropriety internally despite his means and ability to do so. He did not make a protected disclosure to anyone within the Moti Group.

31. On 18 November 2022, Lutzkie, a corporate rival of the Moti Group, attached several documents to a replying affidavit in an urgent application brought by some

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15 FA, cl 02-17, paras 24 to 25.

16 FA, cl 02-18, para 26.

17 FA, cl 02-26, para 33.7 read with annexures C and D to his employment contract, cl 03-60 – 03 – 61.

18 FA, cl 02-6, para 11; cl 02-20, paras 27 to 31.

of Lutzkie's companies against companies in the Moti Group ("the Kilken application").

32. Notably:

32.1 Lutzkie had no entitlement to these documents and could not have obtained them lawfully,[19] i.e. through commercial negotiations or discovery processes.

32.2 The documents attached to the replying affidavit emanated from within the Moti Group.

33. This raised the applicants' and the Moti Group's suspicions that some of their documents had been stolen.

34. As a result of the delivery of the replying affidavit in the Kilken application, the Moti Group instructed Cyanre Digital Forensic Lab ("**Cyanre**") to undertake an investigation of the One Drive System.

35. The purpose of the Cyanre investigation was to ascertain whether there had been any breaches of its security, and whether documents had been unlawfully copied/stolen, and by whom.[20]

36. During the Cyanre investigation, it was established that:

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19 FA, cl 02-24, para 32.

20 FA, cl 02-25, para 33.

36.1 Van Niekerk had, using multiple virtual private networks, to conceal his location, downloaded approximately 4000 documents belonging to the Moti Group.[21]

36.2 These documents were identified by Cyanre in the report issued by it which forms part and parcel of the criminal docket pertaining to the criminal charges of theft against Van Niekerk.

37. The list of the stolen documents and their respective categories (dealt with below) have been made available in the two confidential affidavits.[22]

38. It is likely that Van Niekerk stole more than the approximately 4000 identified documents as listed in the Cyanre report, but these could not be ascertained at the time the investigation was concluded. The One Drive System only stores activity logs for a period of 90 days.[23]

39. The documents published by the respondents in their articles (also dealt with below) were not listed in the Cyanre report but could only have come from the Ammetti-owned server.[24]

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21 FA, cl 02-24, para 33.

22 FA, cl 02-7, para 12.

23 FA, cl 02-8, para 12.7.

24 FA, cl 02-8, para 12.8.

40. Mr Paul O Sullivan and Associates ("**POA**") provided the applicants with two "*Electronic Metadata Analysis*" reports dated 24 May 2023,[25] that indicate the origin of some documentation not forming part of the Cyanre report, demonstrates the following.

40.1 The first report prepared by POA revealed that the documents were all scanned through a printer at the Moti Group's offices.

40.2 The second report prepared by POA revealed that the metadata from the documents sent by Lutzkie's legal representatives were also scanned by a printer within the Moti Group's offices.

41. As a result of Van Niekerk's theft of the stolen documents criminal proceedings were instituted against him by David Willoughby ("**Willoughby**"), a financial director of the Moti Group.

42. Van Niekerk was arrested on 25 January 2023 attempting to flee the Republic, pursuant to a warrant of arrest issued against him.

43. An urgent *ex parte* application was issued by Van Niekerk the day after his arrest, which resulted in the warrant of arrest being set aside. Curiously, Lutzkie was also a party to those proceedings despite any disclosure of known connection between them.

[25] FA annexures DM3.1 cl 03-3 03.13, DM 3.2 cl 03-14 – 03-26.

44. Willoughby and Mazetti launched an urgent application to have the setting aside of the warrant of arrest rescinded and set aside ("the recission application").

45. The recission application is part heard in the KwaZulu Natal Division of the High Court, Durban, and is due to recommence for argument on 13 and 14 July 2023.[26]

46. Since February 2023, the respondents and the Moti Group have been engaging regarding the articles which the respondents, together with an American outfit similar to the respondents, called the Sentry, intended to write about, *inter alia*, the Moti Group's businesses.[27]

47. The line of questioning pursued by the respondents, and the articles themselves, evidence that either Van Niekerk, Lutzkie, and/or both, have given the respondents the stolen documents.[28]

48. This has not been rebutted nor denied by the respondents, with references to any objective and credible evidence.

49. The respondents intend to publish further articles in relation to the Moti Group which are based on the stolen documents under the same banner of the Moti Files.

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26 FA, cl 02 – 26, paras 34 and 35.

27 FA, cl 02 – 30, paras 38 to 55.

28 FA, cl 02 – 48, paras 56 to 59, read with annexures "DM22", "DM23" and "DM24", cl 03-147 – 189. The articles were published on 28 April, 17 May, and 18 May 2023.

50. Before the launch of these proceedings, the Moti Group attempted to engage with the respondents by, *inter alia*, requesting that the stolen documents be returned and/or that the applicants be given sight of same. [29]

51. The respondents have refused to do so, save for one occasion where only four of the various documents referred to by them had been provided.[30]

52. The inescapable conclusion is that the stolen documents which are in the respondents' possession (regardless of how it came to be and which the respondents have not denied) are those belonging to, and which were stolen from, the applicants (and the Moti Group). [31]

53. It is also incontrovertible that the respondents came into possession of such documents through illegitimate means.[32]

C. *Common cause facts*

54. It is evident that what is common cause between the parties is that:

54.1 the stolen documents emanate from the Moti Group and belongs to it;

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29 See "DM14", cl 03-94 para 9 as well as all the letters to The Sentry who were allegedly collaborating with the respondents in this regard "DM9", cl 03-75, para 8; "DM11", cl 03-85, paras 7 & 8; and "DM13", cl 03-91, para 8.

30 FA, cl 02-12, paras 15.1 and 15.2 as well as annexures "DM3.1" and "DM3.2", cl 03-3 – 03 – 26.

31 FA, cl 02-12, para 15 as well as annexures "DM3.1" and "DM3.2", cl 03-3 – 03 – 26.

32 FA, cl 02-12, para 15 as well as annexures "DM3.1" and "DM3.2", cl 03-3 – 03 – 26.

54.2 the Moti Group did not give their permission for the stolen documents to be possessed or published by the respondents or any other third party; and

54.3 the respondents have published articles (some of which are defamatory) on the Moti Group by using the excerpts of the stolen information and intend to continue doing so. The conclusions they have drawn and expressed in the articles are based solely on the contents of the stolen material.

55. These common cause facts speak directly to, and contradict, the unsupported opposition by the respondents that the applicants seek to gag them and "*force*" them to reveal their confidential sources. This is mistaken and dealt with below.

D. *Disputed Issues*

56. The only issues in dispute between the parties are:

56.1 the manner in which the respondents came into possession of the stolen documents; and

56.2 the respondents' asserted entitlement to remain in possession of the stolen documents;

56.3 and the right, if any, for the respondent to continue to publish articles based on the stolen documents in their possession.

E. *Respondent's possession of the stolen information*

57. On this score, the respondents have failed to explain the manner in which they came into possession of the stolen information.

58. Instead, the respondents have attempted to divert the Court's attention from this by baldly asserting constitutional rights that the manner in which the stolen information were obtained is of no moment.

59. In essence, they contend that journalists are entitled to obtain information from any source in any manner whatsoever.

60. In other words, the respondents contend that they have an unfettered and absolute right regardless of the countervailing or competing rights of others.

61. The only basis to do so is because they are journalists who get to unilaterally determine the public interest.

62. This undermines the foundational rule of law principles that applies to an open and democratic society as the Constitution envisions for the Republic.

63. What the respondents consequently fail to recognise, or engage with, is that all citizens including journalists are required to uphold the rule of law and to not themselves be a party to, incentivise, or otherwise condone theft.[33]

64. The applicants have identified the source of the stolen information as being Van Niekerk, Lutzkie, and/or both. Regardless of the respondents' reasons for not disclosing this, that matters less.

65. What cannot be disputed however, and what this matter truly implicates, is that the documents provided to the respondents was done so unlawfully, and that unlawfulness only gets worse given that they are the fruits of theft.

66. It is these documents that the applicants seek to have returned.

67. Van Niekerk, in accessing the One Drive System, and downloading and distributing the information from it, has committed an offence in terms of section 2,3,4,5 and 6 of the Cyber Crimes Act, 19 of 2020 ("Cyber Crimes Act").

68. Although this theft is the subject of ongoing criminal proceedings it is a significant issue that this Court can, and with respect should, take notice of.

69. Even on the respondents' own version, there are two categories of the applicants' documents in their possession: those they acquired through confidential sources (which the applicants contend is Van Niekerk, Lutzkie, and/or both – not refuted

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33 *Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others* 1991 (2) SA 117 (W) at 132I-133A.

by the respondents), and those which they acquired through "*other means*" (whatever that might mean, but in any event, not the documents the applicants seek returned).

70. The respondents' continued failure to engage with whether the stolen information falling in the first category are those which the applicants have identified in both confidential affidavits to be the same information stolen by Van Niekerk.

71. That failure undermines their claims that the continued possession of same falls within the public interest – the respondents themselves are under a duty to not perpetuate unlawfulness.

72. The respondents have not placed any credible evidence before this Court to justify why in resolving the clash between the competing rights at play, it should be resolved in their favour.

73. It is conspicuous that even though the respondents refer to the documents as being leaked, no person who meets the requirements of a whistle-blower either in terms of the Protected Disclosures Act or the Companies Act has been identified as being responsible for same.

74. That undermines any claim that such a leaker (whomever it may be), and the respondents themselves, are acting in the public interest.

75. This is especially so given that theft in our law is regarded as a continuing offence. The respondents are in possession of stolen information. They have also failed to justify their continued possession thereof.

76. That, too, undermines any exculpatory explanation advanced by the respondents that their possession and/or publication in respect of same can ever be in the public interest.

F. *Respondents' retention of the stolen information*

77. On this score, the respondents' blanket assertion is that they are entitled to retain the stolen information as they are journalists and are the beneficiary of constitutional rights which trump those of the applicants.

78. The respondents make such assertion without laying the foundation for which the stolen information is a matter of public interest.

79. There is no such thing as press exceptionalism and any rights the respondents may have, are capable of appropriate limitation.

80. The right of the freedom of the press cannot be determined solely by the claimants of that right themselves.

81. The respondents' contentions in this regard are two-fold:

81.1 Firstly, they assert that to provide the applicants with the stolen documents would reveal their confidential sources. But this is of no moment. The applicants have their own views about who the sources may be. However, by refusing to give the applicants the stolen information in their possession, the respondents are actively undermining the applicants' right and entitlement to a right of reply by withholding the information that is being used to question them. The issue of sources only arise if, in fact, those sources are Van Niekerk, Lutzkie, and/or both, in which case there is a debate to be had about the respondents' continued possession of stolen information. But in order to avoid that debate, the respondents necessarily create another difficulty for themselves over the sufficiency of the right to reply by deliberately withholding information. With respect, the respondents cannot benefit from this conduct; and

81.2 Secondly, the respondents contend that the stolen documents ought not to be returned because their return would undermine constitutional principles applicable to journalists, particularly those who allegedly act in the public interest. As already alluded to (and is addressed further below), that claim is bad because it is overly broad. The press' rights are just as subject to constitutional limitation, discipline, and control, as any other person's – even when taking the alleged public interest into account – because that is how our Constitution operates.

81.3 Simply put, and in the content of the continued retention of the stolen documents, the real point of contention is whether a generic claim of retention underpinned by an alleged public interest could be limited in light of the counter-veiling rights of, *inter alia*, privacy, dignity, and reputation. By failing to engage this debate at all, the consequence is that the respondents assert for themselves a right greater than that which is provided for in our law.

82. Moreover, the failure on the part of the respondents to engage with the content of the documents is telling.

83. This is because – much like in defamation law, when a claimant can establish that something is *prima facie* defamatory, the burden shifts onto the defendant to establish that one of the justificatory or exculpatory defences as otherwise limiting the applicable liability attaching thereto, notwithstanding the factual/legal defamation having been established.[34]

84. Consequently, and on the facts of this case, the respondents have failed to establish any factual or legal basis to rely on a public interest justification for their possession of the stolen information.

85. There is, with respect, no blanket claim of public interest that lies in the mouth of the respondents that excuses their conduct without any foundation laid therefor.

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[34] *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) at para [85].

86. There is no basis to assume that journalists have a superior status in law. The respondents do not enjoy special constitutional immunity beyond that accorded to other citizens.[35]

87. The respondents contend that to disclose the documents, even to an independent third party,[36] would in some manner reveal the identity of their alleged confidential source – even the Court.

88. Leaving aside that this is a bald claim and never properly explained, the respondents also contradict themselves, for example, by criticising the applicants for not having initially doing something similar.[37]

89. That notwithstanding, and instead of entering into a Court-sanctioned and -controlled limited disclosure process with the applicants to engage in a proper debate regarding the public interest in respect of the stolen information, the respondents self-servingly refuse.

90. Apart from this being the clearest evidence of the respondents arrogating for themselves rights in law that they do not have, it also demonstrates why the construction of a generic public interest contended for by the respondents can (at its worst, as is the case here) amount to a license for theft.

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35 *Holomisa* cited above.

36 Compare and contrast first answering affidavit ("AA (2 June 2023)"), cl 08-44, para 28, and AA (9 June 2023), cl 09-52, para 9.

37 See AA(2 June 2023), cl 08-44, para 28 and AA (9 June 2023), cl 09-52, para 9.

91. That is what occurred on the facts of this case which the respondents fail to engage with.

92. Van Niekerk took over 4,000 private and confidential documents belonging to the applicants before he resigned in breach of his obligations of confidentiality to Mazetti.

93. Those documents are now in the respondents' possession. The respondents admit that most of the documents relating to the Moti Group to which they have access emanate from the Moti Group itself[38], and the analysis on the few documents sent by the respondents to the applicants confirms that the stolen documents were obtained from the applicants[39].

94. The documents were taken from the applicants unlawfully. The respondents deny this but without providing any factual basis to do so[40]. The respondents do dispute that they are in unlawful possession of the documents, but that is a topic to which we return.

95. The respondents have used and intend to publish the contents of the stolen documents. It will not and has not said what the subject matter of those further

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38 AA (9 June 2023), cl 09-50, para 4.1.

39 DM3.1 to FA, cl 03 – 3 – 13.

40 AA (9 June 2023), cl 09-60, para 38.3.

publications will be, nor has it sought to confine its intentions to the use of any particular documents forming part of the host of documents which were stolen.

96. The respondents have one reason for receiving and retaining the stolen documents: they claims they will use them for journalistic purposes i.e. to publish their contents. This reason has two alleged components:[41]

95.1. giving up possession of the documents will reveal the respondents confidential sources which would be detrimental to their journalistic purpose; and

95.2. it is in the public interest to publish their content.

97. These components are both hollow because the respondents do not indicate what they intend to publish and what the public interest is in publishing that content. Further, the respondents do not explain how returning the information would reveal a source. It will not. The applicants do not seek it for that purpose. Both these grounds must then fail. There is therefore no lawful basis for the respondents to retain the applicants' private and confidential information and it must be returned.

41 AA (9 June 2023), cl 09-59 – 61, paras 38.2, 38.6 and 39.

G. *The manner in which the respondents obtained possession of the stolen documents*

98. In this section we briefly address the following:

97.1. the manner in which Van Niekerk took the documents from the applicants;

97.2. the requirements for the protection of sources and why the respondents have not shown why retaining the documents will protect a source; and

97.3. why the respondents have failed to justify retaining the documents to publish in the public interest.

99. Van Niekerk, using clandestine and unauthorised means, downloaded approximately 4,000 documents between 2 September 2022 and 5 October 2022 from the applicants' servers. He did so using multiple private networks to conceal his location[42]. The respondents cannot and do not dispute this fact. Van Niekerk resigned on 7 October 2022.[43]

100. At the time, Van Niekerk was well aware of the private and confidential nature of the documents and was under an obligation to protect and maintain confidentiality over this type of information.[44]

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42 FA, cl 02-25-25, paras 33.3 to 33.4.

43 DM5 to FA, cl 03 – 68.

44 DM4 to the FA, confidentiality agreement, cl03 – 64 – 5.

101. There is no question on the papers that the documents Van Niekerk took from the applicants are the documents that are in the possession of the respondents. They claim to have other documents related to the Moti Group - but those documents are not the subject of this application and the applicants do not seek them.[45]

102. This submission is strengthened by the respondents conduct in launching an urgent reconsideration application on the basis that the 48 hours provided for in the Order was clearly insufficient for them to collate the documents to which the Order applied.[46] The Order only encompassed documents stolen from the Moti Group in the respondents' possession which were provided to it by either Van Niekerk, Lutzkie and/or both.

103. The only reason they would have found the time period wholly unreasonable is if they had a significant number of documents emanating from Van Niekerk, Lutzkie and/or both. Accordingly, this Court can safely proceed on the basis that the respondents is in possession of the documentation and data stolen from the Moti Group by Van Niekerk.

104. If Van Niekerk had concerns about unlawful activity being undertaken that these documents would disclose, he had various avenues available to him to report such

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45 AA (9 June 2023), cl 09-50, para 4.2.

46 See the Order, Cl 08-48 and annexure "**DVR11**", cl 08-138, para 3 thereof to AA (2 June 2023).

activity. These include a disclosure under the Protected Disclosures Act[47] or under section 159 of the Companies Act.[48] He has pursued neither of these courses of action.

105. The Protected Disclosures Act provides a mechanism for employees to make a disclosure of a wide range of unlawful or improper conduct and to receive protection from certain occupational detriments as a result thereof.[49] The definition of disclosure is broad and provides for a range of topics on which an employee can make a disclosure as well as for a wide range of circumstance in which an employee can make a disclosure to an appropriate party outside of his employer.[50]

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47 No 26 of 2000.

48 No 71 of 2008.

49 A "disclosure" that may be protected is defined in section 1 to include:
"*any disclosure of information regarding any conduct of an employer, or an employee that the information concerned shows or tends to show one or more of the of that employer, made by any employee who has reason to believe the following:*

(a) that a criminal offence has been committed, is being committed or is likely to be committed;
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged;
(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;"

50 Section 9 provides that a disclosure may be made externally where the disclosure is made in the belief it is true, where the disclosure is not made for personal gain, it's reasonable to make the disclosure and one or more of the following requirements are met:

106. Section 159 of the Companies Act provides further protection in addition to that provided under the Protected Disclosure Act. The Companies Act provides that it applies to a disclosure by an employee, as defined in the Protected Disclosure Act, irrespective of whether the Protected Disclosures Act would otherwise apply to that disclosure.[51]

107. If a disclosure qualifies for protection under section 159, the protection afforded is broad. Section 159(4) of the Companies Act states that:

> *"A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section-*
>
> *(a)* has qualified privilege in respect of the disclosure; and
>
> *(b)* is immune from any civil, criminal or administrative liability for that disclosure."

(a) that at the time the employee or worker who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;

(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee or worker making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;

(c) that the employee or worker making the disclosure has previously made a disclosure of substantially the same information to—

(i) his or her employer; or

(ii) a person or body referred to in section 8, in respect of which no action was taken within a reasonable period after the disclosure; or

(d) that the impropriety is of an exceptionally serious nature.

[51] Section 159(1) of the Companies Act.

108. Under the Companies Act a person (including an employee) making a disclosure must reasonably have believed at the time of the disclosure that the information showed or tended to show that a company or external company, director or prescribed officer, has, amongst other things:[52]

105.1. contravened the Companies Act;

105.2. engaged in conduct that has endangered or is likely to endanger the health or safety of any individual

105.3. damaged the environment;

105.4. unfairly discriminated or condoned unfair discrimination; or

105.5. has contravened any other legislation in a manner that could expose the company to actual or contingent risk of liability or is inherently prejudicial to the interests of the company.

109. Van Niekerk did not make use of either of these mechanisms, but instead downloaded a huge range of documents and has apparently made them available in their entirety to the respondents.[53] This is not a disclosure of any particular supposed contravention or unlawful activity but simply a dump of information. Moreover, there is no suggestion that access to the stolen information was given

52 Section 159(3) of the Companies Act.

53 FA, cl 02-17, paras 24 to 26 and cl 02-25, para 33, see AA (9 June 2023), cl 09-86, paras 91 to 95 and cl 09-87, paras 98 to 100.

to the respondents in furtherance of any of the purposes contemplated in either of these two pieces of legislation.

110. Van Niekerk therefore had no legitimate purpose in taking the documents, no lawful excuse and took the documents unlawfully.

111. The applicants have an interest in protecting their own confidential information and are under a legal obligation to protect the information they hold on behalf of others which is private and confidential.

112. The applicants have identified three categories of documents, along with specific examples of these documents in each category, in respect of which the applicants have an interest in protecting:

109.1. Private information of individuals maintained by the applicants;

109.2. Legally privileged information; and

109.3. Confidential information.

113. We briefly set out the requirements for the protection of each category and why they are met in this case.

H. *Protected private and confidential information*

114. Many of the documents in the respondents' possession consist of personal private information of employees of companies in the Moti Group as well as their family

members, including Mr Moti's family members. The detail of this information is set out in the second confidential affidavit at paragraph 11.1. They include personal bank statements, identity documents, last wills and testaments, residence permits and medical records.[54]

115. In *Bernstein v Bester* the Constitutional Court confirmed that the right to privacy protects "*the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community*".[55]

116. The right to privacy is protectable *"[w]herever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play."*[56]

117. The private information involved here is further protected under the Protection of Personal Information Act, 2013 ("**POPI**").[57] We deal with this protection

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54 Second confidential affidavit, p 14 – 16.

55 *Bernstein v Bester* 1996 4 BCLR 449 (CC) at para 67.

56 *Investigating Directorate*: *Serious Economic Offences v Hyundai Motor Distributors* (*Pty*) *Ltd*: *In re Hyundai Motor Distributors* (*Pty*) *Ltd v Smit* 2000 10 BCLR 1079 (CC) par 15.

57 See definition of "personal information" under section 1 of POPI:

> *"personal information" means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—*
>
> > *(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;*
> > *(b) information relating to the education or the medical, financial, criminal or employment history of the person;*

elsewhere in these submissions. The applicants, as the entities responsible for this information in the Moti Group,[58] are obliged to protect this information from unauthorised disclosure.[59]

118. The documents described in the confidential affidavit and in the possession of the respondents are private information which the applicants have a right to and are obliged to protect.

119. The respondents have not made any attempt at demonstrating how their continued retention of such documents or the publication of information emanating therefrom, are in the public interest, let alone demonstrating that any public interest in the disclosure of such documents would outweigh the privacy and dignity rights of the individuals and entities to whom the documents relate.

(c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;

(d) the biometric information of the person;

(e) the personal opinions, views or preferences of the person;

(f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;

(g) the views or opinions of another individual about the person; and

(h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person;

58 FA, cl 2-17 – 19, paras 22 to 26.

59 Section 8 of POPI.

I. *Legally privileged information*

120. There are two forms of legal privilege: legal advice privilege and litigation privilege.[60]

121. The requirements for legal advice privilege are fivefold:

> "*The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The requirements are (i) the legal advisor must have been acting in a professional capacity at the time; (ii) the advisor must have been consulted in confidence; (iii) the communication must have been made for the purpose of obtaining legal advice; and (iv) the advice must not facilitate the commission of a crime or fraud; and (v) the privilege must be claimed [by the client]."*[61]

122. Litigation privilege covers the communications were made in confidence for the primary purpose of being laid before the adviser at a time when litigation was pending or contemplated.[62]

123. The privileged documents are dealt with at paragraph 11.2 of the applicants' second confidential affidavit and it is explained why in respect of the examples provided that each document is privileged. The documents include legal opinions

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60 See *Astral Operations t/a County Fair Foods & others v Minister for Local Government, Environmental Affairs and Development Planning (W. Cape)*, 2019 (3) SA 189 (WCC) at paras 6 -7.

61 *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) para 183 and fn 124, which cited with approval the requirements as laid out in Schwikkard et al, *The Principles of Evidence* (2ed Juta) 135-137.

62 *A Sweidan & King* (*Pty*) *Ltd v Zim Israel Navigation Co Ltd* 1986 1 All SA 190 (D) at 193.

providing legal advice, draft affidavits prepared for ongoing litigation, instructions and briefs to attorneys in relation to litigation and advice.[63]

124. The Supreme Court of Appeal has set out the considerations that apply when considering whether legal privilege has been waived:

> "*The first is that there is no difference between implied waiver and a waiver imputed by law. They are different expressions referring to the same thing. The second is that such a waiver may be inferred from the objective conduct of the party claiming the privilege in disclosing part of the content or the gist of the material. The third is whether the disclosure impacts upon the fairness of the legal process and whether the issues between the parties can be fairly determined without reference to the material. Finally, the fourth is that there is no general overarching principle that privilege can be overridden on grounds of fairness alone. The rule is 'once privileged, always privileged' and it is a fundamental condition on which the administration of justice rests. Only waiver can disturb it.*"[64]

125. These documents were taken by Van Niekerk and disclosed without permission. Further, as set out below, they are also confidential and, subject to the documents currently being in the possession of the respondents and other limited parties,[65] they remain confidential. [66]

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63 Second confidential affidavit, p 16 – 7.

64 *Contango Trading SA v Central Energy Fund SOC Ltd* 2020 (3) SA 58 (SCA) at para 48.

65 Van Niekerk and potentially the Sentry and Mr Lutzkie.

66 In *SAA v BDFM Publishers* 2016 (2) SA 561 (GJ) at 53, it was held that legal privilege does not ground a positive right to protect legal privilege but rather a negative right to refuse disclosure. In this matter, the documents are further protected by confidentiality and subject to protection.

66 *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para 28.

126. The respondents, again, do not identify what public interest is asserted in regard to the retention and disclosure of such documents, nor do they demonstrate that the violation of privilege is reasonable and proportional, having regard to any specifically defined public interest imperative.

J. *Confidential documents*

127. Confidential information, particularly information that would give a competitor an advantage over another, is "*an interest worthy of protection*".[67] This interest, the Supreme Court of Appeal has confirmed, is "*underwritten as part of [the] right to privacy guaranteed by section 14 of the Constitution*".[68]

128. The sharing of such information among competitors is generally deemed anti-competitive and therefore contrary to our competition laws.[69] This is especially so for particularised and detailed information of this sort.[70]

129. Protectable confidential information generally constitutes:

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67 *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para 28.

68 Id.

69 Sutherland and Kemp *Competition Law of South Africa* (LexisNexis, Durban) November 2017 – SI 21 at 5-91, citing Richard Whish *Competition Law* (2001) at 447.

70 Id.

"confidential information of an employer to which an employee may have access and which is of such a nature that the employee may never use it except for the benefit of the employer, and which the employee remains bound to keep secret at all times after leaving the employer's employ"[71]

130. Confidential information can be protected if the following requirements are met:

127.1. there is a proprietary, quasi-proprietary or other legal interest in the confidential information;

127.2. the information must be of a confidential nature;

127.3. the relationship must exist between the parties which imposes the duty on the respondent to preserve the confidence of information imparted to him, for example the relationship of employer and employee, or the fact that the respondent is a trade rival who has obtained confidential information in an improper manner;

127.4. the respondent must have knowledge of the confidentiality of the information and of its value. The knowledge can be express or implied. Improper use must have been made of that information, whether as a springboard or otherwise.

131. The following requirements must be met in order for information to qualify as confidential information:[72]

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71 *Knox D'Arcy Ltd and others v Jamieson and others* 1992 (3) SA 530).

72 *Alum-Phos (Pty) Ltd v Spatz and another* [1997] 1 All SA 616 (W) at 623.

128.1. first, it must involve and be capable of application in trade or industry: i.e. it must be useful;[73]

128.2. second, it must not be public knowledge and public property: i.e. objectively determined it must be known only to a restricted number of people or to a closed circle;[74]

128.3. third, the information objectively determined must be of economic value to the person seeking to protect it.[75]

132. The confidential information in the possession of the respondents includes documents containing a ferrochrome processing process, plant designs,[76] confidential commercial agreements subject to third party confidentiality rights,[77] and pricing structures with customers.[78]

133. Whilst the respondents are not competitors in the present instance, they are aware that the information is confidential and was obtained contrary to confidentiality obligations of Van Niekerk and therefore unlawfully obtained. It is

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73 Van Heerden & Neethling, Unlawful competition at 225.

74 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1948] 65 RPC 203 (CA) at 211 and 215: *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 321G-H: *Van Castricum v Theunissen and another* 1993 (2) SA 726 (T) at 731C-E.

75 *Coolair Ventilator Co (SA) (Pty) Limited v Liebenberg* 1967 (1) SA 686 (W) at 691B-C.

76 Second confidential affidavit, p19, para 11.3.71 page 19.

77 Second confidential affidavit, p 20, para 11.3.7.4 and to 11.3.7.6.

78 Second confidential affidavit, p 20, para 11.3.7.4 and to 11.3.7.8.

also alleged that both the respondents and a competitor, Lutzkie, were provided with access to the same information as part of broader scheme to harm the Moti Group. Further, given the lack of any legitimate interest in the respondents' retention or use of the information described below, it is submitted that the rights of confidentiality are enforceable against AmaBhungane in the present situation.

134. Moreover, whilst certain of the confidential information which has been published by the respondents, is apparently in the possession of the Sentry, Lutzkie and Van Niekerk, the extent of the distribution of the information is both limited and uncertain. Van Niekerk has not published any information, Lutzkie has used limited information in his court application and the Sentry has not published any of the applicants' documents.

135. The applicants concede that information already in the public domain has lost its confidentiality.[79] The actual information published by the respondents and used in court papers by Luzkie[80] is a tiny fraction of the 4,000 odd documents in the respondents' possession.[81]

136. The fact that certain of the information in the trove of documents has been published cannot mean that the applicants have lost confidentiality over other documents simply because they were leaked alongside those documents.

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79 *SAA v BDFM* para 38.

80 FA, 02-25, para 32.4.

81 Only two articles at DM22, cl 03-147 – 72 and DM23 cl-173-84 include the documents, and only limited extracts are published.

137. In sum, it is the applicants' submission that, based on the examples provided, the information under the respondents' control is private, legally privileged and confidential.

138. In the time available only a limited set of documents has been analysed and examples given, but it is submitted that given the nature of the information in those examples, as well as the lists of documents contained in CD1 making up the confidential information which demonstrate that the examples are representative, that the applicants have shown that at least the majority of the documents in the respondents' possession are private, or legally privileged and/or confidential.

139. As will be demonstrated below, the respondents have no justification for retaining these documents.

K. *The respondents have no legal basis to retain stolen documents*

140. The respondents have one stated purpose in retaining the documents - they are journalists and seek to publish the content of the documents. The respondents claim that they are entitled to retain these documents, despite the fact that they were unlawfully taken from the applicants because to deliver the documents would reveal the source who provided the stolen documents to the respondents, and it is necessary to retain the stolen documents in order to publish stories which will be in the public interest.

141. The respondents have however failed to show why retaining the documents is necessary for either of these purposes. We address each in turn.

L. *Return of documents will not reveal confidential source(s)*

142. The applicants do not dispute that journalists are entitled, in certain circumstances to withhold disclosing the identity of their sources in certain circumstances.[82]

143. This case however does not involve the disclosure of the identity of a source. The applicants do not seek such disclosure, they seek the return of documents. The return of the stolen documents in the circumstances of the case will not reveal or disclose a confidential source of information of the respondents.

144. However, the respondents adopt the position that returning the documents will indirectly reveal the identity of their source.[83] The respondents do not allege one fact to show why this is the case.[84] Their contention is a mere bald allegation unsupported by any credible evidence. It is also not accompanied by any tender

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82 *Amabhungane Centre for Investigative Journalism NPC and Another v Minister Of Justice And Correctional Services And Others* 2021 (3) SA 246 (CC) para 115.

83 AA (9 June 2023), cl 09-51, para 8.

84 AA (9 June 2023), 09-51, para 8.

of confidential disclosure to the Court itself, in order for the Court to make an appropriate assessment of the claim asserted by AmaBhungane.

145. In any event, on the facts of this case, it is not in dispute that Van Niekerk took from the applicants the documents which the applicants now seek to have returned to them. It is effectively admitted that these documents form part of the documents concerning the Moti Group,[85] to which the respondents have access. The respondents refuse to confirm whether it was Van Niekerk himself or some intermediary who was their "source" in the sense of the person who gave them the documents. The applicants have no interest in and do not seek the identity of such an intermediary if he or she exists. Van Niekerk's role in the theft of the documents is already a matter of record.

146. Therefore, there is no dispute that the documents under the respondents' control are those which Van Niekerk took from the applicants. The applicants have already confirmed this through expert analysis in any event.[86] Providing the documents in respondents possession to the applicants therefore provides no new information on this front.

147. In addition, there is no factual basis laid at all by the respondents for why returning these documents would reveal the identity of any intermediary who passed the documents on to them from Van Niekerk. The Court cannot therefore

85 AA (9 June 2023), cl 09-50, para 4.1.

86 FA, cl 02-25 -26, para 33.

simply accept the respondents' "*say-so*" that the identify of sources would be revealed.

148. This is particularly the case because even if delivering the documents would somehow reveal the identity of a source, the Court must assess the claim of source protection to determine if it worthy of protection. It is not simply there for the taking. We explain why below.

M. *The respondents have not shown why the documents ought not to be returned*

149. Section 16 of the Constitution enshrines media freedom and *"(t)he Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16".*[87] This is common cause.

150. One of the protections afforded to the media is the ability to refuse disclosure of their sources. However, that ability is limited. In *Bosasa*,[88] Tsoka J held:

> "*(I)t is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of press is fundamental and sine qua non for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This*

87 *Khumalo And Others v Holomisa* 2002 (5) SA 401 (CC) para 24.

88 *Bosasa Operations (Pty) Ltd v Basson and Another* 2013 (2) SA 570 (GSJ) para 38, as endorsed in *Amabhungane Centre for Investigative Journalism NPC and Another v Minister Of Justice And Correctional Services And Others* 2021 (3) SA 246 (CC) para 115.

essential and critical role of the media, which is more pronounced in our nascent democracy founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded." (emphasis added)

151. Tsoka J went on to state:[89]

> *"It is self-evident that the defendants are not entitled to a blanket privilege. In a case where a journalist obtains information concerning the commission or pending commission of a serious crime, it would be foolhardy for a journalist to raise the provisions of s 16 of the Constitution as his defence, in refusing to reveal his/her sources. In the present matter the sources appear to have acted out of civic duty, to expose, what in their view, constitutes corruption. The sources appear to have acted in the public interest and for the public good."*

152. The Court in *Bosasa* also noted that the journalists in that case had provided information on the sources and why protection was required stating:[90]

> *"According to the defendants the sources are in the plaintiff's employment. The sources are fearful of reprisals, should their identities be revealed. They gave the information to the first defendant on the understanding that their identities would not be revealed."*

153. It is necessary to provide such information in order to assess the claim of source protection. The limitations alluded to in *Bosasa* are not fully developed in South African law, but the foreign cases - considered in *Bosasa* - provide helpful guidance and what is required.

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89 Para 54.

90 Para 40.

154. In *Goodwin v United Kingdom*[91] the European Court of Human Rights considered that the court could require a journalist to identify of a source, but only if revealing that source was required in the public interest.[92] The question of whether the identify of a source ought to be revealed therefore involves weighing the interest in protecting that source's identity versus disclosing it.

155. In *Telegraaf Media Nederland Landelijke Media v the Netherlands*, the Third Section of the European Court of Human Rights acknowledged that the disclosure of source's identity involves a balancing exercise and that:[93]

> *"While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose (for example, by intentionally fabricating false information), courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise." (emphasis added)*

156. The Supreme Court of Canada has also indicated that in assessing a claim to reveal the identity of a source a case-by-case analysis is required and that it is central

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91 *Goodwin v. United Kingdom*, 22 Eur. Ct. H.R. 123, 10-11 (1996).

92 Para 46.

93 *Telegraaf Media Nederland Landelijke Media B.V. v The Netherlands*, app. 39315/06 (2012) at para 128.

that the source must have been promised confidentiality. The Court explained this and set out the criteria as follows:[94]

> *The scope of the case-by-case privilege will depend, as does its very existence, on a case-by-case analysis, and may be total or partial (Ryan, at para. 18). The "Wigmore criteria" consist of four elements which may be expressed for present purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good ("Sedulous[ly]" being defined in the New Shorter Oxford English Dictionary on Historical Principles (6th ed. 2007), vol. 2, at p. 2755, as "diligent[ly] . . . deliberately and consciously"). Finally, 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." (emphasis added)*

157. The Canadian Supreme Court went on to confirm that "*The media accepts that privilege can only be claimed where the communication is made explicitly in exchange for a promise of confidentiality* " and that *"[t]he fourth Wigmore criterion does most of the work. Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good)."* [95]

158. This balancing exercise - required in Europe and Canada - is acknowledged in the limited right to refuse to disclose a source noted in Bosasa and endorsed by the

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94 *R v National Post* [2010] 1 SCR 477 paras 52 and 53.

95 Paras 56 and 58.

Constitutional Court in *AmaBhungane*[96] aligns with our own constitutional jurisprudence.

159. There is no hierarchy of rights in the Bill of Rights, and the right to freedom of expression (and its implied protection of sources) must be weighed against the protection of other fundamental rights.[97] For example, the Constitutional Court has explained that one must weigh the protection of competing interests together such as the right to freedom of expression and dignity as follows:[98]

> *"The First Amendment declaims an unequivocal and sweeping commandment; s 16(1), the corresponding provision in our Constitution, is wholly different in style and significantly different in content. It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection. Moreover, the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law" (emphasis added)*

96 *AmaBhungane para 115* citing *Bosasa* para 38.

97 *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) para 55; *Khumalo and Others v Holomisa*, supra, para 25.

98 *S v Mamabolo (E Tv) And Others Intervening)* 2001 (3) SA 409 (CC) para 41.

160. It follows that the protection of sources cannot merely be asserted in bald terms to invoke constitutional protection. Secondly, it is not and cannot be absolute in its invocation. It is subject to the balancing exercise instructively reflected in other jurisdictions such as Europe and Canada. That balancing exercise is essential when assessing a claim to recognize or refuse the protection of a confidential source in South Africa.

161. In this application the applicants are seeking to vindicate rights of dignity, to privacy, and to protect legally privileged information and confidential information. The return of the information in question also serves the fundamental principle of the rule of law which is foundational to our constitutional dispensation.

162. Section 1(c) of the Constitution provides that the supremacy of the Constitution and "rule of law" are foundational values. It is an aspect of the rule of law that no one is entitled to take the law into his or her own hands and in fact that "*taking the law into one's own hands is thus inconsistent with the fundamental principles of our law*".[99]

163. On the facts in this matter, documents were taken unlawfully from the applicants. There is no claim, let along any substance, on the papers that the person who took them, Van Niekerk, did so with anything but ill-intent. The documents he took found their way to a competitor of the applicants who was in a dispute with the

[99] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 11.

applicants[100] and to the respondents. There was no attempt to follow valid whistle-blowing mechanisms and the information taken includes private and confidential and legally privileged information.

164. Against that, the respondents have not even shown how returning the information would disclose the identity of a source, have not explained why the source or sources require protection, and have not even set out that the source or sources were promised confidentiality. We emphasize that the respondents' version on the true nature of its alleged source of information has not been consistent: It began with a version the documents were "*a trove of leaked internal document*".[101] It then progressed to a version that the stolen documents were obtained from "*whistle-blowers*" . The latest version is that the documents are from a confidential source whose identity must be protected.

165. On any of the above versions the respondent simply have not established that they are entitled to retain the documents belonging to the applicants. The documents were not leaked. They were as a fact stolen. The person who stole them, and whomsoever made them available to the respondents is not a whistle-blower, within the meaning of the applicable statutory requirements. And the source in this case is not confidential at all.

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100 FA, cl 02-24 – 25, para 32.

101 See for instance, the first unnumbered paragraphs of annexure "DVR 5(a)", cl 08 – 91.

N. *There is no public interest in further publications of the stolen documents*

166. The second basis for retention of the documents is that AmaBhungane is entitled to retain the documents in order to publish articles based on the content of these documents which is in the public interest.[102]

167. In *Financial Mail*[103] in relation to information that was unlawfully obtained that such information, despite amounting to an invasion of the right to privacy by, could be justified in the public interest, but only rarely. The Appellate Division stated:[104]

> *"…in a case where the information sought to be published was obtained by means of an unlawful intrusion, there may nevertheless still be overriding considerations of public interest which would permit of it being published, it seems to me that such a case would be a rara avis and that the public interest in favour of publication would have to be very cogent indeed. In my opinion, this was not such a case. Here the information in question related to sensitive and confidential information concerning Sage's internal affairs and delicate business negotiations being conducted by it and no good reason was advanced by the appellants as to why the public should have been informed about all this or why indeed the appellants should have been permitted to use this information as the springboard for what is generally a fairly hostile article concerning Sage and its financial affairs."*

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102 AA (9 June 2023), cl 09-69, para 39.

103 *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A).

104 At 465C-D.

168. It is clear from the above quotation that the starting point is this: where information is obtained unlawfully it cannot be published. It is therefore for the party seeking to publish unlawfully obtained information to plead and demonstrate that it is in the public interest to do so.

169. In *Tshabala-Msimang*,[105] a newspaper was provided with private health records of then Minister of Health in contravention of the National Health Act,[106] which protections flowed from a person's right to privacy in respect of such records.[107] The Court held that the newspaper had no right to possess the information and was obliged to return those records. The Court stated:[108]

> *"The Sunday Times does not have any right to the medical records of the first applicant, either to possess or otherwise to have access to them. It also does not have a right to retain any copies of such records or any part thereof. In fact, in terms of the National Health Act these records are to be kept and maintained by the second applicant and access to these records is only permitted in very strict circumstances. It is the first applicant who has the right to authorise access or to deny such access. I see no reason why I should not make an order that would specify that the records pertaining to the treatment and the stay of the first applicant in the Cape Town Medi-Clinic of the second applicant, which were in the possession of the respondents, be returned to the second applicant." (emphasis added)*

170. In respect of the publication of the content of these news articles, the Court considered Financial Mail and indicated that: *"In a case where the information*

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105 *Tshabala-Msimang and another v Makhanya and Others* 2008 (6) SA 102 (WLD).

106 No 61 of 2003.

107 Para 27.

108 Para 32.

sought for publication is obtained by unlawful means, there may well be overriding considerations of public interest which would permit of its publication".

171. Axiomatically, we submit that there may also be overriding considerations of public interest which would preclude publication, depending on the facts. It is thus incumbent upon the respondents to demonstrate, not some oblique and hypothetical consideration of public interest which warrants publication generally but, indeed, a specifically articulated and defined public interest consideration which is looked at with reference to the particular documents in question.

172. However, in assessing public interest the Court in *Tshabala-Msimang* indicated that whilst freedom of the press was entrenched in the Constitution, it:[109]

> *"does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However, freedom of the press does mean that there should be no censorship. No unreasonably restraint should be placed on the press as to what they should publish."*

173. What is required under this assessment is again a balance between the rights of a person whose information may be published, and the right of the public to receive the information. As the Court explained in *Tshabala-Msimang*: *one weighs the extent of the limitation against the purpose, importance and effect of the intrusion*

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109 Para 34.

and this entails weighing the benefit that flows from allowing the intrusion against the loss that intrusion will incur.[110]

174. In deciding to allow the publication in Tshabala-Msimang, the court held that the newspaper had explained why the information to be published was in the public interest - it reflected upon the ability of a cabinet minister to carry out her constitutional duties.[111]

175. In this case the respondents have not shown any public interest in publishing further information based on the documents it has in its possession. The respondents claim public interest in the historic articles it has published as follows:

172.1. The alleged interest in relation to the Moti Group's involvement with the government of Zimbabwe in the article "*The Moti Files: How businessman Zunaid Moti cosied up to the Mnangagwa regime*".[112]

172.2. The alleged relationship between Mr Moti and a former employee of Investec published in the article "*Zunaid Moti's 'inside man' at Investec*".[113]

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110 Para 42.

111 Para 43.

112 AA (9 June 2023), cl 09-60, para 39.1.

113 AA (9 June 2023), cl 09-70, para 39.3.

172.3. The alleged business relationship between the Moti Group and representatives of the state of Botswana also published in the article "*The Moti Files: How businessman Zunaid Moti cosied up to the Mnangagwa regime*".[114]

172.4. Finally there is an alleged public interest in the way Van Niekerk was arrested in relation to his taking of the documents from the applicants published in the article "*The Moti Files: Red flags in police hunt for former Moti Group employee*" and threats allegedly made by an investigator used by the Moti Group. [115]

176. All these claims relate to past publications, and only the first two relate to documents taken from the applicants. There is no indication anywhere in the respondents' papers of what further allegation it intends publishing based on the documents and why such publication would be in the public interest.

177. As with the claims of source protection, the court cannot find it is in the public interest to allow retention of the documents which were unlawfully taken from the applicants because the respondents might one day discover something in those documents about which they will publishing in the future.

178. The respondents simply have not explained what content from the documents it wishes to publish and has not set out any basis at all for the court to find that it is

114 AA (9 June 2023), cl 09-70 – 71, para 39.5.

115 AA (9 June 2023), cl 09-71, paras 39.6-7.

in the public interest to publish anything not already published. For the avoidance of doubt, the applicants do not accept that the past articles were published in the public interest but even if they were, there is no interest in retaining the documents in relation to past publication.

179. For these reasons, the applicants submit that that the respondents have failed to show any lawful basis for its retention of the documents.

O. *The availability of limited confidentiality disclosure to balance competing rights*

180. The protection of confidentiality has been considered by our courts in numerous contexts. It has consistently been held, albeit in a different context, that the fact that documents contain information of a confidential nature "*does not per se in our law confer on them any privilege against disclosure*". [116]

181. In *Crown Cork*[117] it was held, in the context of competing rights to discovery on the one hand and protection of confidential information, on the other, that a court may place limitations upon a litigant's ordinary rights of untrammelled inspection and copying of documents discovered by his opponent where the opponent claims that

116 *Unilever plc and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) (*Unilever*) at 339J.

117 *Crown Cork & Seal Co Inc v Rheem SA (Pty) Ltd* 1980 (3) SA 1093 (W).

the documents contain his trade secrets which may be misused, that is used for purposes other than the litigation, and in furtherance of unlawful competition.

182. The suitability of such an approach where competing rights are sought to be balanced, is self-evident. There is no reason why a similar balancing exercise cannot serve as a means to safeguard the interest which journalists have in protecting confidential sources on the one hand, with the competing rights to privacy and dignity on the other hand.

183. The applicants have therefore proposed[118] a reasonable mechanism through which the nature and content of the documents may be identified, so that the public interest demands which may permit disclosure and retention, can be properly weighed against the public interest demand in prohibiting disclosure and retention. Rather than considering these competing rights in the abstract, it enables a considered evaluation with reference to each document in question.

184. In this procedure, the identities of the respondents' confidential sources are protected and will not be disclosed to the applicants or to any entities or individuals within the Moti Group or, indeed, to any person other than the applicants' legal representatives who will be subjected to confidentiality requirements.

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118 Applicants' Counter-Application ("**CA**"), prayer 5, Cl 1 – 77, read with annexure "A", Cl 10 – 80 to 83.

185. The respondents have not provided any reasons why such a limited disclosure regime would not adequately safeguard the identities of their sources whilst simultaneously affording protection to the applicants' competing rights to privacy and dignity. It is simply not addressed by the respondents.

186. The reasoning behind the court's decision in *Crown Cork* is resonant with the issues for consideration in the present matter. In making reference to the decision in *Warner-Lambert Co v Glaxo Laboratories Ltd* 1975 RPC 354 it posed the problem for consideration as follows:[119]

> *"In this respect the Court is, in my opinion, confronted with a balance or conflict of expedients. The plaintiff is entitled to be protected against infringements of its monopolies under the two patents in suit. If the defendant is in fact infringing, it should not be permitted to shelter behind a plea of secrecy. If, however, the defendant is not infringing, it is entitled to have the secrets associated with its process maintained intact. The parties are competitors in a highly competitive market. How can justice be done and at the same time effect be given to the rights of each party to the greatest possible extent?... In the present case, however, if this course (disclosure by the defendant without any restrictions) were to be adopted and the plaintiff were to fail in the action, the defendant might be seriously prejudiced. If, on the other hand, there were no disclosure, the plaintiff might be unduly hampered in proving his case. An infringer should not be assisted in protecting himself by non-disclosure of matters which in the normal way would be the subject of pre-trial discovery."*

187. The answer to the problem was given as follows:[120]

> *"In such a case a controlled measure of disclosure seems best calculated to serve the interests of justice. The course which has been taken in a number of*

119 At 1097F – G.

120 At 1097H.

such cases has been to direct disclosure to selected individuals upon terms aimed at securing that there will not be either use or further disclosure of the information in ways which might prejudice the plaintiff."

188. Nothing prevents the court from using the mechanism proposed by the applicants in order maintain the balance between the parties' competing interests in order to ensure that justice is done.

P. *Reason why the application was brought ex-parte*

189. The respondents contend that the launch of *ex parte* application was an abuse. We submit that they are mistaken for the reasons that follow.

190. As a starting point, an *ex parte* application is appropriate when the applicant can show that the giving of notice to the other side will defeat purpose or effect of the application.

191. An applicant is obliged to disclose all material facts and it is not suggested by the respondents that the applicants withheld any of the facts or events in their application.

192. It is common cause that the respondents were publishing a series of articles about Mr Moti and the Moti Group and that publication was ongoing.[121]

193. In the article published on 28 April 2023[122] reference is made to a trove of leaked internal documents[123] which the applicants have demonstrated conclusively were taken from it by an attorney employed by the Moti Group at the time, Van Niekerk.[124]

194. The respondents published this article, based on documents in their possession belonging to the Moti group and obtained unlawfully, whilst consciously refusing to provide the Moti group with copies of the documents on which the article was based.

195. The respondents published this article, based on documents in their possession belonging to the Moti group and obtained unlawfully[125], whilst consciously

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121 There is no suggestion by the respondents that publication had run its course or that no further articles were going to be published on News 24 or in the Daily Maverick. The documents are all part of a series called "The Moti Files".

122 DM22 03-47.

123 DM22 03-147, 03-149.

124 Van Niekerk has never come forward, whether on his own behalf or via an intermediary (assuming he is in witness protection, and there is not a shred of evidence to suggest he is), to explain his motives in stealing the documents from the Moti Group.

125 It is clear that the Moti Group and the applicants did not give Van Niekerk permission to take these documents. Mazetti has laid a charge of theft against Van Niekerk.

refusing to provide the Moti group with copies of the documents on which the article was based.[126]

196. The article published on 28 April 2023 includes extracts of documents, (presumably included to support the one-sided narrative of the article) which were not made available to Mr Moti before thew article was published.

197. In one of the documents there is reference to the "Aluminothermic process/Technology"[127], which is clearly a reference to a business process and technique.

198. There is a further refence to a business transaction.[128]

199. The entire article[129] demonstrates the extent to which AmaBhungane was prepared to publish about Mr Moti, based on Moti documents in their possession which they were not prepared to show him.

200. In the next article, dealing with Mr Moti's relationship with his bankers, going back to nine years ago, further private and confidential documents are blazoned all over the article.

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126 See the letter of Webber Wentzel dated 13 April 2023 DM15 03-98, para 4.1.

127 03-56.

128 03-57.

129 DM22, cl 03-47 to 03-172.

201. In a subsequent article[130] published on 17 May 2023 there is reference to "The #MotiFiles" followed by the statement "*When the first major chapter of the #Moti Files landed on 28 April….*".

202. The article ends of by stating "*Our journalists are continuing to work on follow-up articles in the #MotiFiles series*", a clear indication that further articles were being prepared and the likelihood was that Mr Moti would not be provided with the documents on which the articles would be based, or that those documents would even be identified for him to allow him to identify them himself.

203. All the objective evidence showed that there existed the real likelihood that articles would appear based on stolen and withheld documents.

204. If the respondents had been given notice of the application it is most reasonable to conclude that further publication would have taken place in the interim.

205. This aspect was pertinently raised in the founding affidavit as follows:

> *"Put differently there was no reason for AmaBhungane to previously refuse to identify to the applicants and URA, the precise stolen confidential documents, admittedly taken by Van Niekerk from Mazetti and the Moti Group, unless the intention was, and is, to hide the identity of the documents from the applicants and use them clandestinely against Mr Moti and the Moti Group in future."*[131]

130 DM24 03-85.

131 FA, cl 02-56, para 63.

206. Considering the manner in which the stolen documents were initially acquired and are now being concealed from the applicants and the Moti Group, it was reasonable for the applicants to have a real apprehension that if the respondents were to receive notice of this application, the information that they had been provided with would be at very least concealed.[132]

207. There was no reason for the respondents to previously refuse to identify to the applicants and the applicants' attorneys of record ("URA"), the precise stolen confidential documents, admittedly unlawfully removed and copied by Van Niekerk from Mazetti and the Moti Group, unless the intention was, and is, to hide the identity of the documents from the applicants and use them impermissibly against Mr Moti and the Moti Group in future (i.e. catching them unawares and publishing about them without giving them a proper right to comment).

208. This Court should find that the applicants were justified in approaching the court *ex parte* as it was clear that the relief sought was of a temporary nature and the "newsworthiness" of the material would not diminish.[133]

209. If the applicants had given notice of the application to the respondents, that in itself would have placed the applicants and the Moti Group firmly in AmaBhungane's sights and provided it with fuel to publish another article in the interim, effectively nullifying the purpose of the application.

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132 FA, cl 02-56, para 62.

133 This court can accept that the respondents were always going to anticipate the return day and so the relief would not prejudice the respondents.

Q. *The Cyber Crimes Act*

210. The Cyber Crimes Act was assented to on 26 May 2021 and the date of commencement of the relevant sections referred to herein was 1 December 2021.

211. It applied and was in force:

207.1. when Van Niekerk stole the "trove" of what the respondents initially describe as "leaked internal documents", (many of which are identified in the first confidential affidavit); and

207.2. at all times whilst Van Niekerk was employed by Mazetti.

212. Its purpose as identified in its preamble is *inter alia to create offences which have a bearing on cybercrimes……. and to provide for matters connected therewith.*

213. For ease of reference a copy of the Cyber Crimes Act will be made available to the Court.

209.1. "article" is defined as including any data, computer data storage medium which may be concerned with or connected to the commission of an offence in terms of Part I and II of Chapter 2 ".

209.2. "data" means electronic representations of information in any form;

209.3. "data message" means data generated, sent, received or stored by electronic means, where any output of the data is in an intelligible form;

209.4. "person" means a natural or juristic person;

209.5. "publicly available data" means data which is accessible in the public domain without restriction.

214. Section 2 (which is part of Part 1 of Chapter 2) renders Van Niekerk's conduct in downloading and copying documents from the Moti Group's One-Drive System an offence.

215. Section 3 provides as follows:

"Unlawful interception of data.

(1) Any person who unlawfully and intentionally intercepts data, including electromagnetic emissions from a computer system carrying such data, within or which is transmitted to or from a computer system, is guilty of an offence.

(2) *Any person who unlawfully and intentionally possesses data or the output of data, with the knowledge that such data was intercepted unlawfully as contemplated in subsection (1), is guilty of an offence.* ***(emphasis added)***

(3) Any person who is found in possession of data or the output of data, in regard to which there is a reasonable suspicion that such data was intercepted unlawfully as contemplated in subsection (1) and who is unable to give a satisfactory exculpatory account of such possession, is guilty of an offence.

(4) (4) For purposes of this section "interception of data" means the acquisition, viewing, capturing or copying of data of a non-public nature through the use of a hardware or software tool contemplated in section 4 (2) or any other means, so as to make some or all of the data available to a person, other than the lawful owner or holder of the data, (Again, emphasis added) the sender or the recipient or the intended recipient of that data and includes the:

(a) examination or inspection of the contents of the data and
(b) diversion of the data or any part thereof from its intended destination to any other destination"

216. The respondents have never owned up to the origin of the "*trove of leaked internal documents*"[134] despite being advised by URA that they were stolen by Van Niekerk. On the papers before Court, the applicants have consistently asserted that the documents reported on by the respondents have been stolen from them by Mr Van Niekerk. The respondents have not put up any countervailing version to explain how they acquired possession of the documents. We therefore submit that the only credible version which explain the provenance of the documents in the possession of the respondents is that of the applicants, and the Court should reject the respondents' version that the documents in their possession were not stolen from the applicants.

217. The respondents claim that the revelation of how the stolen documents came into their possession will reveal confidential sources of information. They contend that "*it is unlawful for a journalist to reveal their confidential sources, or to be required to do so*".[135]

218. We respectfully submit that the respondents are mistaken in their contention.

214.1. First, there is no law that we are aware of which makes conduct of a journalist unlawful when they reveal or are compelled to reveal the sources of their information, confidential or otherwise. The respondents

134 DM22, cl 03-47.

135 cl 09-38, para 13.

have not identified any such law which imposes the obligation of the kind they contend for.

214.2. Second, journalist do not enjoy protection similar to legal professional privilege. The absence of such protection was recognized much earlier by Lord Denning M.R in *Mulholland*[136], when he held at 489 to 490 –

> "*The journalist puts forward as his justification the pursuit of truth. It is in the public interest, he says, that he should obtain information in confidence and that he should publish it to the world at large, for, by so doing, he brings to the public notice that which they should know. He can express wrongdoing and neglect of duty which would otherwise go unremedied. He cannot get this information, he says, unless he keeps the source of it secret. The mouths of his informants will be closed to him, if it is known if it is known that their identity will be disclosed. So he claims to be entitled to publish all his information without ever being under any obligation, even when directed by a court or a judge, to disclose whence he got it. It seems to me that the journalists put the matter much too high. The only profession that I know which is given the privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, a necessary question in the course of justice to be put and answered. A judge is the person, on behalf of the community, to weigh these conflicting interests – to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being*

136 *Attorney General v Mulholland; Attorney General v Foster* [1963] 1 ALL E.R. 767 (CA).

> *done or, in the case of a tribunal such as this, in a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse."*[137]

214.3. Thirdly, in this case the probable source of information is known and has already been revealed.

214.4. Fourthly, there are no public interest considerations which require protection of confidentiality of the alleged source. Far from it, public interests considerations require preservation of confidentiality of the stolen documents. We rely, in this regard, on the following dictum of the judgment of the House of Lord in *Granada Television*, [138] where it was held that -

> *"As a general rule, the court should not, in my judgment, allow the media knowingly to break the law, civil or criminal, and claim munity. The media should be allowed to exploit the immunity by promising a wrongdoer concealment so that he may break the law with impunity or by rewarding a wrongdoer with a promise that the media will conceal his guilt, when the wrongdoing is committed with the object and is successful in achieving the object of enabling the media in turn to break the law provided they are successful in evading and injunction and are willing to pay damages. There is no acceptable public interest in upholding the secrecy of unlawful communications made for the purposes of unlawful publication."*[139]

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137 At 771A-D.

138 *British Steel Corporation v Granada Television* Limited [1981] 1 ALL E.R 417 (CA).

139 At 447e-f.

219. We submit that the respondents cannot hide behind the notion of the confidentiality of their sources when the identity of a known thief of Moti Group owned documents is known to the public at large (i.e. Van Niekerk). There is no basis to protect the identity of a source confidential when the world knows who that source is.

220. However, AmaBhungane's characterisation of the documents as a "*trove of leaked internal documents*" makes it clear that it (and consequently the journalists working on the ("#MotiFiles") are aware that they possess data or the output of data with knowledge that such data was unlawfully and intentionally intercepted (whether by Van Niekerk as is obvious) or another leak within the Moti Group.

221. This makes the respondents possession of the documents an offence.

222. To the extent that our courts have previously shied away from finding that the copying of documents gives rise to a vindicatory claim, this must be reconsidered in light of section 12 of the Cyber Crimes Act which provides as follows:

*"**12 Theft of incorporeal property**:*

> *The common law offence of theft must be interpreted so as not to exclude the theft of incorporeal property".*

223. Where it is an offence to possess something which belongs to another, there can be no argument that the owner can invoke civil proceedings aimed at divesting the unlawful possessor of the property stolen.

224. We also respectfully submit that Cyber Crimes Act recognises that electronically stored property can exist in multiple originals. Digital signatures are recognised by the Electronic Communications Act and it has become increasingly common for transactions which are required to be in writing to be validly concluded by an exchange of electronically or digitally signed documents over the internet.

225. In its series of #Moti Files articles the respondents state that the documents are "*leaked*," which clearly means that to the knowledge of the respondents, such documents did not come into their possession via legitimate means.

226. The Cyber Crimes Act recognises that theft of incorporeal property should not be excluded from the common law offence of theft.

227. This, we submit, means that the law must now recognise that there is no difference between breaking into a person's office and stealing a file containing original documents and accessing such person's computer and downloading electronically stored documents.

228. The gatekeeper of the Moti Group's documents, including all of those which contain personal information of its staff and others, as well as its business documents is Ammetti.

229. The effect of the Cyber Crimes Act means that there is no difference between:

225.1. Van Niekerk breaking into the Moti Group's offices and loading troves of files into a truck and handing them over to Lutzkie and/or the respondents; and

225.2. Van Niekerk downloading such files from the Moti Group's computer platform and providing them to Mr Lutzkie and/or the respondents.

230. In both instances Van Niekerk is guilty of theft and the others are guilty of receiving stolen property knowing it to be stolen.

231. This also begs the question why the respondents have steadfastly refused to separate out the documents which it knows have no journalistic value and return them to the applicants or agree to delete them.

232. The applicants did not proceed by way of a search and seizure application but obtained an order in reasonable circumstances, where the respondents could have conceded possession of those documents that have no journalistic value. Its failure to do so justified the grant of the orders.

R. *Protection of Personal Information Act*

233. POPI is premised on the constitutional right to privacy enshrined in section 14 of the Constitution, (which includes the protection of the privacy of the private communications).

234. Section 14 of the Constitution provides as follows:

"14. Privacy*.*

Everyone has the right to privacy, which includes the right not to have-

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed."

235. Whilst the right to privacy is not unassailable in certain exceptional circumstances, it exists and may be proved without further ado[140] .

236. The preamble of POPI expressly provides inter alia that: "…..*the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information"*.

> *"Personal information" is defined in POPIA and "means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to:*
> *(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, wellbeing, disability, religion, conscience, belief, culture, language and birth of the person;*
> *(b) information relating to the education or the medical**, financial, criminal** or employment history of the person;*

[140] In other words, one does not have to make out a case for privacy. On the contrary one must make out a case for an invasion of privacy.

(c) any identifying number, symbol, email address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
(d) the biometric information of the person;
(e) the personal opinions, views or preferences of the person;
(f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
(g) the views or opinions of another individual about the person; and
(h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person"

237. The starting point and purpose of POPI is to prevent the unauthorised dissemination and disclosure of personal information.

238. Once again, as regards the personal information stored on the Moti Group's One-Drive computer system, Ammetti is the gatekeeper of such personal information.

239. Section 7 of POPI provides for an exclusion for journalistic, literary or artistic purposes as follows:

"7. Exclusion for journalistic, literary or artistic purposes.
(1) This Act does not apply to the processing of personal information solely for the purpose of journalistic, literary or artistic expression to the extent that such an exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression .

(2) Where a responsible party who processes personal information for exclusively journalistic purposes is, by virtue of office, employment or profession, subject to a code of ethics that provides adequate safeguards for the protection of personal information, such code will apply to the processing concerned to the exclusion of this Act and any alleged interference with the protection of the personal information of a data subject that may arise as a result of such processing must be adjudicated as provided for in terms of that code.

(3) In the event that a dispute may arise in respect of whether adequate safeguards have been provided for in a code as required in terms of subsection (2) or not, regard may be had to-

(a) the special importance of the public interest in freedom of expression;

(b) domestic and international standards balancing the-

(i) public interest in allowing for the free flow of information to the public through the media in recognition of the right of the public to be informedÕæ and

(ii) public interest in safeguarding the protection of personal information of data subjects;

(c) the need to secure the integrity of personal information;

(d) domestic and international standards of professional integrity for journalists; and

(e) the nature and ambit of self-regulatory forms of supervision provided by the profession".

240. The burden of proof to justify the infringement of a constitutional right, rests on the party seeking to infringe the right. [141]

241. In its affidavits, the respondents have repeatedly papers refused to engage with the facts and to either admit or deny that it is in possession of personal information that it does not require for journalistic purposes.

242. It is hard to think of a more drastic invasion of Mr Moti's privacy than in the publication of his letter to "*My dearest Uncle*"[142] in one of the articles.

243. The entire article regarding Mr Moti's banking relationship with Investec is an infringement of his right to privacy as it directly deals with his financial history.

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141 See *Kauesa v Minister of Home Affairs And Others* 1995 (1) SA 51 (NM) at 55F-I.

142 The respondents' article of 28 April 2023, cl 03 – 162 – 163.

244. We submit that this type of sensationalistic reporting is aimed at that which the public may find interesting, as opposed to information in which the public has an interest.

245. The line between an invasion of privacy and journalistic freedom of expression has become completely blurred.

246. Irrespective of these instances, there is a host of protected information, identified in the first and second confidential affidavits, which the respondents have simply sidestepped and has no business retaining, notwithstanding the exception provided for in section 7 of POPI.

247. Section 7 of POPI does not excuse or override the respondents' knowledge that the documents are stolen and were acquired illegally.

248. Irrespective as to the nature and enforceability of the Press Code[143], the respondents have obtained news other than in a manner which is legal, honest and fair. In doing so it must demonstrate that public interest is in its favour.[144]

249. Clause 1.5 of Chapter 1 of the Press Code obliges the media to use personal information for journalistic purposes only.

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143 The applicable Press Code is the revised version effective from 30 September 2022, available on https://presscouncil.org.za.

144 Press Code Chapter 1, clause 1 "Gathering and reporting of news", clause 1.4. Once again we emphasise that AmaBhungane has failed to distinguish between (i) that which the public find merely interesting and (ii) that in which it has an interest.

250. Irrespective as to whether the Press Code is enforceable by a an individual or company or not, it is surely a yardstick for the purposes of determining what constitutes acceptable **use** of personal information and clause 1.5 must be considered in conjunction with the relevant provisions of POPI.

251. Use (as a noun) is defined inter alia as *availability*[145] and the respondents' access to personal information of companies and individuals forming part of the Moti Group constitutes use.

252. Ammetti as gatekeeper possesses personal information of inter alia:

249.1. staff and personnel and staff employed by the Moti Group, including employment contracts etc;

249.2. personal information of Mr Moti and his children;

249.3. confidential and sensitive business information of the Moti Group companies which is explicitly of a private and confidential nature.

253. Ammetti is not only entitled but obliged to take reasonable steps to recover that information.

254. This is not one of the instances where confidentiality must yield to higher interests.[146]

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145 Concise Oxford English Dictionary 7th Edition.

146 *Compare South African Broadcasting Corporation v Avusa Ltd and Another* 2010 (1) SA 280 (GSJ).

255. If the respondents had taken the position in the first place that it had certain documents and information which was of no journalistic value to it and was prepared to identify and surrender it to the applicants, the position may well have been different.

256. Unfortunately, the respondents' attitude was rather that it was immune to any endeavours on the part of the applicants to ascertain what it had.

257. In the circumstances the applicants were entitled to the relief sought and granted *ex parte.*

S. *Rei Vindicatio Relief*

258. It is settled law that a *rei vindicatio* is the cause of action (either by application or action) for an owner to reclaim possession of its property.

259. To do so, the applicants must show that:

259.1 they are the owners of the property; and

259.2 the respondents were in possession of the property when the application was launched.[147]

147 *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at para 8.

259.3 There can be no quarrel with the notion that the applicants are the owners of the stolen information. This much having been admitted by the respondents.

260. Our Courts have held that:[148]

> "*While Serurrier AJ was probably correct, in my respectful opinion,* ***in holding that information is, in general, not property amenable to vindication, I am in agreement with the argument advanced by the applicant's counsel, with reference, amongst other matters, to the full court's judgment in Cerebros Food Corporation, that search and seizure relief of the type sought by the applicant in the current case is nevertheless competent if it is shown to be required to protect the applicant against harm that it is able to show that it is likely to suffer as a consequence of the use of the information by the respondents in the context of unlawful competition, or breach of contract.*** *The judgment in Cerebros Food Corporation in point of fact serves as authority for the point, if such were required.*
>
> *I do not think that it matters that the applicant labelled its claim as vindicatory. If the founding papers are read in a businesslike way it is quite evident that the* ***applicant's concern is not to regain possession of any property in the sense of a thing, but rather to enforce its contractual rights in terms of the covenant in restraint of trade and to protect its position against what it alleges have been acts of unlawful competition by the respondents.*** *I am thus not persuaded by the respondents' counsel's argument that search and seizure relief was notionally incompetent on the facts alleged by the applicant. To the extent that the judgment in Waste-Tech suggests otherwise, I respectfully disagree with it."* (own emphasis)

261. In this regard, given that the applicants are claiming the return of their documents they are required to demonstrate that the property is corporeal and that there is an imminent harm which might befall them should they not be returned.

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148 *Absa Insurance and Financial Advisers (Pty) Ltd v Moller and Others* (20216/2014) [2014] ZAWCHC 176 (21 November 2014) at paras 10 and 11.

262. Although the applicants need only show a *prima facie* right, we submit that the evidence goes far beyond this, and it is clear that the respondents are in possession of the stolen documentation, without any lawful basis or justification.

263. Mazetti was Van Niekerk's employer when he stole the documents, and Ammetti was the owner, representative, and administrative agent for the various companies within the Moti Group.

264. The One Drive System, from which the documents were unlawfully copied, downloaded, and ultimately provided to third parties including Van Niekerk's previous attorneys, Mr Lutzkie and his attorneys, and the respondents.

265. Van Niekerk is not a "*whistle-blower*"[149] and has not claimed to be one.[150] [151]

266. The events which are the subject of the respondents' articles occurred years before[152] Van Niekerk took up employment with Mazetti.[153]

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149 The Protected Disclosures Act sets out parameters for communications which can be regarded as constituting "whistle blowing." Its preamble reads as follows: "To make provision for procedures in terms of which employees and workers in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees or workers in the employ of their employers; to provide for the protection of employees or workers who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith".

150 Van Niekerk does not meet the definition of a Whistle-blower in terms of section 159 of the Companies Act.

151 Applicants replying affidavit ("**RA**"), cl 10 – 37, paras 100 to 104.

152 2015-2018.

153 2 February 2022.

267. He has never come forward, whether on his own or via an intermediary, to explain the basis for his theft of the applicants' documents.[154]

268. Whilst documents or information obtained from a confidential source may be protected,[155] there is no privilege which attaches to a journalist's source and journalists can be compelled to disclose the sources of their information.[156]

269. The respondents are well aware that the documents were stolen from the applicants.

270. The applicants' attorneys Ulrich Roux and Associates ("**URA**") have advised them and their co-collaborator, The Sentry of this at every turn of the way[157] having informed them as much at every opportunity.

271. In the only response of any substance from the respondents' previous attorneys,[158] the issue of the documents being stolen is simply not addressed and must arguably be taken as admitted.

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154 Van Niekerk has never sought to justify his theft of the stolen documents, whether as lawful or excusable on some or other basis.

155 *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Others 2020 (1) SA 90 (GP)* at paragraph 38.

156 Schwikkard and Van Der Merwe Principles of Evidence, Third Edition -Private Privilege section 10.4 p 153 and the authorities referred to in footnote 230.

157 See the letters of URA DM9, cl 03 – 75 – 76, para 3; DM10, cl 03 – 81, para 3; DM12, cl 03 88 – 90, para 5; and DM14, cl 03 – 94 – 97, para 9.

158 DM15, cl 03 – 98 – 99.

272. Furthermore, the same response from the respondents that should the applicants launch an application *ex parte* (as they did) would be unlawful,[159] falls to be rejected.

273. Confronted with a deliberately recalcitrant opponent who refused to divulge the true nature and extent of the effective control they exercised over the applicants' stolen information, coupled with the respondent's unequivocal commitment to continue publishing stories about the Moti Group as was intimated in their latest article,[160] notwithstanding that to do so they would continue to use and disseminate the stolen information, justifies the applicants' conduct.

274. This Court will appreciate that extracts of documents provided are not complete - particularly where the respondents proffer a one-sided narrative in respect thereof.

275. The sufficiency of the right to reply as enshrined in the Press Code necessarily entails the respondents furnishing the applicants with copies thereof so that, particularly in instances where the authenticity and legal origin of those documents is placed in dispute, the applicants as subjects of the adverse reporting are afforded a reasonable ability to engage therewith.

276. Anything else is an ambush.

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159 "DM15", cl 03 – 98, para 5.

160 "DM24", cl 03 – 185, last para "*Our journalists are continuing to work on follow-up articles in the #MotiFiles series*."

277. The respondents conduct themselves as though they are entitled (as of right) to take aim at the applicants and the Moti Group by subjecting them to a double-bind – by, on one hand, putting questions to them on incomplete information (itself prejudicial), and then publishing adverse comments about them anyway where they fail to sufficiently engage and/or refuse to on the basis that the information is stolen (itself prejudicial).

278. This should not be permitted.

T. *Final interdict sought*

Grounds for interdictory relief established

279. In the circumstances, it is clear that applicants are entitled to the interdict sought.

280. The applicants were required to demonstrate, on a balance of probabilities, that: -

280.1 as a matter of substantive law they have a clear or definite legal right;[161]

280.2 such a right is reasonably expected to be infringed by the respondents;[162] and

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161 *Gien v Gien* 1979 2 SA 1113 (T) 1119.

162 *Setlogelo v Setlogelo* 1914 AD 221.

280.3 and that the interdict preventing the respondents from publishing the stolen information is the only appropriate form of relief.[163]

Clear right established

281. The applicants have demonstrated that they are the owners of the stolen information.

282. The use and publication of the stolen information in the manner in which the respondent are doing so is harmful to the applicants, the Moti Group, its employees, and its associates.

283. The stolen information are confidential and proprietary and pertain to the business dealings and proprietary and confidential of various private companies within the Moti Group and should not be in the public domain.

284. This is also true in respect of privileged and confidential information as well.

285. By contrast, the limitation of the respondents' freedom of the media is necessary and restrained.

286. They know the documents they rely on are stolen, and their failure to identify and provide the applicants with copies of the documents they intend reporting on cannot be justified.

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163 LAWSA para 202.

287. We submit that the applicants have demonstrated a clear right to the relief sought.[164]

A well-grounded apprehension of harm

288. The applicants have demonstrated that the respondents have published one-sided and biased articles which are no doubt intended to impugn the Moti Group's reputation with documents they are aware have been improperly obtained and unlawfully retained.

289. The applicants have taken considerable steps to prevent the respondents utilising stolen information and at least to identify and provide copies of them for the purposes of the response sought to their questions.

290. The most recent set of questions posed to Mr Mogojane questions how a person, who was part of National Treasury and a fierce opponent of State Capture, has now switched sides clearly demonstrates a narrative aimed at defaming the Moti Group and detracting from its business and reputation.

291. All the while, the respondents continue and have indicated that it will continue to publish its sensational one-sided articles with the view to possibly disclosing more of the applicants' stolen information.

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164 FA, cl 02 – 58, para 70 and cl 02 – 59,para 71.

292. The applicants and the Moti Group have a right to protect their reputation and their business dealings from further harm at the hands of the respondents.

293. The harm the applicant has suffered coupled with the respondents' continued conduct is demonstrative of the irreparable harm they have and will continue to suffer should the relief sought not be granted.[165]

No other satisfactory remedy available

294. Prior to the launching of this application, the applicants have taken all reasonable steps to ensure that their rights and their rights to their stolen confidential documents are protected.

295. The longer the respondents remain in possession of the stolen information, they remain a constant threat to the applicants and the Moti Group and its reputation, business and employees.

296. The applicants have even co-operated with the respondents to the extent necessary to obtain sight of any of their stolen confidential documents which remain in the active and ongoing possession of the respondents.[166]

297. The Press Code complaints mechanism does not count. That is a self-regulated mechanism that has no real powers in respect of the breach of rights that the applicants seek to protect.

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165 FA, cl 02-48, paras 56 to 59 and 02-60, para 72.

166 FA, cl 02 – 61, paras 74 and 75.

U. *Counter-application*

298. In their replying papers to the reconsideration application the applicants foreshadowed their counter-application for declaratory relief, an order for retraction of the articles published by them and for an interdict of further publication of articles based on the contents of the stolen documents in breach of the obligations they had in terms of the press code to which they are a party.[167] In addition the applicants sought an order compelling the respondents to provide a limited disclosure of the stolen documents on the terms of confidentiality set out in Annexure "A" of notice of counter-application in order to ensure that the respondents do not publish articles based on the stolen documents in the manner that is unfair.[168]

299. The applicants made it clear that the basis of the relief sought in the counter-application is the version put up by the respondents in their affidavit filed in support of the application for reconsideration.[169] The applicants also made it clear that the relief sought in the counter-application is based on facts that are common

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167 Applicant's Notice of counter-application ("CA Notice"), cl 10 – 75 to 10 – 77, paras 1 – 5.

168 Annexure A to CA Notice, cl 10 – 80 to 10 – 83, paras 1.1. to 7.2.

169 RA, cl 10 – 34, para 92.

cause and proceeded to identify those facts in support of the counter-application.[170]

300. The respondents vehemently object to the counter-application on the grounds that it is not urgent;[171] it is irregular and an abuse of court process in that it was raised for the first time as a new matter in the replying affidavit;[172] and that it lacks merit.[173] Before we address the merits of the counter-application and the respondents' contention that it lacks merit, we address the technical objections of the respondents that the counter-application is not urgent and constitutes an irregular process.

Alleged lack of urgency

301. The *ex parte* application was launched on the basis of urgency. It was considered and dealt with by the Court on an urgent basis and the relief sought therein was granted on an urgent basis. Despite their initial protestation that they would not be able to comply with the terms of paragraph 2 of the Order, the respondents then launched an urgent application for reconsideration of the Order in terms of Rule 6(12)(c) of the Uniform Rules of Court ("the first reconsideration

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170 RA, cl 10 – 35, paras 95 to 10 – 39, para 106; and also 10 – 40, para 107 to 10 – 41 para 111 of the replying affidavit.

171 The respondent's affidavit in response to counter-application ("RAA"), cl 10 – 95, paras 17 to 10 – 96, para 24.

172 RAA, cl 10 – 93, paras 5 & 6.

173 RAA, cl 10 – 93, para 7.

application").[174] The fourth respondent who deposed to the affidavit in support of the first reconsideration application made it clear that the reconsideration was sought urgently.[175]

302. The relief sought in the counter-application is urgent in the light of the defences put up by the respondents in their answering affidavit to the main application. There is no basis to delay the determination of that relief. That relief is connected to the main relief sought in the *ex parte* application and seeks to vindicate the same constitutional entitlements which the applicants have pleaded in the main application.

303. Other than the mere allegation of irregularity and abuse the respondents have not provided any basis for delaying the determination of the relief sought in the counter-application. We respectfully submit that the interests of justice require the determination of that relief, in as much as it is not only practical and convenient to do so, but also the determination of that relief will indicate the rights and obligations of the parties in dealing with the stolen documents going forward. It will also be cost- effective to do so in the circumstances of the present case.

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174 The respondent's first Rule 6(12)(c) notice, cl 08 – 1 to 08 – 2.

175 AA (2 June 2023), cl 08 – 36, para 9.

Alleged irregularity of abuse

304. This is the same theme which the respondents raised in their first reconsideration application.[176] The purpose of repeating the same theme in objecting to the determination of the counter-application is manifest. It is a clear desire by the respondents to avoid scrutiny of their conduct based on the facts that are common cause which show a breach of the obligations they voluntarily assumed under the press code.

305. We point out that until the applicants had sight of the respondents' version in the answering affidavit which was filed on 09 June 2023 the applicants were unaware that the conduct of the respondents breached the terms of the press code in the manner that has now been set out in that answering affidavit. It was only after the respondents had put up their version that the applicants, on legal advice, pursued the relief sought in the counter-application. They could not have done so before. The filing of the replying affidavit presented the appropriate opportunity for them to seek that relief.

306. What is curious about the respondents' objection is that they had proceeded to deal with the relief sought on the merits (or on their contention on the lack of merit) in the supplementary supporting and answering affidavit filed by them. There is no prejudice which redounds to their disadvantage, now that they have responded to the counter-application on its merits or lack thereof, as they contend.

176 AA (2 June 2023), cl 08 – 36, para 7.2.

307. Even if it were to be held that the relief sought in the counter-application is based on a new matter that is pleaded for the first time in the replying affidavit (which too is the founding affidavit to the counter-application), we respectfully submit that that in itself is not a basis to refuse the determination of that relief. The Court retains a discretion and we ask it to exercise its discretion in the interests of justice.

308. We therefore submit that the respondents' objection to the consideration of the counter-application should be dismissed.

Merits of counter-application

309. The replying affidavit explains the justification for each of the relief sought in the counter-application. We briefly deal with each of the relief sought in the light of the respondents' contention that there is no merit in that relief.

310. In respect of the declaratory relief sought in paragraph 1 of the notice of counter-application the applicants have explained that they have not been afforded an adequate opportunity to respond to the articles published by the respondents based on the contents of the stolen documents.[177]

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177 RAA, cl 10 – 41, para 112 to 10 – 42, para 112 – 112.1.3.

311. In respect of the order of retraction sought in paragraph 2 of the notice of counter-application the applications have explained that publication of those articles violated their to privacy, dignity and reputation. We do not repeat the analysis of the facts which we have canvassed elsewhere in these submissions. For the present purposes we submit that an order of retraction is competent even in motion court proceedings where violation of the applicants' rights has taken place.

312. In respect of the prohibitive interdict concerning future publication of the articles based on the stolen documents we emphasise that it is common cause that the respondents have made it clear that they intend to continue to publish further articles based on the contents of the stolen documents in order to perpetuate a media narrative that they have already started in the previous articles they have published. We also emphasise that the further publications the respondents intend to make will likely repeat the similar inferences drawn by them from the contents of the stolen documents they have made in the previous articles they published.

313. Whilst we accept that our courts do not readily grant prohibitive interdicts of the kind that they applicants seek in this case, we respectfully submit that the circumstances of the present case are exceptional and justify the grant of the relief sought because:

310.1. the defamatory allegations are based on stolen documents. There is nothing more that the respondents have done by means of investigative journalism which justify the inferences they draw and intend to draw from the contents of the stolen documents;

310.2. the respondents have refused to meaningfully engage with the applicants in order to ensure fair reporting; and

310.3. the respondents have sought to place themselves above the law and even refuse to accommodate publication of further articles in a manner that respect and protect the applicants' rights to privacy, dignity and reputation.

314. Having regard to the special circumstances of the present application, we submit that the prohibitive interdict sought by the applicants is justified.

315. The common theme of the defence raised by the respondents to divert attention from their failure to comply with their obligations under the Press Code is that this Court has no jurisdiction to consider the applicants complaints based on the breach of the press code. They contend that only the Press Council has jurisdiction to consider and pronounce upon the applicants' complaints.

316. We respectfully submit that the respondents are mistaken. First, the press code is a voluntary regulatory machinery. Whilst the applicants are entitled to approach the Press Council to lodge a complaint or complaints against the respondents, they are not obliged to do so, especially whereas here they seek to ventilate and

vindicate their fundamental rights. At best for the respondents, the press code is a guide for their conduct, but not an instrument which excludes the jurisdiction of this Court to entertain and determine the violation of the applicants' fundamental rights by the respondents.

317. Secondly, the press code does not and cannot be interpreted to vest upon the Press Council the exclusive jurisdiction to deal with and determine breaches of fundamental rights. Any such interpretation of the Press Code would render it unconstitutional. The Court must prefer an interpretation which makes the press code consistent with the provisions of the Constitution, and thus preserve the inherent constitutional jurisdiction vested upon this Court in terms of sections 34 and 165 of the Constitution.

318. We therefore submit that the respondents' contention of exclusive jurisdiction should be dismissed.

319. Finally on the counter-application we point out that the applicants also seeks a judicially sanctioned order of limited confidential disclosure. Here too, the applicants have explained the basis of that order and we do not repeat the analysis of the common cause facts on which they relied to justify that order.

320. We respectfully submit that the limited order of disclosure sought along *Crown Cork* terms is justified in the circumstances of the present case. It will also provide the type of balance which our courts have adopted whenever there is a case of competing interests.

321. For all of the above reasons we submit that the applicants are entitled to the relief sought in the counter-application

U. *Conclusion*

322. Having regard to the above submissions we ask the Court to confirm the *rule nisi* issued by Justice Holland-Muter on 1 June 2023 as modified by Justice Van Nieuwenhuizen on 3 June 2023. We also ask the Court to grant the relief sought in the notice of counter-application.

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