IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO 2023-050131

In the matter between:

MAZETTI MANAGEMENT SERVICES (PTY) LTD	**1ST APPLICANT**
AMMETTI HOLDINGS (PTY) LTD	**2ND APPLICANT**

and

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	**1ST RESPONDENT**
STEPHEN PATRICK SOLE	**2ND RESPONDENT**
ROSHAN MICAH REDDY	**3RD RESPONDENT**
DEWALD VAN RENSBURG	**4TH RESPONDENT**

RESPONDENTS' HEADS OF ARGUMENT: 27 JUNE 2023 HEARING

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INTRODUCTION

> "*When you tear out a man's tongue, you are not proving him a liar, you are only telling the world that you fear what he might say.*"[1]

1. This case goes to the heart of the right to know. It concerns a court order which, if confirmed, will effectively extinguish the right of journalists to receive and impart public interest information that is leaked by confidential sources.

2. The question before this Court is whether it is intrinsically unlawful for journalists to receive, and to publish, leaked information. We submit that it clearly is not.

3. The respondents ("**amaBhungane**" and three of its investigative journalists) this year published a series of exposés about "**the Moti Group**", a business empire comprising some 250 companies with interests in inter alia mining, metal processing, aviation, security, property and finance, headed by Mr Zunaid Moti.[2]

4. The exposés relied partly on internal Moti Group documents, which formed part of a cache of electronic files confidentially leaked to the respondents ("**the Moti Files**"). The articles revealed, among other things, Mr Moti's links to Zimbabwe's political elites, and suspicious financial flows via the Moti Group's operations in Zimbabwe,[3] as well as a secret loan to an Investec employee tasked with limiting the bank's exposure to the Moti Group's ballooning debt.[4]

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1 Tyrion Lannister in George RR Martin, *A Clash of Kings*.

2 Applicants' founding affidavit, para 10.1 (**02-6**).

3 Applicants' founding affidavit, annex DM22: amaBhungane article entitled "The Moti Files: How businessman Zunaid Moti cosied up to the Mnangagwa regime", 28 April 2023 (**03-147**).

4 Applicants' founding affidavit, annex DM23: amaBhungane article entitled "Zunaid Moti's 'inside man' at Investec", 28 April 2023 (**03-173**).

5. Frustrated by what they call "one-sided and defamatory articles"[5] (but without instituting either a Press Ombud complaint or a defamation action), the applicants (two Moti Group companies) set down an urgent, ex parte and in camera application for two far-reaching forms of relief:[6]

    5.1. a final order compelling the respondents, within 48 hours, to "return" the leaked documents ("**the return relief**");[7] and

    5.2. an interim order restraining them from publishing anything based on the leaked documents pending a return date ("**the restraint relief**").[8]

6. This order ("**Holland-Müter J order**") was granted, in the respondents' absence, and a return date was set for five months later.[9]

7. This was a drastic and draconian violation, not only of the respondents' right of access to courts (which includes the right to be heard before an order is granted against them), but also of the right to freedom of the press and the public's right to know.

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5 Applicants' founding affidavit, para 59.6 (**02-54**).

6 Applicants' amended notice of motion, 1 June 2023 (**01-9** to **01-13**).

7 Id, prayer 3.

8 Id, prayer 4.

9 Order of Holland-Müter J, 1 June 2023 (**001-8**). Facing the 48-hour deadline to "return" the leaked documents, the respondents approached the Court on Saturday 3 June 2023, where the Honourable Acting Justice Van Nieuwenhuizen urged the parties to agree to a variation which would suspend the "return relief" (which he called "obviously inappropriate") so that the matter could be heard on a less urgent basis – respondents' second affidavit, para 11 (**09-52**).

8. The respondents are thus asking this Court urgently to reconsider and set aside the Holland-Müter J order under Rule 6(12)(c), or to discharge the rule nisi.[10] They have set the matter down for reconsideration and urgently anticipated the rule nisi, as they are entitled.

9. Purportedly in response, the applicants have since filed a "counter-application" against their own original application, seeking new and more extensive relief on new facts (in reply, no less).[11] This gambit is obviously irregular and impermissible, and the "counter-application", as well as all its associated documents, should be struck out.[12] We will deal with the "counter-application" in separate written submissions. For present purposes, we merely note that it loudly attests to the flaws in the original order. If the applicants truly had faith in the competence and merits of their original, ex parte urgent application, they would simply have stood by it – rather than belatedly trying to improve their position through a defective further process.

10. In these heads of argument, we will address the following:

    10.1. the salient principles of press freedom;

    10.2. the brief background;

    10.3. the proper approach to the evidence;

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[10] Notice of reconsideration under Rule 6(12)(c), intention to oppose confirmation of the rule nisi, and anticipation of the return date, 9 June 2023 (**09-14**).

[11] Applicants' replying affidavit, annex X: applicant's notice of motion in counter-application, 15 June 2023 (**10-75**).

[12] Respondents' notice to strike out, 20 June 2023 (**10-120**).

10.4. why this matter is urgent;

10.5. why the Holland-Müter J order cannot stand:

10.5.1. there was no basis to be heard ex parte;

10.5.2. there is no evidence of unlawful possession of documents;

10.5.3. there is no evidence of unlawful publication;

10.6. how the applicants have abused the court process.

SALIENT PRINCIPLES OF PRESS FREEDOM

11. Section 16(1) of the Constitution guarantees the right to freedom of expression, which includes freedom of the press and other media,[13] and freedom to receive and impart information and ideas.[14]

12. In ***Print Media***, the Constitutional Court (per Skweyiya J) elaborated:

> In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy, unimpeded media.[15]

13. Skweyiya J also cited ***Government v Sunday Times***, where Joffe J held:

> The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the

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[13] Section 16(1)(a) of the Constitution.

[14] Section 16(1)(b) of the Constitution.

[15] *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC), para 54.

> function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators.[16]

14. And in ***Midi Television***, the Supreme Court of Appeal (per Nugent JA) explained:

> It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press… The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself.[17]

15. Two vital legal safeguards of press freedom – and the free flow of information to the public – are the protection of source confidentiality and the general prohibition on prior restraint of publication.

The protection of source confidentiality

16. The press are entitled to receive information from sources on a confidential basis, and to report on it on that confidential basis. Indeed, they are ethically bound to do so.

17. The **Press Code**[18] (which is not statutory law but enjoys statutory recognition),[19] to which the respondents subscribe, states as follows (with our emphasis):

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[16] *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another* 1995 (2) SA 221 (T), 227I

[17] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA); 2007 (5) SA 540 (SCA), para 6.

[18] Press Code of Ethics and Conduct for the Print and Online Media, 2022 ("**Press Code**") – respondents' first affidavit, annex DVR3 (**08-80** to **08-85**).

[19] Section 16 of the Films and Publications Act, 1996. The Press Code is also recognised by the Information Regulator under section 7(2) of the Protection of Personal Information Act, 2013.

11. Confidential and Anonymous Sources

The media shall:

11.1 protect confidential sources of information – the protection of sources is a basic principle in a democratic and free society;

11.2 avoid the use of anonymous sources unless there is no other way to deal with a story, and shall take care to corroborate such information; and

11.3 not publish information that constitutes a breach of confidence, unless the public interest dictates otherwise.

18. In ***SABC v Avusa***,[20] this Court (per Willis J) spoke at length about the importance of source protection for freedom of the press. In addition to extensive foreign law, he also set out the following (with our emphasis):

> [30] The court accepts that one of the most valuable assets of a journalist is his or her source. Sources enable journalists to provide accurate and reliable information. Sources are often in possession of sensitive facts which they would be unwilling to disclose without a guarantee that their identities will not be revealed. The protection of journalists' sources is therefore fundamental to the protection of press freedom. As Lord Denning has observed:
>
> > [I]f [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known.[21]
>
> [31] The court also accepts that journalists in open and democratic societies throughout the world, recognise the importance of preserving the confidentiality of their sources and that they consider it to be their duty to protect their sources' confidentiality. The *Sunday Times* gives examples of a variety of media codes of conduct which recognise this duty in its answering affidavit. These codes include the SABC's Editorial Code of Ethics which provides that "We shall not disclose confidential sources of information".

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[20] *South African Broadcasting Corporation v Avusa Limited and Another* [2009] ZAGPJHC 80; 2010 (1) SA 280 (GSJ).

[21] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 at 1129.

[32] The duty to preserve the confidentiality of sources is recognised in South African law. Almost a hundred years ago, it was held in ***Spies v Vorster***,[22] that an editor should not be compelled to disclose the identity of the author of an anonymous letter because it was contrary to the public interest to compel him to do so:

> If an editor were bound to disclose the name of his correspondent there would be an end of the confidential relationship between the correspondent and the newspaper which has existed for generations, to the advantage of the public, and many an abuse would go unremedied and many a grievance unredressed because those who knew, for reasons good or bad, were unwilling or unable to allow their name to be published. However much it may be abused, as it often is, to air personal grievances and to injure, there can be no doubt that many anonymous communications have been the means of effecting valuable and wide-reaching reforms. A decision in favour of the applicant if applied in other cases might lead to very serious consequences and do much to restrain freedom of communication and breed suspicion and distrust. Its application to other causes of action might destroy that freedom of communication which is so essential to comfort and well-being.

[33] In ***S v Cornelissen***[23] it was recognised that, although a journalist did not enjoy any privilege against compelled testimony, he nonetheless had a just excuse for not testifying in a criminal trial where the police had not attempted to interview any other witnesses who could be called to give the same evidence without impinging upon the public interest in preserving the independence of journalists.

[34] In the ***Prinsloo*** case[24] Van Der Westhuizen J acknowledged that:

> it is a well-known and important consideration on the part of the media not to disclose information made available to it or their sources of information. Without going into the detail of areas or situations where this principle may be subject to debate, I accept that it is an important element of the integrity of a free press.

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[22] (1910) 31 NLR 205 at 216.

[23] 1994 (2) SACR 41 (W).

[24] *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T) at 475A-B.

19. The Constitutional Court itself has recently recognised the importance of source protection for the right to freedom of expression. In ***amaBhungane v Minister of Justice***, Madlanga J held:

> I agree that keeping the identity of journalists' sources confidential is protected by the rights to freedom of expression and the media. This Court has acknowledged the constitutional importance of the media in our democratic society, and has confirmed that "[t]he Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16". It follows that the confidentiality of journalists' sources, which is crucial for the performance by the media of their obligations, is protected by section 16(1)(a). Like the High Court, I place reliance on Tsoka J who held as much in ***Bosasa***. Relying on local and foreign authorities, he put it thus:
>
> > "[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 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."[25]

20. Journalists' source confidentiality is thus a concrete constitutional entitlement.

21. Of course, like any right, source confidentiality cannot be absolute. The African Commission on Human and Peoples' Rights has articulated the appropriate limits

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[25] *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC), para 115, citing *Bosasa Operation (Pty) Ltd v Basson and Another* [2012] ZAGPJHC 71; 2013 (2) SA 570 (GSJ), para 38. See also the High Court judgment which the Constitutional Court was confirming: *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* [2019] ZAGPPHC 384; [2019] 4 All SA 343 (GP); 2020 (1) SA 90 (GP); 2020 (1) SACR 139 (GP), para 129 et seq.

of the entitlement in the Declaration of Principles of Freedom of Expression and Access to Information in Africa, 2019:

> **Principle 25. Protection of sources and other journalistic material**
>
> 1. Journalists and other media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except where disclosure has been ordered by a court after a full and fair public hearing.
>
> 2. The disclosure of sources of information or journalistic material as ordered by a court shall only take place where:
>   a. the identity of the source is necessary for the investigation or prosecution of a serious crime or the defence of a person accused of a criminal offence;
>   b. the information or similar information leading to the same result cannot be obtained elsewhere; and
>   c. the public interest in disclosure outweighs the harm to freedom of expression.

22. We submit that this is an accurate statement of the conditions that must be met before a court can order a journalist to disclose any material held for journalistic purposes, including those that identify confidential sources of information.

The prohibition on prior restraint

23. An interdict prohibiting publication (whether interim or final) is known as a judicial "prior restraint", or more colloquially as a "banning order" or "gagging order".

24. In ***Print Media***, the Constitutional Court (per Skweyiya J) held:

> The case law recognises that an effective ban or restriction on a publication by a court order even before it has 'seen the light of day' is something to be approached with circumspection and should be permitted in narrow circumstances only.[26]

[26] *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC), para 44.

25. Skweyiya J quoted with approval from the Court of Appeal of England and Wales in ***Attorney-General v BBC***, where Lord Scarman held that:

> the prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice.[27]

26. Even the apartheid Appellate Division held that such banning orders should very rarely be granted. In ***Heinemann***, Rumpff JA held as follows:

> The freedom of speech – which includes the freedom to print – is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. <u>When a Court of law is called upon to decide whether liberty should be repressed – in this case the freedom to publish a story – it should be anxious to steer a course as close to the preservation of liberty as possible.</u> It should do so because freedom of speech is a hard-won and precious asset, yet easily lost.[28]

27. The European Court of Human Rights has also warned against prior restraints. In ***Observer and Guardian v United Kingdom***, the Court found that the English courts had violated the right to freedom of expression[29] by granting interlocutory injunctions prohibiting newspapers from publishing details of the notorious book *Spycatcher*. The Court held that, although the Convention does not conclusively prohibit prior restraints,

> the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the

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[27] *Attorney-General v British Broadcasting Corporation* [1981] AC 303 (CA), 362.

[28] *Publications Control Board v William Heinemann Ltd and Others* 1965 (4) SA 137 (A) at 160E-F (emphasis added).

[29] Article 10 of the European Convention on Human Rights.

> press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[30]

28. Interestingly, 6 of the 24 judges partially dissented, saying the majority had been too accommodating of prior restraints:

> Under no circumstances … can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a "time of war or other public emergency threatening the life of the nation" and, even then, only "to the extent strictly required by the exigencies of the situation".[31]

29. This group quoted with approval from the United States Supreme Court judgment in ***New York Times v United States***, concerning the leaked Pentagon Papers, where it was held that "the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints".[32]

30. Of course, our Constitution does not cast freedom of expression in such absolute terms as the First Amendment.[33] But the comparison illustrates how exceptional and pressing the grounds must be for granting a prior restraint.

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[30] *Observer and Guardian v United Kingdom* [1991] ECHR 49, para 60.

[31] Id, Partly Dissenting Opinion of Judge De Meyer, joined by Judges Pettiti, Russo, Foighel and Bigi.

[32] *New York Times Company v United States; United States v Washington Post Company* 403 US 713, 717.

[33] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; 2007 (9) BCLR 958 (SCA); 2007 (5) SA 540 (SCA), para 14.

BRIEF BACKGROUND

31. The Moti Files were leaked to amaBhungane, expressly and strictly on the basis that the source(s) shall not be identified.[34]

32. amaBhungane published three articles which referred to leaked documents from within the Moti Files:

    32.1. 17 February 2023: "The Moti Files: Red flags in police hunt for former Moti Group employee".[35]

    32.2. 28 April 2023: "The Moti Files: How businessman Zunaid Moti cosied up to the Mnangagwa regime".[36]

    32.3. 17 May 2023: "Zunaid Moti's 'inside man' at Investec".[37]

33. Before each article, detailed questions were sent to Mr Moti and the Moti Group, and their responses were fairly reflected in the articles as well as published in full on amaBhungane's website, with links to them embedded in the articles.[38]

34. Meanwhile, the attorneys for Mr Moti and the Moti Group wrote to amaBhungane on 12 April 2023, inter alia requesting "that you furnish us with the documentation … which has clearly formed the basis of the questions directed at our clients".[39]

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[34] Respondents' second affidavit, para 4.1 (**09-50**).

[35] Respondents' second affidavit, annex DVR16 (**09-149**).

[36] Applicants' founding affdidavit, annex DM22 (**03-147**).

[37] Id, annex DM23 (**03-173**).

[38] Respondents' first affidavit, para 16 (**08-38** to **08-39**).

[39] Applicants' founding affidavit, annex DM14: letter from Ulrich Roux and Associates ("**URA**") to amaBhungane, 12 April 2023, para 9 (**03-95**).

35. The respondents' attorneys replied the next day, 13 April 2023, and it is important to quote extensively from this letter (with emphasis added):

> 4.1 To the extent that our client has access to any documentation with a view to publishing content pertaining to the Moti Group, our client declines to provide you with such documentation. This is, apart from anything else, because to do so may reveal the identity of confidential sources. Our client is in any event under no legal obligation to provide you with any details pertaining to their sources or their journalistic research, and there is no basis for your demand that they do so.
>
> 4.2 In any event we are instructed to inform you that our client is not currently in possession of any such documentation. There is no such documentation stored in physical form or in virtual form on any hard drives or computers currently in the possession of our client or its employees.
>
> 4.3 Instead, the only access of our client and its employees to any such materials is via two secured servers located outside of South Africa. One server is not controlled by our client, whereas the second is. In respect of the second server, our client and its employees have no intention to delete or destroy such materials and undertake not to do so for a period of at least a year from today's date.[40]

36. The letter continued:

> 5. Lastly, we are concerned that the tone of your letter suggests that your client may be intending to launch a court application of some sort against our client. Our client is concerned that your client may be inclined to do so on an ex parte basis, which would in the circumstances be unlawful:
>
> 5.1 We deny that there is any basis for such an application.
>
> 5.2 But even if there were, in light of the facts set out above, there would certainly be no basis for such an application to proceed ex parte. The ordinary requirements for ex parte applications are not met. Moreover, any relief granted against our client would seriously threaten our client's rights and obligations to freedom of expression and the media, including multiple ongoing investigations into a range of issues.

[40] Applicants' founding affidavit, annex DM15: letter from Webber Wentzel ("**WW**") to URA, 13 April 2023 (**03-98** to **03-99**).

5.3 It is therefore essential that our client is heard before any relief is sought and, if any such application is to be launched, our client requires it to be served on ourselves.

5.4 We trust that you will heed this caution and draw it expressly to the attention of any judge that is approached.[41]

37. On the same day, the Moti Group's attorneys wrote back, stating inter alia:

> We once again request that your client provides clarity pertaining to its possession of documentation, information and recordings which were stolen from our clients by Mr Clinton van Niekerk, and whether your client has had any contact indirectly or directly with him.[42]

38. The remainder of the letter concerned an extension to respond to questions that amaBhungane had sent their clients. The letter did not address what was said about a potential ex parte application.

39. On 25 May 2023, the applicants instituted an ultra-urgent, ex parte and in camera application for:

39.1. a final order compelling the respondents, within 48 hours, to "return" the leaked documents; and

39.2. an interim order restraining them from publishing anything based on the leaked documents pending a return date;

39.3. a rule nisi in respect of both.

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[41] Id.

[42] Applicants' founding affidavit, annex DM16: letter from URA to WW, 13 April 2023, para 3 (**03-101** to **03-102**).

40. The Holland-Müter J order ensued, and was served on the respondents at 18h36 on Thursday 1 June 2023. In terms of the order, they had to "return" the leaked documents by 18h35 on Saturday 3 June 2023. This would have the dual effect of (a) depriving the respondents of their source material; and (b) disclosing to the Moti Group what documents they received, and from whom.[43]

41. In an effort to avoid troubling the Court on a Saturday, the respondents proposed at 08h00 on the Friday morning that the "return relief" be varied by agreement to read:

> Pending the return day set out hereunder, any anticipation thereof by the respondents or any one of them, or the finalisation of this application, the respondents are ordered not to take any steps that will result in the deletion or destruction of: [the documents listed in the Holland Muter J order][44]

42. The applicants rejected this proposal without coherent reasons, in a lengthy and argumentative letter, ultimately making a counter-proposal that the respondents instead "deliver" the leaked documents to an independent firm of attorneys with 72 hours,[45] later extended to 30 days.[46]

43. This would not wholly cure the oppressive result that the respondents sought to ameliorate, which was that they would be deprived of access to the documents, and compelled to breach source confidentiality, without ever having been heard by a Court.

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[43] Respondents' first affidavit, para 26 (**08-41**).

[44] Id, annex DVR9: letter from WW to URA, 2 June 2023, para 4 (**08-131**).

[45] Id, annex DVR10: letter from URA to WW, 2 June 2023, para 13 (**08-134**).

[46] Letter from URA to WW, 2 June 2023, para 8.2 (**07-13**).

44. The respondents accordingly set the matter down for reconsideration under Rule 6(12)(b) for the morning of Saturday 3 June 2023.

45. At the hearing, Acting Justice Van Nieuwenhuizen strongly urged the applicants to agree to a variation along the lines originally proposed by the respondents at 08h00 the previous day, which they then did. Van Nieuwenhuizen AJ felt strongly that costs should not be determined in urgent court and should be reserved. The following was thus ordered by agreement ("**Van Nieuwenhuizen J order**"):[47]

> 1. The order of Justice Holland-Muter dated 1 June 2023 is varied by the replacement of paragraph 2 (excluding subparagraphs) with the following:
>
> "2. Pending the reconsideration of this order in terms of Rule 6(12)(c), or the return day set out hereunder, or any anticipation thereof by the respondents or any one of them, or the finalisation of this application in any other manner, the respondents are ordered not to take any steps that will result in the deletion, destruction or alteration of the following documents:"
>
> 2. The terms of this variation shall not deprive either set of parties of the right to raise or rely on any argument that they would otherwise have been entitled to raise or rely on, on the return day, or any anticipation or reconsideration thereof.
>
> 3. The costs are reserved.

46. The respondents now approach this Court semi-urgently for a reconsideration of the Holland-Muter J order, or discharge of the rule nisi. The respondents have filed a combined supporting and answering affidavit, and the applicants have filed a reply to it (along with new matter, including an irregular "counter-application", which we will address in separate written submissions).

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[47] **001-39**.

PROPER APPROACH TO THE EVIDENCE

47. The applicants are seeking final relief and must prove their case on a balance of probabilities.

48. ***Plascon-Evans*** applies.[48]

WHY THIS MATTER IS URGENT

49. Despite the variation of the Holland-Muter J order by the Van Nieuwenhuizen J order, the respondents are still restrained by an interim interdict that was granted in their absence. The restraint relief in paragraph 3 of the Holland-Muter J order is unaffected by the variation, and bans the respondents from publishing or even "utilising" the documents (e.g. for journalistic research) until 2 October 2023.

50. That would be just over five months in which journalists would have been denied the right to do their work, without ever having been heard by a Court on whether they had done anything wrong. This banning order deals a blow not only to the respondents, who have a right to impart information, but also to the public, who have a right to receive it. In a constitutional democracy, a five-month suspension of fundamental rights is no trifling matter.

51. When this matter is heard, the respondents would have been under the banning order for just under a month. This is a long time in journalism, in circumstances where the respondents have testified that the Moti Files include documents that bear relevance to current political and commercial developments, and that they

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[48] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

had been working with the Files on a further exposé at the time when the Holland-Müter J order was served on them, to be published in less than a month.[49] This means that the exposé would have been published by now if not for the Holland-Müter J order. The public have been deprived of their right to know.

52. The respondents can never regain that lost month, and can ill afford another four. They will thus be denied "substantial redress" if they have to wait for the original return date. The test is not whether they would be denied any redress at all, but whether it would be substantially lesser redress.[50] We submit that it would.

53. This hearing date strikes a reasonable balance between the interests of limiting the period for which the respondents remain banned, and ensuring that the Court has a thoroughly ventilated case to consider.

WHY THE HOLLAND-MÜTER J ORDER CANNOT STAND

54. The Holland-Müter J order must be set aside, or the rule nisi discharged, for the following reasons:

    54.1. There was no basis for the applicants to be heard ex parte.

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[49] Respondents' second affidavit, para 57 (**09-81**).

[50] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196, para 7): "It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial."

54.2. There is no evidence that the respondents are in unlawful possession of any documents, and thus no basis for the "return relief" (paragraph 2 of the Holland-Müter J order).

54.3. There is no evidence that the respondents have published or will publish anything unlawfully, and thus no basis for the "restraint relief" (paragraph 3 of the Holland-Müter J order).

There was no basis to be heard ex parte

55. In ***SAA v BDFM***, this Court emphasised the cardinal importance of the principle of audi alteram partem:

> The principle of audi alteram partem is sacrosanct in the South Africa legal system. Although, like all other constitutional values, it is not absolute, and must be flexible enough to prevent inadvertent harm, the only times that a court shall consider a matter behind a litigant's back are in exceptional circumstances. The phrase "exceptional circumstances' has regrettably through overuse, and the habits of hyperbole, lost much of its impact. To do that phrase justice, it must mean very rarely, only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed.[51]

56. To divine what are exceptional circumstances and a parsimonious compromise in a particular case, regard may be had to the established jurisprudence on Anton Piller orders:

56.1. The <u>exceptional circumstances</u> are that the applicant has a real and well-founded apprehension that evidence required in a subsequent action, or

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[51] *South African Airways SOC Ltd v BDFM Publishers (Pty) Ltd and Others* [2015] ZAGPJHC 293; [2016] 1 All SA 860 (GJ); 2016 (2) SA 561 (GJ), para 22. Ironically, the applicants themselves refer to the right to reply as "sacrosanct" in their replying affidavit in the "counter-application", para 124.2 (**16-29**).

property that they seek to recover,[52] may be hidden, destroyed or spirited away if the respondent were to receive prior notice of the main action.[53]

56.2. The parsimonious compromise is that the ex parte proceedings may only be used to obtain *procedural relief* (attachment for preservation), not final or interim *substantive relief* (such as vindicatory or interdictory relief),[54] and thus that the order must go no further than strictly necessary for the preservation of the evidence or property.[55]

57. The "return relief" that the applicants sought, and obtained in paragraph 2 of the Holland-Müter J order, is even more oppressive than an Anton Piller order, which has been described by our courts as a "draconian form of relief",[56] which "should only be granted in exceptional circumstances".[57]

58. The order was for *substantive* relief, and *final* relief for that matter – the "return" of the documents to the applicants – members (and apparently agents) of the Moti Group. Once surrendered, the Moti Group would irreversibly know what

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[52] *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T).

[53] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A), 15 I–J.

[54] Id, 19F; *Memory Institute SA CC t/a SA Memory Institute v Hansen and Others* 2004 (2) SA 630 (SCA), para 3; *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T), 175C; *Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd* 1993 (1) SA 833 (W), 846B–E.

[55] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A), 16C; *Enterprise Connection Cape (Pty) Ltd v Clarotech Consultants* [2001] All SA 194 (C), 205*a–h*.

[56] *Rath v Rees* 2007 (1) SA 99 (C), 107H.

[57] Id, 108A.

documents have been leaked to the respondents, how, and by whom. There would be no way for the respondents, on the return date, to obtain relief to the effect that the Moti Group would unsee what they had seen.

59. There is simply no authority for the notion that such relief can be obtained on an ex parte basis. On the contrary, the fact that all of the authorities on Anton Piller orders restrict such orders to interim procedural relief, and that these orders are described as the "outer extreme of judicial power",[58] supports the conclusion that substantive relief can never be obtained against a respondent without notice.

60. For this reason alone, paragraph 2 of the Holland-Müter J order cannot stand. It did not strike the parsimonious compromise required in ex parte proceedings.

61. Further, there were no exceptional circumstances justifying an ex parte hearing. The standard set for Anton Piller relief – "a real and well-founded apprehension that this evidence may be hidden or destroyed"[59] – is the bare minimum that the applicants needed to meet even for relief less far-reaching than that which they sought and obtained.

62. And they did not even meet that standard. They merely recited the wording in the form of a perfunctory ipse dixit:

> Due to AmaBhungane's clandestine and dishonest conduct in obtaining the stolen confidential documentation for their own purposes, coupled with the apprehension that they will destroy such confidential documentation and information should they become aware of this application, the

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[58] *Mathias International Ltd and Another v Baillache and Others* 2015 (2) SA 357 (WCC), para 11.

[59] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A), 15 I–J.

applicants contend that there are no less restrictive means of obtaining the stolen documents.[60]

63. This mere say-so was plainly contrived, and there was no evidence to support it. On the contrary, on 13 April 2023, the respondents' attorneys had written to the applicants' attorneys, stating inter alia that the respondents "have no intention to delete or destroy such materials and undertake not to do so for a period of at least a year from today's date".[61]

64. In the face of this undertaking, conveyed between officers of the Court, some six weeks before the application was brought, there was no basis for the alleged apprehension that the respondents were about to destroy or conceal documents.

65. Moreover, the applicants' alleged apprehension was fatally contradicted by their apprehension in the same papers that the respondents are "intent on publishing weekly articles based entirely on stolen documents" (advanced in motivation for the restraint relief).[62]

66. As for the restraint relief (paragraph 3 of the order), there was plainly no basis for seeking this on an ex parte basis. And the applicants did not advance any.

67. Instead, the applicants sought (successfully) to piggyback the restraint relief onto the return relief. They could not do this. Even if they genuinely believed that the return relief had to be sought ex parte (which is doubtful, based on the flimsiness

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[60] Applicants' founding affidavit, para 70.4 (**02-59**).

[61] Applicants' founding affidavit, annex DM15, para 4.3 (**03-98**).

[62] Applicants' founding affidavit, para 59.9 (**02-54**).

of the grounds they advanced for it), they should have sought the restraint relief separately and on notice to the respondents. This is settled law.[63]

68. For these reasons, there was no basis for seeking either head of relief on an ex parte basis. The entire order should thus be set aside or the rule nisi discharged.

There is no evidence of unlawful possession of documents

69. It was unclear from the founding papers what cause of action the applicants intended to underpin the return relief. The applicants claimed in the vaguest terms that among the leaked documents are <u>some</u> containing "information" that is "confidential",[64] "commercially sensitive",[65] "personal",[66] "privileged",[67] and "proprietary".[68] They did not mention intellectual property or trade secrets. Their papers consequently did not make out any proper cause of action based on confidentiality or on privacy. They also did not complain of any unlawful competition against them by the respondents. Instead, they complained about defamation.[69]

70. The applicants' ex parte heads of argument, however, make it clear that the "return relief" was sought solely under the rei vindicatio.[70] The "return relief" –

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[63] *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T), 175C; *Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd* 1993 (1) SA 833 (W), 846B–E.

[64] Applicants' founding affidavit, para 26.4 (**02-19**).

[65] Id, para 25.3 (**02-18**).

[66] Id, para 26.5 (**02-19**).

[67] Id.

[68] Id, para 71.2 (**02-59**).

[69] Id, paras 37.1 (**02-29**), 37.2 (**02-30**), 47.6 (**02-41**), 59.6 (**02-54**).

[70] Applicants' ex parte heads of argument, paras 23-33 (**05-26** to **05-31**).

paragraph 2 of the Holland-Müter J order – was thus based exclusively on the premise that the respondents were in "possession" of "stolen documents" belonging to the applicants, and that they were obliged to return them.

71. But the applicant's case on this score was bad – both because they failed to make out a claim under the rei vindicatio and because the respondents had a legitimate and lawful basis for continued possession.

72. Most instructive for the present case is ***SABC v Avusa***.[71] A preliminary internal investigation report had been circulated to a limited number of SABC employees and board members on a confidential basis.[72] One of the employees, in breach of this confidentiality, provided a copy to the *Sunday Times*, on the basis that the latter would not disclose their identity.[73] SABC sought an order compelling the journalists to deliver the copy of the report back to the SABC. The journalists opposed, arguing that this "could lead to the uncovering of the source … and has averred that this is the real reason for the SABC bringing the application."[74]

73. This Court (per Willis J, as he then was) dismissed the application. For purposes of the present case, two important principles emerge from the judgment. First, the rei vindicatio is not available in this kind of case. And second, it is not unlawful for journalists to receive and retain leaked information, regardless of the source.

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[71] *South African Broadcasting Corporation v Avusa Limited and Another* [2009] ZAGPJHC 80; 2010 (1) SA 280 (GSJ).

[72] Id, paras 3.8 and 3.9.

[73] Id, paras 3.11 to 3.13.

[74] Id, para 11.

The rei vindicatio is not available

74. It is not the applicants' case that the respondents are in possession of physical documents that belong to the applicants. Rather, their case is that Mr Van Niekerk *copied* electronic documents from the applicants' server.[75] The applicants still have the originals.

75. There is no proprietary interest in the copies or the information contained in them. And the applicants cannot vindicate that which is already in their possession.

76. Willis J held in ***SABC v Avusa***:

> During the course of argument, Mr Van Blerk, who together with Mr Mooki, appeared for the SABC, expressly disavowed any reliance on the rei vindicatio for relief. In my view, he did so wisely. In ***Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd*** Serrurier AJ delivered a comprehensive and, in my respectful view, most learned review of South African, American, Australian and English law and concluded that "It thus appears that information or knowledge, of whatever value and however confidential, is not recognized as property either in South Africa or in the English law systems." In ***Prinsloo v RCP Media Ltd t/a Rapport*** Van Der Westhuizen J (then a puisne judge in the Transvaal Provincial Division) found an argument for the return of copies of photographic material based on the common law remedy of the rei vindication to have been "not convincing".[76]

77. It merits taking a closer look at ***Waste-Tech***, where this Court (per Serrurier AJ) held that the information in a document was not "property" for the purposes of an Anton Piller application of the *Cerebos* kind,[77] where the applicant asserts a real

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[75] Id, paras 33.1 to 33.5 (**02-25**).

[76] *South African Broadcasting Corporation v Avusa Limited and Another* [2009] ZAGPJHC 80; 2010 (1) SA 280 (GSJ), para 15.

[77] *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T).

or personal right to property in the possession of the respondent.[78] In that case, the applicant's employee had made copies of confidential documents and given the copies to a competitor. Serrurier AJ held:

> The question which arises in the context of the attachment order is whether the applicant demonstrated the requisite right to recover the documents to which I have already referred. It is plain from the passages to which I have referred above that Elliott did not hand over to the respondent any of the applicant's 'original' documents. He either made copies of documents in the applicant's file or 'gave details' of disposal instructions, prices quoted and customer details. I can understand that had Elliott taken a file of contracts or other documents from the applicant or taken a book from the applicant's library and handed it to Gillespie, the applicant could successfully contend that the respondent was in possession of its property and would be entitled to recover that property or those documents on the basis of a vindicatory or, perhaps, appropriate possessory remedy. It is, however, not suggested in these proceedings that the respondent had documents in which the applicant had a proprietary right. The applicant's real complaint is that the respondent in this manner acquired its 'confidential information' which enabled it to compete successfully.[79]

78. Serrurier AJ referred to the judgment of De Villiers CJ in ***Nelson and Meurant v Quin and Co***,[80] where (much like in the present case) the author of certain letters sought to interdict newspaper from publishing their contents, claiming that he had a property right in them. That Court was unpersuaded, and Serrurier AJ added that 120 years later, there was no authority for the view that "information, whether confidential or otherwise, is the subject matter of proprietary rights at common law in the absence of statutory protection under intellectual property statutes".[81]

79. After also reviewing comparative law, Serrurier AJ concluded as follows:

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[78] *Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd* 1993 (1) SA 833 (W).

[79] Id, 841B–D.

[80] 1874 Buch 46 at 51.

[81] *Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd* 1993 (1) SA 833 (W), 843D.

> It thus appears that information or knowledge, of whatever value and however confidential, is not recognised as property either in South Africa or in the English law systems. Accordingly on this ground the applicant must fail in its attempt to establish a proprietary right to the information contained in the documents which the respondent acquired.[82]

80. ***Waste-Tech*** is a well-known case, and it is frankly staggering that the applicants' counsel did not bring it to the attention of Holland-Müter J.

81. On this basis alone, the rei vindicatio was unavailable. The applicants failed to identify property that was amenable to return.

82. Another problem with the rei vindicatio is that the deponent to the founding affidavit misled the Court when he said that the applicants were the "owners" of all the leaked documents.[83] He went back on this in his third non-confidential affidavit, where he admits that they are not the owners of all the claimed documents but merely the "gatekeepers":[84]

> Ammetti [sic.] services the Moti Group as a whole, which includes the roughly 250 companies under its umbrella. They are the agents which are entrusted to protect such information and as such are not required to demonstrate its [sic.] right to own the information.[85]

83. To suggest that the claimant need not demonstrate ownership, in a rei vindicatio, is clearly wrong.[86]

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[82] Id, 845B.

[83] Applicants' founding affidavit, paras 2.5 and 3.5 (**02-4**).

[84] Applicants' answering affidavit to the respondents' application to strike and replying affidavit in the applicants' counter-application, para 35 (**16-12**).

[85] Id, para 62 (**16-17**).

[86] See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A); *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A); *Smit v Kleinhans* 2021 JDR 2623 (SCA) paras 8-10

The respondents are entitled to receive and retain leaks

84. But even if the rei vindicatio had been competently brought, it could not justify the "return relief" because the respondents had (and continue to have) a right to receive and retain the documents. Their possession is not unlawful.

85. The applicants repeatedly claim, in the founding papers, that the leaked documents are "stolen". But they fail to make out a proper case on that score, for two reasons.

    85.1. First, as a matter of fact, the applicants have not shown that the respondents were complicit in any theft of the leaked documents. Indeed, their papers suggest the contrary since the documents referred to in the respondents' articles are, on the applicants' own assessment, different from those that they say were taken by Van Niekerk or Lutzkie.[87]

    85.2. Second, as a matter of law, the copying of electronic documents from the applicants' servers (assuming that occurred) does not constitute theft. Theft comprises the "unlawful appropriation with intent to steal of a thing capable of being stolen".[88] For the same reason that they cannot be vindicated, electronic copies and the information that they contain are not capable of being appropriated or stolen.

[87] See applicants' founding affidavit, paras 12.8 (**02-10** to **02-11**), read with notice of motion, para 2 (**01-3** to **01-4**).
[88] Burchell *Principles of Criminal Law* 5ed (Juta & Co, 2016) at 689.

86. So, the applicants have not shown that the leaked documents were in fact stolen. But even if they had, that would not, on its own, make the respondents' possession of them unlawful.

87. In ***SABC v Avusa***, Willis J held as follows:

> Notwithstanding the fact that confidentiality is not necessarily a paramount interest, my difficulty, in any event, is this: the respondents have not breached a duty of confidentiality owed to the SABC. The respondents owe it none, although SABC's employees and office-bearers may well have such an obligation. The respondents have not acted wrongfully or unlawfully. The *Sunday Times*' possession of a copy of the report is not wrongful or unlawful.[89]

88. Accordingly, it is not unlawful for journalists to possess leaked information, *even if the leaking itself was unlawful* (contractually or otherwise).

89. But perhaps more importantly for the present case, Willis J found that, once the document had been leaked, the SABC lost its interest in its confidentiality:

> I do not see how the delivery by the *Sunday Times* of a copy of the report, at this stage, can protect the SABC's interest in confidentiality. Even if one accepts that the SABC has a right to privacy in respect of the document, I cannot see how, consequent upon the events recorded above, the delivery of the copy of the report will, in any event, affect this privacy: the horse has bolted. That, it seems to me, is the end of the matter.[90]

90. Similarly, in this case, the horse has bolted. The ice cream has melted. That is the end of the matter.

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[89] *South African Broadcasting Corporation v Avusa Limited and Another* [2009] ZAGPJHC 80; 2010 (1) SA 280 (GSJ), para 18 (emphasis added).

[90] Id.

91. This conclusion is supported by the reasoning of this Court in ***SAA v BDFM***, that even legal advice privilege "cannot be invoked to assert a positive right to the protection or preservation of information whose confidentiality has or may be breached through unauthorised means as a result of which the information has become or may become known to strangers".[91] The Court explained as follows:

> By invoking such legal advice privilege, no less than litigation privilege, the client invokes a 'negative' right, ie, the right entitles a client to refuse disclosure by holding up the *shield of privilege*. What the right to refuse to disclose legal advice in proceedings cannot be, is a 'positive right'; ie a right to protection from the world learning of the advice if the advice is revealed to the world without authorisation. The client may indeed restrain a legal advisor on the grounds of their relationship, and may also restrain a thief who takes a document evidencing confidential information, on delictual grounds.
>
> But if the confidentiality is lost, and the world comes to know of the information, there is no remedy in law to restrain publication by strangers who learn of it. This is because what the law gives to the client is a 'privilege' to refuse to disclose, not a right to suppress publication if the confidentiality is breached. A client must take steps to secure the confidentiality, and if these steps prove ineffective, the quality or attribute of confidentiality in the legal advice is dissipated. The concept of legal advice privilege does not exist to secure confidentiality against misappropriation; it exists solely to legitimise a client in proceedings refusing to divulge the subject matter of communications with a legal advisor, received in confidence. This vulnerability to loss of the confidentiality of the information over which a claim of privilege can and is made flows from the nature of the right itself. The proposition about the consequences of loss of confidentiality is endorsed by the authorities.[92]

92. The application in this case, first, disclosed no evidence that the respondents are in *unlawful* possession of any documents, and second, *did* disclose that the

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[91] *South African Airways SOC Ltd v BDFM Publishers (Pty) Ltd and Others* [2015] ZAGPJHC 293; [2016] 1 All SA 860 (GJ); 2016 (2) SA 561 (GJ), para 53.2.

[92] Id, paras 48-49.

documents are no longer confidential, as they were received not only by the respondents but also by *The Sentry* and a certain Mr Lutzkie.[93]

93. For these reasons, the return relief in paragraph 2 of the Holland-Müter J order had no basis and should be set aside or the rule nisi discharged.

There is no evidence of unlawful publication

94. The applicants' cause of action for the restraint relief (paragraph 3 of the Holland-Müter J order) is defamation.[94]

95. The applicants had to set up a proper case that they were about to be unlawfully defamed. It is trite that this requires the applicants, first, to set out the defamatory matter of which they complain, and second, to prove that it will be unlawful.

96. As to the first requirement, this Court recently reaffirmed the principle as follows in ***Quandomanzi*** (per Wilson J):

> SM Structures declined to set out the defamatory statements that it wishes to restrain in its founding affidavit. That was unfortunate. It is an elementary rule of motion proceedings that the applicant must make out their case in the founding affidavit. In a case in restraint of alleged defamation, it is close to an absolute rule that the defamatory matter alleged must be quoted or otherwise clearly adverted to in the founding affidavit.[95]

97. As to the second requirement, the proper approach to interdicts against allegedly defamatory publications has been set out consistently by the Supreme Court of

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93 Applicants' founding affidavit, paras 40-44 (**02-31** to **02-37**) and para 32.5 (**02-25**).

94 Applicants' ex parte heads of argument, para 4.3.1 (**05-12**).

95 *Quandomanzi Investments (Pty) Ltd t/a SM Structures v Govender and Others* [2023] ZAGPJHC 516 (19 May 2023), para 12.

Appeal in a long line of cases. The position was explained as follows in ***Herbal Zone***:[96]

> [37] The contentions in regard to the onus of proof [that it rested on the publisher to prove justification] were also contrary to established authority, to which for some reason we were not referred. This court dealt with the proper approach of a court to an application for an interdict to restrain the publication of defamatory matter in ***Hix Networking***.[97] There it approved, with some clarification, the following passage from the judgment of Greenberg J in ***Heilbron v Blignault***:[98]
>
> > 'If an injury which would give rise to a claim in law is apprehended, then I think it is clear law that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the Court to prevent any damage being done to him. As he approaches the Court on motion, his facts must be clear, and if there is a dispute as to whether what is about to be done is actionable, it cannot be decided on motion. <u>The result is that if the injury which is sought to be restrained is said to be a defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence.</u> Thus if the defendant sets up that he can prove truth and public benefit, the Court is not entitled to disregard his statement on oath to that effect, because, if his statement were true, it would be a defence, and the basis of the claim for an interdict is that an actionable wrong, i.e. conduct for which there is no defence in law, is about to be committed.'
>
> [38] The clarification was to point out that Greenberg J did not hold that the mere ipse dixit of a respondent would suffice to prevent a court from granting an interdict. <u>What is required is that a sustainable foundation be laid by way of evidence that a defence such as truth and public interest or fair comment is available to be pursued by the respondent.</u>

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[96] *Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others* [2017] ZASCA 8; [2017] 2 All SA 347 (SCA) (emphasis added). See, more recently, *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators* [2021] ZASCA 136; [2021] 4 All SA 652 (SCA), paras 29-30, and the authorities cited therein.

[97] *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A).

[98] *Heilbron v Blignault* 1931 WLD 167 at 169.

98. The reason for this high threshold for a defamation interdict is the principle that a prior restraint of speech "should be permitted in narrow circumstances only".[99]

99. In the present case, there is nothing in the applicants' papers that shows, even prima facie: (a) which statements in amaBhungane's articles are defamatory; and (b) why those statements are wrongful.

100. Indeed the applicants' papers are against them on both counts. Concerning (a), the respondents' articles attached to the founding affidavit do not mention either of the applicants by name, and the applicants have not pleaded (as they must)[100] that, despite not being named, the reasonable reader would think less of the two specific companies before the Court (Mr Zunaid Moti and "the Moti Group" are not applicants before court).

101. Concerning (b), the applicants' affidavit falls hopelessly short of showing that the respondents are about to publish anything unlawfully defamatory (let alone of the specific applicants). For one, the applicants do not allege that the three articles already published were not in the public interest and were not substantially true. On the contrary, the applicants' gripe is that the articles contain truths to which they believe the respondents should not have access. It is precisely the truths in the leaked documents that make the applicants insist they are confidential.

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[99] *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC), para 44.

[100] *Argus Printing & Publishing Co Ltd v Weichardt* 1940 CPD 453; *Visse v Wallachs' Printing & Publishing Co Ltd* 1946 TPD 441; and *South African Associated Newspapers Ltd v Estate Pelser* 1975 (4) SA 797 (A) at 811.

102. The applicants nowhere allege that the articles are false – only that they are "one-sided".[101] They have failed to explain why, and it is a hollow plea for two reasons. First, any "one-sidedness" (which is denied) could only flow from the applicants' controllers at the Moti Group refusing to effectively exercise their right of reply.[102] And second, neither the applicants nor anyone else in the Moti Group has lodged a complaint to the Press Council about any of the articles.[103]

103. Consequently, even on the applicants' own ex parte papers, no case is made out for the restraint relief in paragraph 3 of the Holland-Müter J order.

104. Even if that were not so, the respondents' affidavits now lay a sustainable basis (as required by ***Heilbron***, ***Hix*** and ***Herbal Zone***) that any future publications will, even if defamatory, be defensible in law. The respondents attest that they will not publish anything based on the source material other than in accordance with the Press Code, which is binding on them.[104] There is nothing in the applicants' papers to contradict that.

105. The restraint relief in paragraph 3 of the Holland-Müter J order thus had no basis and should be set aside, or the rule nisi discharged.

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101 Applicants' founding affidavit, paras 59.6 (**02-54**) and 71.3 (**02-59**). There are references to the articles advancing a "false narrative" (paras 26.4.4 (**02-19**), 56.3.4 (**02-49**), 56.4 (**02-50**) and 59.4 (**02-53**), but this is not the same as saying that the articles (let alone specific statements in the articles) are false.

102 The replies that the Moti Group provided have been reflected fairly in the articles and linked in full – applicants' founding affidavit, para 50.2 (**02-43**); respondents' first affidavit, para 16 (**08-38** to **08-39**).

103 Respondents' first affidavit, para 21 (**08-39** to **08-40**).

104 Respondents' first affidavit, para 12 (**08-37**).

THE APPLICANTS HAVE ABUSED THE COURT PROCESS

106. The applicants sought ex parte relief that is even more draconian than an Anton Piller order, and failed to come anywhere close to the evidentiary threshold required for even that less oppressive form of relief. It violated the respondents' constitutional right of access to courts by depriving them of the right to be heard before relief – including final relief – was granted against them.

107. Secondly, the applicants sought this improper relief, in this improper manner, for the ulterior and profoundly anti-constitutional purpose of repressing journalists and forcing them to disclose their source(s).

108. For both of these reasons, the application was an abuse of court process, and thus the applicants should bear the costs of this reconsideration application on a punitive scale.

109. The courts have repeatedly held that where there has been an abuse of the ex parte procedure (particularly in Anton Piller cases), costs should be awarded on the attorney and own client scale.[105]

CONCLUSION

110. For the reasons given above:

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[105] *Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)* 1998 (3) SA 281 (T), 300F–G; *Rhino Hotel & Resort (Pty) Ltd v Forbes and Others* 2000 (1) SA 1180 (W), 1185B; *Frangos v CorpCapital Ltd and Others* 2004 (2) SA 643 (T), 656B and 657B. See also *Beinash v Wixley* 1997 (3) SA 721 (SCA), 739I–J.

110.1. the Holland-Muter J order should be reconsidered and set aside, or the rule nisi discharged;

110.2. the “counter-application” should be struck out or dismissed; and

110.3. the applicants should bear the costs of all the proceedings, including the hearing of 3 June 2023, on the attorney and client scale, including the costs of two counsel.

ISABEL GOODMAN

BEN WINKS

Counsel for the respondents

Chambers, Sandton

23 June 2023