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IN THE HIGH COURT OF SOUTH AFRICA
Gauteng Local Division, Johannesburg

CASE NO: **2024-005491**

In the matter between:

RE Capital Holdings Limited,Newman George Leech	Plaintiff / Applicant / Appellant
and	
Mail & Guardian Media Limited,Luke Feltham ,Lyse Comins	Defendant / Respondent

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Heads of Argument

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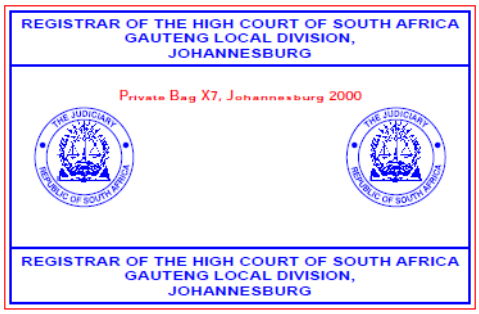

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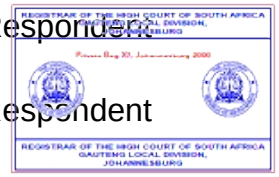
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO.:2024/005491

In the matter between:

RE CAPITAL HOLDINGS LIMITED	First Applicant
NEWMAN GEORGE LEECH	Second Applicant
and	
MAIL & GUARDIAN MEDIA LIMITED	First Respondent
LUKE FELTHAM	Second Respondent
LYSE COMINS	Third Respondent



RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. This application goes to the heart of press freedom.[1]

2. It invokes the well-established norm against judicial prior restraints on the media,[2] which are colloquially known as "gagging orders" or "banning orders".[3]

3. The questions before this Court are:

   3.1. Whether investigative journalists should be interdicted (on a final basis) from publishing articles which link the Applicants to individuals and entities involved in a so-called Ponzi scheme, which is currently being investigated by the Financial Sector Conduct Authority[4] ("**FSCA**") *for an indefinite period*.

   3.2. Whether this Court is the appropriate forum to adjudicate this matter.

4. We submit that both questions must be answered in the negative.

5. Similar attempts relating to prior restraint have occurred twice in this Court in recent months. In both ***amaBhungane***[5] and ***Sithole***,[6] this Court defended the constitutional right to press freedom, dismissed the applications against journalists, and awarded punitive costs against those seeking prior restraint. The Respondents call upon this Court to do so once more.

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

[2] *Mazetti Management Services (Pty) Ltd and Another v AmaBhungane Centre for Investigative Journalism NPC and Others* [2023] ZAGPJHC 771; 2023 (6) SA 578 (GJ) ("***amaBhungane***") at para 16.

[3] *Sithole and Another v Media24 (Pty) Ltd and Others* [2023] ZAGPJHC 884 ("***Sithole***") at para 31.

[4] FA, annexure "FA3" (01-51).

[5] *amaBhungane* above n 2 at para 48.

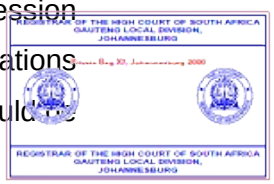
[6] *Sithole* above n 3 at para 49.

6. Notably, in ***amaBhungane***, Sutherland DJP held in July 2023 that:

> "A South African court shall not shut the mouth of the media unless the fact-specific circumstances convincingly demonstrate that the public interest is not served by such a publication."[7]

7. In ***Sithole***, Opperman J held in August 2023 that:

> "Prior restraints on speech are invidious (interim interdicts against publication). They impinge on the right to freedom of expression enshrined in section 16(1) of the Constitution. Restricting publications before they have even seen the light of day is something which should be permitted in narrow circumstances only." (Own emphasis.)



8. The Respondents submit that on the facts of this matter, the public interest is served by publication,[8] and any indefinite or time-bound prior restraint (as the Applicants seek in the alternative) will do substantial violence to the right to freedom of expression, including the freedom of the press and the freedom to receive or impart information.[9]

9. This is especially so because of the ongoing investigation by the FCSA into the BHI Trust Ponzi scheme[10] — in which many people are alleged to have lost their investments[11] — and where there appear to be links between the Applicants and individuals and entities purportedly involved in it.[12]

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[7] *amaBhungane* above n 2 at para 34.

[8] AA, paras 59-64 (12-16 to 12-17).

[9] AA, para 17 (12-5 to 12-6).

[10] AA, para 17 (12-5 to 12-6).

[11] AA, para 39 (12-10).

[12] AA, paras 58-9 (12-14 to 12-16).

10. The difficulty with the Applicants' case is this: the *final relief* which the Applicants seek will indefinitely prohibit the Respondents from publishing any further information about the Applicants in the midst of an ongoing investigation.

11. In addition, and while (at this stage) this matter may not have all the characteristics of a SLAPP suit,[13] it does bear two of them: the ulterior objectives of punishment and deterrence against the Respondents for simply doing their jobs.[14] Should the Applicants persist with the defamation claim that they threaten in the Notice of Motion, the further characteristics of a SLAPP suit may be met.

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

12.1. The salient principles of press freedom.

12.2. A brief background.

12.3. Why this matter is not urgent.

12.4. The requirements for a final (or interim) interdict have not been met.

12.5. The Applicants have abused this Court's process.

12.6. Condonation and the timeframes for filing.

12.7. Costs.

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[13] A SLAPP suit is the acronym for "Strategic Lawsuit Against Public Participation". The use of that label has widened beyond its literal meaning to refer to any legal proceedings by a well-resourced entity aimed at harassing a vulnerable person or entity by outspending them in litigation and thereby forcing a capitulation. See *amaBhungane* above n 2 at footnote 4.

[14] AA, paras 24-6 (12-7). See *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* [2022] ZACC 37; 2023 (2) SA 68 (CC); 2023 (7) BCLR 779 (CC) at para 96.

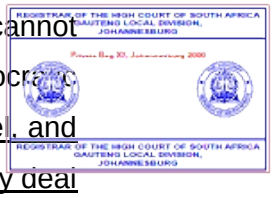
SALIENT PRINCIPLES OF PRESS FREEDOM

This matter has constitutional ramifications

13. Section 16(1) of the Constitution guarantees the right to freedom of expression, which includes freedom of the press and other media,[15] and freedom to receive and impart information and ideas.[16]

14. 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."[17] (Own emphasis.)



15. 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 function of the press to ferret out corruption, dishonesty, and graft wherever it may occur and to expose the perpetrators."[18] (Own emphasis.)

16. Lastly, in ***Midi Television***, the Supreme Court of Appeal (per Nugent J) held:

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

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

[17] *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) at para 54 ("***Print Media***").

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

> "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.[19]

17. The important role of a free, unencumbered press and its centrality to democracy can, therefore, not be gainsaid. One of the vital safeguards for a free press is the general prohibition on prior restraints on publication. A prior restraint, among other orders, is what the Applicants seek.

The foreign and international law position

18. Section 39(1) of the Constitution provides that:

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

19. It is now an established principle that international law is to be interpreted in terms of both binding and non-binding instruments.[20]

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[19] *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) ("***Midi Television***") at para 6.

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

20. The United Nations Human Rights Committee, which is responsible for interpreting the International Covenant on Civil and Political Rights, which South Africa has both signed and ratified, observed that—

> "[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society."[21]

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

> "societal relevance of independent, free and pluralistic news media as a pillar of democracy, a tool to support accountability and transparency, and a means to sustain open deliberation and encourage the exchange of diverse views – underscores the importance of journalism as a public good."[22] (Own emphasis.)

22. In addition, the 2023 Joint Declaration on Media Freedom and Democracy[23] ("**Joint Declaration**"), which was prepared by multiple mandate holders in international fora, including the UNSR FreeEx, advises that member states have a series of positive obligations to create an enabling environment for media freedom, which includes an obligation to:

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[21] United Nations Human Rights Committee, 'General Comment No. 34, Article 19: Freedoms of opinion and expression' CCPR/C/GC/34 (2011).

[22] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 'Reinforcing media freedom and the safety of journalists in the digital age' A/HRC/50/29 (2022).

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

> "(f). Take measures to protect journalists and media outlets from strategic lawsuits against public participation and the misuse of criminal law and the judicial system to attack and silence the media, including by adopting laws and policies that prevent and/or mitigate such cases and provide support to victims. In particular, States should consider that legal proceedings against journalists that excessively extend over time or are accumulated in bad faith harm journalistic work and/or the operation of the media."[24] (Own emphasis.)

Prior restraints are invidious

23. An interdict prohibiting publication (whether interim or final) is known as judicial "prior restraint".[25] They are "invidious".[26] Prior restraints impinge on the right to freedom of expression, which includes freedom of the press and other media as well as the freedom to receive and impart information and ideas.[27]

24. In ***Print Media***, recently cited by this Court in ***Sithole***, 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."[28]

25. In ***Heinemann***, the Appellate Division (in a pre-democratic era) held that prior restraint orders should be rarely granted. 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

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[24] *Id* at para (f).

[25] *Sithole* above n 3 at para 31.

[26] *Id*.

[27] *Id*.

[28] *Print Media* above n 17 at para 44.

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. 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. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost."[29] (Own emphasis.)

26. Notably, in ***Midi Television***, which was cited by Sutherland DJP in the ***amaBhungane*** matter, the Supreme Court of Appeal (per Nugent JA) held:

"[19] In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

[20] Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or

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

otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right. And where a temporary interdict is sought, as pointed out by this Court in *Hix Networking Technologies*, the ordinary rules, applied with those principles in mind, are also capable of ensuring that the freedom of the press is not unduly abridged. Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose. Where there is a risk to rights that are not capable of subsequent vindication a narrow ban might be all that is required if any ban is called for at all. It should not be assumed, in other words, that once an infringement of rights is threatened, a ban should immediately ensue, least of all a ban that goes beyond the minimum that is required to protect the threatened right."[30] (Own emphasis.)

27. Finally, in ***Herbal Zone***, the Supreme Court of Appeal (per Wallis JA) held that:

"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. 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. It is not sufficient simply to state that at a trial the respondent will prove that the statements were true and made in the public interest, or some other defence to a claim for defamation, without providing a factual basis therefor."[31]

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[30] *Midi Television* above n 19 at paras 19-20.

[31] *Herbal Zone (Pty) Ltd v Infitech Technologies (Pty) Ltd and Others* [2017] ZASCA 8; [2017] 2 All SA 347 (SCA) at para 38.

The legal principles applicable to this case

28. Therefore, the salient legal principles applicable to this case are:

28.1. The press may be considered a public sentinel, and laws that encroach on press freedom also deal a comparable blow to the public's right to a healthy, unimpeded media.[32]

28.2. 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.[33]

28.3. A publication will be unlawful, and thus susceptible to being prohibited only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place.[34]

28.4. Even then, publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage.[35]

28.5. Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose.[36]

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[32] See *Print Media* above n 17 at para 14.

[33] *Id* at para 24.

[34] See *Midi Television* above n 19 at para 26.

[35] *Id*.

[36] *Id.*

28.6. A sustainable foundation must be laid by way of evidence that a defence such as truth and public interest is available to be pursued by the Respondent at a trial.[37]

29. In their application, the Applicants fail to acknowledge the constitutional implications of this matter and the caution with which this Court should approach prior restraint orders.[38] Equally, counsel for the Applicants suggest that the caution around prior restraint orders and their constitutional ramifications "has no, or little, force in this application".[39] This is incorrect. The appropriateness, or otherwise, of a prior restraint order underpins this application.

BRIEF BACKGROUND

The relief that the Applicants seek

30. The Applicants seek:

30.1. A declarator that the First Respondent's article "contains, disseminates and/or publicises statements and allegations of a false and/or misleading nature, which are defamatory of, and/or injurious of the Applicants."[40] (The "**declarator**".)

30.2. To interdict the Respondents "from making, publishing and/or causing to be published, on any platform, any future articles with substantially similar allegations regarding the Applicants as the M&G article."[41] (The "**prior restraint**".)

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[37] See *Herbal Zone* above at para 27.

[38] AA, para 19 (12-6).

[39] Applicants' Heads of Argument, para 46.3.2 (04-25).

[40] NoM, para 2 (01-2 to 01-3).

[41] NoM, para 3 (01-3).

30.3. To direct the Respondents to "remove or cause to be removed and/or retract or cause to be retracted the M&G article from M&G's website, and any other platform under the First Respondent's control".[42]

30.4. To direct the Respondents to "publish or cause to be published an apology, and a confirmation of retraction" in terms detailed in the Notice of Motion.[43] (Collectively, the "**retraction and apology**".)

31. In the *alternative*, the Applicants seek the removal of the article and to interdict the Respondents from any future publications based on substantially similar allegations[44] "pending the outcome of defamation proceedings for final relief to be instituted by the Applicants, against the Respondents, within 20 days of the court order.[45] (The "**interim prior restraint**".)

32. The Applicants seek costs on the attorney and client scale, including the costs of two counsel, to be paid jointly and severally by all parties that oppose the application.[46]

The context

33. The context of this matter is:

33.1. Since around October 2023, there have been media reports about the BHI Trust, which is reportedly under provisional sequestration and has been labelled as a Ponzi scheme.[47]

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[42] NoM, para 4.1 (01-3).

[43] NoM, para 4.2 (01-3).

[44] NoM, para 5.1 (01-4).

[45] *Id*.

[46] NoM, para 6 (01-4).

[47] AA, para 38 (12-9).

33.2. It is reported that Mr Craig Warriner ("**Mr Warriner**") managed the BHI Trust and that he has surrendered himself to the South African Police Service and is presently on trial for fraud.

33.3. It is alleged that thousands of people are at risk of losing their financial investments in the BHI Trust.[48]

33.4. On 27 October 2023, the FSCA issued a press release indicating that it is investigating the BHI Trust, Mr Warriner, and other related persons.[49]

33.5. On 30 October 2023, the First Applicant asked Mr Michael Haldane ("**Mr Haldane**") to resign from its board, advising that "he was asked by the RE Capital Board to step down as a director because of the potential risks created by the allegations involving Mr Haldane and his investment company, Global and Local."[50]

33.6. The Second Applicant is the Chief Executive Officer and a director of the First Applicant.[51]

33.7. On 9 November 2023, it is reported that Investec terminated its relationship with Global and Local due to its links with the BHI Trust.[52]

33.8. On 10 January 2024, the First Respondent published an article on its website with the title "BHI Trust's international links exposed". The article was published in print on 12 January 2024.[53]

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[48] AA, para 39 (12-10).

[49] AA, para 41 (12-10).

[50] FA, para 30.2.1.1 (01-20).

[51] FA, para 1 (01-8); AA, para 101 (12-24).

[52] AA, para 40 (12-10); FA, annexure "FA2" (01-48).

[53] AA, annexure "AA5" (12-45); AA, annexure "AA4" (12-44).

33.9. The article was written by the Third Respondent.[54]

The links

34. Central to this matter is the following dispute:

34.1. The Applicants submit that the statements regarding them in the article are, both individually and as a whole, false.[55] As a result, the Applicants argue that the article is defamatory and injurious to them.[56]

34.2. The Respondents submit that the statements regarding the Applicants which "link" and "connect" the Applicants, Mr Haldane, Global and Local, and the BHI Trust are true (or substantially true) and in the public interest. Alternatively, they constitute reasonable publication.[57] As a result, the statements are not false or wrongfully defamatory.[58]

35. The Respondents submit that:

35.1. The headline of the article indicates that international "links" to the BHI Trust have been exposed.[59]

35.2. The introductory paragraph of the article reads: "Global and Local Financial Advisers, the company that apparently promoted investments in the alleged almost R3 billion BHI Trust ponzi scheme to local people, has diverse international links and appears to be half-owned by a South African expat living abroad and listed as a Swiss resident."[60] This

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[54] AA, para 43 (12-10).

[55] Applicants' Heads or Argument, para 15 (04-11).

[56] NoM, para 2 (01-3).

[57] AA, para 57 (12-14).

[58] AA, para 62 (12-17).

[59] AA, paras 50-2 (12-12).

[60] AA, annexure "AA5" (12-45).

clearly records the existence of allegations and *does not* positively assert the existence of the Applicants' links to wrongdoing.

35.3. The Second Applicant has been associated with a company listed in the Panama Papers.[61]

35.4. On their own version, the Applicants confirm that both the First Applicant and the Second Applicant are linked to Mr Haldane and asked him to resign from their board on 30 October 2023.[62] Mr Haldane is linked to Global and Local, which appears to be linked to the BHI Trust.[63]

35.5. In 2016, Mr Haldane and the Second Applicant were linked through Wasabi Management Limited ("**Wasabi**"). The Second Applicant was listed as a director of Wasabi and Global and Local is listed as the investment advisor in the investment note.[64]

35.6. On the First Applicant's website, it is stated that the Second Applicant co-founded the Geneva Management Group.[65]

35.7. A 2010 share certificate links Geneva Management Limited to Global and Local.[66]

35.8. The address for the Geneva Management Group listed on the share certificate is similar to the address for the Geneva Management Group (UK) Ltd.[67] Company records show that the Second Applicant is the

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[61] AA, para 58.4 (12-15).

[62] FA, para 30.2.1.1 (01-20).

[63] AA, para 58.3 (12-15).

[64] AA, para 58.3 (12-15).

[65] AA, para 58.4 (12-15); AA, annexure "AA15" (12-77).

[66] AA, para ; AA, annexure "AA9" (12-59).

[67] AA, para 58.6 (12-16).

director of this entity and holds, directly or indirectly, 75% or more of the shares in the company.

35.9. The Third Respondent afforded the Applicants multiple opportunities to reply before the article was published.[68]

35.10. The Second Applicant's representatives declined to allow "background information" that they provided to be published, requiring that it be kept confidential.[69]

36. As indicated in the introductory paragraph of the article, these links, among others, evidence Global and Local's international links and the Second Applicant's link to Global Local.[70] In terms of the headline, Global and Local appears to be linked to the BHI Trust.[71] This is the context within which a reasonable reader would have read and understood the article.

37. ***Plascon-Evans***[72] applies to this matter.

38. As detailed below, the Respondents submit that the statements in the article are true (or substantially true) and in the public interest. Alternatively, they constitute reasonable publication.[73]

THIS MATTER IS NOT URGENT

39. In ***AParty***, the Constitutional Court (Per Ngcobo J) noted:

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[68] AA, paras 66-9 (12-18).

[69] FA, para 35.4 (01-23 to 01-24).

[70] AA, para 59 (12-16).

[71] AA, para 40 (12-10); FA, annexure "FA2" (01-48).

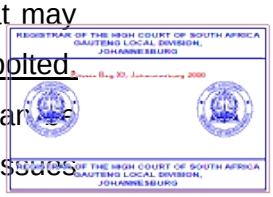
[72] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 ("***Plascon-Evans***").

[73] AA, paras 57, 62, and 64 (12-14 and 12-17).

> "Approaching courts at the eleventh hour puts extreme pressure on all involved including respondents and the courts, as these cases amply demonstrate. It results in courts having to deal with difficult issues of considerable importance under compressed time limits."[74]

40. Within the context of this matter, the reasoning of Tolmay J in ***Mokate v UDM*** is apposite:

> "I am of the view that in the light of the fact that the publication took place on 17 June 2020 [three weeks before the hearing], the statement has been in the public domain for a significant time and the harm that may have been done, has already occurred. The proverbial horse has bolted. Such harm that Dr Mokate may suffer, due to the statements, can be addressed in due course when the matter is heard and the issues between the parties are property ventilated. She will be able to obtain redress at a hearing in due course, as all other litigants in defamation matters do."[75] (Own emphasis.)



41. In addition, in ***Mabote*** this Court held (per Opperman J):

> "By the time the respondent published its article, it was already in the public domain that applicant had been involved in a romantic relationship with Mr Edwin Sodi. No action has been taken by applicant against Opera News or any of the other publications. There seems to be merit in the argument that whether this Court grants the applicant the relief she seeks or not (apart from the one million rand which she does not seek be awarded to her by the urgent Court) her reputation will not undergo any material change for it is already what it is and the publications above listed have seen to that. Courts are not inclined to grant orders that will have

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[74] *AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) ("***AParty***") at para 64.

[75] *Mokate v United Democratic Movement and Another* [2020] ZAGPPHC 377 ("***Mokate v* UDM**") at para 7.

only academic effect, and this must weigh in the overall decision."[76] (Own emphasis.)

42. This matter is not urgent for the following reasons:

42.1. By the time of the hearing of this matter, the article will have been in the public domain for almost four weeks.[77] The alleged harm that the Applicants allege to have suffered has already occurred.

42.2. The article is also available on two other online platforms over which the Respondents have no control.[78] The owners and operators of these platforms have not been cited in these proceedings.[79] The prior restraint orders which the Applicants seek will, therefore, not remedy the harm that the Applicants allege has been caused.[80]

42.3. As we detail below, the Respondents have raised a defence based on a sustainable factual foundation.[81] This matter also has a complex factual matrix.[82] Whether the alleged defamation is wrongful may need to be decided in due course by a trial court.

42.4. An award of damages is available to the Applicants to vindicate their right to reputation, if it is later found to have been infringed.[83]

43. On these grounds alone, this application should be dismissed.

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[76] *Mabote v Fundudzi Media Proprietary Limited t/a Sunday World* [2020] ZAGPJHC 287 ("***Mabote***") at para 28.

[77] AA, para 12 (12-4).

[78] AA, paras 12-13 (12-4 to 12-5).

[79] AA, para 13 (12-5).

[80] AA, para 14 (12-5).

[81] *Herbal Zone* above n 31.

[82] AA, para 27 (12-8).

[83] *Midi Television* above n 19.

THE REQUIREMENTS FOR A FINAL (OR INTERIM) INTERDICT HAVE NOT BEEN MET

44. In addition to the clear challenges with urgency detailed above, this matter should be dismissed for the following four reasons:

    44.1. The Respondents have raised a defence.

    44.2. There are no exceptional circumstances which warrant a prior restraint order.

    44.3. There are available alternative remedies.

    44.4. The interim relief is final in effect.

The Respondents have raised a defence

45. In ***EFF v Manuel***, the Supreme Court of Appeal (per Navsa and Wallis JJA) held that:

> "Where defamation is established and the defences to a claim for an interdict are shown on the papers to be without substance, the grant of a final interdict is permissible. Conversely, where the opposition to an interdict is based on a colourable defence based on facts advanced in the answering affidavit that cannot be rejected on the papers and require oral evidence, a final interdict may not be given. Whether any interim relief can be granted will depend on the application of the well-established rules in relation to interim interdicts."[84] (Own emphasis.)

46. In ***Ndlozi***, this Court (per Wilson J) recently provided an overview of the truth and public benefit defence:

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[84] *Economic Freedom Fighters and Others v Manuel* [2020] ZASCA 172; [2021] 1 All SA 623 (SCA); 2021 (3) SA 425 (SCA) ("***EFF v Manuel***") at para 88.

"[50] As its name implies, the defence of truth and public benefit is engaged only where the published statement is substantially true.

. . .

[52] While I do not think that the respondents were entirely honest in their presentation of the story, the fundamental truth of the gist of both the defamatory statements cannot seriously be impugned.

. . .

[54] This is perhaps the most difficult part of the case. Truth has never been a complete defence to a claim of defamation. That entails accepting that it may sometimes be defamatory and unlawful to publish something that is perfectly accurate. That may sound counter-intuitive, because, while it may sometimes be rude, or unethical, to speak the truth, or unlawful to break a duty of confidentiality, it seems onerous to require a defendant, especially a media defendant, to demonstrate that the dissemination of a true fact was also for the public benefit. As a general proposition, the public benefits from knowing the truth. The media exist to disseminate the truth, and must be accorded an appropriate margin of appreciation in their work towards doing so. That is precisely why we do not generally hold the media liable for publishing a falsehood if the publisher reasonably believed the falsehood was true.

[55] However, the law recognises that it is not always in the public interest to publish a fact merely because it is likely to be of interest to the public".[85] (Own emphasis.)

47. In ***Independent Newspapers***, the Supreme Court of Appeal (per Marias JA) extensively detailed the "public benefit" element of the defence, holding that:

"[42] The criterion allows for considerable elasticity in its application and is woefully unhelpful in failing to provide any indication of what is meant by public benefit or interest. It is true that what is interesting to the public is not necessarily the same as what it is in the public interest for the public to know but that leaves unanswered how to distinguish the two. It seems

[85] *Ndlozi v Media 24 t/a Daily Sun and Others* [2023] ZAGPJHC 1040; 2024 (1) SA 215 (GJ); [2024] 1 All SA 392 (GJ) ("***Ndlozi***") at paras 50. 52, and 54-5.

obvious that what it is in the public interest for the public to know may not in fact be interesting to the public and that what the public finds interesting it may not be in the public interest for the public to know.

[43] Prurient or morbid public curiosity, no matter how widespread, about things which are ordinarily regarded as private or do not really concern the public cannot be the test. Nor can the fact that there is a legitimate public interest in a particular topic such as the prevention of crime and the apprehension of offenders mean that any information of any kind which is relevant to that topic may be published with impunity."[86]

48. The Respondents argue that the relevant statements in the article are true (or substantially true) and in the public interest. In their answering affidavit they lay out a sustainable foundation based on evidence to show that the defence can be pursued by the Respondents at a trial.[87]

49. The Respondents also detail why the article is in the public interest, not simply of interest to the public.

50. The Respondents state that:

50.1. "It is clear that the fate of the BHI Trust and its related persons and entities, and the outcome of the FSCA investigation, is in the public interest, given the financial implications for investors in the BHI Trust and the need to ensure appropriate regulation in the financial sector."[88]

50.2. "In the midst of an FSCA investigation into the BHI Trust and 'other persons', and Investec's termination of its relationship with Global and Local as a result of its relationship with BHI, the Applicants' past and recent links and connections to Global and Local and Mr Haldane are

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[86] *Independent Newspapers Holdings Ltd and Others v Suliman* [2004] ZASCA 57; [2004] 3 All SA 137 (SCA); 2005 (7) BCLR 641 (SCA) ("***Independent Newspapers***") at para 42-3.

[87] See *Herbal Zone* above para 27. See, also, AA, paras 57-65 (12-14 to 12-18).

[88] AA, para 42 (12-10).

certainly in the public interest. It is alleged that thousands of people are at risk of losing their financial investments in [the] BHI Trust. These people and the public at large have a right to receive information which may be relevant to them, the FSCA investigation and the 'significant media interest' in it, and the broader regulation of the financial sector. The public interest in exposing alleged financial crimes cannot be gainsaid."[89]

51. If this Court is minded to consider this matter on the papers, the application must fail as the Respondents have laid out a sustainable defence of truth in the public interest, which cannot be rejected on the papers.[90] Alternatively, the Respondents argue that the publication was reasonable.[91]

52. If this Court is of the view that the facts must be dealt with in due course, this application too must fail as an alternative remedy through the potential award of damages is available to the Applicants in due course.[92]

53. The Applicants have, therefore, not proved the existence of a clear right. The article is not wrongfully defamatory. As a result, the interdictory relief cannot be granted.

54. It is also for these reasons that the declarator and the retraction and apology orders should not be granted.

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[89] AA, para 60 (12-16 to 12-17).

[90] *EFF v Manuel* above n 84.

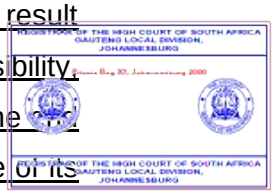
[91] *National Media Ltd and Others v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A); *EFF v Manuel id* at paras 41-8.

[92] *Mokate v UDM* above n 75.

There are no exceptional circumstances warranting prior restraint

55. In ***Hix***, the Supreme Court of Appeal held that:

> "To sum up, cases involving an attempt to restrain publication must be approached with caution. … freedom of speech is a right not to be overridden lightly. The appropriate stage for this consideration would in most cases be the point at which the balance of convenience is determined. It is at that stage that consideration should be given to the fact that the person allegedly defamed (if this be the case) will, if the interdict is refused, nonetheless have a cause of action which will result in an award of damages. This should be weighed against the possibility, on the other hand, that a denial of a right to publish is likely to be the end of the matter as far as the press is concerned. And in the exercise of its discretion in granting or refusing an interim interdict regard should be had inter alia to the strength of the applicant's case; the seriousness of the defamation; the difficulty a respondent has in proving, in the limited time afforded to it in cases of urgency, the defence which it wishes to raise and the fact that the order may, in substance though not in form, amount to a permanent interdict."[93] (Own emphasis.)



56. The caution expressed in ***Hix*** applies to interim interdicts but should be considered (and even more so) where a final interdict is sought.

57. On the facts of this matter:

    57.1. The Applicants have not placed exceptional circumstances before this Court warranting the grant of a final interdict.[94]

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[93] *Hix Networking Technologies CC v System Publishers (Pty) Ltd and Another* [1996] ZASCA 107; 1997 (1) SA 391 (SCA); [1996] 4 All SA 675 (A) ("***Hix***").

[94] AA, para 28 (12-8).

57.2. The effect of the prior restraint (whether final or interim) is that the denial to publish will be permanent. It will be for an indefinite period, in the midst of an ongoing FSCA investigation.[95]

57.3. The Applicants' case, particularly in relation to harm, is speculative[96] and any alleged harm has already occurred.

58. It is also for these reasons that this matter should be dismissed.

There are alternative remedies

59. The Applicants have alternative remedies:

59.1. The matter can be heard in the ordinary course. As detailed above, the article was published almost four weeks ago,[97] and it is available on multiple platforms, which the Respondents do not control.[98] At this stage, an award for damages is capable of indicating the right to reputation. The interdictory relief and the prior restraint orders will not remedy the harm that the Applicants allege has been caused.

59.2. The Press Council of South Africa ("**Press Council**") was, and still is, available to the Applicants.[99] While a party is not precluded from approaching this Court directly, the Applicants fail to explain why they have elected not to the Press Council, which is known to offer speedier remedies.[100]

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[95] AA, para 16 (12-5).

[96] *Midi Television* above n 19 at para 19.

[97] AA, para 12 (12-4).

[98] AA, paras 12-13 (12-4 to 12-5).

[99] AA, paras 20-23 (12-6 to 12-7).

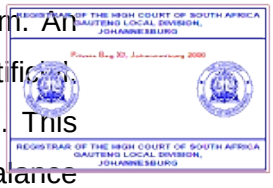
[100] AA, para 23 (12-7).

60. In addition to the reasons detailed above, the application falls to be dismissed on this basis.

The interim relief has the effect of final relief

61. In ***UDM v Lebashe***, which is cited by this Court in ***Sithole***, the ineffectual nature of interim relief, which is apposite to this matter, is detailed by Molemela JA (as she was then) in her minority judgment:

> "Considering the above, the allegations were already in the public domain in any event. Only the appellants are not permitted to repeat them. An interim order under such circumstances is not only impotent, but artificial. It amounts to no more than what the law calls a *brutum fulmen*. This relates to one of the requisites for an interim interdict, namely the balance of convenience. On this score, it clearly did not favour the granting of an interim order, and the interim order should not have been granted in the first place."[101]



62. In terms of the interim relief proposed by the Applicants, and as noted in ***Hix***, it has the effect of being final.[102]

63. The interim order (like the final order) fails to acknowledge the "time-sensitive" and "fluid" context of this matter, where a Ponzi scheme and associated people and entities are being investigated by the FSCA.[103] The interim relief is intended to last for the length of trial, which may take years, and may extend beyond the investigation into the BHI Trust and those associated with it.[104] This disadvantage of curtailing the free flow of information outweighs its advantage.[105]

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[101] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2021] ZASCA 4; [2021] 2 All SA 90 (SCA) ("***UDM v Lebatshe***") at para 60.

[102] AA, para 17 (12-5 to 12-6).

[103] *Id*.

[104] *Id*.

[105] See *Midi Television* above n 19 para 26.

64. However, should this court consider the interim relief, the balance of convenience favours the Respondents due to the significant ramifications of this matter on the right to freedom of expression.[106]

65. For all these reasons, this matter should be dismissed, if not struck from the urgent roll.

THE APPLICANTS HAVE ABUSED THE COURT PROCESS

66. In the 2022 report[107] (cited above) by the current UNSR FreeEx, Irene Khan, which was presented to the United Nations Human Rights Council, the Special Rapporteur called for an end to weaponisation of court against journalists and noted that:

> "States should discourage frivolous or vexatious legal action (strategic lawsuits against public participation) against journalists and news outlets by adopting laws and policies that allow early dismissal of such cases, limit the damages claimed in civil defamation suits against journalists and media outlets, permit the defence of "public interest" and "no malice" for journalists, provide legal support to victims of strategic lawsuits against public participation, end "forum shopping" and sanction the use of strategic lawsuits against public participation."[108]

67. In the recent case of ***Maughan***, the Kwa-Zulu Natal Division held:

> "It is quintessential to the freedom of expression and freedom of the press to protect the abuse to intimidate, censor and silence journalists by means of SLAPP suits."[109]

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[106] AA, para 81 (12-21).

[107] See above n 22.

[108] *Id* at para 113.

[109] *Maughan v Zuma and Others* [2023] ZAKZPHC 59 ("***Maughan***") at para 190.

68. Despite the existence of a defence — based on a substantial factual foundation — for the allegations contained in the article, the Applicants have:

68.1. Approached this Court on urgency and for final relief in the form of a "gagging order", in circumstances where such relief is not warranted. This constitutes an abuse of process.[110]

68.2. Failed to file a Rule 16A notice.[111]

68.3. Avoided the Press Council.

68.4. Sought a personal and punitive costs order against the Second and Third Respondents who were acting in the course and scope of their duties.[112]

69. The only reasonable inference that can be drawn is that the application has a "manifestly intimidatory componentry".[113] It was instituted for the ulterior purpose of punishing and deterring the Respondents, particularly the Second and Third Respondents, in the midst of an ongoing FSCA investigation, with the intent to achieve a chilling effect by making an example of them.[114]

70. While this matter may not, at this stage, have all the characteristics of a SLAPP suit, the ulterior objectives of punishment and deterrence are apparent.[115]

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[110] AA, para 96 (12-23).

[111] AA, paras 30-6 (12-8 to 12-9). See *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) at para 30.

[112] AA, para 44 (12-10).

[113] AA, para 97 (12-24)

[114] AA, para 98 (12-24).

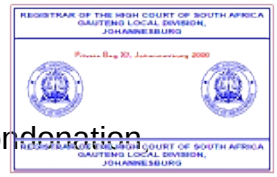
[115] *Sithole* above n 3 at para 42.

The Applicants should pay punitive costs

71. In ***Sithole***, for similar reasons, this Court awarded punitive costs against the Applicants in that matter.[116] This Court should, within its discretion, elect to do the same in this matter.

CONDONATION AND TIMEFRAMES

72. The Respondents seek condonation for the late filing of their answering affidavit.[117] In doing so, they provide detailed reasons for the period of the delay, which are reasonable.[118]



73. The test for condonation is well established.[119] For a court to grant condonation it must be satisfied that good cause has been shown. The factors which should be taken into account are the degree of lateness, the reasons for the lateness, the prospects of success, any prejudice that may be suffered, and the interest in finality.[120]

74. The Respondents filed their answering affidavit four days late. They have explained the reasons for the delay. The crux of the present determination is the prospects of success that the Respondents have in this matter, as has been detailed above, and that the prejudice suffered by the Respondents, should this Court not grant condonation, will substantially outweigh the prejudice, if any, suffered by the Applicants due to the nature of the relief that is sought.

75. The hearing of this matter, as detailed in the Notice of Motion, has not been delayed, good cause has been shown, and it is in the interests of justice that this Court hears the Respondents' version.

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[116] *Sithole* above n 3 at paras 47-9.

[117] AA, paras 83-95 (12-21 to 12-23).

[118] *Id*.

[119] *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 552.

[120] *Id*.

76. As a result, we submit that condonation should be granted.

CONCLUSION

77. For the reasons given above, we submit that this application should be dismissed, alternatively struck from the urgent roll, with costs on the attorney and client scale, including the costs of one counsel, where so employed.

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Rosebank, Johannesburg
5 February 2024

[121] I am thankful to S'lindile Khumalo and Claire Dehosse for their research support in the preparation of these heads of argument.

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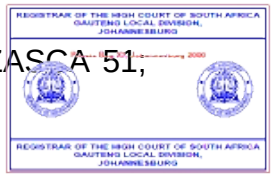

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