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

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW

1 On 10 January 2024, the first respondent published an article ("**the M&G article**") written by the second respondent ("**Ms Comins**") on its website, which is accessible globally, including Europe.[1]

2 The M&G article was published in the following context:

2.1 There exists widely publicised allegations that an entity by the name of BHI Trust, apparently constituted in South Africa, is a Ponzi scheme and that Global and Local Investment Advisors (Pty) Ltd ("**G&L**") was involved in BHI Trust's alleged wrongdoing.[2]

2.2 In or about October 2023, Mr Craig Warriner, a trustee and fund manager of BHI Trust, resigned from BHI Trust following criminal allegations and charges of fraud levelled against him, including by numerous dissatisfied South African investors in BHI Trust.[3]

2.3 Shortly thereafter, the Financial Sector Conduct Authority ("**the FSCA**") issued a press release, stating it was investigating BHI Trust and others relating to the activities of the BHI Trust, in respect of the possibility that BHI Trust was conducting unauthorised financial services business and unauthorised collective investment scheme business.[4]

3 The M&G article purports to have "*exposed*" "*links*" between the applicants, on

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1 FA para 11 (01-10 to 01-11) and annexure "**FA1**" (01-39 to 01-40).

2 FA para 12.1 (01-11).

3 FA para 12.2 (01-11).

4 FA para 12.3 (01-11).

the one hand, and – on the other hand – those named as wrongdoers in the preceding publicity, namely, BHI Trust, G&L, Mr Warriner and another person who is mentioned in the M&G article, namely Mr Michael Haldane.[5] None of these links are grounded in fact; various statements in the article are false; and the article is defamatory and injurious to the dignity and reputation of the applicants.[6]The M&G article strikes at the heart of the applicants' businesses (which are centred on high value investments for and on behalf of clients), which are built on trust relationships with investors, and will cause harm to the applicants' businesses, at all levels unless retracted.[7] This harm will likely have catastrophic consequences on the applicants' business ventures, and has the potential to destroy the applicants' business altogether.

4 The M&G article remains available online around the world and in South Africa, and has already been read by hundreds of thousands if not millions of people. Each time it is accessed, read, and disseminated, the applicants suffer additional and expanding harm from which it seeks this Court's protection.[8] The only manner in which this kind of harm may be effectively mitigated is through retraction, correction and associated relief.

5 In this application, the applicants approach this Court on an urgent basis seeking the following orders:

5.1 Declaring that the M&G article contains false, defamatory and injurious

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5 FA para 13 (01-11).

6 FA para 14 (01-11).

7 FA para 50 (01-30).

8 FA para 51 (01-32).

statements and allegations pertaining to the applicants;[9]

5.2 Directing the respondents to:

5.2.1 remove (from their website) or retract and to apologise for the M&G article;[10] and

5.2.2 not to publish further articles with substantially similar allegations regarding the applicants.[11]

5.3 *Alternatively*, granting an order to remove the M&G article from their website and to interdict publication of similar allegations on an interim basis pending the outcome of defamation proceedings.[12]

6 Whilst the respondents belatedly filed a notice of opposition, they have – at the time of filing these heads of argument – failed to file an answering affidavit in accordance with timeline prescribed by the applicants in their notice of motion.

7 The rest of these heads of argument are structured as follows:

7.1 First, we deal with the facts relevant to this application.

7.2 Second, we identify the respects in which the M&G article is defamatory of the applicants.

7.3 Third, we explain why the applicants are entitled to the relief that is sought in the notice of motion.

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9 NOM para 2 (01-2 to 01-3).

10 NOM para 4 (01-3 to 01-4).

11 NOM para 3 (01-3).

12 NOM para 5 (01-4).

7.4 Fourth, we deal with the urgency of this application and the respondents' failure to adhere to the timeline prescribed in the notice of motion.

7.5 Finally, we conclude and address the issue of costs.

FACTS

8 In this section, we outline the facts relevant to this application. We do so in three parts. First, we deal with the correspondence between the applicants and the respondents before publication of the M&G article. Second, we identify particular statements in the M&G article that are false. Third, we deal with correspondence between the parties after publication of the M&G article.

Pre-publication correspondence

9 On 5 December 2023, Ms Comins emailed Mr Ben Monteith, an Accounts Director of SEC Newgate, which acts as an external communications and public relations adviser of RE Capital, asking various, vague and broad-ranging questions about the applicants. She did not make specific allegations against the applicants for them to respond to, but asked general questions pertaining to their relationship with BHI Trust and Mr Haldane.[13]

10 On 6 December 2023, Mr Monteith answered these questions by way of email, informing Ms Comins, *inter alia*, that:

10.1 Mr Haldane:

10.1.1 was a director of RE Capital Ltd from 30 November 2022 to 30

[13] FA para 29 (01-20 to 01-21).

October 2023 (i.e. a period of 11 months);

10.1.2 had no operational or day-to-day involvement in RE Capital or any of its subsidiaries; and

10.1.3 was asked by the RE Capital board, as a precautionary measure, to step down as a director because of potential reputational risks created by the allegations involving Mr Haldane and G&L, which he immediately did.

10.2 Mr Leech was a director of:

10.2.1 GMG Trust from 2002 to 2007; and

10.2.2 Wasabi Management Limited ("**WML**"), an investment manager to BHI International Limited ("**BHIIL**"). (These entities are <u>not</u> related to BHI Trust and G&L and have no relevant "links" to them.[14])

10.3 RE Capital is not involved with G&L, WML, the BHI Trust or BHILL.[15]

11 The applicants answered these questions on a confidential basis, requesting also that the final draft of the article that M&G be shared with them prior to publication, so that they could comment on it and correct any factual inaccuracies.[16]

12 On 6 December 2023, Mr Monteith and Ms Comins exchanged further emails, in which:

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[14] FA para 14.1& 14.2 (01-15).

[15] FA para 30 (01-21 to 01-23).

[16] FA para 31 (01-23).

12.1 Ms Comins, purporting to afford the applicants a right of reply, requested that the applicants provide an "*on the record response*", but once again failed to make any specific allegations them; and

12.2 Mr Monteith requested Ms Comins to clarify if any allegations were being made against the applicants, and to specify these allegations to enable them to respond appropriately thereto.[17]

13 On 18 and 19 December 2023, further emails were exchanged:

13.1 Ms Commins once again requested the applicants to provide their "*on the record responses*", and asked two further questions.[18]

13.2 Mr Monteith responded by telling Ms Comins that Geneva Management Group (BVI) Limited ("**GMG (BVI)**"), in which Mr Leech is a shareholder, does not hold shares in in G&L. Therefore, he could not comment on the allegation that G&L and Mr Haldane had advised clients to invest in BHI Trust (because Mr Leech simply had no knowledge of that). He also reiterated that the applicants were happy to "*respond to any specific and appropriate questions or comments you may make in your piece*".[19]

13.3 In reply, Ms Comins wrote, we "w*ill go with no comment from Mr Leech as you have requested*", to which Mr Monteith responded by reiterating, "*If there are specific comments or allegations the piece makes against our client, please put them to us*".[20]

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[17] FA para 32 (01-23).

[18] FA para 33 (01-23 to 01-24).

[19] FA para 35.1 (01-24).

[20] FA para 35.2 (01-24).

13.4 Ms Comins then responded: "*[I've] put them to you in my questions but you've asked me not to quote Mr Leech. May I go ahead and quote the responses please?*"[21] Mr Monteith replied that the applicants were asking that their answers be treated as confidential.[22]

14 On 10 January 2024, the M&G article was published.[23]

False statements in the M&G article

15 The statements regarding the applicants in the M&G article are, both individually and as a whole, false.

16 The M&G article contains the following <u>particular</u> false statements:[24]

16.1 RE Capital and Mr Leech:

16.1.1 have relevant links with G&L and BHI Trust;[25] and

16.1.2 are connected to BHI Trust through G&L and WML.[26]

16.2 Mr Haldane, the representative of G&L, is "*linked*" (in a relevant sense) to RE Capital and Mr Leech through having been on the board of RE

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21 FA para 35.3 (01-24).

22 FA para 35.4 (01-24 to 01-25).

23 FA para 11 (01-10 to 01-11) and annexure "**FA1**" (01-39 to 01-40).

24 FA para 21 (01-16 to 01-18).

25 "*Global and Local Financial Advisors, the company that apparently promoted investments in the alleged almost R3 billion BHI Trust ponzi scheme to local people, has diverse international links and is half-owned by a South African expat living abroad and listed as a Swiss resident.*"

26 "*Leech remains as a director of RE Capital Holdings and appears to be a 50% shareholder in Global and Local through a company called Geneva Management Group and is also listed as a director of Wasabi Management LTD on a company document signed by Katrinos (Kaddy) Cost, who issued investor statements on behalf of BHI Trust's administrator, Rubicon Administration, as late as September 2023 before its crash.*"

Capital.[27]

16.3 G&L is partly owned by Mr Leech, through Geneva Management Group or otherwise.[28]

16.4 Geneva Management Group:

16.4.1 undertook business activity;

16.4.2 was related to BHI Trust, G&L, Mr Warriner and Mr Haldane; and

16.4.3 had subsidiaries listed on the London Stock Exchange.[29]

16.5 The applicants:

16.5.1 were provided a reasonable opportunity to comment on the links drawn in the M&G article;

16.5.2 refused to comment on these links.[30]

17 Each of these particular false statements, when read as a whole, conveys to the reasonable reader that:

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[27] "*Newman George Leech, who has previously been associated with a company in the Panama Papers, also shared a directorship of London listed company RE Capital Holdings with Global and Local representative Michael Haldane, until 30 October last year.*"

[28] "*Global and Local Financial Advisors, the company that apparently promoted investments in the alleged almost R3 billion BHI Trust ponzi scheme to local people, has diverse international links and is half-owned by a South African expat living abroad and listed as a Swiss resident. . . . '[Rubicon Global Limited], along with a company called Geneva Management Group, appear to be 100% shareholders of South Africa's Global and Local Investment Advisors according to documents,' Henderson said . . . Leech remains as a director of RE Capital Holdings and appears to be a 50% shareholder in Global and Local through a company called Geneva Management Group*".

[29] "*Pillay said he had previously worked for Geneva Management Group, of which Leech was a director, 'and, yes, it does have massive offshore companies and it also has companies listed on the London Stock Exchange . . . We are all connected somehow. We all know each other but no one knew what Mr Warriner was doing.'*"

[30] "*Leech's representative in the United Kingdom repeatedly declined to comment on the company ownership and links to Leech despite being approached on several occasions by the Mail & Guardian in recent weeks. He provided 'background' information but declined to allow its publication and refused to comment. Similar attempts to contact Haldane have also been unsuccessful.*"

17.1 the applicants have relevant "*links*" with wrongdoing, misappropriation of investor funds, and a Ponzi scheme;[31] and

17.2 the M&G article purports to have "*exposed*" these links.[32]

15. This is false. The applicants did not facilitate, they took no part in, and they did not know about, the alleged wrongdoing and are accordingly not "*linked*" to it. Because the applicants had no links with wrongdoing, there was nothing to be exposed.[33]

Post-publication correspondence

18 On 12 January 2024, the applicants' attorneys addressed a letter to Mr Feltham and Ms Comins recording the inaccuracies in and defamatory nature of the M&G article, noting that the M&G article was published without the applicants being afforded an opportunity to comment thereon, and demanding that M&G article be retracted.[34]

19 No response was received by Mr Feltham, or any other representative of M&G. On 13 January 2023, though, Ms Comins responded, denying all the allegations against the respondents.[35]

20 On 14 January 2024, the applicants' attorneys wrote to the respondents pointing out the deficiencies in Ms Comins' response, reiterating the factual inaccuracies, stating that the M&G article associates the applicants with wrongdoing, recording

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[31] FA para 22 (01-18).

[32] FA para 23 (01-18).

[33] FA para 20 (01-16).

[34] FA para 38 (01-26).

[35] FA para 39 (01-26 to 01-27).

that the applicants were not afforded an opportunity to comment on the essential substance of the allegations in the M&G article, and demanding retraction of the M&G article.[36]

21 On 15 January 2024, Mr Feltham emailed the applicants' attorneys, stating only that the applicants had a right of reply, which M&G would publish.[37] In the light of the respondents' refusal and/or failure to retract the M&G article, the applicants launched this application.

THE M&G ARTICLE IS DEFAMATORY

22 The test for whether a statement is defamatory is whether, in the opinion of a reasonable person, the words would tend to undermine, subvert or impair a person's good name, reputation, or esteem in the community.[38]

23 The M&G article contains statements of fact that, either expressly or by their clear implication, would be understood by any reasonable reader of the M&G article to mean, *inter alia*, that the applicants:

23.1 were involved with unlawful conduct that is connected with BHI Trust's Ponzi scheme;

23.2 engaged in unscrupulous, improper and unlawful business conduct, such as misappropriation and fraud;

23.3 do not have regard for the law and act with impunity;

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[36] FA para 40 (01-27).

[37] FA para 41 (01-27).

[38] *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 8, read with paras 150, read with paras 8, 91(a), 169, 170 and 173.

23.4 cannot be trusted with investor funds; and

23.5 use a network of offshore companies to misappropriate and hide funds of investors.[39]

24 The M&G article does not say that there might be links between the applicants and criminality. It does not merely record the existence of allegations, but rather it positively asserts the existence of the applicants' link to wrongdoing.[40] Indeed, if this was not the objective meaning of the article, its sensational banner line, i.e., "*BHI Trust's international links exposed*", would make no sense, nor would its crude image of heaps of money and floating pyramids.

25 In *Yutar*, the Appellate Division faced similar facts, where a poster with the words "*How Dr. Yutar misled the Court*" was presented in "*sensational form*". Rejecting the argument that "*misled*" could reasonably be read as meaning "*recklessness*" rather than "*intention*", Steyn CJ held:

> "*The announcement on the poster of the important news of the week, 'How Dr. Yutar misled the Court', and the sensational banner line across the front page, 'Dr. Yutar misled the Court', could hardly have been understood by a reader in any other sense than that Dr. Yutar intentionally led the court to accept what was not true. The mere fact of the announcement on the poster and of the sensational presentation of the news must have conveyed that something gravely reprehensible had been perpetrated by the respondent. Something short of deliberate and serious deception could not within reason have given rise to such a poster or such a headline. A more innocent meaning would have rendered them somewhat incongruous. They must, together or separately, have created in the*

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[39] FA para 22 (01-18).

[40] Therefore, the facts of this case are distinguishable from cases involving only allegations, e.g., *Modiri v Minister of Safety and Security and Others* 2011 (6) SA 370 (SCA) paras 15 and 25-26, *Council for Medical Schemes and Another v Selfmed Medical Scheme and Another* [2011] ZASCA 207 paras 61-63, *Smalle and Another v Southern Palace Investments 440 (Pty) Limited and Another* [2016] ZASCA 189 paras 27-28, *Moselakgomo v Media 24 Ltd and Others* [2014] ZAGPJHC 147 paras 5-7.

mind of the reader the impression that the respondent had been guilty of a deliberate misrepresentation, of such importance as to call for such a flourish of emphasis. That, I have no doubt, is how the reader would have understood the word 'misled', and that, I likewise have no doubt, is how the author intended him to understand that word. The language of the poster, as such, admits of no other conclusion."[41]

26 Analogously, the litany of false statements in the M&G article must be read with its accompanying banner line and image. When they are, we submit, they must have created in the mind of the reader the impression that the applicants were in fact linked to wrongdoing, which the M&G article had purportedly exposed. The language and imagery admits of no other conclusion.

27 In this way, the allegations in the M&G article are analogous to a publication that states that a person has been arrested, which the Supreme Court of Appeal has held is defamatory, "*because it would lead the reasonable reader to infer that*" the respondents "*believed, on reasonable grounds*" that the applicants are guilty of the wrongdoing purportedly exposed in the M&G article.[42]

28 These are serious and adverse allegations. Plainly, they have a tendency to, or are calculated to undermine, the applicants' reputations and dignity.[43]

APPLICANTS' RIGHT TO RELIEF

29 On the uncontested facts delineated in the founding affidavit, the applicants are entitled to orders:

29.1 declaring that the M&G article contains false, defamatory and injurious

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41 *South African Associated Newspapers Ltd and Another v Yutar* 1969 (2) SA 442 (A) 451B-E.

42 *Manyatshe v M & G Media Ltd and Others* [2009] ZASCA 96 para 16.

43 FA para 24 (01-18 to 01-19).

statements and allegations pertaining to the applicants;

29.2 directing the respondents to retract and to apologise for the M&G article, and not to publish further articles with substantially similar allegations regarding the applicants;

29.3 *alternatively*, granting the above orders on an interim basis pending the outcome of defamation proceedings.

30 We deal in turn with each form of relief.

Declaratory relief

31 Section 21(1)(c) of the Superior Courts Act, 2013, affords this Court the power to grant declaratory relief in respect of, *inter alia*, an existing right or obligation. In *Cordiant Trading*, the Supreme Court of Appeal held that a two-stage approach must be followed when considering the granting of declaratory relief:

31.1 the Court must be satisfied that the applicant is a person interested in the existing right or obligation; and

31.2 the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.[44]

32 We submit the following:

32.1 Regarding the requirement that there be an existing right:

[44] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2006] 1 All SA 103 (SCA) para 18.

32.1.1 The applicants' right[45] is not to be subjected to the wrongful and intentional publication of defamatory statements.[46]

32.1.2 The M&G article was published and it is defamatory. Thus, the elements of wrongfulness and intention are presumed, with the respondents having a full onus to rebut this presumption.[47]

32.1.3 The respondents did not file an answering affidavit in which they laid a factual foundation for a defence.[48]

32.1.4 Therefore, the applicants have a right in the sense that is required for declaratory relief.

32.2 Regarding this Court's discretion, given the nature of the harm – both past and ongoing, as outlined below – this is an appropriate case for this Court to exercise its discretion in favour of the applicants.

33 Therefore, we submit that the applicants are entitled to the declaratory relief that is sought in the notice of motion.

Final interdictory relief

34 In addition to the declarator, the applicants seek final interdictory relief against the respondents, namely, orders directing the respondents:

34.1 To retract and to apologise for the M&G article; and

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[45] FA paras 46-48 (01-29 to 01-30).

[46] *Le Roux* at paras 84 and 171, read with paras 8 and 150.

[47] *Le Roux* at paras 85 and 171, read with paras 8 and 150.

[48] *Le Roux* at para 85.

34.2 not to publish further articles containing substantially similar allegations.

35 Litigants may proceed in claims for defamation by way of applications for final interdicts,[49] and where the "*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*".[50] Thus, to obtain relief the applicants must show a clear right, an injury or well-founded apprehension of harm, and that there is no adequate alternative remedy.[51]

Clear right

36 To obtain a final interdict, the applicants must place before this Court facts that prove on a balance of probability the existence of a substantive right.[52]

37 Above, we demonstrated that the:

37.1 M&G article is defamatory and was published;

37.2 elements of wrongfulness and intention are presumed; and

37.3 the respondents have not filed an affidavit laying any factual foundation to rebut this presumption.[53]

38 Therefore, the applicants have a clear right.

Injury, or well-founded apprehension of harm

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[49] *Malema v Rawula* [2021] ZASCA 88 (23 June 2021) para 26.

[50] *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) para 88.

[51] *Ramos v Independent Media (Pty) Ltd and Others* ZAGPJHC 60 para 122.

[52] LTC Harms in Joubert (ed) *The Law of South Africa* 2ed, vol 11 para 394.

[53] FA paras 46-48 (01-29 to 01-30).

39 The M&G article caused and continue to cause damage to the applicants' dignity and reputation.

40 The false and defamatory statements in the M&G article call into question the applicants' integrity and their commitment to RE Capital's core values:

40.1 They do so by purporting to expose links between them and the allegedly unlawful conduct involving BHI Trust, strongly suggesting that the applicants are involved therein.

40.2 Thus, there is a real risk that the applicants' business and reputation have suffered irreparable harm, by virtue of RE Capital's existing and potential investors potentially reading the M&G article. The article strikes at the heart of their businesses, which are built on trust. It threatens to destroy or substantially impair their business. Without limitation, this includes the probability that:[54]

40.2.1 new investors will be dissuaded from investing with the applicants and existing investors may pull their investments;

40.2.2 the contents of the M&G article would almost certainly be flagged by potential lenders to RE Capital conducting due diligences, which would, at an operational level, have catastrophic consequences for RE Capital, given the nature of its business. This would result in RE Capital incurring difficulties when raising new, and extending existing, borrowing facilities with financial institutions in order to carry out its business. By way of illustration,

[54] FA para 50 (01-30 to 01-32).

RE Capital is currently looking to finance the construction of an asset in Europe with a financial institution, to the value of over USD 25 million ("**the Project**"). Should this financing of the Project be delayed due to the false allegations in the M&G article, it would mean, *inter alia*, that: (i) the commencement of construction for the Project would also be delayed; (ii) there would be additional irrecoverable project costs amounting to over USD 5 million as a result of delay; and (iii) RE Capital would need to terminate and re-enter certain construction cost arrangements with third parties. As an investment management and property development company, this has the potential to destroy the growth of RE Capital completely, and result in potential retrenchments;

40.2.3 the applicants have already received calls from various parties (including its existing clients), making enquiries and asking questions directly linked to the M&G article. Some of the clients in question are represented by asset managers / wealth advisors in South Africa and the potential irreversible harm to reputation and the business is heightened in this regard.

40.2.4 aside from its existing clients abandoning the applicants, the applicants are on the verge of closing a significant number of new investments totalling c.€50M in Europe in the next 3 months. The vast majority of the counterparties are regulated institutions and there is a real risk that a few of these deals being cancelled on

account of the article which is extremely damaging to the applicants' brand.

40.3 The M&G article remains accessible on the M&G website, with the harm or reasonably apprehended harm therefore still ongoing. As such, unless it is retracted and the respondents apologise, it will continue to harm the applicants' businesses.

40.4 Moreover, this harm is aggravated by the reasonable possibility that the respondents will publish further articles, containing substantially similar allegations as those contained in the M&G article.[55]

41 Plainly, the applicants have demonstrated injury or a well-founded apprehension of harm if the relief sought is not granted.

No adequate alternative remedy

42 The third requirement for final interdictory relief is that the there be no adequate alternative remedy.

43 The applicants seek two forms of interdictory relief:

43.1 a retraction and apology; and

43.2 an order not to publish articles containing substantially similar allegations to those contained in the M&G article.

44 Regarding retraction and apology, the Constitutional Court has held that such an

[55] FA paras 49-53 (01-30 to 01-33). See also annex "**FA11**" to the FA, in which Ms Commins states, *inter alia*, that "*I would like to invite Mr Leech to send his official "on the record" statement for consideration for publication in a future follow-up article regarding the BHI Trust/Global and Local matter.*" (01-73).

order can be an appropriate remedy in respect of an injury to a person's dignity.[56] Moreover, this Court has held that it can be appropriate where the respondent is a media organisation.[57]

45 This relief would be appropriate here:

45.1 We have addressed the harm suffered, and is still being suffered, by the applicants.

45.2 Ordering the respondents to publish a retraction and apology, we submit, will vindicate the applicants' interest in their good name and reputation. As the Constitutional Court explains:

> "*Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society.*"[58]

45.3 Respect, tolerance and reconciliation—each of these fundamental values cry out for the respondents to retract and apologise. Plainly, this would promote the "*restorative justice*", recognised by the Supreme Court of Appeal in *Media24*,[59] a matter also that involved a defamatory publication

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[56] *Le Roux v Dey* paras 202-203, read with para 150.

[57] *Ramos* at paras 132-134.

[58] *Le Roux* v Dey at paras 202-203.

[59] *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) paras 73-74.

by a media organisation.

46 Regarding <u>further publication</u>:

46.1 The applicants seek an order interdicting the publication of further articles with substantially similar allegations as those contained in the M&G article. Importantly, therefore, they do not seek relief:

46.1.1 prohibiting publication of any allegations against them, just those based on false information; and

46.1.2 requiring the respondents to obtain the applicants' confirmation of the accuracy of allegations before publication.

46.2 The form of the order sought is the logical corollary of the declarator, i.e., that the respondents must refrain from publishing further allegations that are false, defamatory and injurious of the applicants. For this reason, an order of the kind has been upheld by the Supreme Court of Appeal.[60]

46.3 In addition to being logically entailed by the declarator, such an order is justified by the following:

46.3.1 The respondents have no defence to the publication of the false, defamatory and injurious allegations in the article. Given the basic errors on which its allegations are based, no such defence could conceivably be constructed if they published substantially similar allegations. On this basis alone, the applicants are entitled to the

[60] *Manuel* at para 133, read with para 25.5.

interdictory relief sought.[61]

46.3.2 Whilst prior restraint interferes with the freedom of speech,[62] we submit that this concern has no, or little, force in this application:

(a) First, the interdict extends only to publication of substantially similar allegations to those contained in the M&G article. In substance, it will not interfere with the respondents' protected speech. Rather, it would ensure that they do not repeat false, defamatory and injurious allegations in future articles.

(b) Second, prior restraint can be justified when a proper case for this relief is made out.[63] The substance of the M&G article is defamatory, false and injurious to the applicants. Further, the harm faced by them is not speculative,[64] rather it is imminent and substantial. So, the applicants have made out a case for an order interdicting the respondents from publishing further articles with allegations that are substantially similar to those in the M&G article.

47 Therefore, both the retraction and apology and the interdict of further publications will provide the applicants with effective relief. The respondents do not contend that adequate alternative remedies exist, nor in fact do such remedies exist.

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61 *Hix* at 402G-I.

62 *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) para 44.

63 *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) paras 19-20.

64 *Midi Television* at para 19.

Conclusion: final interdictory relief

48 The applicants are entitled to final interdictory relief:

48.1 The M&G article is defamatory and the respondents have marshalled no defence to rebut either wrongfulness or intention, which means that they have a clear right.

48.2 The applicants have demonstrated injury or a well-founded apprehension of harm if the relief sought is not granted.

48.3 There are adequate alternative remedies to retraction and apology, or to the interdict of substantially similar publications.

Interim relief

49 If this Court declines to grant final relief, we submit that the applicants are entitled to the alternative interim relief:

49.1 Our submissions above in relation to a final interdict demonstrate that the applicants have established a *prima facie* right, reasonable apprehension of harm, and the absence of any other adequate remedy.[65]

49.2 Moreover, the balance of convenience favours the applicants:

49.2.1 Given the strength of the applicants' case—we submit they have a clear, but at least a *prima facie*, right—the prospects of success in future proceedings are good.[66]

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[65] FA para 58 (01-34).

[66] *Steel & Engineering Industries Federation v National Union of Metalworkers of SA* 1993 (4) SA 196 (T) 205F.

49.2.2 If the M&G article is not temporarily retracted, the applicants will suffer irreparable and continuing harm.

49.2.3 The respondents, contrarily, will suffer no harm if they are ordered, on a temporary basis, to retract the M&G article and to refrain from publishing allegations substantially similar to those contained in the article.[67]

[67] FA para 59 (01-34).

URGENCY AND FAILURE TO ADHERE TO TIMELINES

50 The applicants have brought this case on an urgent basis.[68]

51 The ultimate test for urgency is whether substantial redress can be achieved by a hearing in the ordinary course.[69] The timeline in the notice and set down date must be fixed having regard to this consideration.[70]

52 Plainly, this application is urgent and the timeline is reasonable:

52.1 Given the nature of the harm suffered and reasonably apprehended, the applicants will not achieve substantial redress in the ordinary course.[71] For as long as the M&G article remains online, the applicants will continue to suffer irreparable harm.[72]

52.2 The applicants launched this application 6 days after good faith attempts to obtain a retraction and apology failed, and a mere 11 days after the M&G article was published online.[73] They acted as expeditiously as possible in the circumstances.[74]

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[68] NOM para 1 (01-2).

[69] *In re Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ) paras 6-7.

[70] *Luna Meubels Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) 137E-G

[71] FA para 60.2 (01-35).

[72] FA paras 60.5-60.6 (01-35 to 01-36).

[73] FA para 60.3 (01-35).

[74] FA paras 60.4 (01-35) and 61.2 (01-36 to 01-37).

52.3 Further, the timeline set out in the notice of motion is reasonable, in that it balances the above urgency with the need to afford the respondents a reasonable amount of time to respond.[75]

52.4 It is relevant that the respondents – by virtue of their pre- and post-publication correspondence, and their responses to the applicants' letters of demand – have already applied their minds to the issues that form the subject matter of this application.[76]

53 Notwithstanding the above, the respondents only filed their notice of intention to oppose on 31 January 2024, 8 days after they were obliged to do so under the notice of motion; and they failed to file their answering affidavit on 29 January 2024, as they were obliged to do so under the notice of motion. (The applicants afforded the respondents 8 days, i.e. more than a week, to file an answering affidavit.)

54 On 31 January 2024, the respondents' attorneys wrote to the attorneys for the applicants.[77] They recorded that, because "*our clients have only recently secured legal representation*", they had been "*instructed to request an extension to the timeframes listed in the Notice of Motion*", essentially delaying the hearing of the application by one week.

55 On the same day, the applicants' attorneys replied as follows:[78]

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[75] FA para 61.3 (01-35).

[76] FA para 61.1 (01-36).

[77] Letter from Power & Associates Inc. to Webber Wentzel, dated 31 January 2024 (11-1 to 11-2).

[78] Letter from Webber Wentzel to Power & Associates Inc., dated 31 January 2024 (11-3 to 11-5).

55.1 The delay in securing legal presentation is not a legitimate basis on which to justify the revised timeline, at all – but clearly not in circumstances where the respondents were aware of the application on 21 January 2024 when the application was launched, and moreover were warned that such an application was imminent since as early as 14 January 2024.

56 The following principles are trite:

56.1 An applicant in urgent proceedings is entitled to frame their own rules, which, if reasonably formulated, a respondent ignores at its peril. [79]

56.2 Where the timeframes set by an applicant in urgent proceedings are not adhered to, respondents must seek condonation for the failure to adhere to the rules framed by the applicant. To obtain condonation, a respondent must set out the explanation for their delay, which explanation must cover the entire period of the delay and is reasonable. [80]

57 In this application:

57.1 the timeline formulated by the applicants are, for the reasons articulated above, reasonable;

57.2 the respondents ignored the timeline at their own peril; and

57.3 the only reason for the respondents ignoring the prescribed timeline is that the respondents inexplicably failed to obtain legal representation for

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[79] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 781H-782G.

[80] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 22.

more than a week after they received the application, which manifestly is not a reasonable explanation.

58 In the circumstances, we submit that this application properly falls to be decided on an urgent basis, and on the uncontested factual basis set out in the founding affidavit.

CONCLUSION

59 We submit that the principal or alternative relief sought in this application should be granted with costs, which costs should include the costs of two counsel.

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1 February 2024