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

Case number: 21/01144

In the matter between:

MARIA DA CONCEIÇÃO DAS NEVES CALHA RAMOS Applicant

and

INDEPENDENT MEDIA (PTY) LTD First Respondent
SIFISO MAHLANGU Second Respondent

COURT ADDRESS

A. INTRODUCTION

1. This case is primary about media freedom, and that is what distinguishes from many of the cases cited by the applicant. We propose structuring our address in 5 parts.

    1.1 First, we begin at the beginning – by addressing each of the prayers sought in the notice of motion, and show why each is inappropriate on the facts of this case.
    1.2 Thereafter, we remind the court on what the established jurisprudence is in these matters by reference to reported judgments. We are constrained to do so because the applicant has now burdened this court with trans-Mediterranean libel law which has no bearing whatsoever in this case.
    1.3 Thirdly, we advance the case that there is no defamation and, in any event, the defences advanced are dispositive of any defamation claim.
    1.4 Fourthly, we address the costs issue.
    1.5 Finally, we propose the appropriate remedy

B. RELIEF

(i) Prayer 3: Interdict against publication & republication

2. The statements are not defamatory or false or unlawful. If this court should find that they are, there are defences that dispose of that charge. But even if this court should dismiss those defences, in fact even if the respondents had filed no opposing papers, the applicant is not entitled to an order that bars the media from ever publishing a story about the applicant's role as Chief Executive of a bank implicated in the alleged price fixing of national currency. That's prayer 3.

3. The reason for this is plain. The Competition Commission's investigation of the currency price fixing scandal is still on-going and may very well make adverse findings in relation to the applicant's role. This Court cannot anticipate the outcome of that investigation by suppressing journalists doing their own investigative reporting on this issue pending the outcome of that investigation.

4. By censuring the respondents from ever publishing any story or opinion about the applicant's role, the Court will have prejudged the outcome of the Competition Commission's investigation. Eight years ago, this Division cautioned about precisely this sort of thing in **Heroldt v Wills** when Justice Willis said (cited in para 120 of our heads/ CaseLines 054-53):

> **"[40] Although judges learn to be adept at reading tealeaves, they are seldom good at gazing meaningfully into crystal balls. For this reason I shall not go so far as 'interdicting and restraining the respondent from posting any information pertaining to the applicant on Facebook or any other social media'. I have no way of knowing for certain that there will be no circumstances in the future that may justify publication about the applicant."**

5. There is no way of this Court knowing for certain that there will be no circumstances in the future that may justify publication about the applicant's role as Chief Executive in the currency price fixing scandal.

6. Plus, the Opinion piece is more than just about the currency price fixing scandal and the applicant's role in it. It is also about

6.1 her appointment as chairman of Anglo-Gold Ashanti
6.2 her donation to the President's election campaign
6.3 the SARB bailout or subvention to ABSA Bank, in relation to which (it is public knowledge) she deposed to an affidavit resisting the attentions of the Public Protector in that regard

7. If this court were to grant prayer 3 of the notice of motion, all these issues would be off limits for this media group, whatever the circumstances that may inform the need for the publication of material about any of these issues in the future.

8. There is simply no reasonable basis for such censorship.

9. If these issues are irrelevant to the order sought by the applicant, as she claims, then she should have carved them out of the extremely wide ambit of her prayer 3.

10. So, for these reasons, the applicant is not entitled to prayer 3. Unless this court takes the view that Justice Willis was clearly wrong in **Haroldt v Wills**, this court is bound by that judgment.

11. Of course, this court may in its discretion fashion a just and equitable relief that avoids the overbreadth of prayer 3 in its current form. But then the applicant would not be entitled to the costs of a court-attenuated order because the respondents have come to court to meet a far wider order that they were constrained to oppose, not a more reasonable order that this court may in its discretion fashion for her.

12. But let me be clear; our starting point is that the statements in question are not defamatory and, in any event, the defences put up by the respondent are dispositive of the claim. It is only in the event of this court finding defamation and rejecting these defences that we say it cannot grant prayer 3 in its current iteration.

13. In any event, the interdict is not the only effective remedy that is open to the applicant. The Constitutional Court has pronounced that offensive political commentary is best dealt with in the media platform in which it was published, not in court (**see DA v ANC 2015 (2) SA 232 (CC) at para 134**). The respondents have offered the applicant precisely that opportunity (**CaseLines 009-23 to 009-25; paras 44 to 48**)

(ii) *Prayer 4: Permanent removal of statements*

14. The applicant is also not entitled to prayer 4. The simple reason is that an interdict (which prayer 4 is, and of a mandatory sort) is a remedy that is targeted at harm that is anticipated, not at harm that has already taken place. In other words, an interdict is intended to prevent future conduct and not conduct that has already occurred.

- **National Treasury and Others v Opposition to Unrban Tolling Alliance and Others 2012 (6) SA 223 (CC) at 238A, para 50**
- **Tshwane v Afriforum 2016 (6) SA 279 (CC) at para 55**

15. Assuming, without accepting, that the statements have caused harm to the applicant (that is, the statements about her role as Chief Executive of a bank implicated in the currency price fixing scandal; her being a donor to the President's election campaign; and the SARB subvention or bailout to ABSA bank), these statements have been in the public domain for many years. We have identified some of them (**CaseLines 054-13** at para 17 of our heads). They will continue to be published by other media not joined in this application.

16. So, if the applicant succeeds in persuading this court to order the permanent removal of the statements from all the respondents' media platforms, such an order would simply be academic because nothing would bar other media platforms, not associated with the respondents, from keeping similar statements on their platforms and, indeed, from publishing them. It is now trite that a court is not there to make academic orders or orders that have no practical effect.

- **See section 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959**

17. If these statements cause actual harm or reasonable apprehension of such harm to the applicant for purposes of the final interdict she seeks, then ordering the removal of these statements from the respondents' media platforms will not stop the harm that the publication of similar statements in other media platforms may cause her. The obvious effect of such an order against the respondents is the impression it may create that they are being muzzled from publishing material of public interest that other media are free to publish. That would not be justice for her. It would be suppression of the respondents' right to freedom of opinion [s 15(1)] and freedom of the press and other media [s 16(1)(a)].

18. In any event, the applicant's wounded feelings cannot in law justify the removal of the statements that she finds offensive. The Constitutional Court, no less, has ruled that the right to freedom of expression protects also statements that offend. It said:

> **"the right to freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society"**

- **Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at para 28**

19. The editor has expressed opinions in his piece that the applicant finds offensive. But as this is a judgment of the Constitutional Court, this court must be guided by this *dictum* in its assessment of this case. In fact, this court is bound by this *dictum* even if it does not agree with it.

(iii) Discretion

20. Prayers 3 and 4 are interdictory in nature. Even if the applicant succeeds in satisfying the requirements for a final interdict, this Court still retains a wide discretion to refuse the interdict. We submit that the wide discretion ought to be exercised against the granting of the interdict sought. The Supreme Court of Appeal has already defined the Court's wide discretion in the context of interdicts as meaning **"no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."**

- **see Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 361H-I**

21. As regards the identity of those **"incommensurable features"** to be taken into account in the exercise of that wide discretion, SCA said

> **"The Courts have not defined the considerations which may be taken into account in exercising the so-called discretion, save for mentioning the obvious examples such as the strength or weakness of the applicant's right, the balance of convenience, the nature of the**

prejudice which may be suffered by the applicant and the availability of other remedies."

- **see Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 362B-C**

22. If the Court should find that the requirements for an interdict have been established, then we submit that all these considerations (which are not exhaustive) militate against the exercise of the Court's discretion in favour of granting the interdict sought in this case. Chief among those features or considerations is the fact that the applicant has an effective alternative remedy that is not only afforded by the respondents (**CaseLines 009-23 to 009-25**, para 44 to 48 & 170) but is also endorsed by the Constitutional Court (in **DA v ANC**) in matters of political commentary such as this.

23. If any one of the requirements for an interdict have not been established, then the exercise of discretion does not arise because a Court has no discretion to grant an interdict if the requirements therefor have not been established.

- **LTC Harms: Interdicts, LAWSA, vol 11 (1st re-issue) page 294, para 321**

24. For these reasons, and on the strength of well-established principles of law, we ask this Court not to grant the interdictory relief sought in prayers 3 and 4 of the applicant's notice of motion.

(iv) Prayers 5 & 6: Apology

25. The respondents cannot be ordered to apologise for saying something they did not say.

25.1 Nowhere in the opinion piece is there talk of a *"quid pro quo"*. The article says, instead of the applicant being held accountable (as Chief Executive of a bank implicated in currency price fixing) she was appointed as director of the Public Investment Corporation. Nothing in that statement even remotely suggests that the appointment was a *"quid pro quo"* for the role she played. *Quid pro quo* suggests reward in return for doing something. The article does not say the applicant received a reward for fixing the

currency. But, more importantly, a reasonable reader of ordinary intelligence would not construe that statement as saying that. The obvious question that a reasonable reader of ordinary intelligence would ask is this: why would an organ of state reward a person with a board position in return for doing something that is not in the interests of the country?

25.2 The reasonable reader of ordinary intelligence knows that a Chief Executive of a bank is not a currency trader. One would also expect that such a reader knows, as the article reminds her, that the Chief Executive publicly apologised for the incident. She would be aware that in that public apology the Chief Executive indicated that the culprit traders in the bank had been found and that steps were taken against them. This was all information that was in the public domain and of which the reasonable reader of ordinary intelligence would be aware. In light of all that publicly available information, she would not believe that the Chief Executive herself fixed the currency.

26. Yes the article does say that elsewhere the applicant would have been charged with treason or corruption. That is a matter of opinion by a person who is lay in matters of law. The question is whether a reasonable reader of ordinary intelligence, on reading the piece – knowing what she knows about what a Chief Executive does, knowing that the Chief Executive is not a currency trader, knowing of the Chief Executive's public apology, and the admission of the Chief Executive that the trader culprits will be held accountable – would nonetheless believe that the Chief Executive is corrupt and must be charged with treason. That is the test. The proper test is not what the writer or the applicant believe the statement to mean. It is the meaning that a reasonable reader of ordinary intelligence would ascribe to the statement that matters. Such a reader, in our submission, armed with all this information, would not believe any of these things.

27. In an article styled EXPLAINER: How traders at big banks may have rigged the rand for years; by Kevin Davie, *Business Insider SA*; Jun 11, 2020. https://www.businessinsider.co.za/explainer-rand-manipulation-2020-6 (**CaseLines 009-117**) the author explains the impact of the rand manipulation as follows:

"The commission says manipulating South Africa's currency "has a significant effect on economic activity, especially international trade and international financial transactions".

"Even a 1% change in the fair value of the dollar/rand rate may result in a $1 billion change of the value of imported and exported goods and services."

"The manipulations impacted on the exchange rate of the rand which in turn affected the South African economy - including imports and exports, foreign direct investment, public and private debt, companies balance sheets, with the attendant implications for the price of goods and services and financial assets."

If the rand weakens, everything imported becomes more expensive. South Africa is particularly dependent on the rand because we import most of our oil, and have to buy it in dollars. The rand oil price affects transport costs, and so almost all consumer prices."

28. So, the currency price fixing scandal was so serious an affront on the South African State that a journalist who equates it to treason, cannot lightly be faulted. That the applicant was the Chief Executive of the bank implicated in this conduct is a reasonable factor to consider when looking at the persons who should be held accountable for it.

29. For these reasons, the apology prayers in 5 and 6 are not appropriate in the circumstances of this case.

30. That leaves prayers 2 (declaratory order) and 7 (costs)

(v) *Prayer 2: Declaratory orders*

31. We have addressed this extensively in our heads (at **CaseLines 054-27 to 054-32**). The applicant does not seriously engage with it in the heads submitted on her behalf. We stand by those submissions.

32. The point is this: if granted, the declaratory order in this case will not bind other journalists who have published similar statements (that the applicant says are defamatory, unlawful and false) in other media platforms. Those statements will remain in those platforms, and may be republished, while only the respondents would be barred from publishing them.

33. That, in our respectful submission, is a quintessential example of an order that has no practical effect – even if this court finds the statements defamatory, false and unlawful.

34. So, even if this court finds the statements defamatory, false and unlawful, a declaratory order is not an appropriate remedy in the circumstances. Her remedy, as the Constitutional Court tells us in **DA v ANC 2015 (2) SA 232 (CC) at para 134**, lies in rebuffing the statements in the media platforms in which they have been made. She has been afforded that remedy by the respondents (**CaseLines 009-23 to 009-25; paras 44 to 48)**

C. JURISPRUDENCE BY CASE LAW

35. There is much jurisprudence on the issues that confront this court. We highlight just some of it. The applicant has now, belatedly, sought refuge in the cold climes of English law when our jurisprudence here at home is perfectly adequate. Importing foreign laws into our nascent jurisprudence is to be approached with great caution, as the Constitutional Court has warned in **Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at para 29** (in the context of equality jurisprudence).

36. In any event, the foreign English cases now cited by the applicant provide no assistance to this court as we shall show below. But before we go there, let us remind ourselves of our own jurisprudence, lest we be distracted.

> **"[T]he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time."**

37. It is not I who say this. It is the Supreme Court of Appeal in **National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 (SCA) at 1212G-H**.

38. The article in this case was published at a particular time when news broke of the applicant's appointment as chair of Anglo-Gold Ashanti. It was published in a particular way by way of an opinion piece or political

commentary by a political editor. It was reasonably published because, in the opinion of the political editor, the applicant is not deserving of that appointment when she still has not been held accountable for her role in her bank's alleged involvement in the currency price fixing scandal.

39. Here is another one:

> **"[I]t is good for democracy, good for social life and good for individuals to permit <u>maximally</u> open and vigorous discussion of public affairs."**

40. Again, it is not I who say this but the Constitutional Court in **The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae) 2011 (4) SA 191 (CC) at para [100]**.

41. Here is a third:

> **"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. <u>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. And in its approach to the law, including any statute by which the Court may be bound, it should assume that Parliament, itself a product of political liberty, in every case intends liberty to be repressed only to such extent as it in clear terms declares, and, if it gives a discretion to a Court of law, only to such extent as is absolutely necessary</u>."**
>
> (emphasis supplied)

42. Yet again, it is not I who say this. It is the Appeal Court more than 55 years ago in **Publications Control Board v William Heinemann Ltd and Others 1965 (4) SA 137 (A) at 160E-H**.

43. Here is a fourth:

> **"[A]udiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses!"**

44. It was this Division, some 65 years, ago that said this in **Pienaar and Another v Argus Printing and Publishing Co Ltd 1956 (4) SA 310 (W) at 318C**.

45. Then comes this:

> **"It would be intolerable, and at odds with constitutional values, to say that someone can be held liable (and exposed to significant fines, election bans and criminal liability) for making a statement they reasonably believed was true. The injustice of this, and the chilling effect it would have on all who do not know the facts with complete certainty – in other words, all of us – is a powerful consideration."**

46. The Constitutional Court, no less, said this just 6 years ago in **DA v ANC 2015 (2) SA 232 (CC) at para [157]**.

47. And what is the remedy for a party who feels aggrieved by a political statement such as was made in this case by a political editor? The Constitutional Court has answered this question. The answer does not lie in running to court and seeking interdicts and apologies. It lies in refuting the offending statement in the media platforms on which it was made. The Constitutional Court said in **DA v ANC**:

> **"[134] During an election this open and vigorous debate is given another, more immediate, dimension. Assertions, claims, statements and comments by one political party may be countered most effectively and quickly by refuting them in public meetings, on the internet, on radio and television and in the newspapers. An election provides greater opportunity for intensive and immediate public debate to refute possible inaccuracies and misconceptions aired by one's political opponents."**

48. The impugned Opinion piece was penned by a political editor as his Opinion based on his assessment of what has been in the public domain for many years. Yes, it is not written during an election. But it is written during intense contestation of ideas and narratives in public discourse. The journalist in Mr Mahlangu instinctively wants to shine a torch where the applicant would rather a torch were not shone.

49. Mr Mahlangu's torch beamed a much less intrusive light than the torch shone by the *Sunday Times* newspaper editor, more than 12 years ago, into the private and confidential space of a public figure who did not want the torch shone in that space. This Division refused to interdict the editor from publishing even private and confidential information unlawfully obtained by the newspaper. Here, the facts that the applicant wants suppressed were not unlawfully obtained, are not confidential or private, but have been in the public media for many years and will continue to be in the public media even if this court censors the political editor and his publication in this case.

50. That was of course the judgment in **Tshabalala-Msimang v Makhanya 2008 (6) SA 102 (W)**. That judgment, which refused to interdict publication of private and confidential medical records of a patient unlawfully obtained, is binding on this Court unless this court expresses the view that it was clearly wrongly decided and why.

51. So, what is the point of all this? The simple point is this: our Courts have always jealously guarded freedom of opinion and the expression of that opinion, and set their face against repression of free speech. Our Courts have endorsed the position that even where there may be some weak factual link to sustain an accusation, it could nonetheless qualify as non-defamatory speech. The Constitutional Court, no less, has ruled that the place for correcting a political statement that one considers offensive (and even defamatory) is not the Courts but the hustle and bustle of political contestation – the media platforms in which the offending statement was made.

52. The hurdle for declaring speech as wrongfully and intentionally defamatory is very high indeed. It is not relief that is there simply for the asking.

53. This is a case about freedom of opinion, freedom of the press and other media, and freedom of expression. The question is whether these freedoms should be suppressed or promoted. It is clear from the journalistic Opinion piece that the applicant seeks to impugn, that it is rooted in political speech. Its contents are political. Its contents first emerged more than 5 years ago when a criminal case was laid against her, and in subsequent years when other media reports carried the story.

54. The applicant is not a private person. She is, by her own account, a public servant who has received much commendation for that public service.

55. In a judgment of **this** Division, the Court said the following about political speech:

> **"Although conscious of the fact that I am venturing on what may be new ground I think that the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses!"**
>
> - **Pienaar and Another v Argus Printing and Publishing Co Ltd 1956 (4) SA 310 (W) at 318C-E.**

56. Looked at in its proper context it is fair to say that the political editor published the Opinion piece about the applicant (1) as a **"political speaker"** (2) about a public figure in the form and shape of the applicant (3) and as a commentary on allegations that have been in the public domain for many years.

57. Citing the above dictum in **Pienaar**'s case with approval, the Supreme Court of Appeal said in **Mthembi-Mahanyele v Mail & Guardian Ltd and Another 2004 (6) SA 329 (SCA) at para [86]**:

> **"Those sentiments assume heightened significance in a fledgling democracy such as ours struggling to rid itself of its securocratic and censorious past. The Minister has been too sensitive about the report card. She is in her own right a public figure who at the relevant time was entrusted with a key national portfolio. The true enquiry relates to the manner in which the report card would have been understood by those readers of it whose reactions are relevant to the action. In my view, it cannot be said that to those readers it bore a defamatory meaning. It follows that the report card was not defamatory of the Minister."**

58. The same considerations apply on the facts of this case.

58.1 The applicant has, with respect, been too sensitive about the Opinion piece.

58.2 She in her own right is a public figure who has been associated over many years with a bank that is implicated in the price fixing of national currency, admits to having donated money to the President's election campaign, and does not deny that at least 2 investigations led by judges of the high court found the Reserve Bank's bailout of a bank of which she has been chief executive was fraudulent.

58.3 The true enquiry is whether there was a reasonable basis for the allegations made in the Opinion piece.

58.4 The respondents say the information contained in the Opinion piece has been in the public media for many years.

58.5 They have no reason to disbelieve the information.

59. In light of this context,

59.1 are the statements defamatory?
59.2 are the statements unlawful?

60. To recap: even if this court were to find that the statements, or some of them, are defamatory, the relief that the applicant seeks is not available to her on these facts and when regard is had to South African jurisprudence on defamation and interdicts.

61. But we say in any event the statements are <u>not</u> defamatory.

62. Before we move on to deal with the question of defamation and defences, I wish to dispose of the English authority lately introduced by the applicant.

63. <u>Chase v Newgroup Newspapers</u>

63.1 This was an appeal by the defendant publishers in trial proceedings against the lower court's striking out of its amended defence on the ground that it was introduced after publication of

the libellous story about a nurse being responsible for the death some 18 children in a care home.

63.2 Both the lower court and the appeal court took the view that the new defence was not capable of sustaining the meaning originally ascribed to the published story. In other words, the publisher sought to finesse the meaning of the story by amending its plea to give it new meaning.

63.3 That is far from what has happened in this case. This is not a trial. The respondents have not sought to amend any pleading in order to give new meaning to the article. The applicant has not sought to strike out any of the respondents' defences or any part of the respondent's answering affidavit.

63.4 In any event, the principles of English law discussed in that case are foreign to our law and seem inconsistent with the principles of our own defamation jurisprudence. Specifically, the case identifies 3 principles of English law of defamation:

(a) The first is that English law requires that the defence of justification for a publication based on reasonable grounds for suspecting certain conduct, must be based on actual conduct by the object of the story that gives rise to that suspicion. This is not a requirement in our defamation law.
(b) Second, English law does not permit reliance on hearsay to prove such conduct. Again, this is not part of our law. In our law, publication in the press of false defamatory allegations of fact is not be regarded as unlawful if reasonably published in a particular way and at the particular time and the person republishing it has no reason to doubt its truth (**Bogoshi 1998 (4) SA 1196 (SCA) at 1212G-H**).
(c) Third, a defendant may not in English law plead grounds as a defence of justification based on facts that post-date the publication. I am not aware of such impediment in South African law.

63.5 The Chase judgment is of no assistance here.

64. Daimler v Continental Tyre

64.1 This is a 1915 judgment of the King's Bench. Again, it was an appeal from the trial court concerning two action proceedings. The issue was whether a debt incurred during the War was enforceable by directors and shareholders of a company who were all enemy aliens in relation to the debtor company.

64.2 It is clear of what relevance this judgment is to this case.

65. The 2 English authorities do not assist this court.

66. Manuel v Crawford-Browne

66.1 The applicant relies on this 2008 Cape High Court judgment for the proposition that if one suggests that a Minister of Finance must be charged without a basis for that suggestion this is defamatory and unlawful.

66.2 But in that case there is no suggestion that a criminal case had in fact been opened against the Finance Minister, as in this case. Therein lies the distinguishing factor. In this case, it could be argued that the basis for the suggestion that the applicant should be prosecuted is the fact that a criminal case was opened against her in 2016 (**CaseLines 009-11; para 17**).

67. The other cases (of the SCA and provincial division of the high court) cited by the applicant's counsel for the proposition that the mere suggestion that a person has been **"charged with a crime"** is *per se* defamatory seem to have been overtaken by a judgment of the Constitutional Court in **McBride 2011 (4) SA 191 (CC)** where the Constitutional Court upheld a **"fair comment"** defence to a defamation claim where Mr Robert McBride was labelled **"a murderer and a criminal"** in a newspaper article. There was no dispute that he had in fact committed the murders, but then had subsequently been granted amnesty by the Truth and Reconciliation Commission which had the effect of expunging the murder offence. Accusing someone of being **"a murderer and a criminal"** is, we submit, worse that suggesting that he has been **"charged with a crime"**.

68. The new case cited by the applicant's counsel do not assist this court.

D. ARE THEY DEFAMATORY?

69. We submit that the editor's statements are not wrongfully defamatory or unlawful.

70. The basic principles of common law defamation in South Africa have been usefully set out in **Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) at para [18]**.

71. In order to succeed in a defamation claim, the applicant must establish the elements of the delict of defamation. In other words they must establish that there has been (1) a wrongful and (2) intentional (3) publication (4) of a defamatory statement (5) about them.

72. There is no dispute that there is publication about the applicant. The debate is then about elements (1), (2) and (4), that is, whether the publication in question constitutes defamatory matter and whether the publication is wrongful and intentional.

(i) Does the publication constitute defamatory matter?

73. The question whether the publication is defamatory or not involves a two-stage enquiry. The first is to establish the natural or ordinary meaning of the publication. The second is whether that meaning is defamatory.

- **Sindani v Van der Merwe 2002 (2) SA 32 (SCA) at para [10]**

74. At the first stage, the test to be applied is an objective one, namely, what meaning the reasonable reader of ordinary intelligence would ascribe to the words read in the context of the publication as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply.

- **Sindani v Van der Merwe 2002 (2) SA 32 (SCA) at para [11]**

75. The SCA however held that:

> **"It must also be borne in mind that <u>the ordinary reader has no legal training or other special discipline</u> and that**
>
> > **'if he read the article at all would be likely to skim through it casually and not to give it concentrated attention or a second reading. It is no part of his work to read this article, nor does he have to base any practical decision on what he reads there' (per Lord Pearson in *Morgan v Odhams Press Ltd and Another* [1971] 2 All ER 1156 (HL) at 1184). <u>Consequently, a court that has of necessity subjected a newspaper article under consideration to a close analysis must guard against the danger of considering itself to be 'the ordinary reader' of that article</u> (see also *Ngcobo v Shembe and Others* 1983 (4) SA 66 (D) at 71C – D)."**

76. So, it is not what the applicant or this court makes of a reference to "treason" that of relevance. It is rather what the reasonable reader of ordinary intelligence understands of such reference in light of what she already knows from publicly available information concerning the material contained in the article.

77. At the second stage, the meaning which should be ascribed to a statement is considered. A statement is defamatory if it would tend to lower the applicant in the estimation of right-thinking members of society generally.

- **Simm v Stretch 1936 (2) All England LR 1237 HL 1240**
- **Afriforum and Another v Pienaar 2017 (1) SA 388 (WCC) para [60]**

78. In applying this two-stage enquiry, it is our submission that:

78.1 The ordinary meaning that a reasonable reader of ordinary intelligence would attribute to the editor's statements is (as far as relates to the applicant) that:

(a) the applicant has never been held accountable as Chief Executive for the involvement of her bank in currency price fixing scandal;

(b) the applicant keeps getting appointments to senior corporate positions despite unanswered questions about her bank's involvement in that scandal, and despite a criminal case having been opened against her;

(c) the applicant seems to be above the law for these reasons because anyone else would have been criminally charged for "her role" as Chief Executive of a bank involved in price fixing;

(d) her donation to the President's election campaign seems to be shielding her from accountability as Chief Executive;

(e) so protected is she that when the Public Protector dared to investigate a Reserve Bank "bailout" of her bank that constituted a crime.

78.2 As regards the second stage of the inquiry, the question whether or not the editor's statements tend to lower the applicant in the estimation of right-thinking members of society generally depends on the context in which the statements were made.

78.3 We have demonstrated above that the statements were made in a political context. This is in fact clear from the text of the statement itself. The author is a political editor. He writes and opines on current affairs and politics. That political context has been fraught for some years. Strong opinions are held, on both sides of the political divide, about the SARB bailout issue, the donations to the President's election campaign, and the currency price fixing issue. The editor is of the view that these are topical issues of public interest in the South African political landscape.

78.4 We remind this Court of what the Constitutional Court said in **Islamic Unity Convention 2002 (4) SA 294 (CC)** which said (at para 28):

> **"the right to freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society"**

78.5 The statements of which the applicant complains have been in the public domain for many years. It is her own interpretation that has

not been in the public domain. But her interpretation is not relevant. What is relevant is what those statements are. We have demonstrated above that these statements remain undisputed by her.

78.6 On these considerations, the editor's statements do not tend to lower the applicant in the estimation of right-thinking members of society generally. If they did, she would not have secured all these senior corporate positions including in the United Nations.

79. It is thus our respectful submission that the editor's statements do not constitute defamatory matter. The meaning that a reasonable reader of ordinary intelligence would attribute to the statements in this fraught political context is not wrongful or unlawful. The statements also do not tend to lower the applicant in the estimation of right-thinking members of society, given the fraught political context in which they were made.

80. If the Court should find that the statement is defamatory (which we submit it is not), it is presumed that the publication was both wrongful and intentional. However, that is not the end of the inquiry as the respondents have numerous defences that are open to them in law.

81. We now turn to discussing those defences and submit that they are good defences to resist the applicant's entire relief in this application.

(ii) *Defences*

82. In **Waldis and Another v Von Ulmenstein 2017 (4) SA 503 (WCC)**, Justice Davis held that:

> **"[20] Once a plaintiff establishes that a defendant has published a defamatory statement concerning himself/herself it is presumed that this publication is both wrongful and intentional. A defendant wishing to avoid liability for defamation must raise a defence which rebuts either the requirement of wrongfulness or intention.**
>
> **[21] The general test for wrongfulness is based upon the boni mores or the legal convictions of the community. This means that the infringement of the complainant's reputation should not only have taken place but be objectively unreasonable. . . The application of the boni mores test involves an ex post**

> **facto balancing of the interests of the plaintiff and the defendant in the specific circumstances of this case in order to determine whether the infringement of the former's interests was reasonable.**
>
> **[22] In this balancing process the conflict between the defendant's freedom of expression and the plaintiff's right to a good name demands resolution . . ."**
>
> (authorities omitted)

83. The Western Cape High Court then went on to find, save for two short sentences in the impugned blog, that **"there is no basis by which this blog falls foul of our law of defamation"**. In that case the respondent, a food critic, had written on her blog about the plaintiff's misleading of the public about the sugar-free status of his chocolates, thus posing a danger to the health of diabetics.

84. Some of the defences that are available to the respondents are:

84.1 that the publication was true and in the public interest;

84.2 that the publication constituted fair comment;

84.3 that the publication was made on a privileged occasion; and

84.4 that it was reasonable to publish the facts in a particular way at that particular time.

85. The privilege defence is not available to the respondents. They do not invoke it.

86. Truth of the statement is not enough as a defence against a defamation claim; it must also be in the public interest to publish it.

- **Financial Mail (Pty) Limited v SAGE Holdings Limited 1993 (2) SA 451 (A) at 464C**
- **Argus Printing & Publishing Company Limited and Others v Esselen's Estate 1994 (2) SA 1 (A) at 25B-E**
- **National Media Limited and Others v Bogoshi 1998 (4) SA 1196 (SCA) at 1208G-J**
- **Haroldt v Wills 2013 (2) SA 530 (GSJ) at para [27]**

87. The statements attacked by the applicant as being false are, in the meaning of the reasonable reader of ordinary intelligence, not false. They have also been in the public domain for many years. It is not the applicant's interpretation of those statements that is at issue in the assessment of their meaning but that of the reasonable reader of ordinary intelligence. That she reads the article as saying she personally fixed the rand, does not mean that is the meaning that must be ascribed to it, and therefore judged as false.

88. For fair comment as a defence, the following elements must be established:

88.1 The statement in issue must amount to comment and not to the assertion of an independent fact.
88.2 The comment must be fair.
88.3 The facts on which the comment is based must be true.
88.4 These facts must be in the public interest.

- **Waldis and another v Von Ulmenstein 2017 (4) SA 503 (WCC)**

89. In our submission, and on a careful consideration of the statement within the fraught political context in which it was made, it will be difficult to conclude that the statements in question do not establish these four elements. We say so for the following reasons:

89.1 The applicant does not dispute that she made a donation to the President's election campaign; that she made a public apology for the alleged involvement of her bank in the currency price fixing scandal; that she has not been formally charged for her role in that scandal; that negative stories about her, including stories about "her role" in the currency price fixing scandal, have been in the public domain for some years (she only denies that the stories say she was personally involved in the currency price fixing); that she has filled numerous senior positions in corporate South Africa, and internationally, despite publication of negative stories about her, including "her role" in the currency price fixing scandal.

89.2 These undisputed facts form the basis for the editor's comment.

89.3 The editor's comment is self-evidently in response to what he considers, in his opinion as a political editor of a media

publication, to be the impunity of the applicant who, in his view, keeps being appointed to senior corporate positions despite what he considers to be a serious failure of accountability on her part for the alleged involvement of a bank of which she was Chief Executive in currency price fixing.

89.4 In light of the topical nature of (1) the President's campaign funding and the identity of donors to his campaign, (2) the Public Protector's pursuit of the Reserve Bank subvention to a bank of which the applicant was a Chief Executive, and which is a case often cited as a basis for her removal, (3) the ongoing investigation by the Competition Commission into the currency price fixing scandal, it can hardly be denied that publication of these facts is not in the public interest.

90. For these reasons, we submit that fair comment is a good defence for the respondents if this Court should find that the statements are wrongfully and/or intentionally defamatory of the applicant. That is one of the defences that the editor has advanced.

- **CaseLines 009-22, 009-28, 009-60, 009-64, 009-75, 009-76, 009-77**; **paras 42, 45, 47, 61, 62, 135, 144, 168, 169, 170**

91. By their very nature, in order to establish any one of the defences to a defamation claim, regard must be had to the context in which the statements in question were published. We have set out that context in our heads (**CaseLines 054-8 to 054-28**) and the jurisprudence that governs it in paras 35 to 68 above. We ask this Court, in the interests of justice, to have a close regard to the context and jurisprudence.

92. In **McBride 2011 (4) SA 191 (CC)** the Constitutional Court upheld a **"fair comment"** defence to a defamation claim where Mr Robert McBride was labelled **"a murderer and a criminal"** in a newspaper article. There was no dispute that he had in fact committed the murders, but then had subsequently been granted amnesty by the Truth and Reconciliation Commission which had the effect of expunging the murder offence. Here, the applicant does not deny the factual allegations that form the backbone of the opinion piece. She recasts the meaning of the article as suggesting that she was personally involved in price fixing. That is not what the article says.

93. But, even if it did say that, we would commend to this court the judgment of the Supreme Court of Appeal in **Bogoshi 1998 (4) SA 1196 (SCA) at 1212G-H** which says publication in the press of false defamatory allegations of fact will not be regarded as unlawful if reasonably published in a particular way and at the particular time.

94. The Court's remarks in **McBride** are instructive in the context of this case:

> **"[99] . . . Public debate in South Africa has always been robust. More than 50 years ago, within the then-constrained perimeter of racially-defined public life, a court noted that in this country's political discussion, '(s)trong epithets are used and accusations come readily to the tongue'. The court also found that allowance must be made 'because the subject is a political one, which had aroused strong emotions and bitterness', of which readers were aware, and that they 'would not be carried away by the violence of the language alone'.**
>
> **[100] These words are still apt today. Public discussion of political issues has if anything become more heated and intense since the advent of democracy. A constitutional boundary is the express provision in the Bill of Rights that freedom of expression does not extend to hate speech. Another is the legitimate protection afforded to every person's dignity, including their reputation. But, so bounded, it is good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussion of public affairs."**

95. Given the context in which the statements in question were published and the timing thereof, it is our respectful submission that the political editor's statements fit the description of **"vigorous discussion of public affairs"** which the Court should accept as being **"good for democracy"**.

96. With regard to the reasonable publication defence, we invoke, again, the judgment of the SCA in **Bogoshi 1998 (4) SA 1196 (SCA) at 1212G-1213J**:

97. The publication of the statement was thus fair, in the public interest, true, and (given their timing and context) reasonably published in a particular way and at the particular time.

E. COSTS

98. We have addressed this in our heads. The applicant seeks costs on an attorney and client scale. If she succeeds, she is not entitled to costs on that scale. The Constitutional Court has laid the standard for costs on that scale and the applicant does not meet that standard. She must show: fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.

- **Biowatch Trust [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), para 18;**
- **Helen Suzman Foundation [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC), para 36**
- **Public Protector v South African Reserve Bank [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) para 223**

99. The applicant meets none of these.

F. APPROPRIATE REMEDY

100. We ask that the entire application be dismissed with costs on attorney and client scale for reasons discussed in our heads (**CaseLines 054-18 to 054-27**; paras 29 to 52).

101. On the factual disputes that were foreseeable (as discussed in **CaseLines 054-21 to 054-27**) we submit that the dispute falls to be decided in favour of the respondents on the application of the **Stellenvale rule**.

102. If the court is not with us on the defamation point in prayer 2, we submit that the applicant is nonetheless not entitled to prayers 3, 4, 5 and 6 for the reasons advanced.

103. If the court should be against us on prayer 3, we submit that the order is too widely cast and that this court is at large, in its discretion, to fashion an order that is more reasonable and that will not trench on the respondents' right to freedom of the press and other media.

104. If the court should be against us as regards the overbreadth of the apology in prayer 5, we submit that the court is at large, in its discretion, to fashion

a more reasonable text that excludes an apology for statements the respondents have not made.

V Ngalwana SC
F Karachi
N Jiba

Counsel for the Respondents
Chambers, Sandton

26 March 2021