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

RESPONDENTS WRITTEN SUBMISSIONS

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A. THE ISSUE

1. The applicant approaches this Court

1.1. on an urgent basis;[1]

1.2. for a declaratory order that the statements made about her in the article published on 9 December 2020 are defamatory of her, false and unlawful;[2]

1.3. for a final interdict stopping the respondents from publishing or republishing the article and *"any statement that says or implies that the Applicant, while employed as the CEO of Absa Bank, participated in fixing the rand or committed corruption or treason in relation to the fixing of the rand"*;[3]

1.4. for a mandatory interdict directing the respondents to permanently remove the article from the IOL website, Twitter and Facebook accounts;[4]

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1 NoM, para 1. The applicant (RA, at para 39; HoA, at para 61) contends that the question of urgency is no longer an issue since the parties agreed to remove the matter from the urgent roll. We submit that urgency (or rather the lack thereof) remains relevant to the issue of costs

2 NoM, para 2

3 NoM, para 3

4 NoM, para 4

1.5. for a mandatory interdict directing the respondents to publish within 24 hours of the date of the order a retraction and apology that the applicant has prepared.[5]

2. In short, the applicant seeks interdictory relief and declaratory relief on an urgent basis. There is no merit for any of these as we shall endeavour to show.

2.1. Firstly, the applicant fails to demonstrate urgency and has, only after the respondents' attorneys had pointed to the futility of the exercise, by agreement removed the matter from the urgent roll.

2.2. Secondly, the applicant has failed to satisfy the requirements for declaratory relief.

2.3. Thirdly, the applicant has failed to satisfy the requirements for an interdict.

2.4. Fourthly, in any event, the applicant has failed to show that the statements in question constitute defamatory matter and, if they do, that the defences available to the respondents do not avail them.

[5] NoM, para 5

2.5. Fifthly, if she succeeds, the applicant is not entitled to costs on a punitive scale, while the respondents are so entitled.

3. We shall endeavour to show each of these failures below, but, before going there, it is important to place this application in what we submit is its proper context.

B. CONTEXT[6]

4. Section 15(1) of the Constitution guarantees the right of everyone to freedom of thought and opinion, rights which are meaningless until expressed. It reads:

> *"Everyone has the right to freedom of conscience, religion, thought, belief and opinion."*

5. Section 16 guarantees the right to freedom of expression. The section reads:

> *"(1) Everyone has a right to freedom of expression, which includes –*
> *(a) freedom of the press and other media;*
> *(b) freedom to receive and impart information or ideas;*
> *(c) freedom of artistic creativity; and*
> *(d) academic freedom and freedom of scientific research.*
> *(2) The right in subsection (1) does not extend to –*
> *(a) propaganda for war;*
> *(b) incitement of imminent violence; or*
> *(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

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6 Our Courts now accept Lord Steyn's remark, in *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at para 28, that "in law context is everything". See *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) at para [89]; *Firstrand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 (6) SA 429 (GSJ) at para [15]; *FNB of SA Ltd t/a Wesbank v CSARS and Another; FNB of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at paras [63] et seq.

6. Since the advent of our Constitution, the right to enjoy freedom of expression is one that has been fiercely promoted and jealously guarded in this country. Section 15 of the Interim Constitution protected both 'speech' and 'expression'. The use of only the wider concept, 'expression' in section 16 of the Constitution, has been interpreted as signifying a deliberately expansive approach to constitutional protection of speech and expression.[7]

7. Our Courts have always jealously guarded freedom of expression, and set their face against suppression 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.

8. Thus, in *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC), the Constitutional Court upheld a defence of fair comment in an action for defamation based on reports which referred to the plaintiff as a murderer even though he had been granted amnesty in terms of s 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995. The Constitutional Court said:

> " *[83] ... Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true. In the succinct words of Innes CJ, the defendant must 'justify the facts; but he need not justify the comment'.*
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> *[84] ... In our constitutional State, comment on matters of public interest receives protection under the guarantee of freedom of expression...*
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> *...*

[7] *Masuku and Another v South African Human Rights Commission* 2019 (2) SA 194 (SCA)

[94] … it seems to me to be wrong to assume that newspaper readers read articles in isolation. This is particularly so when they read editorial comment or columnists commenting on current affairs."

9. Short of proscribing hate speech, propaganda for war and incitement of imminent violence, the Constitution does not prescribe what people may or may not think, opinions people may or may not hold, and statements that people may or may not make. The Legislature, too, does not prescribe what people may or may not say outside these limitations. In the absence of legislation, the courts cannot prescribe (as the applicant will have this court do) what people may or may not say outside these boundaries.

10. The rights to freedom of opinion (as conferred on everyone by s 15(1) of the Constitution) and expression (as conferred on everyone by s 16 of the Constitution) are an essential component of dignity and continued improvement in the quality of people's lives. As the Constitutional Court held in *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC):

"[122] … This court has already spoken lavishly about this right. The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.
[123] What is more, being able to speak freely recognises and protects 'the moral agency of individuals in our society'. We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human."

11. Freedom of opinion and expression therefore lie at the very heart of our democracy. They are valuable for their implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form, and express opinions and views freely on a wide range of matters.

12. The South African Constitution, and numerous decisions of the higher courts, bear testimony to the fact that the threshold for declaring speech as wrongfully and intentionally defamatory is therefore very high indeed. It is not relief that is there simply for the asking.

13. Particularly, in this case, the article is a Leader and found on the side bar of the Opinion page. This is not mere label. Immediately, this tells the reader of ordinary intelligence that this is the author's Opinion or comment, not fact. That which is presented as fact will be presented as such as a basis for the opinion expressed. The Opinion is protected under s 15(1) of the Constitution. A Leader or Opinion piece is not a news report; it is the Opinion of the editor, a view point or editorial stance of the editor. It is a view point to which the editor exercises a political social analysis.

14. The high-water mark of the applicant's claim is that

> *"As a matter of 'ordinary meaning', the article accuses Ms Ramos of being personally involved in manipulating the Rand/dollar exchange rate. A 'reasonable person' reading the article would understand Mr Mahlangu to mean that there are grounds to conclude that Ms Ramos was engaged in 'fixing the rand' or similar criminal or unethical conduct, and that she has, in her personal capacity, engaged in criminal or unethical conduct that justifies criminal or disciplinary action."*[8]

15. What the applicant describes is, with respect, not *"a reasonable person"* extracting the *"ordinary meaning"* of the Opinion piece. She seems rather to be describing her clone who will read in the Opinion piece exactly what she reads in it. The meaning she ascribes to the article is not *"ordinary meaning"* at all; it is contrived.

16. If she is not describing her clone, then the applicant does not seem to have much regard for readers of the publication in which the Opinion piece appears. As the Constitutional Court has cautioned in *McBride*, it is *"wrong to assume that newspaper readers read articles in isolation. This is particularly so when they read editorial comment or columnists commenting on current affairs."* The applicant will have this Court believe that readers of the piece have been living in the Cango caves somewhere in Oudtshoorn since 1994, and have been exposed to none of the constitutional developments since, and the many media reports of the issues covered in the Opinion piece.

17. The reasonable reader of ordinary intelligence will know that the applicant has been shrouded – fairly or unfairly – in the same controversy for several years

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[8] Applicant's HoA, para 13

now. The reasonable reader of ordinary intelligence will also have the common sense to know that a chief executive, who is not and has never been a currency trader, cannot possibly manipulate currency. These very issues have been in the public domain and continue to be so. Here are some of the media reports

Date	**Publication**	**Title / Content**	**Annexure (to the AA)**
March 2016		Black First Land First laid criminal charges against Ms Ramos in relation to the rand fixing issue	"SM-1"
23 Feb 2017	Independent News	Posted: *"Barclays Africa CEO says sorry for rand fixing"*	"SM-2"
23 Feb 2017	Reuters	Posted: *"South Africa's Barclays Africa CEO 'deeply regrets' role in FX rigging".*	"SM-3"
11 June 2019	*The South African*	Posted: *"Maria Ramos: New PIC board member dogged by conspiracy theories"* *"The appointment of Maria Ramos to the new interim board of the Public Investment Corporation (PIC) will be seen as a strong and stable business decision to many South Africans. However, the former Transnet and Absa executive cuts something of a controversial figure, and her new job is exposing those divisions once more ... she's been accused of "manipulating the rand" at Absa, and was forced to apologise in 2017 for her part in "currency-fixing". Maria Ramos is also blamed for selling-off MTN and the V&A Waterfront for much less than their true value. She may have the qualifications and the experience, but her copybook isn't immaculate."*	"SM-5"
12 July 2019	Antonio Quicksilver	Posted: *"Should Maria Ramos be in the PIC".* *"In 2015, the Competition Commission launched an investigation into market manipulation involving the Rand by a host of local & international banks…. In 2017, the Competition Commission accused the banks named in the Rand Fixing Scandal of trying to collude on their defence against the allegations, to get off on technicalities. As then ABSA Group CEO, Maria publicly apologised for her part in "currency-fixing"."*	"SM-6"
2 June 2020	Eye Witness News	Posted: *"Competition Commission files new charges against banks over rand manipulation"* *"The banks must file their answers to these charges, which have now been further substantiated. These charges will not go away. Some of the individual traders involved in the currency manipulation have been dismissed, but their employers - the banks, are yet to be held accountable in South Africa. It is the responsibility of the South African authorities to get to the bottom of*	"SM-7"

		these serious allegations about the manipulation of our currency, wherever it occurred."	
3 June 2020	Independent News	Posted: *"Five South African banks face charges of dollar-rand manipulation"*. *"These charges will not go away. Some of the individual traders involved in the currency manipulation have been dismissed, but their employers, the banks, are yet to be held accountable in South Africa"* and that *"It is the responsibility of the South African authorities to get to the bottom of these serious allegations about the manipulation of our currency, wherever it occurred."*	"SM-8"
11 June 2020	*Business Insider South Africa*	Posted: *"How traders at big banks may have rigged the rand for years"*. *"Standard Bank, Investec, Absa, Investec Bank, and FirstRand are among those accused of rigging the rand-dollar exchange market between 2007 and 2013"* and that the Competition Commission says that *"the 28 banks knew – or ought to have known – that their traders were engaged in the conspiracy."*	"SM-9"
23 Nov 2020	*Biznews* Online	Posted: "*Former Absa CEO Ramos, ex-finance minister Manuel among dozens in travel expense exposé. See lists."*	"SM-10"
9 Dec 2020	*Biznews* Online	Posted: *"Maria Ramos replaces Pityana at AngloGold Ashanti"*. *"Ramos, 61, is former CEO of South African bank Absa Group and previously served as director-general of the nation's Treasury. She's been a director at the world's third-biggest gold producer since May 2019."*	"SM-11"

18. In fact, the applicant was aware of similar statements. This is manifestly clear from the Absa media statement of 23 April 2019 in which the following appears and on which she would have been consulted:

> *"In recent times, there have been public statements by some public figures accusing Absa's former CEO of having been involved in "manipulating the rand", and calling for her prosecution. Such statements are untrue and misleading. The Competition Commission in its submission to the Competition Tribunal named the individuals implicated, and Ms Ramos was not one of them"*[9]

[9] AA, para 18.3

19. In writing the Opinion piece, the second respondent expressed his view point and Opinion. He exercised critical thinking, critical assessment of facts that have been in the public domain for many years. The fact that the applicant does not like the Opinion does not make it defamatory of her. He did not say she personally manipulated the Rand, nor can the reasonable reader of ordinary intelligence be expected to believe that.

20. It is furthermore common cause that the applicant is not a private person. She confirms as much and says that she is *"a successful public servant, business-and industry-leader who conducts herself with integrity, professionalism, and a commitment to public service"*.[10] She cannot be a public servant when she receives accolades for a job well done in her public contribution, but a private citizen when Opinions critical of her are expressed in public.

21. In *Argus Printing and Publishing and Company Limited and Others v Esselen's Estate* 1994 (2) SA 1 (A) at 25B-E the court held that:

> *"I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie defamatory ... The resultant balance gives due recognition and protection, in my view, to freedom of expression.*

[10] FA, para 14

> *I also agree that Judges, because of their position in society and because of the work which they do, inevitably on occasion attract public criticism and that it is right and proper that they should be publicly accountable in this way. And in this connection I can do no better than quote the following well-known remarks of Lord Atkin in the Judicial Committee of the Privy Council in the case of Andre Paul Terence Ambard v The Attorney-General of Trinidad and Tobago [1936] 1 All ER 704 (PC), which dealt with a conviction for contempt of court (at 709):*
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> > *'But whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.'"*

22. No wrong was committed by the second respondent, a member of the public, exercising his right of criticising the applicant and expressing his Opinion in good faith about matters that have been in public domain for many years.

23. Furthermore, we submit, that the statements of which the applicant complains are of public concern and importance. Freedom of expression and the press must not be compromised over the applicant's alleged "highly claimed right to reputation" which has <u>not</u> unlawfully been harmed.

24. Ordinarily, one would not expect a person whose good name has been tarnished in the manner suggested by the applicant to have been appointed to numerous significant positions of trust. The appointments have been made despite the controversy surrounding her being in the public domain <u>still</u>.

25. The context of this application is thus clear and incontestable.

26. We submit with respect that, should the Court choose to protect the applicant's right to reputation over freedom of opinion, expression and the press -- on the facts and circumstances of this case -- there would ultimately be a great imbalance and chilling effect on freedom of opinion, expression and the press.

27. We now address, first, the material disputes of fact that render motion proceedings an unsuited form of litigation in this case. Nevertheless, we propose the appropriate way of resolving those disputes. Thereafter, we address the declaratory orders sought, then the interdict relief, then defamation and lastly appropriate relief and costs.

28. But before that, we touch on the urgency with which this application was initially brought, which we submit was vexatious, frivolous and manifestly inappropriate. Initially, as the Court will have seen from the applicant's notice of motion, the applicant approached this Court on an urgent basis. That approach was always inappropriate and an abuse of this Court's process as it failed to comply with this Division's directives on urgency. Inevitably, and as the respondents expected, the applicant removed the application from the urgent roll, by agreement with the respondents. But this came as no surprise because it was always clear from the facts that the applicant knew that the matter was far from urgent, in part because the facts about which she is complaining have been in the public domain for many years. We mention this not to mount a defence against urgency, which

has now fallen away, but to draw attention to the applicant's proclivity to abuse this Court's process. That proclivity now manifests in the form in which she persists in bringing these proceedings despite the clear material factual disputes. Her legal representatives were sportingly cautioned about this; yet, on instructions from the applicant, they persist. We submit that this is an abuse that calls for this Court's strict censure.

C. URGENCY

29. The lack of urgency is a relevant consideration in demonstrating that the applicant's conduct, in launching this application in the manner and timing that she did, demonstrates a clear abuse of Court process.

30. The fact that the applicant wants the issues resolved urgently does not render the matter urgent.

31. This, with respect

31.1. is discourteous towards the Court which needs to prepare for and hear a considerable number of urgent matters in a day;

31.2. fails to comply with Rule 6(12)(b) of the Uniform Rules;

31.3. fails to comply with this Division's Practice Manual on urgent enrolment; and

31.4. an urgent Court is not geared to deal with.[11]

32. The suggestion that the 'allegations' in the article *"continue to cause harm to my reputation at this critical juncture in my career as a* (sic) *start my new role at AngloGold Ashanti Ltd"* and that *"the allegations incite behaviours which could result in personal harm to me"* is vague and speculative. The applicant fails to state how the article has caused harm to her in her new role at AngloGold Ashanti, and how the *"allegations incite behaviours which could result in personal harm"*. None of this is supported by any evidence.

33. The explanation given by the applicant regarding the delay is contrary to all principles developed by our Courts in considering urgent matters.

34. The Court's processes and rules must be respected, and urgency is not there merely for the asking.

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[11] See *In Re: Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ), especially paras [2]-[3], [5]-[8] and [15]-[20]

35. The conclusion is inescapable that this application was far from urgent. That being so, this Court should express its displeasure with an appropriate costs order as the Practice Manual of this division prescribes.

D. MATERIAL DISPUTES OF FACT

36. An applicant is *dominus litis* and elects to proceed with his/her claim either by way of action proceedings or application proceedings. In this case, the applicant has elected to proceed by way of application proceedings.

37. We submit however that motion proceedings are an inappropriate means by which this dispute between the parties can be resolved. It is also an abuse of this Court's process. In any event, on the qualified *Stellenvale* rule, the factual dispute falls to be determined in favour of the respondents.

38. The applicant disputes that the issue of Absa Bank Rand fixing and the applicant's role therein has been in the public domain for many years before the impugned article. This issue formed part of the respondents' resistance to the alleged urgency as it does resistance on the merits of the application.

39. The applicant knew about this dispute since March 2016 when criminal charges were laid against her for her alleged role in the Rand fixing scandal. We have cited news reports concerning her alleged role published in 2017, 2019 and 2020. This was years before the applicant launched her application. This fact was brought to the attention of the applicant's attorneys on 19 January 2021. Quite apart from the fact that she should never have launched motion proceedings in

these circumstances in the first place, the applicant should have withdrawn both the urgency and the application at that time, and proceeded by way of action proceedings.

40. The Courts have deprecated the conduct of litigants seeking to jump the trial queue by proceeding on motion in matters that are not suitable for that method of litigating, in the hope that the matter will be referred to oral evidence.

41. The purpose of the Courts in motion proceedings is to resolve legal disputes on common cause facts. This application does not fit that mould. It is disposable on one question, namely, whether there arise disputes of fact of the sort that is material, *bona fide*, foreseeable and incapable of resolution on the pleadings.

42. The application was launched on 13 January 2021. A week later (on 19 January 2021) the respondents' attorneys cautioned the applicant's attorneys about the inappropriateness of motion proceedings in light of *"a clear dispute of fact"*. That dispute related to whether the issues about which the applicant is complaining have been in the public domain for many years. These are not spurious disputes.

43. More than 70 years ago this Division sounded a warning about the abuse of motion proceedings as follows:

> *"It is becoming a habit to bring applications to Court on controversial issues and then to endeavour to turn them into trial actions. Applicants thereby obtain a great advantage over litigants who have proceeded by way of action and who may have to wait for many months to get their cases before the Court. Such applications-cum-trials interpose themselves, occupying the time of Judges and still further delaying the hearing of legitimate trials. Applications for the hearing of viva voce evidence in motion proceedings should be granted only where it is essential in the interests of justice."*[12]

44. This is why a Court has a discretion to dismiss an application with costs where an applicant knows or ought reasonably to have known that there is likely to arise material and *bona fide* disputes of fact which cannot reasonably be resolved on the pleadings. But if the Court were inclined to resolve these factual disputes on the pleadings, there is a well-established process.

45. More than 47 years ago, the North Gauteng High Court re-iterated a well-established rule of practice in that Division as follows:

> *"It is a well-established rule of practice in this Division, that dismissal of the application with costs is the proper course to follow if Omegalabs knew or should have known before the proceedings were instituted, that there was likely to be a dispute of fact which the Court would not be able to resolve on affidavit."*[13]

46. Once identified, the resolution of factual disputes in motion proceedings must be done pursuant to the long-established principles laid down in the qualified

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12 *Garment Workers' Union v De Vries and Others* 1949 (1) SA 1110 (W) at 1133. See also *Seloadi v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (BG) at 191; *Bonges v Bonges en 'n Ander* 1965 (2) SA 82 (O) at 85; *De Kloe and Slingerland v Geddes* 1946 TPD 650 at 653.

13 *Carrara and Lecuona (Pty) Ltd v Van Den Heever Investments Ltd and Others* 1973 (3) SA 716 (T) at 720

Stellenvale[14] rule in motion proceedings[15]. Those principles are, in summary, the following:

46.1. The starting point is that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts.

46.2. Unless the circumstances are special, motion proceedings cannot be used to resolve factual issues because they are not designed to determine probabilities.

46.3. Where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

46.4. It may be different if the respondent's version consists of bald or implausible denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers.

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14 Which derives from *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G

15 See *NDPP v Zuma* 2009 (2) SA 277 (SCA) at para [26], 290E-F; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

47. The qualified *Stellenvale* rule in motion proceedings does arise here because while the applicant denies that the issues about the publication of which she complains have been in the public domain for many years, evidence of such previous publication has been provided. Yet, in the face of such clear and unambiguous evidence, the applicant persists in her denial – electing to plead ignorance about the respondents' clear meaning and mischaracterising it. She claims that these publications do not say she was personally involved in the Rand fixing scandal. But,

47.1. in *The South African* of 11 June 2019, the following was published: *"she's been accused of 'manipulating the rand' at Absa, and was forced to apologise in 2017 for her part in 'currency-fixing'"*;

47.2. Antonio Quicksilver wrote on 12 June 2019: *"As then ABSA Group CEO, Maria publicly apologised for her part in "currency-fixing"*;

47.3. on 2 June 2020 *Eye Witness News* reported that employers of the traders involved in the Rand fixing scandal (the banks) *"are yet to be held accountable"*.

48. The applicant seems to be urging this Court to treat these reports as *pro non scripto*. They demonstrate the fallacy of her claim that no one has ever said she

was personally involved. So, while the respondents deny that the Opinion implicates her personally in currency fixing, even on her contrived interpretation it is clear that other publications have previously made the same claim about her. As her entire case hinges on this contrived interpretation, it falls to be dismissed once the Court finds, as it must, that these claims have been made about her previously by other publications.

49. And she knew about similar statements as demonstrated by the Absa media statement of 23 April 2019 referred to earlier.

50. While the Opinion is, with respect, not capable of the meaning she ascribes to it (that is, accusing her of personally manipulating the Rand), and no reasonable reader of ordinary intelligence could possibly think or believe that a chief executive who is not a currency trader can personally manipulate currency, it is clear that she knew when she launched this application that this accusation had been made some years before by others.

51. Motion proceedings for final relief are appropriate only where it is not foreseeable that there will be material disputes of fact in the affidavits. A failure to heed this basic proposition should result in the application being dismissed when disputes on material issues were foreseeable.[16] The issues about which the

[16] See Judge BR Southwood in Essential Judicial Reasoning (LexisNexis), p 23. See also *NDPP v Zuma 2009* (2) SA 277 (SCA); 2009 (4) BCLR 393 (SCA), at para 26

applicant complains have been in the public domain for many years. It was foreseeable that her denial of this fact would raise a material dispute of fact that goes to the heart of the relief sought by her. In the circumstances, her application falls to be dismissed.

52. To the extent that the applicant persists in her denial that the issue of Absa Bank Rand fixing and her role therein has been in the public domain for many years before the impugned article, we submit that the application falls to be dismissed with costs on a punitive attorney and client scale. This issue goes to the heart of the respondents' resistance to the relief sought by the applicant on the merits.

E. REQUIREMENTS FOR DECLARATORY RELIEF NOT MET

53. The applicant fails to satisfy the requirements for the declaratory order she seeks in paragraph 2 of her notice of motion.

54. The applicant seeks a declaratory order that the statements made about her in the article published on 9 December 2020 are defamatory of her, false and unlawful.

55. Declaratory orders are governed by section 21 of the Superior Courts Act 10 of 2013, which replaced the repealed section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959. This section confers a discretionary power upon this Court *"to enquire into and to determine any existing, future or contingent right or*

obligation" notwithstanding the fact that the applicant *"cannot claim any relief consequential upon the determination"*.

56. The right or obligation which is the object of the enquiry may be existing, future or contingent, but it must be more tangible than the mere hope of a right or mere anxiety about a possible obligation.[17]

57. The Supreme Court of Appeal has warned that the fact that a Court can grant declaratory relief does not mean that a person can snatch a remedy from the air. A party is not entitled to approach the Court for what amounts to a legal opinion upon an abstract or academic matter.[18]

58. In order to entertain an application for declaratory relief, a Court must be persuaded that the applicant has an interest in an existing, future and contingent right or obligation that will be determined by the declarator, and that its order will be binding upon other interested parties.[19] If it is so satisfied, the court then exercises a discretion whether to grant or refuse the order sought.

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17 *Family Benefit Friendly Society v Commissioner for Inland Revenue* 1995 (4) SA 120 (T) at 125A

18 S*hoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Another* 1995 (4) SA 1 (A) at 14F – G
Maccsand (Pty) Ltd & another v City of Cape Town & others 2011 (6) SA 633 (SCA) para 39, and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at para 16-17.

59. In doing so the Court may decline to deal with the matter where there is no actual dispute, where the question raised is, in truth, hypothetical, abstract or academic, or where the declarator sought will have no practical effect.[20]

60. The SCA emphasised that there is a two-stage enquiry leading to the decision whether or not to grant a declaratory order.

60.1. During the first stage of the enquiry the Court must be satisfied that the applicant has an interest in an *"existing, future or contingent right or obligation"* that does not amount to mere anxiety about a possible obligation. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist.

60.2. Only if the Court is satisfied that the existence of such conditions has been proven, does it embark upon the second stage, namely, exercise the discretion by deciding either to refuse or to grant the order sought.

61. The applicant falls at the first hurdle.

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[20] *West Coast Rock Lobster Association & others v Minister of Environmental Affairs and Tourism & others* [2010] ZASCA 114 (22 September 2010) para 45-46; [2011] 1 All SA 487 (SCA)

62. Furthermore, the applicant contends that the respondents have tarnished her reputation, a reputation she says has been *"earned over many years, as a leader of ability and sound integrity, who has contributed meaningfully to the economy of South Africa"*.

63. Considering the applicant's career advancement since the Rand fixing news broke some 5 years ago, we submit that it will not be difficult for this Court to dismiss her claim that the publication of the impugned article in December 2020 has tarnished her reputation. It comes across as rather schizophrenic of the applicant to now seek to have the same statements made about her urgently declared as defamatory, false and unlawful, that have been and remain in the public domain for some 5 years. This is not the first publication of this nature in relation to the applicant. Publications of a similar nature and tone, containing similar statements about the applicant remain in the public domain.

64. The applicant has not previously, and does not now, seek to have removed all other publications which have been in the public domain for several years. This means that even if the Opinion piece published by any of the respondents is removed, all the other publications of similar matter will remain. The declaratory relief sought by the applicant is therefore academic, abstract, hypothetical and therefore incompetent.

65. It is also significant that the applicant makes no attempt in her papers at factually addressing

65.1. why she has not accounted for her alleged role in the Rand fixing scandal in circumstances where she in fact issued an apology;

65.2. why she should not face criminal charges or disciplinary action when she was the Chief Executive Officer of one of the implicated banks in something as serious as price fixing;

65.3. the negative publicity surrounding her;

65.4. the donation to President Cyril Ramaphosa's CR17 election campaign; and

65.5. the Reserve Bank bailout to ABSA Bank.

66. These are issues that form part of the publication that the applicant wants this Court to declare defamatory, false and unlawful. Her claiming that some of these are *"irrelevant"* while seeking to have them declared defamatory, false and unlawful demonstrates just how contrived the applicant's case is. The apology she wants issued is not confined to the Rand fixing issue; it goes wider than that.

67. This Court cannot make a finding that the applicant, as Chief Executive Officer of Absa Bank, is not responsible for the alleged fixing of the Rand by Absa Bank during the time she was Chief Executive at Absa Bank, and that she should not be held accountable or called to account in that capacity.

68. This Court cannot interdict the respondents from publishing any statement that says the applicant, while employed as the Chief Executive Officer of Absa Bank, was responsible as Chief Executive for the alleged fixing of the Rand by Absa Bank, or was responsible and accountable (as Chief Executive) for the corruption in relation to the alleged fixing of the national currency. The Competition Commission's investigation is ongoing and it has not yet made any findings in this regard. This Court does not know what the findings of that investigation will be in relation to the role of the applicant. It is the responsibility of the media to keep probing and opining on matters of public and national interest such as this.

69. Once the Court finds that the applicant is not entitled to the declaratory relief she seeks, that is the end of the matter. The rest of the relief the applicant seeks falls away.

F. REQUIREMENTS FOR AN INTERDICT NOT MET

70. The applicant seeks an order interdicting the respondents from publishing or republishing:

70.1. the article; and

70.2. any statement that says or implies that she, while employed as the Chief Executive Officer of Absa Bank, participated in fixing the Rand or committed corruption or treason in relation to the fixing of the Rand.

71. The interdictory relief sought by the applicant ultimately has the effect of preventing the respondents from ever publishing any statement or opinion that says "*the Applicant, while employed as the CEO of Absa Bank, participated in fixing the rand or committed corruption or treason in relation to the fixing of the rand"*.

72. But, the applicant meets none of the requirements for a final interdict.

73. The applicant states that she has a clear right "*to this relief based on the article being defamatory of me"*.

74. We submit however that the applicant has failed to show that the statements by the respondents constitute defamatory matter and, if they do, that the defences available to the respondents do not avail them.

75. Despite public calls for the applicant to be held accountable for her role in the alleged fixing of the Rand at Absa Bank which have been in the public domain since 2016, the seriousness of which was shown by the laying of criminal charges against her, she continued to progress through a number of senior appointments.

76. The respondents' article has brought nothing new. It is what has been in the public domain for over 5 years, which has not harmed or injured the applicant's reputation.

77. The applicant fails to show any actual impairment or reasonable apprehension of harm to her reputation. She states, without more, that *"the harm is particularly acute now given my transition to a new role as chairperson of the board of AngloGold Ashanti. The article undermines my reputation as a business and industry leader. Without this Court's intervention, my reputation and dignity will remain severely impugned."*

78. But the evidence before this court shows that the applicant has failed to show how the article published by the respondents has resulted in any harm or reasonable apprehension of harm to the applicant. The evidence proves the contrary.

79. The suggestion that the 'allegations' in the article *"continue to cause harm to my reputation at this critical juncture in my career as a* (sic) *start my new role at*

AngloGold Ashanti Ltd" and that *"the allegations incite behaviours which could result in personal harm to me"* is vague and speculative. The applicant fails to state how the article has caused harm to her in her new role at AngloGold Ashanti, and how the *"allegations incite behaviours which could result in personal harm"*. None of this is supported by any evidence. This Court is expected simply to take her word for it.

80. On the facts, the applicant has been shrouded in this same controversy. She cannot honestly deny that, the controversy notwithstanding, and on her own version

80.1. she was appointed co-chair of the United Nations Secretary-General's Task Force on Digital Financing of the Sustainable Development Goals from October 2018 to August 2020;

80.2. she was appointed as a director of AngloGold Ashanti in 2019;

80.3. she was appointed as a director of the Public Investment Corporation in 2019;

80.4. she was appointed as the chairperson of the board of AngloGold Ashanti in 2020;

80.5. she was appointed as an independent non-executive director to the Board of Directors of Standard Chartered PLC from 1 January 2021.

81. These are significant appointments that require integrity and, ordinarily, one would not expect a person whose good name has been tarnished in the manner suggested by the applicant to have been so appointed to numerous significant positions of trust. The appointments have been made despite the controversy surrounding her being in the public domain.

82. Clearly, the 'negative' publicity of the applicant in the public domain has not impacted on her appointment to the Public Investment Corporation, AngloGold Ashanti and others.

83. These appointments no doubt are significant appointments from reputable companies whose integrity also depends on members of the Boards that they appoint. The applicant puts up no evidence to show that the negative publicity contained in the article has in fact affected her role as chairperson of the board of AngloGold Ashanti. It is now more than 3 months since the article was published and the applicant still fails to demonstrate any harm.

84. The relief sought by the applicant is therefore nothing more other than dragging this Court to silence the respondents and muzzle them from exercising the rights conferred on them by the Constitution. Freedom of opinion [s 15(1)], freedom

of the press and other media [s 16(1)(a)] and freedom of expression [s 16(1)] are not subject for their exercise to the dictates of the wounded feelings of the well-heeled or politically and economically connected. These are rights that define democracy and by which the effectiveness of democracy is, and ought rightly to be, measured.

85. Our Courts appreciate the robust nature of political discourse in public media and have resisted the temptation to supress political statements about public matters and matters of public interest, even where those matters trespass on the personal. Mr Mahlangu is a Political Editor. So, political matters are some of the issues he writes about. He cannot be muzzled from expressing an opinion based on fact, simply because the subject of his opinion does not like what he writes. That is not a democracy. It is a dictatorship of the media by aa leader in big business.

86. It was indeed this Division in *Tshabalala-Msimang and Another v Makhanya and Others* 2008 (6) SA 102 (W) that, in addressing the theft of a patient's private and confidential medical records which had been leaked by the press in a manner which infringed on the right to privacy of such patient, refused to issue an interdict to further comment on a matter that was already in the public domain. The Court said:

> *"[56] Whatever I may think of the conduct and reporting behaviour of the respondents in the present matter, it would be false to the precepts of our Constitution if I allowed the interdict against the respondents, from further commenting on the issues that*

have already entered the public domain. The prospect of favouring the applicants with this remedy may suspend journalism in a manner too dangerous to accept."

87. By the interdict that she seeks, the applicant wants this Court to *"suspend journalism in a manner too dangerous to accept"*.

88. This Division emphasised the significance of freedom of the press even in the fraught circumstances of that case where a law had been broken by the media. It said:

> *"[34] The freedom of the press is celebrated as one of the great pillars of liberty. It is entrenched in our Constitution but it is often misunderstood. Freedom of the press does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However, freedom of the press does mean that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish.*
>
> *...*
>
> *[40] ... Freedom of expression enables people to contribute to debate on social and moral issues. This right is the most important driver of political discourse, so essential to democracy, which in turn is a concomitant of a free society.*
>
> *[41] An untrammelled system of free expression that is designed to enrich the community and to enrich each participant who is engaged in it, has costs. These costs take the form of statements that injure people's feelings as well as those that challenge their views."*

89. Mr Mahlangu, as group head of politics, editor of *The Star* newspaper, and journalist, was entitled to express a view and be allowed to call for the applicant to be held accountable. Opinions are precisely that. People differ on opinion. The second respondent holds the opinion that Rand fixing constitutes a criminal offence for which the Chief Executive of the institution concerned must be held accountable. So did a politician in 2016 to the extent that he laid criminal charges against the applicant. Another person may hold a different opinion and opine, for example, that it is an ethical or unpatriotic concern. A Court cannot

constitutionally permissibly suppress the expression of opinion that is reasonably based on the author's interpretation of facts. That is what the applicant asks this Court to do.

90. Furthermore, issues such as the Absa Bank bailout, donations made to President Ramaphosa's CR17 election campaign, the fixing of the Rand, are all matters that are still currently the subject of much discussion in the public domain.

91. The applicant's claim does not lie in running to Court on an urgent basis and seeking interdicts on issues that have been in the public domain and which she now seeks to dispute. Her remedy, in a vibrant democracy, lies in refuting the statements she considers offensive in the media platforms on which it was made, as the Absa statement of 23 April 2019 did. The respondents have given the applicant adequate space to respond in the public domain to opinions, views and interpretations about herself and the Rand fixing scandal, and the other issues covered.

92. We submit that the applicant has not made out a case for the relief she seeks and that all the above factors militate against the court granting an interdict.

G. DEFAMATION

93. The law of defamation in South Africa is based on the *actio injuriarum*, a flexible remedy arising from Roman law, which afforded the right to claim damages to a person whose personality rights had been impaired intentionally by the unlawful act of another. One of those personality rights is the right to reputation or *fama*, and it is this aspect of personality rights that was protected by the law of defamation.

94. 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].

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

96. It is not difficult to establish elements (3) and (5), that 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) <u>Does the publication constitute defamatory matter?</u>

97. 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 to establish whether that meaning is defamatory.[21]

98. At the first stage, the test to be applied is an objective one, namely, what meaning the reasonable reader of ordinary intelligence would attribute 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.[22]

99. The SCA has held that:

> *"It must also be borne in mind that the ordinary reader has no legal training or other special discipline 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). Consequently, <u>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)."*[23]

100. At the second stage, the meaning which should be ascribed to a statement

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21 *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA) at para [10]
22 *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA) at para [11]
23 *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA) at para [11]

is considered. A statement is defamatory if it would tend to lower the applicant in the estimation of right-thinking members of society generally.[24]

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

101.1. The article is published in the Leader (opinion) page of the second respondent's newspaper and on its social media platforms.

101.2. It is the author's opinion based on his reasonable assessment of the facts that are already in the public domain.

101.3. The meaning that a reasonable reader of ordinary intelligence would ascribe to the article, in the context that the issue has been and still is in the public domain for several years, is not wrongful or unlawful.

101.4. The meaning that a reasonable reader of ordinary intelligence would ascribe to the statement is as follows:

(a) *"Ramos was never charged"* - This is an allegation of fact. The applicant does not deny it. She has never had a charge in relation to the fixing of the Rand put to her either in a Court of law or upon

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

arrest. She does not deny this fact in her papers. The allegation is therefore not defamatory, false or unlawful.

(b) *"for fixing the rand"* - This is short-hand, in a headline, which makes a connection between the fixing of the Rand, on the one hand, and the absence of a criminal charge therefor, on the other. A headline never tells the full story. A reasonable reader of ordinary intelligence knows to always read the story or opinion in order to grasp what is being said and why. When that is done, the reasonable reader will nowhere find an allegation that the applicant was personally involved in fixing the Rand. The allegation, on a reasonable, plain reading of the Opinion as a whole, is that as Chief Executive of Absa Bank she was responsible for the conduct of her company and must be held accountable for it. Seen in its proper context, the statement is not defamatory of the applicant, false or unlawful.

(c) *"but keeps getting rewarded with top jobs"* - Again, a reasonable reader of ordinary intelligence will read this statement in the context of a headline to be expanded upon in the body of the article. This part of the headline laments the lack of accountability by a Chief Executive in relation to a matter of national interest and significance, namely, the deliberate manipulation of national

currency by a bank of which she is Chief Executive, but instead gets appointed in top positions, such as the chairmanship of a multinational commodities company listed in numerous bourses around the world. Seen in this context, the statement is not defamatory; it is not false; it is not unlawful. It is, in fact, factual. The applicant does not deny that she has been appointed to several high positions of trust even after the news broke of her bank being implicated in the fixing of the Rand, and even after her issuing an apology for that conduct.

(d) *"We must be very concerned about Maria Ramos's recent appointment as chairperson of the AngloGold Ashanti board. Ramos has still not accounted for fixing the rand"* - The first sentence is self-evidently the author's opinion. The second sentence is a factual allegation upon which that opinion is based. The applicant may disagree with the opinion advanced, but that does not give her license to have it censored. The applicant has not disputed the factual allegation that she has yet to be held accountable for the Rand fixing scandal of Absa Bank of which she was Chief Executive at the time. The statements, read together and in the context of the Opinion piece as a whole, are not defamatory or false or unlawful.

(e) *"All the Republic got for her actions was an apology. An apology for Rand fixing"*: Again, this is an allegation of fact. The applicant does not deny that she issued a public apology for Absa Bank's Rand fixing scandal. She does not deny that she has never been held accountable as Chief Executive by, for example, facing disciplinary action or even criminal charges. What the nature of those criminal charges would be, in a case that involves allegations of currency manipulation by a bank of which she is the Chief Executive, is a matter for debate. At least two publications that preceded the article reported that the applicant issued an apology *"for her part in currency fixing"*. The statement is not defamatory or false or unlawful.

(f) *"Ramos wasn't criminally charged nor did she face any disciplinary action. But instead she was honoured with a PIC board seat"*: The first sentence is a statement of fact. The second sentence is an opinion that laments the lack of accountability by the Chief Executive of a major bank that is implicated in the manipulation of the national currency. The applicant may disagree with the opinion, but she has no right to censor it. The statements, read in their proper context and as part of the entire Opinion piece, are not defamatory or false or unlawful.

(g) *"While she was the group chief executive for Absa, Ramos was also a donor to President Cyril Ramaphosa's CR17 campaign"*: This is self-evidently a statement of fact. It is not defamatory or false or unlawful. The applicant has not denied it. In fact, she confirms it. She says it is not relevant to this application, yet she seeks an interdict that the respondents desist from ever publishing it again. Clearly it is relevant.

(h) *"Even with the negative publicity surrounding her, last year she was called into the Public Investment Corporation"*: This is a statement of fact. The statement is not defamatory of the applicant; it is not false; it is not unlawful.

(i) *"Her recent appointment should not be celebrated"*: This is an opinion based on the statements of fact that precede it. The opinion is not defamatory or false or unlawful.

(j) *"Absa borrowed money from the then government of national unity to bail out its debtors and form a new bank, the Amalgamation of Banks in South Africa, thus Absa"*: This is a statement fact. Two judges independently have indeed found that the transaction was in fact not a loan but a *"simulated transaction"* – in other words, a donation disguised as a loan. But

that does not make the statement unlawful.

102. The fact that the article expresses an opinion that the applicant has not been charged for her role in currency fixing does not make it defamatory. It is a statement of fact amid an ongoing investigation by the Competition Commission. Reference to treason is the author's opinion. He is not a lawyer, neither is the reasonable reader of ordinary intelligence. He believes that manipulation of the national currency by a bank of which she is chief executive is a crime against the people of South Africa. That is the context.

103. The article is an opinion of the author. It does not carry with it that the applicant is in fact guilty of an offence or is engaged in corrupt activities. The author does not say that the applicant must be removed from her newly appointed position because she has committed a crime/s which has been proven in a court of law.

104. The fact that the article expresses opinion which the applicant does not like, does not make it defamatory.

105. By thrusting herself into the public eye, the applicant opened herself to public scrutiny. She must consequently display a greater degree of tolerance to criticism than ordinary individuals.

106. We remind this Court of what the Constitutional Court said in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) which, although observing (rightly with respect) that freedom of expression is not an absolute right, said at para [28] that:

> *"[28] South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as 'one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . .'. As such it is protected in almost every international human rights instrument. In Handyside v The United Kingdom the European Court of Human Rights pointed out that this approach to 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".'"*

107. It is thus our respectful submission that the article does not constitute defamatory matter. The meaning that a reasonable reader of ordinary intelligence would ascribe to it in this fraught political context is not wrongful. It also does not tend to lower the applicant in the estimation of right-thinking members of society, given the fraught political context in which it was written.

108. If the Court should find that the statements are defamatory (which we submit they are 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. 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*

109. 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. . ."*

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

110.1. that the publication was true and in the public interest;

110.2. that the publication constituted fair comment;

110.3. that the publication was made on a privileged occasion; and

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

111. We submit that the publication of the article was fair, in the public interest, true, and reasonably published in a particular way and at the particular time. In our submission, and on a consideration of all the statements (as a reasonable reader of ordinary intelligence, not a Court, would do) within the fraught political context in which they were made, and considering that the controversy surrounding the applicant has been and still is in the public domain for several years, it will be difficult to conclude that the statements in question do not establish one or more or all of these four defences.

112. The applicant is mistaken in her categorisation of all the statements as *"statements of fact"*, and the Rand fixing allegation as being directed at her personally. Her entire application seems to hinge precariously on these two incorrect assessments or assumptions. As already demonstrated above, some of the statements constitute opinion or fair comment while others are statements of fact.

113. The statements are firstly preceded by the word "opinion" and are also published in the opinion page. They were made genuinely and honestly; they were not made maliciously as demonstrated by an invitation to the applicant to engage on these issues – something which is rarely done where the piece concerned is an opinion piece and not a story. These statements were already in the public domain.

114. The statements made relate to a matter of public interest. It is important that the

public debate about the applicant's fitness to hold positions of high responsibility, continues within the constitutional bounds protecting freedom of expression and free flow of information.

115. On a proper and reasonable construction of the Opinion piece as a whole, it is clear that the applicant is implicated in price fixing only in her capacity as Chief Executive who is responsible and accountable for the conduct in which her company allegedly engaged. The Competition Commission's investigation is ongoing and it has not yet made any findings in this regard. It is the responsibility of the media to keep probing and opining on matters of public and national interest such as this.

116. In *National Media Ltd. and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1209H the SCA held that:

> *"…we must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion (Prof JC van der Walt in Gedenkbundel: HL Swanepoel at 68). The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens - from the highest to the lowest ranks (Strauss, Strydom and Van der Walt Mediareg 4th ed at 43). Conversely, the press often becomes the voice of the people - their means to convey their concerns to their fellow citizens, to officialdom and to government."*

117. We submit that the statements made are of public concern and importance, the freedom of expression and press must not be compromised over the applicant's highly claimed right to reputation which has not been and is not unlawfully

harmed in any way. Mere conjectural speculation that harm might occur is not enough.

118. The discussion about the applicant has been and continues to be in the public domain. The importance of public debate cannot be overemphasised. The author expressed an honestly-held opinion, without malice, on a matter of public interest on facts that are true and that are already in the public domain.

H. APPROPRIATE RELIEF AND COSTS

119. For all these reasons, we submit that the appropriate relief is that the application be dismissed with costs on a punitive scale, such costs to include the costs of two counsel.

120. If, in spite of all the submissions made on behalf of the respondents, the Court finds it appropriate to rule in favour of the applicant, we submit that an order that forbids the media from ever publishing a story about the applicant's role in the alleged price fixing of national currency is far-reaching and irrationally censorious. The Competition Commission's investigation in this regard is still on-going and may very well make adverse findings in relation to the applicant's role. This Court cannot, with respect, anticipate the outcome of that investigation by suppressing journalists doing their own investigative reporting on this issue pending the outcome of the Competition Commission's

investigation. By censuring the respondents from ever publishing any story or opinion about the applicant's role in that scandal, the Court will have prejudged the outcome of the Competition Commission's investigation. In this regard we would commend the following dictum of this very Division to this Court:

> "[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."[25]

121. 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 in the price fixing of the Rand.

122. As regards costs, 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: frivolous, vexatious or manifestly inappropriate conduct.[26] She fails to demonstrate any of these.

123. Contrastingly, should the respondents succeed, as the case law manifestly dictates that they should, they are entitled to costs on attorney and client scale.

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25 *Heroldt v Wills* (12/10142) [2013] ZAGPJHC 1; 2013 (2) SA 530 (GSJ); 2013 (5) BCLR 554 (GSJ); [2013] 2 All SA 218 (GSJ) (30 January 2013)

26 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), para 18; *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and others* 2015 (2) SA 1 (CC), para 36;

Bringing this application on an urgent basis and on motion, and persisting in that approach despite glaring material disputes of fact in order to jump the trial queue, was vexatious, frivolous and manifestly inappropriate.

V Ngalwana SC
F Karachi
N Jiba
Chambers, Sandton

N Gwele (pupil)
L Tefo (pupil)
PABASA: Pius Langa School of Advocacy

17 March 2021

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