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

Case number: 2023-050131

In the matter between:

MAZETTI MANAGEMENT SERVICES (PTY) LTD	First Applicant
AMMETTI HOLDINGS (PTY) LTD	Second Applicant
and	
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	First Respondent
STEPHEN PATRICK SOLE	Second Respondent
DEWALD VAN RENSBURG	Third Respondent
SOUTH AFRICAN NATIONAL EDITORS FORUM	First Amicus Curiae
MEDIA MONITORING AFRICA TRUST	Second Amicus Curiae
CAMPAIGN FOR FREE EXPRESSION	Third Amicus Curiae
CORRUPTION WATCH NPC	Fourth Amicus Curiae

CORRUPTION WATCH'S HEADS OF ARGUMENT

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INTRODUCTION

1. On 1 June 2023, this Court, per Holland-Muter J, issued two urgent *ex parte* interdicts (granted in camera) against AmaBhungane Centre for Investigative Journalism NPC (**AmaBhungane**) and three of its investigative journalists (**investigative journalists**).

2. First, this Court issued an order that required AmaBhungane and the investigative journalists to hand over a number of documents **(the leaked documents)** that AmaBhungane alleges were obtained from confidential sources (**the production order**). On our reading of this order, it is final in its effect, as it cannot be undone.[1]

3. Second, this Court issued an interim pre-publication ban that prohibits AmaBhungane and the investigative journalists from publishing any articles based on the leaked documents or utilising or disseminating any of the leaked documents to any third parties (**publication ban**).

4. On 3 June 2023 the production order was amended, by agreement between the parties, to prohibit the deletion, destruction or alteration of the leaked documents, pending reconsideration of the order.

5. The outcome of this application will have far-reaching consequences beyond its particular facts. The roles played by corruption whistle-blowers and the media in exposing corruption, fostering transparency and accountability, and protecting the victims of corruption against wrongdoing are also implicated.

6. Corruption Watch is a civil society organization that seeks to expose corruption and the abuse of public funds. Corruption Watch aims to expose those who engage in corrupt

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[1] *J R 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd* 2009 (4) SA 302 (SCA) para 25.

activities, nepotism and abuse of power and public funds in both the public and private sectors. Of particular concern to Corruption Watch is the safety of whistle-blowers who report corruption to investigative journalists, as such sources either receive no, or inadequate, protection under the Protected Disclosures Act 26 of 2000 (**PDA**) or other legislative instruments. It is for the purposes of advancing these objectives that Corruption Watch has sought to be joined as an *amicus curiae* in this case.

7. The respondents' Rule 16A notice states that in terms of section 16 of the Constitution:

   7.1. Journalists are permitted to receive information from sources on a confidential basis and publish that information, provided they do so in the public interest;

   7.2. It is not unlawful for journalists to hold any information, regardless of the manner in which it was obtained, provided they do so in the public interest;

   7.3. Journalists have a right to keep their source material and the identity of their sources confidential; and

   7.4. A prior restraint on journalistic publication can only be granted in exceptional circumstances and such a restraint can never be granted *ex parte*.[2]

8. Two important principles relevant to the above issues are well established in our law. First, in *AmaBhungane*,[3] the Constitutional Court held that "*keeping the identity of journalists' sources confidential is protected by the rights to freedom of expression and the media*."[4] The Court recognised that the confidentiality of journalists' sources is

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2 Respondents' Rule 16A notice, para 2, Caselines 10-2.

3 *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* 2021 (3) SA 246 (CC) ("***AmaBhungane***").

4 Id at para 115.

protected by the right to freedom of the press and other media in section 16(1)(a) of the Constitution[5] and endorsed Tsoka J's finding in *Bosasa*[6] that:

> "*[I]t is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of press is fundamental and sine qua non for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded.*"[7] [our emphasis]

9. Second, a prior restraint on publication, although occasionally necessary, constitutes a *"drastic interference with freedom of speech and should only be ordered when there is a substantial risk of grave injustice"*.[8]

10. The primary issues that we shall address in these submissions are:

    10.1. the nature of the *"limited circumstances"*, referred to in *AmaBhungane*, in which journalists may be required to disclose their sources; and

    10.2. what would constitute a *"substantial risk of grave injustice"* that would justify a prior restraint on publication.

11. In considering these issues, we shall stress:

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5 *AmaBhungane* para 115.

6 *Bosasa Operation (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) **(*Bosasa*)**.

7 Id para 38.

8 *Print Media South Africa v Minister of Home Affairs* 2012 (6) SA 443 (CC) at para 44; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) **(Midi Television)** para 15

11.1. the role and effectiveness of investigative journalism in exposing corruption; and

11.2. the importance of the abuse of process doctrine in protecting the anonymity of vulnerable whistle-blowers who report corruption.

12. In the sections which follow, we shall set out:

12.1. the relevant international law;

12.2. certain findings of courts in comparable jurisdictions; and

12.3. the obligation of courts to combat corruption;

before considering how these principles inform the determination of the case before this Court.

THE LEGAL PRINCIPLES

International law

13. International law has a special place in our law which is carefully defined by the Constitution.[9] Section 39(1)(b) of the Constitution requires courts, when interpreting the Bill of Rights, including the rights to media freedom and source protection under section 16(1), to consider international law.

14. Several binding international law instruments concur that the protection of journalists' sources, including whistle-blowers, is an indispensable and basic condition for media

[9] *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa* 2015 (2) SA 1 (CC) **(*Glenister II*)** para 97.

freedom. Such protection is necessary to ensure the free flow of information which is widely recognised as an essential element of several international human rights law agreements.

15. South Africa has ratified the United Nations Convention Against Corruption ("**the Corruption Convention**").[10] The Convention may be used as an interpretive aide in understanding the nature and scope of the State's constitutional obligation to effectively combat corruption and organised crime,[11] as well as the right to media freedom in the context of corruption.

16. Article 13(1) of the Convention requires South Africa to take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.

17. In terms of Article 13 of the Convention, this participation should be strengthened by:

> *"(b) Ensuring that the public has effective access to information;*
>
> . . .
>
> *(c) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:*

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[10] 2004 43 ILM 37. The Convention was adopted on 31 October 2003 and entered into force on 14 December 2005. South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004.

[11] *Glenister II* supra para 115.

(i) For respect of the rights or reputations of others;

(ii) For the protection of national security or order public or of public health or morals." (underlining added).

18. It follows that South Africa is bound by the Convention to take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, which respect, promote and protect the freedom of the media to receive, publish and disseminate information concerning corruption. This freedom should only be limited where strictly necessary to protect the rights of others. In other words, there should be no alternative suitable remedies that do not restrict the media's role in exposing corruption.

19. South Africa is also a party to the International Covenant on Civil and Political Rights ("**ICCPR**").[12] Article 19(2) provides that:

> "*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*."

20. The UN Human Rights Committee noted in its General Comment No 34 that Article 19(2) of the ICCPR requires State parties to:

> "*recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources*."[13]

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[12] The ICCPR was adopted by the General Assembly of the United Nations on 19 December 1966, signed by South Africa on 3 October 1994 and ratified on 10 December 1998.

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

21. South Africa has also ratified the African Union Convention on Preventing and Combatting Corruption ("**the AU Convention**"),[14] which obliges State parties to adopt legislative and other measures "*to protect informants and witnesses in corruption and related offences, including protection of their identities*" (underlining added).[15]

22. Article 12(4) of the AU Convention further binds South Africa to:

> "*Ensure that the Media is given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial*."

23. The AU Convention accordingly requires South Africa to ensure that the media has access to information in cases of corruption and that it adopts measures to protect the identities of informants in corruption and related offences.

24. In a similar vein, the Southern African Development Community Protocol against Corruption ("**the SADC Corruption Protocol**")[16] requires South Africa to adopt measures that will create, maintain and strengthen:

> "*mechanisms to encourage participation by the media, civil society and non-governmental organizations in efforts to prevent corruption*."[17]

25. These international law principles are supported and strengthened by the findings of courts in comparable jurisdictions.

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14 The AU Convention was adopted on 11 July 2003. South Africa signed the Convention on 16 March 2004, ratified the Convention on 11 November 2005 and it entered into force on 5 August 2006.

15 Article 5(5) of the AU Convention.

16 The SADC Corruption Protocol was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.

17 Article 4(1)(i) of the SADC Corruption Protocol.

Foreign case law

26. This Court may derive assistance from foreign case law in interpreting the Bill of Rights, including the right to media freedom and source protection expressed in section 16(1) of the Constitution.[18] The Court may have recourse to comparative law but is not obliged to consider it.[19]

27. The protection of the confidentiality of journalistic sources is well-established in several comparable jurisdictions. Many prominent foreign judgments have recognised that "*exceptional circumstances*" are required to justify the compelled disclosure of a journalists' confidential sources and that such an order may only be justified if the information about the source is essential to safeguarding a vital public interest.

28. In *Randal*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia recognised that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists threatens to hinder their ability to gather and report the news.[20] The Court held that war correspondents are entitled to a qualified privilege against testifying to what they regard as confidential information,[21] and recognised that they could not be compelled to testify about their sources, except under exceptional circumstances.[22]

29. In the landmark case of *Goodwin v United Kingdom*, the Grand Chamber of the European Court of Human Rights further found that a court order that required a journalist to reveal

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18 Section 39(1)(c) of the Constitution.

19 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at para 28.

20 *Prosecutor v. Brdjanin*, Case No. IT-99-36-AR73.9, *Decision on Interlocutory Appeal*, paras. 46-50 (Int'l Crim. Trib. Yugoslavia, Appeals Chamber, Dec. 11, 2002) ("***Randal***") para 35.

21 Id paras 48 to 49.

22 Id para 50.

their confidential source was an impermissible violation of Article 10 of the European Convention on Human Rights.[23] The Court held that an order requiring a journalist to disclose their source may only be justified by the public interest and recognised that the:

> "*Protection of journalistic sources is one of the basic conditions for press freedom. . . Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest*."[24] (underlining added).

30. The Court held the private interests of a company in preventing the further dissemination of its confidential information and the taking of action against a source who is presumed to be an employee were outweighed by the interest of a free press in a democratic society.[25]

31. In *Telegraaf Media Nederland Landelijke Media v the Netherlands*, the Third Section of the European Court of Human Rights recognised that the concept of journalistic "*source*" is "*any person who provides information to a journalist*",[26] which would include a whistle-blower. The Court further recognised that:

> "*While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in*

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23 *Goodwin v. United Kingdom*, 22 Eur. Ct. H.R. 123, 10-11 (1996) at para 46.

24 Id at para 39.

25 Id at para 38.

26 *Telegraaf Media Nederland Landelijke Media B.V. v The Netherlands*, app. 39315/06 (2012) at para 86.

> *circumstances where a source was clearly acting in bad faith with a harmful purpose (for example, by intentionally fabricating false information), courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise*."[27]

32. The European Court of Human Rights recognised in *Dupuis v France* that there had been a violation of Article 10 of the European Convention on Human Rights in circumstances where journalists had been criminally sanctioned for disseminating information obtained illegally but where that information was in the public interest, on a matter of political debate and about a public figure.[28]

33. The Supreme Court of Canada in *R v Vice Media* recognised that because of the importance of the media's role in a democratic society, they are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible.[29]

34. In *Schoen*, the United States Court of Appeals, Ninth Circuit held that once journalistic privilege is properly invoked, the burden shifts to the requesting party to demonstrate a sufficiently compelling need for the journalist's materials to overcome the privilege.[30] At

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27 Id para 128.

28 *Dupuis v. France*, App. No. 1914/02 (Eur. Ct. H.R. June 7, 2007).

29 *R v Vice Media Canada Inc*, 2018 SCC para 14.

30 *Schoen v. Schoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

a minimum, this requires a showing that the information sought is not obtainable from another source.[31] The Court further recognised that the journalist's privilege extends to protect information and materials obtained without a guarantee of confidentiality.[32] It reasoned that the compelled disclosure of even non-confidential information harms the media's ability to gather information by damaging confidential sources' trust in the press' capacity to keep secrets and, in a broader sense, by converting the press in the public's mind into an investigative arm of prosecutors and the courts.[33]

35. In short, there is weighty support in foreign case law for the propositions that: (i) protection of journalistic sources is a basic requirement for press freedom; (ii) disclosure of such sources is likely to have a chilling effect on the right of freedom of expression; and (iii) such a disclosure can only be justified by a compelling public interest in exceptional circumstances.

36. We turn now to consider the obligation to combat corruption.

THE DUTY TO COMBAT CORRUPTION

37. The Corruption Convention, the AU Convention and the SADC Corruption Protocol, which have been discussed above, underline the need to ensure that the media has access to information in cases of corruption and to protect the identities of informants in corruption cases.

38. It has been accepted in our courts that corruption is pervasive in South Africa.

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31 Id.

32 Id at 1292.

33 Id at 1295.

39. In *Glenister II* the Constitutional Court stated that "*[c]orruption is rife in this country*" and there is consensus that "*stringent measures are required to contain this malady before it graduates into something terminal*."[34] In considering the international obligations under section 7(2) of the Constitution to combat and prevent corruption, the Court held that:

> "*[C]orruption in the polity corrodes the rights to equality, human dignity, freedom, security of the person and various socio-economic rights. That corrosion necessarily trigger the duties section 7(2) imposes on the State. We have also noted that it is open to the state in fulfilling those duties to choose how best to combat corruption. That choice must withstand constitutional scrutiny*."

40. The Constitutional Court proceeded to hold that:

> "*corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk*."[35] (underlining added).

41. In a similar vein, this Court has noted that we live in a society "*where corruption has become cancerous*",[36] that the media plays an "*essential and critical role*" which is

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34 *Glenister II supra* para 1.

35 *Glenister II supra* para 166.

36 Tsoka J, *Bosasa Operation (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) at para 38. Cited with approval in *AmaBhungane supra.*

"more pronounced" in our "*nascent democracy founded on openness*", and this role should be *" fostered rather than denuded"*.[37]

42. We turn now to consider the implications of the principles discussed above for this case.

THE PRODUCTION ORDER

43. The well-established requirements for (what is in effect) the final interdictory relief sought by the applicants in respect of the production order are a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary legal remedy.[38]

44. In our submission, the applicants have failed to establish:

    44.1. the unlawful infringement of their rights;

    44.2. a sufficiently important public interest to justify the disclosure of the respondents' sources; and

    44.3. the absence of any alternative remedy.

Unlawful infringement of a right

45. An applicant may seek a final interdict to protect against the unlawful violation of their property rights. In *Oak Valley Estates*, the Constitutional Court recognised that final interdicts are:

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[37] Tsoka J, *Bosasa Operation (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) at para 38. Cited with approval in *AmaBhungane*.

[38] *Pilane v Pilane* 2013 (4) BCLR 431 (CC) at para 38.

> *"intended to protect an applicant from the actual or threatened unlawful conduct of the person sought to be interdicted. Thus, for an interdict to be granted, it must be shown, on a balance of probabilities (taking into account the Plascon-Evans rule, where final relief is sought on motion), that unless restrained by an interdict, the respondent will continue committing an injury against the applicant or that it is reasonably apprehended that the respondent will cause such an injury."* (emphasis added).[39]

46. In *Hotz*, the Supreme Court of Appeal further held that the purpose of final injunctive relief is *to* "*put an end to conduct in breach of the applicant's rights*".[40]

47. In order to establish a clear right, the applicants have to prove, on a balance of probability, facts which, in terms of substantive law, establish the right relied upon.[41] As held by Rogers AJ in *Antares International Ltd*, the key question is whether the applicants have established that their rights have been unlawfully violated by the respondents.[42]

48. The applicants face substantial difficulties in their reliance on the *rei vindicatio* and their rights to confidentiality and privacy, in respect of the leaked documents.

49. With regard to the *rei vindicatio*, it is not in dispute that the applicants are still in possession of the original documents.

50. In *SABC v Avusa*,[43] this Court endorsed: (i) the conclusion[44] that information or knowledge, however valuable or confidential, was not property; (ii) the finding in

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39 *Oak Valley Estates supra* at para 19.

40 *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at para 36.

41 *Fairhaven Country Estate (Pty) Ltd v Harris and Another* 2015 (5) SA 540 (WCC).

42 *Antares International Ltd v Louw Coetzee & Malan Incorporated* 2014 (1) SA 172 (WCC) at para 31.

43 *SABC v Avusa* 2010 (1) SA 280 (GSJ) **(*Avusa*)** at para 15.

44 In *Waste Tech (Pty) Ltd v Wade Refuse (Pty) Ltd* 1993 (1) SA 833 (W) at 841F – 845C.

Prinsloo v RCP Media Ltd t/a Rapport[45] that an argument for the return of photocopied documents based on the *rei vindicatio* was unconvincing.

51. It follows that, insofar as the applicants seek to rely on property rights, they will have to persuade this Court that the cases referred to above were wrongly decided.

52. In relation to the rights to confidentiality and privacy, in *Avusa* this Court held that:

52.1. confidentiality *"may have to yield to higher interests"*;

52.2. the journalists – in contradistinction to employees of the SABC - owed no duty of confidentiality in respect of the leaked report to the SABC and that their possession of the documents was "*not wrongful or unlawful*"; and

52.3. even if the SABC had a right to privacy over the leaked report, once it was the delivered to the journalists, *"the horse has bolted"* and this right was extinguished.[46]

53. The latter principle was confirmed (in relation to the right to confidentiality) in *SAA v BDFM*, where this Court held that "*[o]nce confidentiality is shattered, like Humpty Dumpty, it cannot be put back together again*."[47]

54. We submit that *Avusa* and *BDFM* were correctly decided, and that the applicants should not be granted relief on the basis of their rights to confidentiality and privacy in the leaked documents.

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45 2003 (4) SA 456 (T) at 464E.

46 *Avusa* at para 18.

47 *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) ("***SAA v BDFM***") at para 38.

Disclosure of journalists' sources

55. The respondents contend that the purpose of this application is to ascertain: (a) what documents the respondents have access to; and (b) how and from whom they obtained them.[48] On our reading of the papers, the respondents' contention is well founded. If this Court is satisfied that the granting of an order for the return of documents (in terms of paragraph three of the applicants amended notice of motion), will have the effect of disclosing the respondents' sources, it will have to consider whether such disclosure is justified.

56. We have referred above to *AmaBhungane*, where the Constitutional Court recognised that the preservation of the confidentiality of journalists' sources is crucial for the performance by the media of their obligations.[49] The Court upheld the finding in *Bosasa* that *"subject to certain limitations"*, journalists are not required to reveal their sources.

57. What are these limitations which govern when journalists will be required to disclose their sources?

58. In our submission, the test to be applied is, at the very least, that stated in the *Goodwin* and *Financial Times* cases, namely that there are exceptional circumstances and *"an overriding requirement in the public interest"*. We propose that the factors to be taken into account in determining whether to make an order which has the purpose or effect of requiring journalists to disclose their sources, should include the following:

    58.1. the reason and purpose for which the journalist obtained the information from the source;

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48 Respondents' supplementary supporting and answering affidavit, para 28, Caselines 09-56 to 09-57.

49 *AmaBhungane* at para 115.

58.2. the nature of the interests relied upon by the party seeking disclosure, and in particular whether they are public or purely private or commercial interests;

58.3. whether there is credible evidence that the information received relates to unlawful or unethical conduct, and in particular to evidence of corruption or potential corruption, in which case the claim for disclosure should be subject to heightened scrutiny;

58.4. the potential consequences of the order for the source/s threatened with disclosure;

58.5. where the journalist has already published information:

58.5.1. whether the material published is shown to be factually inaccurate or gratuitously sensationalistic;

58.5.2. the nature and purpose of the published articles;

58.6. whether source protection is invoked in the context of "*watchdog*" or "*accountability*" journalism (where sources may require anonymity to protect them from reprisals); and

58.7. whether *"the horse has bolted"* principle, referred to above, is applicable;

59. The applicants fall a long way short of satisfying the standard of *"an overriding requirement in the public interest"* for disclosure. All of the considerations referred to in the preceding paragraph militate against disclosure of the respondents' sources. The applicants rely on private interests of an unconvincing nature and fail to identify any material factual inaccuracies in the articles published. On the other hand, AmaBhungane

has an impressive track record of exposing corruption in the public interest[50] and the articles published by them (relating to the applicants) contain credible evidence of corruption or potential corruption.

60. In short, the public interest weighs heavily in favour of non-disclosure of the documents (and, in all likelihood, the respondents' sources).

No alternative remedy

61. In *Midi Television* the Supreme Court of Appeal held that:

> "*Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose*."[51]

62. This finding casts considerable doubt on the applicants' claim that they have no alternative remedy.

THE INTERIM PUBLICATION BAN

63. There are four requirements for the pre-publication interim interdict sought by the applicants:

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50 This is apparent from the *Gupta Leaks*, *Mckinsey* and *Regiments* investigations referred to at paragraph 38.7 of Dewald van Rensburg's supplementary affidavit, Caselines 09-61 to 09-65.

51 *Midi Television supra* at para 20.

63.1. First, there must be (at a minimum) a *prima facie* right on the part of the applicant.[52]

63.2. Second, there must be no other ordinary remedy that is available to give adequate redress to the applicant.[53]

63.3. Third, the balance of convenience must favour the granting of interim relief.[54]

63.4. Fourth, there must be a well-grounded apprehension of irreparable harm if interim relief is not granted and final relief is ultimately granted.[55]

64. Corruption Watch advances the following submissions in relation to the requirements for an interim interdict:

64.1. The applicants have failed to satisfy the requirements for a pre-publication interdict;

64.2. The balance of convenience test should take into account the need to combat corruption; and

64.3. In any event, this is an appropriate case for this Court to exercise its overriding discretion to refuse an interim interdict.

Requirements for a pre-publication interdict

65. We have referred above to the finding in *Midi Television* that a prior restraint on publication, although occasionally necessary, constitutes a drastic infringement of the

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52 *Vaal River Development Association supra* para 253.

53 *Vaal River Development Association supra* para 218.

54 *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC) para 48.

55 *Vaal River Development Association supra* para 291.

right of freedom of speech and should be permitted only when there is a *"substantial risk of grave injustice"*.[56]

66. The applicants have failed to plead or meet the required legal standard of a substantial risk of grave injustice.[57] The evidence before this Court is insufficient to support a finding that any substantial risk of a grave injustice will befall the applicants if the pre-publication interdict is not granted.

The balance of convenience

67. In order for the applicants to obtain an interim interdict, this Court must be satisfied that the balance of convenience favours the granting of the order sought. This Court must first weigh the harm to be endured by the applicants if interim relief is not granted as against the harm that the respondents or the public will suffer if the interdict is granted.

68. In *OUTA*[58] the Constitutional Court held that the test for an interim interdict must be applied: (i) cognisant of the normative scheme and democratic principles underlying our Constitution; and (ii) in a manner that promotes the *"objects, spirit and purport of the Constitution"*.[59] It went on to hold that an interim interdict restraining a statutory body or official from exercising its powers should only be granted after the court, in considering the balance of convenience, had proper regard to *"balance of powers harm"*.

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56 *Print Media South Africa v Minister of Home Affairs* 2012 (6) SA 443 (CC) at para 44; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para 15

57 *Print Media South Africa* id at para 44.

58 *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) (***OUTA***).

59 *OUTA supra* para 45.

This entails an assessment of whether the relief would intrude into the exclusive terrain of another branch of government.[60]

69. We submit that given the objects, and the normative underpinning, of the Constitution, which were relied upon in *OUTA*, in this case, the balance of convenience inquiry should take into account the need to combat corruption. In a case, such as this application, where there is credible evidence that the respondents are seeking to expose corruption, this should be a weighty consideration in determining where the balance of convenience lies.

70. Having regard to the factors (referred to above) which we proposed should be taken into account in determining whether journalists should be required to disclose their sources, we submit that the balancing of the harms implicated in this matter favour the dismissal of the interim relief sought by the applicants. On the one hand, the applicants will not suffer irreparable harm if the interim interdict is not granted. On the other hand, the granting of the interim interdict would cause considerable harm to the respondents and the public interest, particularly given the public interest in exposing and combatting corruption.

This Court's overriding discretion

71. Even if all the requirements for an interim interdict are satisfied, this Court is vested with an overriding wide discretion to refuse to grant the relief sought.[61] Public-interest factors can and (we submit) ought to be taken into account in the exercise of this discretion.[62]

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60 *OUTA supra* paras 45 - 47.

61 *Hix Networking Technologies v System Publishers (Pty) Ltd* 1991 1 SA 391 (A) at 399A

62 *Cipla Medpro v Aventis Pharma* 2013 (4) SA 579 (SCA) para 52.

72. For the reasons set out above, we contend that this Court has a duty to combat corruption and, in the circumstances of the present case, this means that it should exercise its public override discretion in this instance, as: (i) the public interest in the integrity of investigative journalism in the context of corruption clearly outweighs the applicants' alleged contractual or "*proprietary*" interest in the leaked documents; and (ii) failure to do so would have a chilling effect on the fight against corruption.

73. In short, public interest factors ought to be considered in the exercise of the Court's discretion in this case, where they require that confidential sources and journalistic investigative practices be protected.[63]

ABUSE OF THE LEGAL PROCESS

74. In *Beinash*,[64] the Supreme Court of Appeal confirmed that our courts have the authority to protect the integrity of the legal system by preventing the abuse of their processes.[65] Abuse of process can in general terms be said to occur where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.[66] Determining what constitutes an abuse of process is always based on the specific facts and circumstances of each case.[67]

75. Our Constitution unequivocally recognises the protected status of journalists' sources[68] - especially, we submit, in the context of corruption whistle-blowers.

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63 *Cipla Medpro v Aventis Pharma* 2013 (4) SA 579 (SCA) at para 52.

64 *Beinash v Wixley* 1997 (3) SA 721 (SCA), cited in *Mineral Sands and Others v Christine Reddell and Others* [2022] ZACC 37 (***Mineral Sands***).

65 See also *Mineral Sands,* id at para 49.

66 *Mineral Sands,* id at para 49; *Beinash supra* at at 734F-G.

67 *Mineral Sands,* id at para 90.

68 *Amabhungane supra* at para 115.

76. Furthermore, the PDA recognises the importance of protecting whistle-blowers who report corrupt or otherwise unlawful conduct by their employees or co-workers. Its principled objective is to provide safeguards for such disclosures and to protect the interests of the whistle-blowers who make them.[69]

77. Corruption Watch urges this Court to reinforce these constitutional and policy imperatives by finding that any litigation proceedings instituted with the ulterior purpose of revealing the identity of corruption whistle-blowers or prohibiting journalists from exercising their constitutional right and duty to inform the public about allegations of corruption constitute an abuse of the legal process.

CONCLUSION

78. Corruption Watch contends that the relief sought in the reconsideration application ought to be upheld, *alternatively* that paragraphs 2 and 3 of the order granted by this Court, per Holland-Muter J, should be discharged.

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Chambers, Cape Town and Sandton
Tuesday, 20 June 2023

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[69] The stated objective of the PDA is: "*To make provision for procedures in terms of which employees and workers in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees or workers in the employ of their employees; to provide for the protection of employees or workers who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith*." (underlining added).