

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 005491/2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
28/2/2024 DATE	
 SIGNATURE	

In the matter between:

RE CAPITAL HOLDINGS LIMITED

first Applicant

NEWMAN GEORGE LEECH

second Applicant

And

MAIL & GUARDIAN MEDIA LIMITED

1st Respondent

LUKE FELTHAM

2nd Respondent

LYSE COMINS

3rd Respondent

JUDGMENT

MAKUME, J:

- [1] In this matter the Applicants seek an order interdicting the Respondents from publishing certain statements which the Applicants deem as being defamatory

of his and his company's character and good standing also to remove from their website such statement.

- [2] The second Applicant is a Director of the first Applicant a private Ltd company duly incorporated in accordance with the laws of the United Kingdom with registration number 12922405 and has its principal place of business at 7th floor, 105 Strand London England WC2ROAA.
- [3] The second Applicant though holding a South African citizenship is a Swiss National and presently resides in Switzerland.
- [4] The second and third Respondents both domiciled in South Africa are employed as Editor and Journalist respectively by the first Respondent the Mail & Guardian newspaper.
- [5] Media Monitoring Africa (MMA) is a non-profit organisation that acts as a watchdog with the objective of promoting ethical, fair journalism and an open and competitive broadcast media in South Africa and across the continent of Africa. The Campaign For Free Expression (CFE), is like wise a not-for-profit organisation based in Johannesburg. Its objectives are to protect and expand the right to free expression by monitoring a free flow of ideas and information as well as to report on relevant events and developments, promoting transparency and access to information in all sectors of society. It undertakes strategic and precedent setting legal action to promote and defend free expression.
- [6] MMA and CFE in applying to be admitted as Amicus Curia filed substantive submissions in support of the concept of freedom of the press and speech as envisaged in Section 16 of the Constitution of the Republic of South Africa. The Applicants are opposing the application.
- [7] In their submissions both MMA and CFE in support of the defence raised by the Respondents also referred to the duties and functions of the Press Ombudsman

whose duties are to deal with complaints by the public against journalist and media houses.

- [8] The sum total of these submission has a bearing on whether this application should be enrolled as one of urgency in terms of Rule 6(12).
- [9] The Respondents have raised an initial point in *limine* to the effect that this application is not urgent and should be struck off the roll with costs. I deal with that issue now.
- [10] It is trite law that an applicant is required in terms of rule 6(12) to set forth explicitly the circumstances which he or she avers renders the matter urgent and why he or she maintains that he cannot be afforded substantial redress at a hearing in due course.
- [11] Separately but closely related to that aspect the respondents have raised two other issues namely that on the issuing of the notice of motion the applicant should have issued a Rule 16 A notice calling on interested parties to join as a *Amis Curia* in view of the contention that the application raises constitutional issues being dignity as well as freedom of speech as entrenched in Section 16 of the constitution of South Africa.
- [12] The second issue also related to the first one is that the applicants have failed to join other parties or media houses who have also published the statements being complained of.
- [13] Lastly the respondents raise the issue that the applicants could have referred their complaint to the press council for a decision and in the event that the statement was later found to be defamatory then the applicant would have a claim for damages.
- [14] Many years ago in this division Cachalia J in the matter of: **Digital Printers v Riso Africa (Pty) Ltd Case number 17318/2002** a decision which was quoted

and referred to with approval by Wepenar J in RE: **Several Matters in the Urgent Court 2013 (1) SA 549 GSJ** held as follows:

“If a matter becomes opposed in the urgent court and the papers become voluminous there must be exceptional reasons why the matter is not to be removed to the ordinary motion roll. The urgent court is not geared to dealing with a matter which is not only voluminous but clearly includes some complexity and even some novel points of law.”

- [15] In as far as the applicants prayer that the respondents be ordered to remove or cause to be removed and or retract or cause to be retracted the impugned article from its website and any other platforms under the first respondents control the respondents have correctly indicated that the article also appeared in other publications to which they have no control and in any event those publications not having been joined the harm has already been done and that the horse has bolted.
- [16] The respondents have referred this court to three decisions that of: *Mokate v UDM*; *Mabote vs Fundudzi Media*. In both matters the court found that by the time the application for urgency was heard the publication was already in the public domain and dealing with those matters in the urgent court would serve no purpose.
- [17] The first issue to be resolve is the admission of Media Monitoring Africa (MMA) as well as Campaign For Free Expression (CFE) as *Amici Curae*.
- [18] In their applications to be admitted as *amici* they maintain that their interest is to support freedom of speech as entrenched in Section 16 of the constitution of South Africa. This the applicants dispute on misdirected grounds.
- [19] MMA in particular has been accepted and made submissions as *amicus* in a number of cases in particular the matter of: **Maughan v Zuma and Others [2023] ZAKZPHC59** which matter concerns abuse of process and private prosecution for a journalist in an effort to silence the journalist. In that matter

MMA was joined by not only the South African National Editors Forum (SANEF) but also by CFE.

- [20] This Court is accordingly persuaded that both MMA and CFE be admitted as *amicus curiae*. This matter is clearly about asserting a Constitutional right.

IS THIS APPLICATION URGENT?

- [21] it is common cause and not disputed that on the 10th January 2024 the Mail and Guardian published an article online with the banner headline "BHI TRUST'S INTERNATIONAL LINKS EXPOSED"
- [22] BHI Trust is a South African entity which through a certain Mr Graig Warriner carried on a Ponzi Scheme which was being investigated by not only the police but by the FSCA. Mr. Warriner is presently in custody after handing himself to the police.
- [23] On Friday the 12th January 2024 the same article was published in the print version of the Mail and Guardian. The print article has a photo of the second Applicant Mr. Newman George Leech. In it is mentioned that Mr Leech is connected with a company that marketed the Ponzi Scheme namely Global and Financial Advisors.
- [24] These are the articles that have led to this application for the reason that the article states that there is a connection between Craig Warriner and the first and second applicants thus implying that the applicants are also involved in the Ponzi Scheme.
- [25] In their Notice of Motion the Applicants plead that in the alternative to paragraph 2 to 4 which is the interdict they seek that order pending the outcome of a defamation claim for damages. This implies that the issue whether the articles complained of are defamatory or not will still have to be traversed in trial proceedings still to be instituted.

[26] it is clear that the applicants seek final interdict to stop the respondents publishing what is in the public interest whether that is true or not that is an issue not capable of being decided in the urgent court.

[27] The Respondents have set out four reasons why this application is not urgent and falls to be struck off the roll they are the following:

27.1 that by the time this application is being heard the article would have been in the public domain for four weeks which means that the alleged harm has already occurred. Opperman J in **Mabote v Fundudzi Media (Pty) Ltd t/a Sunday World [2020] ZAGPJHC 287** concluded as follows:

“ by the time the respondents published its article it was already in the public domain that applicant had been involved in a romantic relationship with Mr. Edwin Sodi no action has been taken against Opera news or any of the other publications. There seems to be merit in the argument that whether this court grants the application the relief she seeks or not (apart from one million rand which she does not seek be awarded to her by the urgent court) her reputation will not undergo any material change for it is already what it is and the publication above listed have seen to that. Courts are not inclined to grant orders that will have only academic effect and this must weigh in the overall decisions.”

27.2 The second reason which is closely linked to the one mentioned above is that the article is available on two other online platforms over which the Respondents have no control. Those publications owned by other entities should have been joined in this application. That misjoinder on its own means that this application should be struck off the roll.

27.3 The third reason is that respondents supported by the submission of the *Amici Curae* have raised not only a defense based on a sustainable factual foundation as it was found in **Herbal Zone (Pty) Ltd v Infitech**

Technologies (Pty) Ltd 2017(2) ALL SA 347 (SCA) but raised a Constitutional issue of freedom of speech. Wallis JA in the Herbal Zone concluded that what is required is that a sustainable foundation be laid by way of evidence that a defence such as truth and public interest or fair comment is available to be pursued by the respondent. It is not sufficient simply to state that at a trial the respondent will prove that the statements were true and made in the public interest or some other defence of a claim for defamation without providing the factual basis therefore."

27.4 The fourth reason is that the Applicants have failed to prove that they have no alternative remedy. In this matter the Applicants have the following alternative remedies:

- a) A claim for damages.
- b) Referring the Complaint to the Press Council.

[28] In conclusion it is appropriate to quote the words of Nugent J in **Midi Television (Pty) Ltd vs Director of Public Prosecution (Western Cape) 2007 (5) SA 540 (SCA)** in which he concluded as follows:

"it is important to bear in mind that the constitutional provision of a free press is not one that is made for the protection of the special interests of the press. The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information which is possible only if there is a free press. To abridge the freedom of the press is to abridge the right of citizens and not merely the right of the press itself."

[29] This matter involves some novel points of law which cannot be adequately given attention to in the urgent court (See In re: Several Matters in the Urgent Court) In the result I make the following order:

Order

- a) This application is struck off the roll due to lack of urgency
- b) The Applicants are ordered to pay the taxed costs of the Respondents.

Dated at Johannesburg on this 28 day of February 2024



M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

Date of hearing : 06 February 2024

Date of Judgement : 28 February 2024

For Applicant : Adv D Smit Sc

With : Adv M Kruger

Instructed by : Messrs Webber Wentzel

For Respondents : Attorney M Power

Instructed by : Messrs Power and Associates

For Amici : Adv S Scott