



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Case no: 2025-092980

In the matter between:

**CAPE UNION MART
INTERNATIONAL (PTY) LTD
PHILIP JOSEPH KRAWITZ**

First Applicant

Second Applicant

AND

**MAGHMUDA OCKARDS
MUHAMMAD SHAFIQ GAMIET
MOHAMED ZAIN JEENAH
SHERAZAAD RAHIMA SYLVESTER
SAYED RIDHWAAN MOHAMED
UNIDENTIFIED PROTESTERS AT
CAPE UNION MART PREMISES
PALESTINIAN SOLIDARITY
CAMPAIGN, CAPE TOWN**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

AND

**CENTRE FOR APPLIED LEGAL
STUDIES**

Amicus Curiae

Coram: Justice J Cloete, Justice C N Nziweni et Justice R Barendse

Heard: 15, 17 and 18 June 2026

Delivered electronically : 4 September 2026

ORDER

- 1 The application to strike out by the first to fifth and seventh respondents is dismissed.
- 2 The respondents are interdicted and restrained from making any claim that the first applicant (Cape Union Mart) or one of its brands, including Poetry, Old Khaki and K-Way, are associated with the State of Israel in any way.
- 3 The respondents are interdicted and restrained from making any claim that the first applicant (Cape Union Mart) or one of its brands, including Poetry, Old Khaki and K-Way, are funding “genocide” or any military conflict in Gaza in any way.
- 4 The respondents are interdicted and restrained from making any claim that the second applicant is “funding genocide”, the Israeli army, or the conflict in Gaza in any way.
- 5 The respondents are interdicted and restrained from claiming that the applicants are killing children or are complicit in the killing of children.
- 6 The respondents are interdicted and restrained from publishing, in any way, defamatory statements to the effect that the applicants support a genocide in Gaza, or that the applicants have “killer(s) ways”.
- 7 The respondents are interdicted and restrained from preventing access to the first applicant’s stores by its customers.
- 8 The respondents shall, during any protest action held at the first applicant’s stores or premises, comply with the provisions of the Regulation of Gatherings Act 205 of 1993.
- 9 Each party shall pay their own costs.

JUDGMENT

Cloete J (Nziweni J *et* Barendse J concurring) :

Introduction

[1] The applicants (Cape Union Mart and Mr Krawitz respectively) have approached this court for a final interdict against the respondents for what they contend is continuing defamatory and other unlawful conduct. The application is opposed by the first to fifth and seventh respondents. The second, third and fourth respondents are members of the seventh respondent, the Palestinian Solidarity Campaign, Cape Town (PSC). Although the first and fifth respondents are not members of the PSC, they were referred to collectively with the second, third, fourth and seventh respondents as the ‘PSC respondents’. The sixth respondent, namely the unidentified protestors at Cape Union Mart’s premises, have not participated¹. The Centre For Applied Legal Studies (CALS) was admitted as *amicus curiae*.

[2] Cape Union Mart is a South African company operating a chain of retail stores across Southern Africa. It owns brands such as K-Way, Poetry, Old Khaki and Travel & Safari. It has a board of nine directors. Mr Krawitz is the executive chairperson. He is not a shareholder.

[3] Mr Krawitz has close historic ties to Cape Union Mart. His grandfather founded the business in 1933, and he joined it as a young man. Mr Krawitz and his family are Jewish, and he is a prominent member of the South African Jewish and business communities.

¹ Despite the applicants having complied with a substituted service order.

[4] Although the first and fifth respondents are not members of the PSC, they often attend PSC arranged protests. The PSC describes itself as a voluntary organisation and grassroots civil society movement based in Cape Town, committed to advocating for human rights, justice and equality for the Palestinian people. It is a secular organisation, but has members of all faiths. It states that it operates through peaceful campaigns, public education, boycotts and protest action, aimed at ending the oppression of Palestinians, including Israel's occupation of Palestinian territories and what it describes as Israel's other violations of international law. It maintains that it rejects anti-semitism unequivocally, just as it rejects Islamophobia and all forms of ethnic or religious bigotry.

The context of the dispute

[5] There are disagreements on the papers about various factual aspects, but over the course of the three days the matter was argued, many became side issues which no longer require consideration. I will thus focus on what is now common cause, or no longer materially disputed, insofar as these are relevant to determination of the true issues.

[6] From November 2023, and following developments in Gaza, the PSC and other supporters, both known and unknown, began gathering regularly to protest outside Cape Union Mart stores within this Court's jurisdiction. These protests continued for 19 months until the applicants approached this court for relief, as well as thereafter, despite the terms of an interim order.² According to the PSC, the purpose of these gatherings was to urge the public to boycott Cape Union Mart's stores as part of a broader campaign 'to boycott businesses linked to the State of Israel's military campaign in Gaza, whether through ownership, or because of their support for Israel's conduct'. The PSC says that Cape Union

² The application was brought on 19 June 2025 and opposed by the respondents on 1 July 2025. On 6 August 2025, an order was made by agreement providing for certain interim relief and postponing the matter to 16 and 17 February 2026 for hearing. It was then again postponed for hearing before us.

Mart was targeted because Mr Krawitz as its executive chairperson ‘and principal owner ... is known to hold leadership positions in organisations that raise funds for Israel (including for its military and settler enterprises)’.

[7] Posters displayed at various of these gatherings, and utterances by PSC members and/or its supporters thereat, are admitted by the PSC respondents to be the following: (a) a poster held by the first respondent, with her face disguised, bearing the words ‘K-Way Killers Way’ alongside an equation mark next to a photograph of Mr Krawitz; (b) posters depicting the swastika (the hate symbol of Nazi Germany) superimposed on an Israeli flag; (c) a poster bearing the words ‘Boycott Cape Union Mart: They fund genocide’; (d) protesters chanting ‘Philip, Philip, what do you say, how many children have you killed today’, referring directly to Mr Krawitz; (e) the first respondent holding a poster bearing the words ‘Phillip Krawitz Genocide Funder’ next to a photograph of Mr Krawitz and his wife; (f) the first respondent holding a poster reading ‘I know your suffering and your poverty (but you are rich), and how you are BLASPHEMED & SLANDERED by those who say they are Jews (Zio’s) and are not THEY ARE THE SYNAGOGUE OF SATAN’; (g) a poster(s) bearing the words ‘Cape Union Mart supports killing of children in Palestine’; (h) the first respondent holding a manipulated photograph of Mr Krawitz with devil’s horns, i.e. Satan; and (i) the first respondent holding a poster with an arrow pointed towards a Cape Union Mart store with the words ‘ISRAEL KILLS/ starves BABIES’.

[8] Furthermore, the fifth respondent admits posting pictures of himself at these protests on his public Instagram account, including where he was holding a poster with the name and photograph of Mr Krawitz alongside a Cape Union Mart logo and the words ‘Cape Union Mart supports genocide. Proudly supports MURDERS OF KIDS’.

[9] The PSC respondents allege that they learned of Mr Krawitz's affiliations through public sources (media interviews, newspaper articles and reports); and that given that Cape Union Mart 'is a family-owned company, headed by Mr Krawitz, it was deemed appropriate to target the business for a consumer boycott in protest of his close association with Israel and its atrocities in Gaza'.

[10] They say that their admitted conduct cannot be viewed in a vacuum. They proceeded to deal in some detail with the conflict in Gaza and their views about it, as well as the views of others. They are of course entitled to their views, but it is important to contextualise the actual litigation before us, since we are not a court of public opinion but a court of law.

[11] In the words of the Constitutional Court in *Masuku*³:

‘[1] At the heart of this matter are three fundamental rights, all indispensable to any healthy constitutional order. These rights – the rights to equality, human dignity, and the right to freedom of speech and expression – are rights that carry unique and troubled pasts interwoven into the fabric of apartheid history. In this constitutional dispensation, they are inextricably interconnected with what it means to be a citizen of a democracy, free to live a life in a condition of dignity and humanity. In this matter, these rights meet each other.

[2] The background to this matter is disturbing, and the genesis of the legal question with which this Court now finds itself seized, lies in four statements made orally and in writing by Mr Bongani Masuku in respect of the protracted feud between Israel and Palestine in the Middle East. It should be said at this earliest opportunity that what this Court is not called upon to do is to make any pronouncement on that situation, which is a concern of international relations and not a justiciable issue. To pronounce on this situation would be both wholly inappropriate and totally irrelevant to the legal questions that are the objects of our attention. Now that any ambiguity as to what we are doing here has been eradicated, let us turn to the background of this matter – the reason we are here.’

[12] It is also necessary to say what the dispute before us is *not* about. No relief is sought to limit the respondents' criticism of the State of Israel and the

³ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC).

events that unfolded in Gaza in any way whatsoever. No general relief is sought to ‘insulate the applicants from any public scrutiny or accountability’ as the respondents suggest. Nor is any relief sought to prevent the respondents from assembling in public places or from boycotting Cape Union Mart.

[13] In their amended form, the orders sought by the applicants include: (a) restraining the respondents from making what the applicants contend are false claims that they are funding a genocide and killing babies; (b) harassing and preventing access to customers of Cape Union Mart at its stores; and (c) compliance with the Regulation of Gatherings Act⁴ (Gatherings Act), which the PSC respondents have now undertaken to do, thus leaving only the sixth respondent (the unknown protestors who have not participated in this litigation).

[14] Put differently, the applicants ask *inter alia* for an interdict to prevent the respondents from defaming them, and offending the dignity of Mr Krawitz, under the guise of freedom of expression, and for them to behave lawfully and comply with a piece of legislation that no-one (including the CALS, which I deal with later) has sought to impugn.

[15] It is also appropriate to deal briefly at this juncture with the PSC respondents’ application to strike out portions of the applicants’ replying affidavits on the basis that they constitute impermissible matter which, it is alleged, are scandalous, vexatious and/or irrelevant, hearsay, new matter or secondary evidence. The first overall complaint is that in their replying affidavits, the applicants introduced evidence of further happenings that occurred after their application was launched. Given the PSC respondents’ concessions, it is not necessary to consider that evidence.

[16] The second overall complaint is one pertaining to supporting affidavits introduced in reply. The short answer is that, ironically, the PSC respondents

⁴ Regulation of Gatherings Act 205 of 1993.

relied almost exclusively on hearsay evidence to support their claims against Mr Krawitz in the form of articles and reports downloaded off the internet. In these circumstances, it ill-behoved the PSC respondents to complain, after the applicants were obliged to deal therewith, that the allegedly offending portions of their replying affidavits fell to be struck out.

The applicants' case in the founding papers

[17] The principal founding affidavit was deposed to by Mr Krawitz. His evidence was as follows. Neither he nor Cape Union Mart have any involvement in the war in Gaza. The ties he has with Israel in his personal capacity stem solely from his family's religion of Judaism, which he says are ties with the Jewish state as a spiritual homeland for Jews and not with the government of Israel.

[18] He explained that his late grandfather, also Philip Krawitz, came to South Africa at the time of intensifying persecution of Jews. Since he founded Cape Union Mart in 1933, the Krawitz family has been involved in the business, although it has expanded into a large corporate entity. Currently it has approximately 3000 employees and 270 stores. The group's employees, on all levels, come from different ethnic, religious, cultural and demographically diverse backgrounds.

[19] As is expected from all major businesses in South Africa, Cape Union Mart has a comprehensive Corporate Social Investment (CSI) policy. Donations are given to qualifying organisations. The CSI policy includes a requirement that Cape Union Mart may only make donations in the communities in which it conducts business, and he could therefore categorically state that it has never donated anything to any person or organisation outside of Southern Africa.

[20] In his personal capacity, Mr Krawitz has served, and continues to serve, in several leadership positions. These include being a trustee of the Cape Town Holocaust & Genocide Centre, a past president of the South African Chamber of Business and the Cape Town Chamber of Commerce, protector of the Ikamva Labantu Trust, and the South African chairperson of Keren Hayesod, which he described as a public benefit company and non-profit organisation based in Israel.

[21] He explained that he has been privileged to receive several awards during his career, amongst them, for present purposes, the Keren Hayesod Yakir Award for philanthropy in 2015 (he was one of four international recipients). He annexed a report on that award, published in the SA Jewish Report of 24 June 2015. He said that the timing of that award was a surprise to him, given that he had been involved in both Jewish and non-Jewish organisations his entire career. At the award ceremony, a photograph was taken of him and his wife with Israeli Prime Minister Netanyahu.

[22] During 2014, there was another well-publicised conflict between Israel and who Mr Krawitz described as Hamas-affiliated Palestinian militants, which came to be known as ‘Operation Protective Edge’ or the ‘2014 Gaza War’. Keren Hayesod spearheaded a fundraising campaign for the Fund for Victims of Terror, which was already founded in 2002, providing assistance on a purely humanitarian basis to civilians of any religious background affected by terrorism on Israeli soil.

[23] Mr Krawitz believed it was his involvement in Keren Hayesod that led to allegations during 2023 that he had pledged to ‘raise money for the Israeli war fund’, which he described as completely false, but which were repeated after his 2015 award was then brought up. Mr Krawitz attributed this falsehood to a member of an organisation called the SA Boycott, Divestment and Sanctions

Coalition. He also believed that this falsehood propelled the respondents to hold the protests and make the claims which they did.

[24] He also referred to a video of an interview in which he took part on 28 October 2024, during a private function of the non-profit organisation ORT Jet at which he was guest speaker, and which was subsequently widely distributed on social media. During the interview, when asked about the boycott campaign against Cape Union Mart (which by that time had been ongoing for almost a year) he responded:

“The Jewish Report published a picture of me together with my wife together with (Israeli Prime Minister) Netanyahu.

Suddenly I became, quote unquote, the biggest funder of the Israeli army.

I would be privileged to be the biggest funder of anything in Israel..

And so, they picked up on that, “I’m the biggest funder to the Israeli army and you must boycott K-Way and you mustn’t buy from K- Way”’.

[25] According to Mr Krawitz, during the same interview he emphatically denied funding the Israeli army, and the above statement was ‘clearly sarcastic to illustrate the ludicrous nature’ of the allegations against him. He had in fact said he would be privileged if he were, indeed, the biggest funder of *anything* in Israel as that would imply he was a man of such wealth that he could, ‘let alone the Israeli army’.

[26] After detailing the nature of the protests, and unsuccessful attempts by Cape Union Mart senior representatives to engage with the protestors, Mr Krawitz referred to the recent presence of counter-protestors bearing the Israeli flag. He feared that this could escalate into physical altercations between opposing groups. As he put it: ‘Cape Union Mart, and its customers, are now being drawn into a battlefield of opposing views about a war we have no part in. The applicants are suffering ongoing, intensifying and irreparable harm’.

The PSC respondents’ case

[27] The PSC respondents admitted most of the conduct complained of. They did not seriously suggest that the utterances made (whether in posters or verbally) are not defamatory, and correctly so. However, they denied that their conduct is wrongful on two grounds: (a) truth and public benefit; and (b) protected commentary.

[28] Their answering affidavits and annexures thereto are voluminous (almost 900 pages). I will endeavour to isolate the pertinent portions. By way of an overview of their opposition, they said that the relief, if granted, would operate as a prior restraint on core political speech and peaceful assembly, protected under s 16 and s 17 of the Constitution. Their boycott and protest campaign is a form of political expression and conscientious activism, directed at Mr Krawitz ‘and by extension Cape Union Mart’s, support of, and connections to, the unlawful and genocidal conduct of the State of Israel in Gaza’. The ‘by extension’ theme in relation to Cape Union Mart ran throughout their papers.

[29] The respondents claimed that Mr Krawitz’s public statements and official roles make him, and by extension, Cape Union Mart, fair subjects of moral and political criticism. They also claimed in emphatic terms that their statements about *both* applicants are true and for the public benefit.

[30] The admitted sources of the information upon which they relied were reports and articles downloaded from the internet, as well as the interview of October 2024. From these articles and reports, they had formed the view that Mr Krawitz holds ‘senior positions in bodies’ that directly support Israel’s military and settlement actions and policies. One of his ‘most significant’ roles is in Keren Hayesod – United Israel Appeal (UIA). According to them, the sources to which they referred revealed that, under Israeli law, Keren Hayesod works in close coordination with the Israeli government to advance Israel’s national priorities, one of which is supporting members of the Israeli military and paramilitary infrastructure (IDF).

[31] The PSC respondents first referred to Mr Krawitz's position in Keren Hayesod to link him to these activities. They claimed that although it runs a charitable foundation, Keren Hayesod is effectively an Israeli governmental entity, which not only supports its military and paramilitary structure but also supports Jewish settler organisations operating in occupied East Jerusalem and which include forcibly displacing Palestinian residents.

[32] They linked Mr Krawitz to the activities complained of by claiming that Keren Hayesod-South Africa is 'the local affiliate that raises funds from the Jewish community and others for Keren Hayesod's programmes in Israel'. Although the PSC respondents did not dispute that Mr Krawitz in his capacity as chairperson of Keren Hayesod-South Africa was instrumental in raising funds in 2014/2015 to assist 'Israeli' victims of conflict, they maintained that Keren Hayesod's leadership's appreciation of his 'unswerving devotion to Israel at that time demonstrates a broader commitment beyond any one project, and by accepting the 2015 award he held himself out as a 'champion of Israeli causes'.

[33] They further alleged, in support hereof, that Mr Krawitz also serves on Keren Hayesod's international governing body as Campaign Executive, advising its World Chairman; and that through Keren Hayesod he has become directly involved with the Jewish Agency for Israel (JAFI). Although formally independent, JAFI is, according to them, another of Israel's national institutions, established by law to collaborate with the state, and it focuses on immigration, settlement and diaspora, having historically played a role in establishing and expanding Israel. It is also claimed by them to have security-related programmes.

[34] Keren Hayesod is further alleged to be intertwined with JAFI, with more than 50% of the former's funds raised being earmarked for JAFI projects. Since 2020, Mr Krawitz has served on JAFI's board of governors to represent Keren-

Hayesod. The PSC respondents also placed emphasis on Mr Krawitz's other local activities, which they claim link him to 'Zionist' organisations.

[35] As far as Cape Union Mart is concerned, the 'by extension' theme was encapsulated in the following paragraph in the principal answering affidavit:

'[s]tatements directed at Cape Union Mart track the publicly-embraced identity of Mr Krawitz, as its executive chairperson, and brand association. The statements articulate derivative complicity and are also true in substance, or are protected opinion.'

[36] Although the PSC respondents relied on hearsay evidence, no proper attempt was made to have it introduced under s3 (1)(c) of the Law of Evidence Amendment Act⁵. This subsection confers on a court a wide discretion to receive hearsay evidence in the interests of justice, having regard to the following: (a) the nature of the proceedings; (b) the nature of the evidence; (c) the purpose for which the evidence is tendered; (d) the probative value of the evidence; (e) the reason why the evidence is not given by the person on whose credibility the probative value of such evidence depends; (f) any prejudice to a party which the admission of such evidence might entail; and (g) any other factor which in the opinion of the court should be taken into account.

[37] In addition, on 24 July 2025 the PSC respondents availed themselves of uniform rule 35, but without first seeking leave of the court to make the rules of discovery applicable to motion proceedings as they were required to do. Despite this, the applicants delivered a comprehensive response on 25 August 2025, long before the PSC respondents delivered their answering affidavits on 17 and 21 November 2025 respectively. As part of that response, the applicants provided detailed information, including extracts from Cape Union Mart's records reflecting the entities to which it had donated money since 2020.

⁵ Law of Evidence Amendment Act 45 of 1988.

[38] Moreover, the PSC respondents launched an urgent application on 19 August 2025, seeking to make the rules of discovery applicable to these proceedings under rule 35(13), but subsequently abandoned that application. Their belated attempt during argument to persuade us that the evidence was not hearsay in light of the Electronic Communications and Transactions Act⁶ took it no further, since even if the material upon which the PSC respondents relied fell within the definition of ‘data message’, this had never been their case and the applicants could thus not have dealt with it in their affidavits.

The response of the applicants

[39] Mr Krawitz deposed to the principal replying affidavit as well. He maintained that, apart from the obvious hearsay material squarely relied upon by the PSC respondents, they had been selective in what they had placed before the court. For example, in a recorded interview in 2002, which he said was similarly publicly available, he had specifically distanced himself from what was happening in Gaza, and stated that war is not the answer. His position has not changed over the years since then, and he has expressed it whenever appropriate. Since the PSC respondents have access to the internet and a search engine, they must have known of his publicly expressed stance and elected to withhold this.

[40] He also took issue with the PSC respondent’s interpretation of Zionism and said that he certainly does not subscribe to that interpretation (no expert evidence was placed before us by any party on this score). He denied that either Keren Hayesod or JAFI, in which he is involved as a local, South African leader, are Israeli ‘government entities’. In support hereof, he referred to affidavits deposed to by Mr Shlomo Zomer and Mr Moshe Ashirie, who are the international chief financial officers of Keren Hayesod and JAFI respectively.

⁶ Electronic Communications and Transactions Act 25 of 2002.

[41] Mr Zomer's evidence was as follows. Keren-Hayesod is an organisation which funds various social aid and Zionist education programmes. While it is regarded as a 'national institution' it is independent of the government of Israel. It does not provide any funding whatsoever to the Israeli government or the Israeli Defence Force. It only supports philanthropic, non-political, social and humanitarian purposes. Its *mechinot* and lone soldier programmes do not offer any military training whatsoever, and do not involve the Israeli Defence Force. It holds a 20% stake in JAFI and focuses much of its fund-raising efforts on JAFI's programmes and projects.

[42] Keren Hayesod-South Africa supports specific programmes of Keren Haysod in Israel, primarily through fundraising. Keren Hayesod has a policy of requesting an indication of intent for all sizeable donations; donors are required to specify for which programme or project the funds are intended; and donations are ring fenced accordingly. Neither Mr Krawitz nor Keren Hayesod-South Africa have ever been involved in any way with the *mechinot* programmes, whether through fundraising or otherwise.

[43] The donations received from Mr Krawitz and/or Keren Hayesod-South Africa have, in accordance with this policy, been applied as follows: (a) the Net@Ramie project, which provided hundreds of Arab-Israeli adolescents with computer access and education on the use of technology; (b) the Beit Issie Shapiro therapeutic centre for children with disabilities; (c) the Fund for Victims of Terror, a first responder that provides short-term financial stipends within 48 hours to terror victims of all backgrounds; (d) the Youth Futures programme, which provides educational and mentoring programmes for at-risk Arab adolescents, amongst others, in different cities in Israel, most of which have been used in the mixed (i.e. Muslim-Jewish) city of Lod; (e) the Barzilai Medical Center in Ashkelon which serves significant numbers of Arab-Israelis and patients from Gaza; (f) the landscaping and development of the Karmel Ramon residential neighbourhood for young families in the Mitzpe Ramon

development town in the Negev; and (g) subsidised housing programmes benefitting Israel's elderly and disabled, regardless of religious affiliation.

[44] Mr Ashirie's evidence was as follows. JAFI, although also recognised as one of Israel's 'national institutions', similarly operates independently from the Israeli government and provides no funding whatsoever to that government or the Israeli Defence Force. It has the same policy as Keren Hayesod regarding ring fencing of donations.

[45] Mr Krawitz has only been involved in fundraising for the Fund for Victims of Terror (which Mr Ashirie said also provides long-term rehabilitative aid) and the Youth Futures programme. The Fund for Victims of Terror provides assistance exclusively to civilians who have been harmed in terrorist attacks and are lawfully present in Israel. No assistance is provided to members of the security forces, whether they be soldiers, police officers or any other member. JAFI does not fund, undertake, or support any settlement activities outside of the 'Green Line', being the 1949 Armistice border.

Evaluation of the evidence

[46] The admissible evidence establishes that Mr Krawitz is not funding a genocide or murdering babies, whether directly or indirectly through the positions he holds in Keren Hayesod or JAFI; and that Cape Union Mart, a separate legal entity with an independent board and shareholders, is not doing so either. To this I would add that the PSC respondents' notion of 'derivative complicity' which is not found in South African law and in some foreign jurisdictions is a term for strict or vicarious liability, was quickly abandoned during argument before us.

[47] The PSC respondents and the sixth respondent (the unknown protesters) have regrettably conflated their reliance on articles and reports downloaded from the internet, and their own perceptions, with facts. Courts must determine

the cases before them on proven or uncontested facts, and not speculation, opinions and inadmissible material. In addition, any right thinking person with an independent mind will be alive to the dangers of relying on what is found on the internet as the truth; our time honoured rules of evidence are there for a reason, namely to assist courts in administering justice; and if Judges were to depart from those rules to appease a litigant, irrespective of how strong the views of that litigant might be, our legal system would descend into chaos.

Legal principles applied to the evidence

[48] Matters involving an attempt to restrain publication are to be approached with caution. It must be ‘clear that the defendant has no defence’.⁷ This is subject to the qualification that the mere *ipse dixit* of a respondent is not enough to prevent a court from granting an interdict. As was stated by the Supreme Court of Appeal in *Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others*⁸: ‘[w]hat 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 a respondent’. At the risk of repetition, the evidence required to be put up by a respondent must be both admissible and relevant to lay a sustainable factual foundation.

[49] The two-stage enquiry whether a publication is defamatory and therefore *prima facie* wrongful is trite. A court must consider the ordinary meaning of the words used and then decide whether that meaning is, objectively speaking, defamatory.⁹ In the present case the utterances (I use this in the loose sense of the word) are such that, as I have already said, not even the PSC respondents seriously contend that they are not defamatory. The words and symbols are egregiously so, and of this there can be little doubt.

⁷ *Hix Networking Technologies v System Publishers and Another* 1997 (1) SA 391 (A) at 399D-E and 402C-D, referring to *Heilbron v Blignaut* 1931 WLD 167.

⁸ *Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others* [2017] 2 All SA 347 (SCA) para 38. See also *Tau v Mashaba and Others* 2020 (5) SA 135 (SCA) para 23.

⁹ *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) para 38.

[50] Further, even a carefully worded statement understood by a ‘reasonable reader’ to be an allegation only, as opposed to an established fact, does not undo the defamatory nature thereof. As was stated by the Supreme Court of Appeal in *Times Media Ltd and Others v Niselow and Another*¹⁰ :

‘[20] That does not mean, of course, that the article is not capable of bearing a defamatory meaning. Where the words complained of are capable of bearing the imputation that there are reasonable grounds to suspect that a person has committed the impugned act they are defamatory...’

[51] Although the PSC respondents were initially categoric in their principal answering affidavit that their utterances were *true*, they later claimed that some utterances were ‘not a literal allegation of personally committing genocidal acts with intent’, or were ‘a morally and factually informed viewpoint’, or were ‘an accusatory question’. *Times Media* makes it clear that, on the proven facts before us, this does not assist them.

[52] Once an applicant for a defamation interdict has shown that *prima facie* defamatory matter was published about them, the respondent bears the onus to rebut wrongfulness or intention.¹¹ A respondent can discharge this onus in one of two ways: by presenting direct evidence, or by making a plausible case that, with the advantage of discovery and subpoenaing witnesses and documents, they will be able to produce evidence to sustain their defence.¹²

[53] In the present matter, the PSC respondents have failed to produce direct evidence, and have not made out a plausible case, let alone suggested, that a referral to oral evidence or trial will support any sustainable defence. What they instead did was to advance defences based on inadmissible hearsay evidence, despite having other avenues available to them, and then to seek, unsuccessfully, to strike out those portions of the applicants’ replying affidavits

¹⁰ *Times Media Ltd and Others v Niselow and Another* [2005] 1 All SA 567 (SCA).

¹¹ *Malema v Rawula* [2021] ZASCA 88 para 31.

¹² *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators* [2021] 4 All SA 652 (SCA) para 30, referring to *Malema v Rawula* paras 34-64.

which demonstrated that their allegations were untrue. That is the end of their defence of truth and public benefit.

[54] The PSC respondents claim that the grant of an interdict would operate as a ‘prior restraint of speech’. There is a cautionary rule against prior restraint of publication, given its potential to be a drastic interference with freedom of speech. Such prior restraints are to be ordered only where there is a substantial risk of grave injustice.¹³

[55] However ‘prior restraint’ can only logically refer to matters not already in the public domain. It speaks to the ‘free flow of information’¹⁴ and stems from the premise that one ‘must expect that freedom will not be abused until [*there are*] adequate grounds for believing the contrary’.¹⁵ In the present matter, the applicants seek to restrain the repetition of defamatory matter which is already in the public domain; there is no guess work in what the respondents want to continue saying, and therefore no impediment to the free flow of information. The respondents have been making the defamatory statements for years. All they are required to do is to justify those statements or refrain from continuing to publish them.

[56] Turning now to the defence of protected commentary. The requirements for this defence in defamation are well-established. The essential elements are: (a) the statement must be one of comment and not of fact; (b) the comment must be fair, in that it must be relevant to matter commented upon and must not be actuated by malice; (c) *the facts upon which it is based must be true* [my emphasis]; and (d) the comment must relate to a matter of public interest.¹⁶

¹³ *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) paras 15 - 16.

¹⁴ *Midi Television* para 6.

¹⁵ *Midi Television* para 27.

¹⁶ *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) para 159.

[57] It has been established on the admissible evidence that the ‘facts’ upon which respondents’ statements are based are not true, and accordingly one of the essential elements underpinning such a defence is absent. However, for sake of completeness, the following.

[58] In *Democratic Alliance v African National Congress and Another*¹⁷ the Constitutional Court referred to prior authorities in order to explain the difference between factual statements and opinions in our law, and I summarise them:

58.1 In order to be justifiable as fair comment, it must appear as comment ‘and must not be so mixed up with the facts that a reader cannot distinguish between what is report and what is comment’. If fact and comment are intermingled, a reasonable reader ‘will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by [them];

58.2 ‘There must ... be a placing before the readers of the facts commented upon before the plea of fair comment can operate at all...[t]here must be some reference in the article which indicates clearly what facts are being commented upon. If there is no such reference, then the comment rests merely upon the writer’s own authority’;

58.3 A defence of fair comment must fail if no reference was made to any sources from which the writer deduced the facts on which he or she based the utterance complained of, since ‘no opportunity was afforded to a reader of the article to know the grounds on which the imputation was based’; and

58.4 It must be clear to those reading the publication which are the facts, and which are the comments made based upon them. ‘A commentator is not

¹⁷ *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) paras 70-72 and 75 (minority judgment of Zondo J, Jafta J and Leeuw AJ concurring)

protected if he or she chooses to publish an expression of opinion which has no relation by way of criticism to any fact before the reader.’

[59] In the present case, many of the admitted utterances complained of were presented as factual statements. Furthermore, there were no extrinsic facts already in the public domain from which the reasonable reader could deduce that they were facts.¹⁸ As mentioned, the PSC respondents also assert however that a reasonable reader would not see these utterances as a ‘literal allegation of personally committing genocidal acts with intent’.

[60] To my mind the PSC respondents conflate the first enquiry (namely whether an utterance is *prima facie* defamatory, which involves the ‘reasonable reader’ test) and the second enquiry (namely the defences of truth and public benefit, or fair comment/protected commentary, which must be fact based).

[61] Moreover the PSC respondents themselves implicitly acknowledged that protected commentary must be fact based. The deponent to their principal answering affidavit, Mr Usuf Chikte, stated that ‘the PSC makes that connection [*of funding a genocide and murdering babies*] explicit in our campaign literature and it is protected opinion on disclosed facts’. This prompted the applicants to request these materially relevant documents under rule 35(12). Mr Chikte’s response was that his earlier unequivocal statement was ‘merely illustrative of a point’. The PSC respondents also marshalled considerable effort directed at establishing extrinsic facts that a genocide is happening in Gaza. But that is not the issue before us – it is whether Mr Krawitz and Cape Union Mart are funding and facilitating a genocide, including by murdering babies.

[62] There is a general thread in the PSC respondent’s case pitting ‘political speech’ against ‘hate speech’. But again, the applicants have not claimed that

¹⁸ Such as in the case of Mr McBride, fn 14 above at para 89.

any material – albeit hateful – constitutes prohibited hate speech. Their complaint is that the utterances defame them and impair the dignity of Mr Krawitz. A case of hate speech was therefore not one which the PSC respondents were called upon to meet.

[63] The CALS also misconstrued the applicants’ case, providing us with argument on s 16 of the Constitution (the freedom of expression provision) in the context of prohibited hate speech. This was unhelpful. So too was the argument advanced by the CALS about how s 8(7) of the Gatherings Act should be interpreted against s 17 of the Constitution (the right to assemble and protest provision).

[64] Section 8(7) of the Gatherings Act provides:

‘No person shall at any gathering or demonstration wear a disguise or mask or any other apparel or item which obscures his facial features and prevents his identification.’

[65] The CALS submitted that although framed as a public order measure, the practical effect of this provision is to restrict the manner in which individuals may participate in a protest. In so doing, s 8(7) limits the exercise of the right protected in s 17 of the Constitution, and a ‘broad or inflexible interpretation risks deterring participation in protests by individuals who fear identification, surveillance, retaliation or social stigma’. For this reason, it was argued, s 8(7) should not be applied as a blanket provision, but rather in a manner that targets only conduct which genuinely threatens or facilitates unlawful activity.

[66] However what in truth the CALS attempted was persuade us to find a way to disregard a peremptory provision in a statute, enacted for the purpose of giving effect to s 17 of the Constitution, without any regard to the principle of subsidiarity. This is legally impermissible. The subsidiarity principle was once again spelt out in *Mazibuko and Others v City of Johannesburg and Others*¹⁹ :

¹⁹ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 73.

‘This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively, challenge the legislation as being inconsistent with the Constitution.’

[67] As previously mentioned, the PSC respondents have since undertaken to comply with the Gatherings Act, despite disputing various claims made by the applicants in relation to their conduct at the protests. There can also be no prejudice to the unknown protestors if such an order is made against them, given that all they need do is comply with the law. The same applies to preventing Cape Union Mart’s customers from accessing its stores, since those customers too have rights.

[68] Having regard to all of the foregoing, I am persuaded that the applicants have met the requirements for a final interdict, namely: (a) a clear right to their reputations and protection of access by customers to Cape Union Mart’s stores; (b) an injury which they are continuing to suffer; and (c) no suitable alternative legal remedy, in that even an action for damages will not prevent the harm from continuing. The purpose of an interdict is to put an end to conduct in breach of an applicant’s rights. Any alternative remedy will have to afford similar protection.²⁰ Such a remedy is absent in the present case.

Costs

[69] The applicants have been substantially successful, but it must be borne in mind that some of the relief they sought in their notice of motion was overbroad (which was conceded during argument), and the PSC respondents had to deal with that. In my view, even the amended relief handed up by way of a draft order is too broad for comfort, and may well open up another round of litigation. I must also factor into account that Mr Krawitz regrettably did himself no favours during his interview in October 2024 in the full knowledge of the international outrage generated by the Israeli / Hamas conflict. He could,

²⁰ *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) para 36.

and should, have been more sensitive and restrained, and unfortunately, he probably stoked the proverbial fire for the respondents. In these circumstances it is appropriate that each party should bear their own costs.

[70] The following order is made:

1 The application to strike out by the first to fifth and seventh respondents is dismissed.

2 The respondents are interdicted and restrained from making any claim that the first applicant (Cape Union Mart) or one of its brands, including Poetry, Old Khaki and K-Way, are associated with the State of Israel in any way.

3 The respondents are interdicted and restrained from making any claim that the first applicant (Cape Union Mart) or one of its brands, including Poetry, Old Khaki and K-Way, are funding 'genocide' or any military conflict in Gaza in any way.

4 The respondents are interdicted and restrained from making any claim that the second applicant is 'funding genocide', the Israeli army, or the conflict in Gaza in any way.

5 The respondents are interdicted and restrained from claiming that the applicants are killing children or are complicit in the killing of children.

6 The respondents are interdicted and restrained from publishing, in any way, defamatory statements to the effect that the applicants support a genocide in Gaza, or that the applicants have 'killer(s) ways'.

7 The respondents are interdicted and restrained from preventing access to the first applicant's stores by its customers.

8 The respondents shall, during any protest action held at the first applicant's stores or premises, comply with the provisions of the Regulation of Gatherings Act 205 of 1993.

9 Each party shall pay their own costs.

J I CLOETE
JUDGE OF THE HIGH COURT

I agree.

C N NZIWENI
JUDGE OF THE HIGH COURT

I agree.

R BARENDSE
JUDGE OF THE HIGH COURT

Appearances

For applicants:

Mr C Woodrow SC with Mr H Scholtz

Instructed by:

Hurter Spies Inc.

For first to fifth

& seventh respondents:

Mr I Jamie SC with Mr U Naidoo and Ms
N Essa

Instructed by:

Ashraf Mahomed Attorneys

For *Amicus Curiae*:

Mr J Bhima

Instructed by:

Centre for Applied Legal Services