IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case Number: 05/16077

In the application of:

THE FREEDOM OF EXPRESSION INSTITUTE	First applicant for admission as an amicus curiae
THE SOUTH AFRICAN NATIONAL EDITORS' FORUM	Second applicant for admission as an amicus curiae
THE SOUTH AFRICAN CHAPTER OF THE MEDIA INSTITUTE OF SOUTHERN AFRICA	Third applicant for admission as an amicus curiae
THE MEDIA WORKERS' ASSOCIATION OF SOUTH AFRICA	Fourth applicant for admission as an amicus curiae

In the matter between:

IMVUME MANAGEMENT (PTY) LIMITED	Applicant

and

M & G MEDIA LIMITED	First Respondent
FERIAL HAFFEJEE	Second Respondent
STEFAANS BRUMMER	Third Respondent

SAM SOLE Fourth Respondent

WISANI WA KA NGOBENI Fifth Respondent

AFFIDAVIT

We, the undersigned,

GUY BERGER and ROBERT BRAND

hereby make oath and say that:

1. Guy Berger is a Professor in and the Head of the School of Journalism and Media Studies at Rhodes University, Grahamstown. A copy of his curriculum vitae is attached as Annexure "GB1".

2. Robert Brand is a Senior Lecturer in the School of Journalism and Media Studies at Rhodes University, Grahamstown. A copy of his curriculum vitae is attached as Annexure "GB2".

3. We submit that in the light of the positions we currently hold and the activities detailed in our respective curriculum vitas, we are qualified to comment as experts on issues related to the practice of journalism and freedom of the press.

4. In light of this expertise, we have been asked to give our views on the need for the protection of journalists' confidential sources, both in general and with regard to the

particular circumstances of the present proceedings. We do so in this affidavit. The facts and opinions to which we depose in this affidavit are to the best of our belief true and correct.

5. At various points during this affidavit we refer to academic or other works of relevance to the present matter. A full list of the sources used in this regard is attached as Annexure "GB3".

INTRODUCTION

6. The duty to protect confidential sources of information "is a basic tenet of journalistic ethics" (Kruger 2004: 190). It is a universal feature of journalism ethics codes in South Africa (Retief 2002) and Europe (Ronning 2002), and it is recognised in some form in the law of countries and jurisdictions as diverse and far-flung as Mozambique, Sweden, and all but one state of the U.S.

7. The obligation to protect confidential sources derives from the central role of journalism in the democratic process. This role is linked to three important rights:

    7.1. That of freedom of expression, which is a right of each citizen;

    7.2. That of freedom of the press and other media, which recognises particular institutional rights; and

    7.3. That of the right of citizens to access information.

    None of these rights is absolute in the South African constitution, and each needs to be weighed against other rights such as those of dignity or privacy. Even so, these particular rights are generally deemed to be wholly necessary conditions of

democracy in South Africa, and this significant status has to be kept prominently in mind regarding the possibility of any curtailments or limitations.

8. Of significance for this expert opinion, is that these rights are in many ways interdependent, they may also be analysed with regard to their distinctive relevance for journalism.

9. Freedom of expression is fundamental to democracy. The Constitution guarantees freedom of expression as a fundamental right, and explicitly includes “freedom of the press and other media” and the freedom to receive and impart information as components of that fundamental right. Thus, the media, are not only bearers of the right to freedom of expression, but have a constitutional obligation to ensure that citizens have access to the information they need to participate in democratic processes.

10. The Constitution’s guarantee of freedom to the media qua institution is important, because it represents a recognition that the media amplifies the individual right of freedom of expression, as well as the right to access information. This is due to the mass communication character of the media, which character enables the individual rights to be taken to a shared social plane. In short, while freedom of expression exists independently of freedom of the media, this institutional freedom rests on – and helps realise – freedom of expression. While the rights to freedom of expression, and to information, need to be cherished, so too does freedom of the media. The cross-fertilisation of these rights in enabling journalism to serve as a pillar of democracy is the theme of much legal jurisprudence.

11. The central role of the mass media in a democracy may be said to have three components:

    11.1. Information dissemination;

11.2. promoting debate; and

11.3. providing public scrutiny.

These will be analysed in turn.

12. Firstly, the media act as the eyes and ears of society. Lord Bingham described this role by saying that

> "In a modern, developed society, it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to, and informed about, matters which call or may call for consideration and action. It is very largely through the media …that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring." (*McCartan Turkington Breen v Times Newspapers* (2000) 4 AER 913 (HL) 922 B – D)

13. Secondly, the news media act as a "marketplace of ideas". In modern society, the media are often the only forum for public discourse and debate on important issues. Stifling this debate by limiting the flow of information into the public arena would have negative consequences for the democracy, and this is especially true in a society which, like South Africa, has recently emerged from an era of censorship and repression of free speech.

14. Thirdly, the media act as a "public watchdog", parallel to the justice system, to uncover abuses and betrayals of public trust. The watchdog role of the media is

most often perceived to be in relation to the state, but corruption, dishonesty and graft may, of course occur in any sphere of life, including the private sector.

PROTECTION OF CONFIDENTIAL SOURCES IN JOURNALISM

15. In order to fulfil their mandate of informing the public, acting as a marketplace of ideas, and especially performing the "watchdog" function, journalists sometimes make use of information supplied by sources who, for a variety of reasons, wish to remain anonymous. Investigative journalists, especially, rely on relationships with sources who have access to information and who are willing to divulge the information only on condition that their anonymity is guaranteed.

16. According to the South African media ethicist Johan Retief (2002: 118):

> "(w)ell-informed sources are the basis, the bread and butter, of any journalist's success. It goes without saying that the protection of these sources is a vital part of that success. (…) The amount of attention that most ethical codes give to this matter testifies to this fact."

17. Geneva Overholzer, a U.S. media academic and former editor, states the principle even more forcefully (2004):

> "It's a cardinal rule of journalism: do not disclose the identity of someone who gives you information in confidence. (…) The benefits flowing to the public from this pact of confidentiality are invaluable … it is incontestable that some information vital to a democratic public will reach it only through the protection of confidentiality."

18. The use of anonymous sources, according to Retief, is justified when publication of the information is clearly in the public interest; the information cannot be obtained by

any other means; and the trustworthiness of the source or information is beyond doubt (118).

19. An example of a case that satisfied Retief's three conditions was the Watergate scandal in the U.S., when *Washington Post* reporters Carl Bernstein and Bob Woodward made use of information supplied by anonymous sources to expose criminal activity by presidential aides. Another, local, example, was the so-called Information Scandal, when *Rand Daily Mail* journalists Mervyn Rees and Chris Day obtained information from, among others, an anonymous source, to the effect that the apartheid government had channelled public money into purchasing newspapers in order to influence public opinion.

20. In both those cases, the subject matter was undoubtedly of public interest, and failure to publish the information would have been harmful to the public good. And in both cases, exposure of the wrongdoing would not have been possible without the use of confidential sources.

21. In appropriate circumstances, therefore, it is in the interests of society as a whole that journalists must be able to give assurances of protection to the sources of information given in confidence. The International Press Institute, a body representing editors and publishers worldwide, stated this principle in a resolution adopted in response to the jailing of *Washington Post* journalist Judith Miller in the U.S. this year for refusing under subpoena to reveal the identity of a confidential source:

> "Independent journalism enhances justice by bringing to light information that is important for the citizenry to know and that might otherwise remain hidden. If news media are to serve as the watchdogs of society, they must be able to gather information without fear of punishment for themselves or their sources." (International Press Institute 2005).

22. The professional duty to protect confidential sources is an almost universal feature of journalistic ethics codes in South Africa and elsewhere. The ethicist Johan Retief (2002) has developed a "Universal Code of Ethics" into which he distilled 10 common features from journalistic ethics codes from South Africa and around the world. It includes the duty to "(p)rotect confidential sources unless there is an overriding public interest not to do so". Helge Ronning (Ronning & Kasoma 2002: 63) distilled a similar set of eight common features from European codes of journalism ethics. The "duty not to divulge confidential sources" is one of them.

23. The Press Code of Professional Practice of the Press Ombudsman of South Africa, which applies to print media, states in Section 6 that "(a) newspaper has an obligation to protect confidential sources of information". The Code of Conduct of the South African Union of Journalists states that "(a) journalist shall protect confidential sources of information". The South African National Editors Forum's *Guidelines on confidential briefings and sources*, adopted by the SANEF council in 2004, provide that "whatever commitment a journalist has given a source (in relation to confidentiality) should ethically bind that journalist". (It should be noted that many news organisations also have protocols and rules to be followed by journalists to ensure that information obtained from anonymous sources is not abused or misused – the SANEF guidelines were developed with that objective in mind.)

24. Many South African media companies have adopted ethics codes that contain similar injunctions to protect the confidentiality of sources.

    24.1. The South African Broadcasting Corporation's Editorial Code of Ethics provides that "(we) shall not disclose confidential sources of information".

    24.2. The e-tv code of conduct binds its editorial staff to "(u)se all legal means to protect the confidentiality of sources".

24.3. *The Star's* code of ethics states that its journalists "are bound to protect confidential sources of information".

24.4. *Die Burger's* ethics code states that "journalists are obliged to protect the sources of confidential information, and may not divulge them to anyone except the editor or the editor's representative" (our translation).

24.5. The Mail & Guardian's Professional Code provides that "(i)f a reporter undertakes to protect the confidentiality of the source, it is expected that this is upheld, no matter what threats or inducements are offered to break the agreement".

25. The duty to protect the confidentiality of sources is widely accepted by journalists throughout Africa.

25.1. The Botswana Code of Ethics provides that "(w)hen sources are promised confidentiality, that promise shall be honoured, unless released by the source".

25.2. The Draft Code of Conduct for Namibian Media states that "(e)very journalist shall observe secrecy regarding any source of information and has a moral obligation to protect sources unless the person who gave him such information authorises the disclosure of his identity".

25.3. The Code of Conduct of the Media Council of Zambia provides that "(j)ournalists should respect the confidentiality of sources to whom they have pledged anonymity".

25.4. Similar pledges to uphold the confidentiality of sources appear in professional codes of journalistic ethics in Angola, Malawi, the Democratic Republic of Congo, Ghana, Kenya and Tanzania. (Copies of codes cited in

this section are available on the web site http://www.journalism.co.za/modules.php?op=modload&name=News&file=article&sid=1778)

26. Further afield, the Code of Practice of the British Press Complaints Commission states that "(j)ournalists have a moral obligation to protect confidential sources of information" (Press Complaints Commission 1991). Many U.K. news media incorporate similar injunctions into their own codes of ethics. The Guardian's Editorial Code, for instance, states that "(s)ources promised confidentiality must be protected at all costs" (The Guardian 2005). International organisations including the International Federation of Journalists and the International Press Institute also recognise the duty to protect confidential sources of information (Journalism.co.za 2005; International Press Institute 2005).

27. These are not simply rules on paper. Evidence of the importance journalists attach to the ethical obligation to protect confidential sources is the great lengths to which some journalists have gone, and the prejudice they have suffered, in the observance of this rule. In South Africa, journalists such as John Matisonn of the *Sunday Express;* Benjamin Pogrund of the *Rand Daily Mail,* and Thami Mazwai of *Sowetan* chose imprisonment rather than revealing the identity of their sources or testify in political trials (Burns 2001; Nix 1997). Zimbabwean journalist Mark Chavunduka, editor of the *Zimbabwe Standard* and recipient of the prestigious Nieman Fellowship in 2000, endured "beatings with planks, booted feet and fists, electric shocks and water suffocation for hours on end" while in detention for nine days after refusing to reveal the source of a report on a plot to topple President Robert Mugabe.

> "It would have been easier, certainly, for me to reveal our sources and 'simply go home', as my torturers kept telling me. (…) But by taking that easier route, I'd have violated the professional ethics I'd been taught in journalism school as well as my personal conscience… Revealing their names would have betrayed and endangered our sources." (Chavunduka 2001: 77)

RATIONALE FOR PROTECTION OF CONFIDENTIAL SOURCES

28. There are five reasons why the forcible disclosure of journalists' confidential sources would blunt the effectiveness of the media in fulfilling their mandate of informing citizens in a democracy, acting as a marketplace of ideas, and serving as the public's watchdog. In summary, these are:

    28.1. The "chilling" effect;

    28.2. Loss of independence;

    28.3. Burden on time and resources;

    28.4. Intrusion into the editorial process; and

    28.5. Safety and protection

    We deal with each of these in turn.

The "chilling" effect

29. The most obvious effect of a subpoena to force the disclosure of journalists' sources is the likelihood that other sources will be deterred from confiding in journalists for fear of being exposed. Unless potential news sources are confident that their identity will not be forcibly revealed, they will be reluctant to disclose information to journalists. The disclosure of sources under subpoena would therefore have a "chilling effect" on journalists' ability to develop other sources and gather news. Judith Miller, the *New York Times* reporter jailed for refusing to divulge a source that disclosed to her the identity of a CIA operative, noticed this "chilling effect" after a

subpoena had been served on her: people had become “nervous about talking to somebody who’s at the centre of … a controversy like this”, she commented before being sentenced to an indefinite jail term (Smolkin 2005). Matt Cooper, a *Newsweek* reporter subpoenaed in the same investigation as Miller, noticed a similar “chilling effect” on potential sources (Smolkin 2005).

30. The chilling effect is a real and serious concern for journalists. The relationship between reporters and confidential sources was recognised by the U.S. Supreme Court in *Branzburg v Hayes* 408 U.S 665 (1972) (Alexander & Cooper 1997), and has been attested to by many journalists and media scholars (Penrod 2004). Maintaining the confidentiality of sources, writes Penrod, “is essential to journalism”. The author continues:

> “Without promises of confidentiality, many sources are unwilling to give journalists valuable information … (W)hen the confidentiality is breached, sources fall silent, leaving journalists – and ultimately the public – uninformed.”

Loss of independence

31. When litigants have access to reporters’ information and source materials, the public may perceive the media as an investigative tool of the litigants instead of a neutral entity. This undermines public confidence in the media and restricts journalists’ newsgathering ability. Use of the media as an investigative tool for discovery by civil litigants is common in the U.S., where 38 percent of subpoenas served on news organisations in 1999 related to civil litigation. This “strikes at the very notion of the press as an independent, impartial watchdog” (Dalglish *et al* 2002). The independence of the media, which is essential for the performance of its watchdog duty, is threatened if journalists are forced to take part in litigation to which they are not a party. It may create a public perception that the media are sympathetic to one side of the litigation, or even worse, taking an active part on behalf of one side.

32. It is not the job of the media to conduct investigations on behalf of the state or civil litigants. The “lazy lawyer” phenomenon – “litigation attorneys using journalists as fact chasers for their cases” – has no place journalism or law (Dalglish *et al* 2002),

Burden on time and resources

33. Paul McMasters, ombudsman at the Freedom Forum’s First Amendment Center, calls the potential drying up of sources the “premier problem” caused by subpoenas to force disclosure of sources, but cites additional consequences. These include bogging down reporters and editors in dealing with court challenges, thus affecting the ability of the news organisation to gather and disseminate news efficiently (Smolkin 2005).

34. The burden is especially heavy for small and independent newspapers, which do not have the resources available to larger news organisations. If a journalist has to respond to a subpoena, testify at a trial, or meet with lawyers, the journalist’s duties have to be covered by another journalist. That has a direct effect on the public’s receipt of news, and therefore threatens to undermine the function of media in a democratic society.

Intrusion into the editorial process

35. The use of subpoenas can affect the internal functioning of the press through the “chilling effect” it has on internal decisions about the coverage of news and the publication of stories. The prospect of a subpoena may inhibit the media from newsgathering or disseminating news. Rather than risk being subpoenaed to reveal source, a journalist or newspaper may decide not to publish information. Newspapers may also become averse to using information supplied on condition of confidentiality, ultimately affecting the depth and accuracy of coverage.

36. A related practical difficulty occurs when journalists destroy unpublished notes or other records if faced with a subpoena, to prevent the record being used to identify a source. This practice may also affect the depth and accuracy of news coverage, undermining the role of the media in a democracy (Dalglish *et al* 2002).

Safety and protection

37. Compelled disclosure of sources may, in certain circumstances, threaten the safety and wellbeing of journalists and their sources. Sources who provide information on condition of confidentiality may face harassment, prejudice or retaliation from employers or others if their identity is disclosed. Some sources risk their lives by giving information to reporters. Disclosure of their identity, in such cases, may have serious consequences (Dalglish *et al* 2002).

38. Being forced to disclose sources or provide information to prosecuting authorities may also endanger the lives of journalists. This concern was graphically illustrated in 2000, when journalists at the *Cape Times* and other news media were subpoenaed to hand over photographic and written material relating to the death of Rashaad Staggie, a gang leader. They refused. The subpoenas were later withdrawn after widespread protests from the journalistic profession. Ryland Fisher (2000), then editor of the *Cape Times*, commented

> "The situation in Cape Town had become extremely volatile, and journalists had been threatened by gangsters and anti-gang campaigners alike. If newspapers had been seen to be colluding with the police, we could have exposed our journalists to grave danger and undermined the trust they enjoyed in the community."

LEGAL PROTECTION OF JOURNALISTS' CONFIDENTIAL SOURCES

39. In this section, we detail the legal protection that is given to journalists' confidential sources in various countries.

South Africa

40. The protection of journalists' confidential sources is not given specific recognition in either the Constitution or any other statutory instrument in South Africa (Burns 2001: 293). A journalist may, in certain circumstances, be subpoenaed to provide information that could be useful to litigants in a civil case. The subpoena may require the journalist either to testify in person or turn over any physical evidence such as documents, tapes or photographs in his or her possession. (Burns 2001:293).

41. As regards criminal cases, Section 205 (1) of the Criminal Procedure Act 51 of 1977 provides that a judge or magistrate may, upon the request of the prosecuting authority, order any person who may have information about an alleged offence to appear before the court. Should a journalist be summoned in this way, and refuse to answer questions, he could be sentenced in terms of Section 189 (1) for a period of up to two years, or in the case of information being sought about certain serious matters, for up to five years (Barker 1998). Section 205 has in the past been used to force journalists to reveal the identities of confidential sources (Burns 2001: 293). Faced with a Section 205 subpoena, a journalist has a choice of either honouring the obligation to keep a source confidential, and going to jail, or acting unethically and identifying the source.

42. Section 205 has been the subject of criticism from the journalistic and legal professions because it could inhibit the free flow of information, thus infringing Section 16 of the Constitution (Barker 1998). The Truth and Reconciliation Commission in its final report called for the repeal of Section 205 because of the possibility that it may be used, as it had been in the past, to force journalists to reveal their sources (Retief 2002: 120).

43. However, there have been changes both to the letter and interpretation of the law since 1993 that give journalists some protection against a subpoena to testify or produce information, and also signify that the courts may be prepared to take into account journalists' obligation to protect their sources (Barker 1998).

44. In 1993 Section 205 was amended to the effect that a person who refuses to give information under subpoena may not be jailed unless the court is of the opinion that the information sought is "necessary for the administration of justice or the maintenance of law and order". The effect of the amendment is that imprisonment for refusal to disclose the identity of a source will be "the exception rather than the rule" (Burns 2001: 294).

45. Even more significant from the point of view of journalists, is the shift in the courts' interpretation of what constitutes a "just excuse". However, we do not address this issue here as we understand that this will be a subject for legal argument during these proceedings.

46. That the authorities are sensitive to the special position of journalists and the media is evident in an agreement with editors covering the use of Section 205. On February 19, 1999, the Ministers of Justice and Safety and Security and the National Director of Public Prosecutions signed a Record of Understanding with the South African National Editors Forum, in which the parties agreed about the "need to balance the interests of the maintenance of law and order and the administration of justice on the one hand with the right to freedom of expression and specifically freedom of the press and other media". The agreement recognised that journalists have a right and a duty to collect news, and "that in order to exercise this right and duty it is necessary, under appropriate circumstances, that their sources and information should be protected". To this effect, the parties agreed to investigate the amendment of Section 205 of the Criminal Procedure Act to accommodate those journalistic rights and duties.

47. As an important interim measure, the parties also established a procedure to follow before a journalist would be subpoenaed to testify in criminal proceedings. This includes a mechanism for mediation of disputes between the prosecuting authorities and journalists, whereby representations may be made to the National Director of Public Prosecutions when an official wishes to compel a member of the media to testify.

48. Negotiations on the amendment of Section 205 continue between the National Director of Public Prosecutions, the Justice Department, Sanef and the Parliamentary Portfolio Committee on Justice (Sanef Annual Report 2005: 24).

49. Recently, the South African government, through the Minister of Justice, affirmed that the protection of confidential sources is a prerequisite for media freedom. The Minister of Justice stated in an answering affidavit submitted in *Munusamy v Hefer NO and Others* 2004 (5) SA112 (O) that the protection of sources "is one of the basis (sic) conditions for press freedom" and that without it "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". The affidavit noted that:

> "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 measure cannot be compatible with Section 16 of the Constitution unless it is justified by an overriding requirement in the public interest."

50. Although the law does not yet accommodate a "journalist's privilege" in South Africa, the developments discussed above indicate that there is an understanding within the Department of Justice that journalists' ethical obligations, including the obligation to protect confidential sources, should be recognised and accommodated to some

extent in our law. And although the developments concern criminal proceedings, there is no reason why the same understanding should not also apply to civil disputes.

Other African countries

51. The Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights in 2002, affirms in its preamble that freedom of expression is a cornerstone of democracy and a means of ensuring respect for all human rights and freedoms.

52. Although the declaration does not recognise any special rights for journalists or for the media as an institution, Section 15 of the declaration expressly recognises the importance of protecting the confidentiality of journalists' sources. It states that:

> "Media practitioners shall not be required to reveal their confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:
>
> - the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
> - the information or similar information leading to the same result cannot be obtained elsewhere;
> - the public interest in disclosure outweighs the harm to freedom of expression; and
> - disclosure has been ordered by a court, after a full hearing."
>
> (African Commission on Human and Peoples' Rights 2002)

53. This position mirrors in some respects the position of the "Stewart" principles in the U.S.(see below), as well as the United Nations Criminal Tribunal, which in 2002 adopted a qualified privilege for war correspondents in regard to being forced to

testify in cases against alleged war criminals. The tribunal ruled that a subpoena could only be issued if the evidence sought was of direct relevance to the case, and the evidence could not be obtained elsewhere (Berger 2004).

54. A much stronger protection of reporters' sources is provided in Mozambique. Article (74) (3) of the Constitution of Mozambique states that "freedom of the press shall include (…) protection of professional independence and confidentiality". Article 30 of the Mozambique Press Law elaborates:

> "Journalists shall enjoy the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment." (Ojo 2004)

55. In Zimbabwe, the High Court in a 1994 ruling confirmed a journalist's right to keep sources confidential. However, Zimbabwe's government does not appear to accept the ruling (Mitchell 2005).

Europe

56. In *Goodwin v United Kingdom* 1996 (22) EHRR 123 (ECHR), the European Court of Human Rights held that an order to divulge the identity of a journalist's sources was a violation of Article 10 of the European Convention on Human Rights (which guarantees free speech and freedom of the press). The UK-based appellant had written an article about a company, which successfully interdicted publication and then sought to compel disclosure of the journalist's source. The lower courts ordered the journalist to divulge the identity of his sources, and their order was upheld in the House of Lords.

57. The ECHR held that:

> "Freedom of expression constitutes one of the essential foundations of a democratic society and (…) the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms. 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 effects an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest". (Para 39).

58. The *Goodwin* judgment gives strong recognition of the importance that the safeguarding of sources for media freedom, and sets a standard that all states who are party to the ECHR must follow (Freedom of Expression Litigation Project 1998). The ruling helped overturn the 2003 sentence of two Belgian journalists who were fined by a Brussels court for refusing to reveal their sources for an article about maladministration at the Belgian State Railways (Mitchell 2005).

59. Prior to the *Goodwin* judgment, the European Parliament in 1993 had adopted a resolution on the protection of journalists' sources, which stated that the parliament:

> "believes that the right of confidentiality for journalists' sources is an important factor in improving and increasing the supply of information to the public, and that this right ... is inextricably linked to the freedom of information and the freedom of the press in the broadest sense, lending substance to the fundamental right to

freedom of expression, as defined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

(Freedom of Expression Litigation Project 1998)

60. A number of national jurisdictions within the European Union – including Portugal, Austria, France, Germany, the Netherlands, Norway and Sweden – recognise some form of journalistic privilege to protect the confidentiality of sources. In Sweden the Freedom of the Press Act, which has constitutional status, binds journalists to respect the confidentiality of sources who wish to remain anonymous. Journalists who reveal the identity of a source without consent may be prosecuted at the source's behest (Mitchell 2005). Portugal has also given constitutional recognition to the "reporter's privilege" to protect confidential sources (Mitchell 2005).

61. In the United Kingdom, Section 10 of the Contempt of Court Act of 1981 provides that a court may not force disclosure of a journalist's source unless it is in the interests of justice or national security or for the prevention of crime. The so-called "newspaper rule" holds that in defamation cases, journalists need not reveal the identity of sources before the commencement of the trial. The "newspaper rule" also applies in Australia and New Zealand.

United States

62. In *Branzburg v Hayes* 408 U.S 665 (1972) a majority of the U.S. Supreme Court held that the First Amendment – which guarantees freedom of speech – did not give journalists any special privilege to escape disclosing the identity of a source under subpoena. The case, however, applied only to grand jury proceedings, and to circumstances where the journalists were direct witnesses of the crime being investigated. The ruling therefore has not set a legally binding precedent for other types of proceedings.

63. In *Branzburg*, Justice Stewart argued for a qualified privilege, and his interpretation, known as the "Stewart principles", is now widely accepted in the U.S. Stewart asserted that journalists should be exempted from subpoenas to disclose the identity of sources unless the body seeking to compel the disclosure can demonstrate that

    63.1. the information sought is relevant to a legal proceeding about a specific, probable violation of law;

    63.2. the information cannot be obtained elsewhere, in a way that is less prejudicial of First Amendment rights; and

    63.3. there is a compelling and overriding interest in obtaining the information. (Berger 2004)

64. Since *Branzburg*, 31 U.S. states and the District of Columbia have adopted so-called "shield laws" giving journalists protection against subpoenas, while courts in 18 other states have set precedents giving journalists some form of protection, usually based on the Stewart principles (Penrod 2005). The only states which continue to hold-out against this trend are Hawaii and Wyoming.

65. While two states – Alabama and Pennsylvania – provide absolute privilege, the other shield laws provide a qualified privilege, sometimes including materials and sources, some times sources only, and in some cases providing for *in-camera* disclosure to allow the court to determine whether to grant an exemption or not (Berger 2004).

66. The U.S. attorney-general has adopted guidelines to ensure that prosecutors act with sensitivity to the special role of the media. The "Attorney-General's guidelines for subpoenaing members of the news media" establishes a process to be followed before journalists are subpoenaed, including a negotiation stage. Subpoenas may not be issued without authorisation from the Attorney-General, and must generally be limited to verification of published information (Berger 2004).

THE USE OF CONFIDENTIAL SOURCES IN THE PRESENT MATTER

67. In considering the present case from the point of view of journalistic practice, there are in our view three questions that have to be answered.

    67.1. Firstly, did the Mail & Guardian's reporters (Third to Fifth Respondents) and editor (Second Respondent) act in accordance with the newspaper's own protocol on the use of anonymous sources?

    67.2. Secondly, did they act in accordance with generally accepted ethical norms of the journalistic profession?

    67.3. Thirdly, what would the consequences be if they revealed the identity of their sources under subpoena?

The Mail & Guardian's protocol

68. The Mail & Guardian's professional code states the following in relation to the use of anonymous sources:

> "Unnamed sources should be avoided unless there is absolutely no other way to handle the story, and if the source is backed by others. No unnamed source should be used without the explicit agreement of the editor or head of department, who will require the reporter to identify the source, in the strictest confidence. In particular, intelligence sources are to be treated with caution as it is their job to plant information in the paper which cannot be tracked back to them."

69. The question whether the Second to Fifth Respondents acted in accordance with this protocol is best left to the Respondents themselves to answer. Suffice to say the following: it appears from the affidavit of the Third Respondent, and it stands to reason, that the Applicant's bank documents which are the subject of this dispute could not have been obtained by any means other than from confidential sources. We refer in particular to Paragraphs 79 and 80 of the Third Respondent's affidavit.

70. Secondly, it is clear from the Third Respondent's affidavit that much of the information obtained from unnamed sources was backed by others, as required by the Mail & Guardian's protocol. The information obtained from the Applicant's bank documents relating to the advance of R15 million paid by PetroSa to the Applicant, and PetroSa's subsequent payment to Glencore, was confirmed by PetroSa and the Minister of Minerals and Energy Affairs. We refer to Paragraphs 63, 71 and 77 of the Third Respondent's affidavit. Information relating to a payment from the Applicant's bank account to Hartkon and Uluntu Investments was confirmed by the Applicant in an attorney's letter to the Respondents. We refer to Paragraph 65.3 of the Third Respondent's affidavit. We are satisfied that the Respondents made strenuous efforts to verify information obtained from the confidential source. This was also the case in previous reports published by the Respondents concerning the Applicant.

71. Thirdly, it is our understanding that the Third Respondent is the head of the First Respondent's investigations department. The requirement that the editor or head of department should agree to the use of confidential sources, and be informed of the identity of such sources, had therefore been met.

Generally accepted professional ethics

72. There are two standards of generally accepted journalistic ethics against which one could measure the Respondents' actions: Johan Retief's three conditions for the justifiable use of anonymous sources; and the South African National Editors Forum's guidelines on the use of confidential sources. In our opinion, the

Respondents satisfied the requirements of both in their use of information obtained from confidential sources relating to the Applicant, particularly information relating to the Applicant's bank documents.

73. The use of anonymous sources, according to Retief (2002: 118), is justified when publication of the information is clearly in the public interest; the information cannot be obtained by any other means; and the trustworthiness of the source or information is beyond doubt (118).

74. We have already referred to the Third Respondent's affidavit, from which it appears that the information that is subject to the dispute could not have been obtained except from confidential sources. Bank documents would not be supplied on the record to the Respondents by the Applicant's banker, auditors or employees. It stands to reason that those who supplied the information would require an undertaking of confidentiality for fear of retribution.

75. Secondly, the trustworthiness of the source or sources in this case is not an issue. It is common cause that the information obtained from the Applicant's bank documents relating to payments made to the ANC, Hartkon and Uluntu Investments is accurate and true.

76. Whether publication of the information was justified hinges on the question of public interest. The Third Respondent in his affidavit states that the information was in the public interest because it related to issues of good governance, public money, abuse of power, and possible conflicts of interest. We refer particularly to Paragraphs 66, 76, 78 and 89.2 of the Third Respondent's affidavit.

The concept of public interest generally in law and journalism

77. The concept of public interest, which plays a central role in journalism ethics and the law relating to defamation and privacy, is difficult to define. Our courts recognise

public interest as a justification, or part-justification, for the publication of defamatory statements or invasions of privacy; however, even the courts have found the concept impossible to define or describe exhaustively. A distinction is often made between the public interest and that which merely titillates the interest of the public. The public interest implies that the public can derive some meaningful benefit from the information published. “It goes without saying,” says Burns (2001:167), “that the public has an interest in statements relating to the integrity or efficiency of public officers or figures”.

78. According to the authors of one of the standard texts on South African media law, “it is impossible and undesirable to give an exhaustive statement of the subjects which are of public interest” (Bell, Dewar & Hall 1990). Lord Denning’s words from *London Artists Ltd. v Little*, 1069 2 QB 375 391 B-C are often quoted in this context:

> “There is no definition in the books as to what is a matter of public interest. (…) I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them and others; then it is a matter of public interest…” (Cited in Bell, Dewar & Hall 1990: 65)

79. Some examples of matters that may be in the public interest, according to Bell Dewar & Hall, are:

    79.1. The public conduct of any man who holds, or seeks, a public office or position of public interest;

    79.2. Political and state matters;

    79.3. The management of public institutions.

80. According to Burns (2001: 193), courts may also consider whether the plaintiff is a public figure or involved in a newsworthy event; and “the motive, disposition or intention with which the defendant acts”.

81. The Press Ombudsman’s Code of Professional Practice states the following in connection with public interest:

> “The public interest is the only test that justifies departure from the highest standards of journalism and includes:
>
> - Detecting or exposing crime or serious misdemeanour;
> - Detecting or exposing serious anti-social conduct;
> - Protecting public health and safety;
> - Preventing the public from being misled by some statement or action of an individual or organisation;
> - Detecting or exposing hypocrisy, falsehoods or double standards or behaviour on the part of public figures or institutions and in public institutions.”

82. The Code of Practice of the U.K. Press Complaints Commission has a similar description of public interest, but adds:

> “There is a public interest in freedom of expression itself. The Commission will therefore have regard to the extent to which material has, or is about to, become available to the public.”

83. Johan Retief (2002: 160) equates the public interest with the public’s “right to know”:

"Sometimes the public has a legitimate need to know information that other people would like to keep private. The media's task is in essence *not* to leave people alone."

84. Ronning (2002: 71)) states that the public interest "has to do with the notion of social responsibility" and "with what is of essential social importance, of benefit to society, and of public concern for reasons of political and economic decision-making"..

The public interest in the present case

85. Taking the above into account, it is difficult not to conclude that the information obtained by the Respondents is in the public interest, and that there is an overwhelming public interest in publishing the information. We will restrict our discussion to information obtained from the Applicant's bank documents, particularly payments made to the ANC, Hartkon and Uluntu Investments.

86. We make this statement for the following reasons:

86.1. The information concerns public figures. The Applicant's Chairman and Chief Executive, Sandi Majali, is a public figure by virtue of his voluntary association and relationship with politicians and members of government, including ANC Secretary-General Kgalema Motlanthe. He regularly travelled with senior public officials and represented himself during these travels as a representative or agent of the ANC, a political party (We refer to Paragraphs 24-26, 27.4, 28-30, 32-34, 36, 38-40, 56 and 58 of the Third Respondent's affidavit.) As a public figure representing himself as a representative of a political party, his conduct is a legitimate subject for scrutiny by the media. The payment of R65 000 made to Hartkon Construction relates to a public figure, Minister of Social Development Zola Skweyiya. The payment of R50 000 made to Uluntu Investments relates to the brother of a public figure,

Deputy President (and former Minerals and Energy Affairs Minister) Phumzile Mlambo-Ngcuka. The public has an undeniable interest in information relating to the conduct, integrity or efficiency of politicians (Burns 2001).

86.2. The information relates to the management of a public institution. PetroSa is a state-owned body, founded with public money, and accountable to the government of South Africa. The alleged irregular "advance" paid by PetroSa to the Applicant, and the subsequent payment to Glencore for condensate, which amounted to a double payment, are therefore undoubtedly of public interest.

86.3. The information clearly relates to "political or state matters". The interpretation made by the Respondents, based on the Applicant's bank documents, is that public money was channelled to a political party shortly before an election. The public clearly has an interest in knowing such information.

86.4. The defendants did not act maliciously or out of personal animosity. Their intention and motive throughout was to expose misuse of public money and possible conflicts of interest relating to politicians. There is a public interest in exposing such matters.

86.5. The actions of the Defendants were aimed in part at preventing the public from being misled by statements emanating from an individual and organisation (the Applicant and Sandi Majali), and at exposing alleged falsehoods or improper conduct on the part of public figures. Their actions thus fall under the description of public interest in the Press Ombudsman's Code.

87. Taken as a whole, it is clear that the information obtained by the Defendants from the Applicant's bank documents is in the public interest. The public would derive a

real and tangible benefit from being made aware of the information as it may prevent future abuse of public money for political purposes, and wastage of public money.

The SANEF Guidelines

88. It is our opinion that the Defendants also acted in accordance with the South African National Editors Forum's guidelines on confidential briefings and sources. The guidelines follow Retief in requiring that anonymous sources should only be used as a last resort and that their trustworthiness should be beyond doubt. As detailed above, those requirements were met by the Defendants.

89. In addition, Sanef's guidelines require that anonymous sources should have direct knowledge of the information, that independent verification of the information is recommended, and that editor-level approval should be obtained for the use of anonymous sources. In the present case, it is evident that the information obtained from anonymous sources – the Applicant's bank documents – constitutes direct knowledge and evidence of the events reported by the Defendants. As stated above, the Defendants made efforts to obtain independent verification of their information, and in a number of cases obtained such independent verification. The Second Respondent's affidavit implies that the information was used with editor-level approval.

CONSEQUENCES OF FORCED DISCLOSURE OF THE RESPONDENTS' SOURCES

90. Earlier in this affidavit we set out what the consequences of forced disclosure of confidential sources would be generally. In this section, we examine the effects of a forced disclosure in the present proceedings, in the light of these general consequences.

The "chilling" effect

91. The most obvious consequence would be to deter other sources from providing information to the Mail & Guardian and its journalists (and indeed other news organisations and their journalists). Breach of the undertaking to keep the sources confidential would harm the reputation of the journalists involved, dry up the flow of information to the Mail & Guardian, and prevent information of abuse of power and corruption from being published, to the detriment of South Africa's people and democracy.

92. Mail & Guardian Editor Ferial Haffajee (Second Respondent) states in her affidavit at paragraph 18 that the newspaper receives at least five "tip-offs" every week from people in the public and private sector who want to disclose information about "maladministration and malfeasance". This is indicative of the newspaper's reputation for investigative journalism, and of trust that it would protect its sources. It is not unreasonable to surmise that many of these sources may be persuaded not to contact the newspaper if it disclosed the identity of sources in the present case.

Loss of independence

93. Disclosure of the sources would, in effect, turn the Mail & Guardian into an investigative tool of discovery for the Applicant, who may be expected to proceed against those sources. That would damage the reputation of the Mail & Guardian as independent sources of news and undermine public confidence in the media at large, with detrimental consequences for democracy.

Intrusion into the editorial process

94. Forced disclosure of the Mail & Guardian's sources – or imprisonment or other punishment of its journalists for refusing to reveal their sources – will have a "chilling effect" on the newspaper's news coverage. Its journalists may be inhibited from

newsgathering and disseminating news, or decide not to publish information rather than run the risk of facing a subpoena to reveal a source. It is not unreasonable to surmise that this “chilling effect” would inhibit other news organisations as well, threatening to undermine the public’s right to be informed abut matters of pubic interest.

Safety and protection

95. Here is a strong likelihood that compelled disclosure of the Mail & Guardian’s sources would lead to retribution against those sources, either by their employers, or in the form of proceedings by the Applicant. There can be no other reason why the Applicant seeks the identity of the sources.

CONCLUSION

96. On the basis of the above, it may be argued that there is a public interest in maintaining the confidentiality of the Mail & Guardian’s sources, and that the public interest in maintaining confidentiality outweighs any prejudice the Applicant may suffer as a result.

97. Following the reasoning in *Goodwin v United Kingdom*, We would argue that an order to divulge the identity of the Mail & Guardian’s sources would be a violation Section 16 of the Constitution. Without safeguards to the media, including the protection of journalistic sources, journalists’ ability to perform the watchdog function that the Constitution demands is impaired. Therefore, such an order cannot be justified except by an overriding requirement in the public interest. The Applicant has not put forward any considerations of public interest that would outweigh the public interest in maintaining the confidentiality of the Mail & Guardian’s sources, and in publishing the information obtained from them.

98. As indicated at the outset, the South African constitution protects not just the freedom of expression, but as an extension thereof, also the freedom of the press. The public interest in the proper functioning of the institution of the media, and of its members, is thus enshrined in the fundamental law of the Republic.

99. Compelling journalists to reveal their sources, particularly in the present matter, would violate this cardinal principle of our society. The effect would be to damage the functioning of an institution whose freedom to operate is specifically recognised in the Constitution. This would not only be a sad day for South African citizens, but it would also damage the country's international reputation as a democracy.

_____

GUY BERGER

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ this _____ day of _____2005 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

_____

COMMISSIONER OF OATHS

_____

ROBERT BRAND

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