

**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 HAFJEJEE**

Second Respondent

**STEFAANS BRUMMER**

Third Respondent

**SAM SOLE**

Fourth Respondent

**WISANI WA KA NGOBENI**

Fifth Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**JANE DUNCAN**

hereby make oath and say that:

1. I am the Executive Director of the Freedom of Expression Institute, the first applicant for admission as an amicus curiae in these proceedings.
2. Save where otherwise stated or as may appear from the context, the facts to which I depose are within my personal knowledge and are true and correct.
3. I have read the affidavits filed by the applicant and the respondents in the main application.
4. The Freedom of Expression Institute (“FXI”), the South African National Editors Forum (“SANEF”), the South African Chapter of the Media Institute of Southern Africa (“MISA-SA”) and the Media Workers Association of South Africa (“MWASA”) seek to be admitted as amici curiae in the above matter. At times in this affidavit I refer to these applicants collectively as “the amicus applicants”.

5. I am duly authorized to depose to this affidavit on behalf of the FXI and to represent the other amicus applicants in these proceedings. I refer in this regard to the relevant confirmatory affidavits on behalf of SANEF, MISA-SA and MWASA. These affidavits are attached respectively as Annexures “JD1”, “JD2” and “JD3”.
  
6. This affidavit deals with the following issues in turn:
  - 6.1. Descriptions of the amicus applicants;
  
  - 6.2. Nature of this application;
  
  - 6.3. Background to this application;
  
  - 6.4. Interests and submissions which the amicus applicants will seek to advance should they be admitted as amici curiae.

#### **THE FREEDOM OF EXPRESSION INSTITUTE (“FXI”)**

7. The first applicant for admission as an amicus curiae is the FXI. The FXI is an association not for gain, governed by its constitution, in terms of which it is capable of bringing proceedings in its own name. A copy of its Constitution is attached as Annexure “JD4”. It has its principle place of business at 21st Floor, Sable Centre, 41 de Korte Street, Braamfontein, Johannesburg.
  
8. The FXI was formed in January 1994 to assist in the repeal and amendment of South African laws inhibiting freedom of expression and association. The FXI has since evolved into a public interest lobby group which campaigns for media freedom, including the protection of journalistic sources.

9. The FXI has been admitted as an amicus curiae by various courts, including the Constitutional Court, in cases involving freedom of expression. The cases in which it has been admitted as an amicus curiae include:

9.1. *Laugh-It-Off Promotions cc v South African Breweries International (Finance) B.V. t/a Sabmark International* in both the Constitutional Court (2005 (8) BCLR 743 (CC)) and the Supreme Court of Appeal (2005 (2) SA 46 (SCA));  
and

9.2. *Munusamy v Hefer NO and Others* 2004 (5) SA 112 (O).

#### **THE SOUTH AFRICAN NATIONAL EDITORS' FORUM ("SANEF")**

10. The second applicant for admission as an amicus curiae is the SANEF. SANEF is an association not for gain, governed by its constitution, in terms of which it is capable of bringing proceedings in its own name. A copy of its constitution is attached as Annexure "JD5". It has its principle place of business at Room 210A, Nedbank Gardens, 33 Bath Ave, Rosebank, Johannesburg.

11. SANEF was conceived at a meeting of the Black Editors' Forum, the Conference of Editors and senior journalism educators and trainers in Cape Town in October 1996. Delegates decided to unite in a new organisation that recognised past injustices in the media and committed itself to a programme of action to overcome them, as well as defending and promoting media freedom and independence.

12. SANEF is a voluntary forum of editors, senior journalists, and journalism trainers from all areas of the media industry in South Africa. SANEF is the most representative association of editors and media trainers in South Africa.

13. SANEF's vision is to promote the quality and ethics of journalism, to reflect the diversity of South Africa, and to champion freedom of expression. SANEF subscribes to the principle that a journalist should not disclose confidential sources of information.

### **THE SOUTH AFRICAN CHAPTER OF THE MEDIA INSTITUTE OF SOUTHERN AFRICA ("MISA-SA")**

14. The third applicant for admission as an amicus curiae is MISA-SA. MISA-SA is an association not for gain, governed by its constitution, in terms of which it is capable of bringing proceedings in its own name. A copy of its constitution is attached as Annexure "JD6". It has its principle place of business at 11th floor, Noswal Hall, 3 Stiemens Street, Braamfontein, Johannesburg.

15. MISA-SA is the South African chapter of the Media Institute of Southern Africa ("MISA"), which was established in Namibia in 1992 as a regional, member-driven, non-governmental organisation with eleven chapters in the SADC region, coordinated by a regional Secretariat.

16. The mission of MISA is to lobby for the promotion and protection of media freedom and free expression, including the protection of the confidentiality of journalists' sources. It is also to strengthen and support the development of a vibrant, professional and participatory media sector as an essential part of the deepening of democracy in Southern Africa.

17. MISA's vision is of a Southern Africa region in which the media enjoys freedom of expression, independence from political, economic and commercial interests, pluralism of views and opinions. MISA's vision is of a region where members of society, individually or collectively are free to express themselves through any media

of their choice without hindrance of any kind, such as the threat of being compelled to reveal sources of information.

## **THE MEDIA WORKERS ASSOCIATION OF SOUTH AFRICA (“MWASA”)**

18. The fourth applicant for admission as an amicus curiae is MWASA. MWASA is a trade union, as defined by the Labour Relations Act No. 66 of 1995, governed by its constitution, in terms of which it is capable of bringing proceedings in its own name. A copy of its constitution is attached as Annexure “JD7”. It has its principle place of business at Marble Tower Building, 13th Floor, corner Jeppe and von Wiellegh Streets, Johannesburg, 2000.
19. MWASA was born during the mid-1970s by a group of black journalists to highlight their plight under apartheid.
20. Today MWASA is a trade union broadly representative of journalists and media workers. MWASA’s mission is to protect and advance the rights of its worker members in the broadcasting, print, and related media industries, through inter alia, the promotion of the principle of the protection of journalistic sources.

## **NATURE OF THIS APPLICATION**

21. The amicus applicants seek to be admitted as amici curiae in this matter. I am advised that the admission of an interested party as amicus curiae to this court is governed by Rule 16A of the Uniform Rules of Court.
22. The “constitutional issue”, as contemplated in Rule 16A, in relation to which the amicus applicants seek leave to intervene as amici curiae, is that of the

confidentiality of journalistic sources as an incident of the fundamental right to freedom of the press which is guaranteed by section 16(1)(a) of the Constitution.

23. The interest that the amicus applicants have in the issue of confidentiality of journalistic sources has also been mentioned briefly above. It will be set out in more detail, together with the submissions that will be made to the court, below.

## **BACKGROUND TO THIS APPLICATION**

24. The applicant in the main proceedings launched its application on 21 July 2005 for an order directing the respondents to provide the applicant with the information and documentation as indicated in its Notice of Motion. The applicant did not, in its founding affidavit, raise the constitutional issue of the confidentiality of journalistic sources as an incident of the freedom of the press enshrined in the Constitution. The constitutional issue of the confidentiality of journalistic sources as an incident of the freedom of the press was raised for the first time when the Respondents filed their answering affidavit on 26 August 2005.

25. I became aware of this application on 27 July 2005, when the fourth respondent telephoned me for the FXI's comment on the application. I asked the fourth respondent to telefax me a copy of the application, which he duly did.

26. On 1 August 2005, after having obtained a copy of this application, I was advised by the second respondent of the respondents' intention to raise the constitutional issue of the confidentiality of journalistic sources as an incident of the freedom of the press in the respondents' answering affidavit.

27. In advance of the filing of the respondents' answering affidavit, in an attempt to expedite the process of the amicus applicants' admission as amici curiae, I instructed the amicus applicants' attorney, Simon Delaney of Delaney Attorneys

("Delaney Attorneys") to draft letters to the attorneys of the applicant and respondents, respectively:

27.1. informing them that the amicus applicants wished to intervene as amici curiae in these proceedings; and

27.2. seeking the parties' written consent to the amicus applicants' intervening as amici curiae in terms of Rule 16A(2).

28. Accordingly on 11 August 2005, Delaney Attorneys sent a letter by telefax to the respondents' attorneys, Webber Wentzel Bowens. A copy of the letter is attached as Annexure "JD8".

29. On 12 August 2005, Webber Wentzel Bowens replied to this letter and indicated that the respondents consented to the amicus applicants' intervening as amici curiae. A copy of the letter is attached as Annexure "JD9".

30. Also on 12 August 2005, Delaney Attorneys sent a letter by telefax to the applicant's attorneys, Barry Aaron & Associates. A copy of the letter is attached as Annexure "JD10".

31. On 12 August 2005, Barry Aaron & Associates indicating the applicant's refusal to consent to the amicus applicants' intervening as amici curiae. A copy of the letter is attached as Annexure "JD11".

32. On 17 August 2005, Delaney Attorneys sent a further letter to Barry Aaron & Associates. A copy of the letter is attached as Annexure "JD12". The letter stated that:

32.1. The constitutional issue in relation to which the amicus applicants wished to be admitted as amici curiae was that of the confidentiality of journalistic

sources as an incident of the freedom of the press protected as a fundamental right by section 16(1)(a) of the Constitution;

- 32.2. While the applicant relied on certain constitutional rights in its application, it did not itself raise the issue of the confidentiality of journalistic sources as an incident of the constitutionally entrenched freedom of the press;
- 32.3. In terms of Rule 16A(1), until such time as this issue was raised by a party in the proceedings, the amicus applicants had no right to apply to be admitted as amici curiae and the time limits for such an application did not commence running;
- 32.4. That the amicus applicants had written to the applicant and respondents in anticipation that the respondents were likely, in their answering papers, to raise the constitutional issue of the confidentiality of journalistic sources as an incident of the freedom of the press and in an attempt to expedite the process of their admission as amici curiae;
- 32.5. But that in view of the applicant's apparent attitude to the admission of the amicus applicants, the matter would now have to follow the application procedure contemplated by Rule 16A(5) to (8) with the possibility of concomitant delays to the hearing of the principal application.
- 32.6. Therefore, in the event that the respondents, in their answering papers, raised the issue in respect of which the amicus applicants sought admission as amici curiae, the amicus applicants would accordingly deliver the necessary amicus application within the time limits prescribed by Rule 16A of the Uniform Rules of Court.

33. On 19 August 2005, Barry Aaron & Associates replied to Delaney Attorneys. A copy of the letter is attached as Annexure "JD13". The letter stated that:

- 33.1. The applicant did not intend debating the issues relating the amicus applicants' interests or agenda in the matter or the merits of their admission to the proceedings.
  - 33.2. It was quite clear to the applicant that the amicus applicants and the respondents were working "hand-in-glove" in this Application.
  - 33.3. The amicus applicants had been aware of these proceedings since the time of their institution and the applicant would not permit any delays in the determination of the Application.
  - 33.4. The contemplated admission of the amicus applicants was an abuse because it was unlikely that their submissions would be different, in substance, to those of the respondents.
  - 33.5. If the application for admission as amici curiae was in fact found to be an abuse, the applicant would seek the costs arising therefrom.
34. On 25 August 2005 Delaney Attorneys replied to Barry Aaron & Associates. A copy of the letter is attached as Annexure "JD14". The letter stated that:
- 34.1. The amicus applicants took exception to the unsubstantiated allegations that the amicus applicants are working "hand-in-glove" with the respondents and that their admission as amici curiae would constitute an abuse.
  - 34.2. These allegations were denied in the strongest terms.
35. I annex hereto, marked "JD15", the confirmatory affidavit of Simon Delaney of Delaney Attorneys, confirming the allegations made in this affidavit in respect of actions he took on behalf of the amicus applicants.

36. I repeat that there is no basis at all for the allegation that the amicus applicants are working “hand-in-glove” with the respondents, nor for the allegation that the admission of the amicus applicants as amici curiae would constitute an abuse.

37. Against this factual background, I respectfully submit that the amicus applicants have complied fully with Rule 16A:

37.1. The constitutional issue was first raised in the Respondents’ Answering Affidavit which was lodged on 26 August 2005.

37.2. The applicant refused to consent to the amicus applicants’ admission as amici.

37.3. Therefore, in terms of Rule 16A(5) the amicus applicants had a period of 25 court days from the lodging of the respondents’ answering affidavit to bring this application.

37.4. This application is being brought within that period.

38. Though the amicus applicants are under no duty to furnish an explanation as to why they have waited until the end of this period to bring this application, I believe it is nevertheless appropriate to explain to this court the primary reason that this approach was taken. The amicus applicants decided to wait for the applicant to lodge its replying affidavit in this matter so that they could see how the issue relating to confidentiality of sources had crystallised. This would enable the amicus applicants to outline their position and submissions in the light of the crystallised issue. The replying affidavit was due within ten days of the answering affidavit in terms of Rule 6 of the rules of this Court.

39. However, the applicant has failed to deliver its replying affidavit within this period and has not done so to date. The amicus applicants cannot afford to wait any longer for the replying affidavit to be delivered – to do so would mean that the amicus applicants would be out of time to bring this application. The amicus applicants have therefore had to bring this application now, despite the continued absence of the replying affidavit.

## **INTERESTS OF THE AMICUS APPLICANTS**

40. Earlier in this affidavit I have given details of the interests of the four amicus applicants and how these relate to questions of press freedom and the confidentiality of journalists' sources. For the sake of convenience I repeat briefly the most salient points in this regard:

- 40.1. The FXI is a public interest lobby group which campaigns for media freedom, including the protection of journalistic sources. It has a history of interventions as an amicus curiae in cases involving freedom of expression.
- 40.2. SANEF is a voluntary forum of editors, senior journalists, and journalism trainers. SANEF is the most representative association of editors and media trainers in South Africa and has a vision of promoting the quality and ethics of journalism championing freedom of expression. SANEF subscribes to the principle that a journalist should not disclose confidential sources of information.
- 40.3. MISA-SA is the South African chapter of MISA, a regional, member-driven, non-governmental organisation. Its mission is to lobby for the promotion and protection of media freedom and free expression and to strengthen and support the development of a vibrant, professional and participatory media sector as an essential part of the deepening of democracy in Southern Africa.

MISA's vision is of a region where members of society, individually or collectively are free to express themselves through any media of their choice without hindrance of any kind, such as the threat of being compelled to reveal sources of information.

40.4. MWASA is a trade union broadly representative of journalists and media workers. MWASA's mission is to protect and advance the rights of its worker members in the broadcasting, print, and related media industries, through inter alia, the promotion of the principle of the protection of journalistic sources.

41. I submit that in light of the above, it is clear that the four amicus applicants each have an interest in the protection of journalist's confidential sources. Indeed the protection of journalists' confidential information is a critically important issue for each of the amicus applicants. As such, they have the required interest in the present proceedings and the constitutional issue raised therein concerning the confidentiality of journalistic sources as an incident of the fundamental right to freedom of the press which is guaranteed by section 16(1)(a) of the Constitution.

42. It should be reiterated that all four of the amicus applicants - FXI, SANEF, MISA-SA and MWASA - were previously admitted as amici in the case of *Munusamy v Hefer NO and Others* 2004 (5) SA 112 (O). That case, like the present matter, involved issues that included the confidentiality of sources. The amicus applicants addressed substantial argument to the High Court on this issue.

## **AN OUTLINE OF THE SUBMISSIONS WHICH THE AMICUS APPLICANTS SEEK TO ADVANCE**

43. Rule 16A(6)(b) requires the amicus applicants to “briefly and succinctly set out the submissions which will be advanced” if they are admitted as amici curiae in this matter.

44. The amicus applicants intend advancing the following submissions if they are admitted as amici curiae:

44.1. Journalists’ use of confidential sources is an essential component of the right to freedom of expression and freedom of the press, contained in section 16 of the Constitution.

44.2. Forcing journalists to reveal their confidential sources would severely undermine the media and would diminish the media’s ability to play their constitutionally protected role. In particular:

44.2.1. It would deter other sources from confiding in journalists for fear of being exposed and thus have a “chilling effect” on journalists’ ability to develop other sources and gather news.

44.2.2. It would result in a perceived loss of independence for the media because 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.

44.2.3. It would place a burden on the time and resources available to media organisations by bogging down reporters and editors in dealing with court challenges, thus affecting the ability of the news organisation to

carry out their prime function of gathering and disseminating news efficiently. This is particularly the case for small, independent media organisations who have minimal resources.

44.2.4. It would amount to an intrusion into the editorial process of the media because 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.

44.2.5. It may, in certain circumstances, threaten the safety and wellbeing of journalists and their sources. In particular, sources who provide information on condition of confidentiality may face harassment, prejudice or retaliation or even threats to their lives if their identity is disclosed.

44.3. Journalists should never be forced to reveal their confidential sources of information, alternatively that they should be forced to do so only as a matter of last resort.

44.4. If journalists are to be forced to disclose their sources at all, this should only ever be permissible when required by the state for a prosecution (and only then as a matter of last resort) — not when required by a private party for its own purposes.

44.5. A critical factor to be taken into account before ordering any disclosure of a journalist's confidential source is the public interest in the story concerned — the greater the public interest, the more reluctant a court ought to be about ordering disclosure;

- 44.6. The legal position in countries in North America, Europe and Africa supports the principles set out above concerning the disclosure of journalists' confidential sources.
- 44.7. The ethical position contained in journalists' ethical codes in countries in North America, Europe and Africa supports the principles set out above concerning the disclosure of journalists' confidential sources.
- 44.8. This court is accordingly both entitled and obliged to develop the common law in line with section 39(2) of the Constitution, read with section 16 of the Constitution, to provide that journalists should never be forced to reveal their confidential sources of information, alternatively that they should be forced to do so only as a matter of last resort.

45. I submit that these submissions are self-evidently relevant to the present proceedings. The applicant is seeking to force the respondents to disclose their confidential sources. The submissions that the amicus applicants intend to advance suggest that such an order is impermissible or, at the very least, should only be granted as a last resort – and then only after having taken into account the effect on freedom of the media and the public interest in the story concerned.

46. I submit further that the submissions of the amicus applicants would, with respect, be of great assistance to the court and would be different to the submissions of the parties involved.

- 46.1. The amicus applicants represent an extremely large number of media members, workers and organisations. As such they have a particularly acute understanding of the effect that forced disclosure of confidential sources would have on different types of media organisations – both in terms of the size of the media organisation and the particular medium (print, radio,

television) that they use. Neither of the parties to the proceedings can claim to have this perspective to the same extent.

46.2. The amicus applicants can provide this Court with extensive comparative foreign material from countries in many regions, including North America, Africa and Europe and guide this Court through these materials. These materials include decided cases, statutes, ethical codes and academic articles – all of which would greatly assist this court to see how other jurisdictions have dealt with this issue. It is likely that neither of the parties to these proceedings will have access to such materials.

46.3. The amicus applicants have a far broader perspective and interest on these proceedings than the parties to these proceedings do. The parties involved are limited and affected by their own personal interests in the matter and their submissions will accordingly be tailored to the relief or outcome they seek. In contrast, the amicus applicants are not directly affected by the relief sought or granted by this court. They are therefore able to make submissions as to how the law ought best be developed and under what circumstances it might be permissible for journalists to be forced to disclose their sources.

47. In this regard I refer particularly to the attached joint affidavit of Guy Berger and Robert Brand. The affidavit is attached as Annexure “JD16”. I submit that this affidavit constitutes admissible expert opinion evidence on the question of journalists’ confidential sources. It also includes various facts relating to the position in other jurisdictions that shed great light on this issue. I therefore submit that it will be of assistance to this Court in dealing with the issues before it.

48. If they are admitted as amici curiae, the amicus applicants will advance and develop many of the submissions set out in the Berger and Brand affidavit. I believe that

comparing this affidavit to the materials already before the Court demonstrates that the submissions that the amicus applicants seek to advance:

48.1. Will be of assistance to the court; and

48.2. Are likely to be different to the submissions advanced by the parties to these proceedings.

## **CONCLUSION**

49. If they are admitted as amici curiae, the four amicus applicants will submit their argument together. Therefore no substantial delay or additional time will be required if they are admitted.

50. In the circumstances, I ask that this Court admit the four amicus applicants as amici curiae in the present proceedings, with the right to present both written and oral argument.

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**JANE DUNCAN**

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.

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**COMMISSIONER OF OATHS**