IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.
DATE:_____ SIGNATURE_____

SOUTH AFRICAN BROADCASTING CORPORATION

Applicant

and

AVUSA LIMITED First Respondent

ROWAN PHILP Second Respondent

THE FREEDOM OF EXPRESSION INSTITUTE

Amicus Curiae

JUDGMENT

WILLIS J:

[1] For the sake of convenience, I shall refer to the applicant as "the SABC". The SABC seeks an order compelling the first respondent to deliver to the SABC, a copy of an internal SABC report which the *Sunday Times* obtained from a confidential source. The *Sunday Times* is a newspaper, having a national circulation, which is owned and published by the first respondent. The second respondent is a journalist employed by the first respondent. The second respondent wrote an article which was published in the *Sunday Times* on 22 March 2009. This article has given rise to the present application.

[2] The SABC report has been referred to by the SABC's counsel as "the draft preliminary report". In the interests of brevity, I shall refer to this report simply as the "report". In the

alternative, the SABC has sought an order against the second respondent requiring him to deliver this report. The report itself has not been produced to the court.

[3] The following facts are either common cause or undisputed:

3.1 In about June 2005 the SABC's Group Internal Audit learnt of accusations of irregularities committed by one of its employees, the head of its International Programme Acquisition Division, a certain Ms Matilda Gaboo.

3.2 Further accusations were made against Ms Gaboo thereafter.

3.3 During May 2006 the SABC mandated its Head of Internal Audit, to investigate the accusations. The Head of Internal Audit an extensive investigation was conducted in the course of which numerous individuals were interviewed;

3.4 The investigation resulted in the report which comprised of some 183 pages with certain annexures;

3.5 The date of the report was 2 September 2008;

3.6 The report contained allegations and conclusions which could be of a defamatory nature not

only against Ms Gaboo, but against other persons as well;

3.7 According to the SABC, the report was of a preliminary nature, particularly since at that stage all the information necessary for a full and proper report had not been obtained;

3.8 A limited number of copies of the report were made and distributed to certain specific persons only who were required to maintain confidentiality in respect thereof and the report was placed before the applicant's board of directors during September 2008 on the strict understanding that confidentiality would be maintained in regard thereto;

3.9 The SABC authorized no one to give that report to the first respondent or any of its employees and in particular to the second respondent.

3.10 The SABC instructed its attorneys Cliffe Dekker Hofmeyr as well as Comperio Forensics, "to pursue further the enquiries foreshadowed by the report and to provide a legal opinion on same".

3.11 A person employed by the SABC (referred to by counsel from the parties as a "source") gave a copy of the report to the chief reporter of the *Sunday Times*, the second respondent.

3.12 The source did so under an agreement of strict confidentiality.

3.13 The second respondent agreed that he would not disclose the source's identity and would not reveal any information which could lead to the source's identification.

3.14 The second respondent also agreed that he would not show the copy of the report to anybody except his editor.

3.15 The *Sunday Times* satisfied themselves of the credibility of the source and also obtained extensive outside collaboration of the information in the report.

3.16 The *Sunday Times* remains in possession of the report which has been deposited with its attorneys for safe-keeping.

[4] Although the content of the article published in the *Sunday Times* is, ultimately, not relevant to the determination of the issue, it may nevertheless be useful to record some of the irregularities it revealed. The reason is that this indicates that the *Sunday Times* did not indulge in mere salacious gossip of interest merely to the prurient: the article did not deal with what "is interesting to the public" rather than "what it is in the

public interest to make known".[1] The following appears from the article:

4.1 Ms Gaboo had been the head of the SABC's International Programme Acquisition Division for three years until she resigned in May 2008.

4.2 There had been "mass corruption and gross mismanagement" during her three-year tenure at the SABC.

4.3 Irregular and wasteful expenditure of some R38,7m had been uncovered by September 2008. Since then a second audit by attorneys Cliffe Dekker Hofmeyr and Comperio Forensics, put the figure at R49m. The attorneys warned, however, that the amount "could increase substantially" because only 38 out of 165 of Ms Gaboo's deals had been analysed.

4.4 The audits revealed how Ms Gaboo,

- awarded R22m in deals to a programme supplier Mr Bux, a man who, according to the audit reports, claimed to be the father of her six year old daughter;
- paid Mr Bux R652 800 for a wild life series for which he had just paid R81 600;
- paid a UK supplier Mr Deitch more than R500 000 for consulting services and then gave him a contract for US$915 000 to supply 58 programmes while he worked

[1] See *Financial Mail (Pty) Ltd v SAGE Holdings Ltd* 1993 (2) SA 451 (a) at 464C

in her office, of which the SABC only broadcast 12 programmes, wasting US$657 000 on the deal; and

- purchased 173 titles, representing thousands of episodes, which were never shown and whose licences had expired.

4.5 An SABC Board member said that "What makes it worse, is that the board has been calling for action on this since 2007, and has simply been ignored."

[5] The contents of the report received wide publicity, not only in the *Sunday Times* but also in other media. There were articles relating to the report published in the print and electronic media including *Business Day*, *The Times*, *The Sowetan*, *Mail & Guardian*, *Swazi Times*, *Moneyweb*, the DA website, *Avcom*, *journalism.co.za*, *Thought Leader*, *Africa News Online*, *Filmmaker South Africa*, *Kagablog*, *I-luv-SA* website, *24.com blogs*, *fdsconsultants.co.za and TVSA.co.za*. It appears that the coverage of the report by the other media, was not confined to the information revealed in the *Sunday Times* article. The inference seems obvious: the report was not "leaked" to the *Sunday Times* alone.

[6] It may be useful to record certain developments after publication of the article in the *Sunday Times*: again to indicate that the subject matter of the report is one of substantial public interest. In September 2009, the Auditor-General published a report on an investigation of the SABC at the request of parliament's Portfolio Committee on Communications.[2] The Auditor-General deals in his report with the SABC's own report and with the subsequent investigation by attorneys Cliffe Dekker Hofmeyr and Comperio Forensics. The Auditor-General describes the following highlights of SABC's report:

6.1 The report revealed double payments to suppliers, overpayments to suppliers, material paid for but not received, agreements renegotiated and titles acquired more than once from the same supplier during the same licence period, as a result of which the SABC incurred fruitless, wasteful and irregular expenditure of R46,8m.

6.2 The major findings of the report are summarised as follows:

6.2.1 Three consulting firms were appointed during the period September 2005 to March 2007 to draft policies and procedures for the Content Enterprise Division. As at 2 September 2008, this Division still did

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[2] Respondent's supplementary affidavit p 243 para 3; EHG 1 p 246 - 252

not have approved policies and procedures governing the activities within the Division.

6.2.2 . The SABC paid for content, but never received the broadcast material.

6.2.3 . The SABC paid for material but never broadcast the content, or did not broadcast the material in terms of the contract.

6.2.4 . The SABC acquired the same titles under different contracts from the same for the same licensing period.

6.2.5 . The SABC paid more for content when acquired for a second run than the first run.

6.2.6 . Fruitless and wasteful expenditure of R38m was incurred.

[7] The Auditor-General says that the internal report made the following recommendations:

> 7.1. The SABC board/management must commence with the recovery of overpayments and/or double payments.

> 7.2. The approval of policies and procedures governing activities within the Content Enterprise Division should be fast-tracked.
>
> 7.3 Record keeping within the SABC needs to be addressed.
>
> 7.4. Policies and procedures should be implemented and implementation should be monitored by the governance cluster.
>
> 7.5. The results of the investigation should be used to determine accuracy and completeness of data loaded on the "SAP system".

[8] According to the Auditor-General, the SABC's Audit and Finance Committee has since the internal report, adopted various plans of action to deal with the irregularities it exposed. There is nothing in the papers before the court indicating what progress, if any, has been made towards implementation of any of these plans. The Auditor-General also reports that the SABC's attorneys Cliffe Dekker Hofmeyr and Comperio Forensics continued their investigation but on 15 June 2009 the Acting Head of Internal Audit instructed them to "pause all activities with regard to this investigation" because "the SABC board members resigned and … there was

no clear mandate for the services to be rendered by the legal firm". Cliffe Dekker Hofmeyr did a final handover to the SABC on 26 August 2009 which included a summary of their findings. It revealed that the amount of fruitless and wasteful expenditure had reached R111,7m.

[9] In the SABC's founding affidavit, it says that it "favours proper and open disclosure of the information gathered concerning the conduct of its employees" but that disclosure should only be made "at a stage when the applicant can be reasonably satisfied that the information and conclusions drawn as a result thereof are full, fair and reasonable." The SABC is silent as to when it is likely to be so satisfied – this against the background of the accusations first coming to light in June 2005, more than four years ago.

[10] The circumstances in which the second respondent came to obtain the report are not set out in the answering affidavits of the respondent other than that the second respondent avers that he agreed with his "source" not to disclose the source's identity or to reveal any information which could lead to the source's identification.

[11] The respondents have expressed their concern that the delivery of the *Sunday Times*' copy of the report could lead to the uncovering of the source (the document could contain encryption specifically designed for this purpose) and has averred that this is the real reason for the SABC bringing the application. Interestingly, the SABC, in its replying affidavit, deals with this issue cryptically: it does not deny that it will be able, as a result of obtaining the document, to uncover the source; it also does not deny any such intention and does not proffer any assurances in this regard.

[12] The SABC has itself emphasised that it:

12.1 does not seek any interdict against the respondents in respect of material obtained from the report;

12.2 does not seek relief relevant to the publication that has already taken place;

12.3 acknowledges that it favours proper and open disclosure of information gathered concerning the conduct of its employees.

As mentioned above, the SABC qualifies its stance in regard to disclosure, however, by stating that such disclosure should only be made at a stage when the SABC "can be reasonably

satisfied that the information and conclusions drawn as a result thereof are full, fair and reasonable".

[13] The basis upon which the SABC seeks the relief claimed in its application is a "right to confidentiality" which, it submits, is intimately bound upon with its right to privacy, a right which it further submits vests in juristic persons no less than individual human beings.[3]

[14] Upon a perusal of the SABC's papers, it would seem that it seeks a *rei vindicatio* in circumstances where there is no *res*. I accept and respect the fact that there are those who experience considerable discomfort when Latin is used in court judgments. The difficulty is not only that much of our common law derives from Roman law (which was written in Latin) but also that Latin is a language of extraordinary precision, nuance and depth. Law requires precisely these qualities when it comes to conceptualization. Those of us who have a reasonable acquaintance with Latin resort to it from time to time not necessarily out of an unwholesome attachment to things antediluvian, but because we find ourselves bereft when it comes to trying to express ourselves in, for example, the more familiar English – a language not without its own richness of expression. I shall attempt to convey the earlier sentence which contains Latin expressions

[3] The SABC relied on the *Financial Mail* case *supra* at 463B; 465B-C and *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) especially at 556F-558F.

into English. It is as follows: "The applicant seeks to rely upon a remedy for the recovery of a thing when, in fact, there is no such thing." The clumsiness of the translation does, perhaps, illustrate my point about occasional forays into Latin being excusable.

[15] During the course of argument, Mr *Van Blerk*, who together with Mr *Mooki*, appeared for the SABC, expressly disavowed any reliance on the *rei vindicatio* for relief. In my view, he did so wisely, In *Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd*[4] Serrurier AJ delivered a comprehensive and, in my respectful view, most learned review of South African, American, Australian and English law and concluded that "It thus appears that information or knowledge, of whatever value and however confidential, is not recognized as property either in South Africa or in the English law systems."[5] In *Prinsloo v RCP Media Ltd t/a Rapport*[6] Van Der Westhuizen J (then a puisne judge in the Transvaal Provincial Division) found an argument for the return of copies of photographic material based on the common law remedy of the *rei vindication* to have been "not convincing".[7]

[16] Mr *Van Blerk* placed strong reliance on the following extract from the speech of Lord Griffiths in *Lion Laboratories v Evans*[8]:

[4] 1993 (1) SA 833 (w) at 841F-845C
[5] At 845B
[6] 2003 (4) SA 456 (T) at
[7] At 464E
[8] [1984] 2 All ER 417 at 433c-e

> There is a public interest of a high order in preserving confidentiality within an organisation. Employees must be entitled to discuss problems freely, raise their doubts and express their disagreements without the fear that they may be used to discredit the company and perhaps imperil the existence of the company and the livelihood of all those who work for it. And I am old-fashioned enough to think that loyalty is a virtue that it is in the public interest to encourage rather than to destroy by tempting disloyal employees to sell confidential documents to the press, which I am sure would be the result of allowing the press to publish confidential documents under cover of a shadowy defence of public interest.

[17] Mr *Van Blerk*, not without enthusiasm, pointed out that the approach of Lord Griffiths in regard to confidentiality has been accepted by what was then the highest court in our land in *Financial Mail (Pty) Ltd v Sage Holdings Ltd.*[9] Mr *Van Blerk* quoted the following extract from the judgment of Corbett JA, as he then was:

> With respect, I would enthusiastically endorse this viewpoint. In my view there is a public interest in preserving confidentiality in regard to private affairs and in discouraging the leaking of private and confidential information, unlawfully obtained to the media and others.

[9] 1993 (2) SA 451 (A) at 464C-H

[18] My respect is compounded. With very great respect for Lord Griffiths and our former Chief Justice, I too am old-fashioned enough to endorse their views in general terms. My endorsement arises not from some curmudgeonly hankering for a mythical "code of honour". Wherever human beings act collectively, they will, from time to time, have to make complex and difficult decisions. Effective decision making is rendered very much more likely if a range of views is freely expressed. Nevertheless, few, if any, virtues can be absolute. Confidentiality is certainly no "sacred virtue" and I accept, as Mr *Trengove*, who together with Ms *Hofmeyr*, appears for the respondents, contended, that confidentiality may, from time to time, have to yield to higher interests. Notwithstanding the fact that confidentiality is not necessarily a paramount interest, my difficulty, in any event, is this: the respondents have not breached a duty of confidentiality owed to the SABC. The respondents owe it none, although SABC's employees and office-bearers may well have such an obligation. The respondents have not acted wrongfully or unlawfully. The *Sunday Times*' possession of a copy of the report is not wrongful or unlawful. In *NM v Smith* (*Freedom of Expression Institute as Amicus Curiae*)[10] it was held that even where a litigant wishes to rely on the common law of the *actio injuriarum* for an invasion of privacy, the element of wrongfulness must also be established. I do not see how the

[10] 2007 (5) SA 250 (CC) at para [55]

delivery by the *Sunday Times* of a copy of the report, at this stage, can protect the SABC's interest in confidentiality. Even if one accepts that the SABC has a right to privacy in respect of the document, I cannot see how, consequent upon the events recorded above, the delivery of the copy of the report will, in any event, affect this privacy: the horse has bolted. That, it seems to me, is the end of the matter.

[19] Mr *Van Blerk* has fairly conceded that had it been that the SABC was seeking to interdict the respondents from further publication of the material in the report, the issue that would arise would be a balancing of the right of the applicant to its privacy against the right of freedom of speech and expression on the part of the respondents. He went on to submit that as the SABC seeks no such relief prohibiting further publication arising from the report that it is accordingly not necessary "to determine the extent to which, if at all, the respondents should not have published the material that they have or have not published".

[20] It should be noted, for the sake of completeness, that the SABC claims no copyright in the report. It also makes no claim of unlawful competition by the respondents.

[21] Mr *Trengove*, counsel for the respondents, presented very full argument on the fact that the SABC is a public company,[11] that the State is its only shareholder,[12] that it is a public broadcaster which provides public and commercial broadcasting services to the public and in the public interest,[13] and that it is funded by public money comprising its own revenue, compulsory licence fees and government grants.[14] Mr *Trengove* submitted that because the SABC performs public functions in terms of the Broadcasting Act, it is an "organ of state" as defined in s 239(b)(ii) of the Constitution. He submitted that the SABC is thus bound by the Constitution including the following provisions:

21.1 Section 1(d) in terms of which the founding values of the Constitution include "accountability, responsiveness and openness".

21.2 Section 195(2)(b) read with s 195(1) which provide inter alia that all organs of state must adhere to the following values:

21.2.1 A high standard of professional ethics must be promoted and maintained.[15]

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11 Section 8A(1) of the Broadcasting Act
12 Section 8A(1) of the Broadcasting Act
13 Chapter IV of the Broadcasting Act and ss 9 to 11 in particular
14 Sections 10(2) and 27(1)(a)(i) of the Broadcasting Act
15 Section 195(1)(a)

21.2.2 Efficient, economic and effective use of resources must be promoted.[16]

21.2.3 Transparency must be fostered by providing the public with timely, accessible and accurate information.[17]

[22] Counsel for the respondents alluded to the fact that the Broadcasting Act regulates broadcasting services generally and the SABC as public broadcaster in particular:

22.1 In terms of section 13(4)(b), the members of its board must collectively be "persons who are committed to fairness, freedom of expression, the right of the public to be informed, and openness and accountability of the part of those held in public office".

22.2 Section 6(8)(d) obliges the SABC to develop a Code of Practice that ensures that its services and personnel comply with "the rights of all South Africans to receive and impart information and ideas".

22.3 The SABC must exercise strict control over its finances:

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16 Section 195(1)(b)
17 Section 195(1)(g)

22.3.1 Section 18 obliges it to draw up proper financial regulations concerning the manner in which its financial affairs must be managed. The Minister of Communications must approve the regulations after consultation with the Minister of Finance.

22.3.2 In terms of subsections 24(1) and (2), it must keep proper account of all moneys received or expended by it and of all its assets, liabilities and financial transactions. It must prepare annual financial statements which show its revenues and expenditure and its assets and liabilities "in appropriate detail."

22.3.3 Its annual financial statements must be audited in terms of section 25. The auditor must in terms of section 25(5),

- disallow any payment made without proper authority according to law and report the disallowance to the SABC's board;

- charge against the person who made or authorised the payment in question, so much of the payment as is not condoned by the board, and

- charge the deficiency against the person responsible for it.

22.3.4 In terms of section 25(6), any amount so charged by the auditor, must be paid by the person against whom it has been charged to the SABC within 14 days.

[23] The SABC's annual financial statements and audit report must be submitted to the Minister of Communications who must table it in Parliament in terms of section 28.

[24] Mr *Trengove* furthermore alluded to the fact that the SABC is also subject to regulation in terms of the Public Finance Management Act. It is a "Major Public Entity" listed in schedule 2 and is thus subject to the requirements of chapter 6 of that Act.[18] Its board is its "accounting authority" responsible for its compliance with the Public Finance Management Act.[19] Its duties under this Act include the following:

24.1 In terms of s 50(1), the SABC's board must,

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[18] Section 46 of the Public Finance Management Act

[19] Sections 49(1) and (2)(a) of the same Act

"(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of (the SABC);

(b) act with fidelity, honesty, integrity and the best interests of the (SABC) in managing the financial affairs of the (SABC);

(c) on request, disclose to the (Minister of Communications) or (Parliament), all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of (the Minister of Communications or Parliament); and

(d) seek, within the sphere of influence of (the board), to prevent any prejudice to the financial interests of the state."

24.2 Section 83(1) provides that the SABC's board commits an act of financial misconduct if it wilfully or negligently,

- fails to comply with the requirements of s 51 mentioned above or
- makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

24.3 In terms of section 57, every other official of the SABC,

> "(a) must ensure that the system of financial management and internal control established for (the SABC) is carried out within the area of responsibility of that official;
>
> (b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;
>
> (c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under-collection of revenue due."

24.4 Section 55(1) obliges the SABC to keep full and proper records of its financial affairs and prepare annual financial statements which must be audited. In terms of section 55(2)(b), the annual financial statements and report must include particulars of,

> "(i) any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year;
>
> (ii) any criminal or disciplinary steps taken as a consequence of such losses or irregular expenditure or fruitless and wasteful expenditure;
>
> (iii) any losses recovered or written off."

24.5 The SABC must submit its annual financial statements and report to,

- National Treasury;[20]
- the Minister of Communications;[21]

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[20] Section 55(1)(c)(ii)
[21] Section 55(1)(d)

- the Auditor-General,[22] and

- the Director-General for Communications for tabling in Parliament by the Minister.[23]

[22] Section 55(1)(d)
[23] Section 55(3) read with s 65(1)

[25] I understand counsel for the respondents to have made the submissions in paragraphs [21] to [24] above to make the point that any right which the SABC may have to privacy in regard to the report was trumped by the public interest in the disclosure of its contents. Counsel for the SABC did not dispute the submissions of the respondents in regard to the SABC's public accountability and its duty to manage its resources properly. Indeed, it would have been surprising if they had done so. It must in fairness to Mr *Van Blerk* be recorded that he was scrupulous to emphasise that the SABC accepted its responsibilities to the public.

[26] In the *Prinsloo* case Van Der Westhuizen J said that:

> I am of the view that the possession of such images[24] by someone who is not authorized by the original author or those depicted on them could in principle amount to an ongoing violation or at least a continuing threat of violation of one's privacy.[25]

[24] i.e. photographic images of persons engaged in sexual acts
[25] At 456H

I do not know much about pornography but I should imagine that the experience of viewing pornography is qualitatively different from reading about financial irregularities. Conversely, but similarly, I should imagine that the sense of indignity is qualitatively different if one knows that others are viewing one *in flagrante delicto* (in the very sexual act) in contradistinction to knowing that others are reading about one's alleged financial irregularities.

Mr *Van Blerk* seemingly conflated "confidentiality" with "privacy". Although there are similarities between the two, I am not sure that they are the same. As was said by Langa DP, as he then was, in the unanimous judgment of the Constitutional Court in *Investigating Directorate: SEO v Hyundai Motor Distributors*:[26]

> Juristic persons are not the bearers of human dignity. There privacy rights can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy.

The right to privacy is closely linked to the right to dignity; confidentiality more to the effective functioning of organizations.

Mr *Trengove* submitted that it is not clear that organs of state such as the SABC generally enjoy privacy protection at all. It is

[26] 2001 (1) SA 545 (CC) at para [18]. See also: *Magajane v Chairperson, Northwest Gambling Board* 2006 (5) SA 250 (CC at paras [42 to [50]; *Thint v NDPP* 2009 (1) SA 1 (CC) at para [77]

a good point. In this regard it is instructive to go back to an old case, *Die Spoorbond and Another v South African Railways; Van Heerden and Others v South African Railways*[27] in which Watermeyer CJ delivering the majority judgment, with which Schreiner JA agreed but added additional observations, said:

> On the other hand the Crown's main function is that of Government and its reputation or good name is not a frail thing connected with or attached to the actions of individuals who temporarily direct or manage some particular one of the many activities in which the Government engages, such as the railways or the Post Office; it is not something which can suffer injury by reason of the publication in the Union of defamatory statements as to the manner in which one of its activities is carried on. Its reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature.

In other words, if there is any truth in the aphorism that "Cowboys don't cry" is true, it applied with even greater vigour to the Crown and this at a time when "the Crown" received considerable deference. It should be borne in mind that this judgment was delivered at a time when there was effectively only one omnibus "organ of State" – the Crown.

[27] 1946 AD 999

In *Church of Scientology v Reader's Digest Association*[28] Van Den Heever J said:

> The words of Watermeyer CJ in *Die Spoorbond and Another v South African Railways; Van Heerden and Others v South African Railways* 1946 AD 999 at 1009 may, *mutatis mutandis* be applied to the non-trading associations that most readily come to mind, such as churches and other concerns rendering service of some kind or another to the public or sections of the public.

As far as I am aware, this passage has not been criticized in any judgment of our courts. Reputation and privacy are closely linked and it seems to me that much the same could have been said about privacy. Besides what can be "private" about public affairs such as the conduct of the business of a public broadcaster?

I accept that in the *Investigating Directorate: SEO v Hyundai Motor Distributors* case, Langa DP went on to say:

> Exclusion of juristic persons (from a right to privacy) would lead to possibly grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance have free licence to search and seize material from any non-profit organization or corporate entity at will. This would obviously lead to

[28] 1980 (4) SA 313 (C)

> grave disruptions and would undermine the very fabric of our democratic state.

Three observations need to be made: (i) Langa DP was referring to juristic persons generally rather than the specific *genus* (type or kind) of "organs of State"; (ii) if the State wishes to search and seize from its own organs, this will, except in rare instances, be unlikely to be offensive to the public, public policy or the courts and (iii) the circumstances in which a court may wish to prevent search and seizure in organs of State would almost certainly derive from a desire to protect information from being lost or destroyed rather than the protection of that organ of State's right to privacy. It seems to me that the *Sunday Times*' possession of a copy of the report does not infringe the SABC's right to privacy because there is no such right to be infringed. Even if I am wrong that the SABC has no right to privacy, then as I have said in paragraph [18] above, I cannot see how, consequent upon events recorded above, the delivery of the copy of the report will, in any event, affect this privacy because the horse has bolted: there can be no restoration of privacy by the delivery of the copy of the report. In this regard the document is fundamentally different from the pornographic material which was considered in the *Prinsloo* case. If I am correct that "privacy" and "confidentiality" are not coextensive, then I would also repeat another of my conclusions in paragraph [18]

above: confidentiality was lost when the copy of the report was handed over to the *Sunday Times* and handing it back again will not restore the confidentiality which has been lost.

[27] Mr *Trengove* addressed me on the importance of freedom of expression and the freedom of the media. Of course, these freedoms are of huge importance in a democratic society. Nevertheless, I do not see how the *Sunday Times*' possession or loss of possession of the document *per se* (in and of itself) affects either freedom. Without intending any discourtesy to counsel for the respondents, I shall therefore not summarise their arguments on these issues in this judgment. Rather more complex is the question of the protection of the identity of the *Sunday Times*' source of the information. As I have observed in paragraph [11] above, the respondents have expressed their concern that the delivery of the *Sunday Times*' copy of the report could lead to the uncovering of the source. As I have also observed, the SABC, in its replying affidavit, deals with this issue cryptically: it does not deny that it will be able, as a result of obtaining the document, to uncover the source; it also does not deny any such intention and does not proffer any assurances in this regard. Mr *Trengove* relied on what was said about bare or ambiguous denials where a disputing party must necessarily possess knowledge of the facts and be able to provide an answer (or countervailing evidence) in the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd and*

Another[29] to submit that their was a real risk that the delivery of the document would uncover the identity of the source and that this was in fact the real reason for the application because no other cogent explanation existed for why it was brought. I do not think that I can go so far as to find that this is indeed the real reason for the application but I accept that there is reason to suspect that it may be so.

[28] Mr *Trengove* accepted that our law sometimes allows the victim of a delict who cannot identify the perpetrator, to compel a third party who knows who the perpetrator is, to disclose his or her identity.[30] Mr *Trengove* submitted, however, that this rule does not avail the SABC by reason of the following:

- it is limited to "the type of case where an order is sought for the disclosure of the name of a principal where it is intended to sue that principal"[31] and

- it only entitles the victim to disclosure of the name of the perpetrator and does not entitle him or her to demand the evidence necessary to prove who the perpetrator is.

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[29] 2008 (3) SA 371 (SCA) at para [13]
[30] *Roamer Watch Co SA v African Textile Distributors* 1980 (2) SA 254 (W) 282A to E; *Cerebos Food Corp v Diverse Foods SA* 1984 (4) SA 149 (T) 166I to 167I; *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) 469E to I; *A v R Kinder-en Kindersorgvereniging* 1996 (1) SA 649 (T) 655A to 656H
[31] *Cerebos Food Corp v Diverse Foods SA* 1984 (4) SA 149 (T) 166I to 167A; *A v R Kinder-en Kindersorgvereniging* 1996 (1) SA 649 (T) 656G to H

[29] It should be noted that the SABC disavows any reliance on such a cause of action. It says in reply that it "does not claim return of the report on the ground that it requires it to be able to identify the person or persons responsible for furnishing the report to the respondents".

[30] The court accepts that one of the most valuable assets of a journalist is his or her source. Sources enable journalists to provide accurate and reliable information. Sources are often in possession of sensitive facts which they would be unwilling to disclose without a guarantee that their identities will not be revealed. The protection of journalists' sources is therefore fundamental to the protection of press freedom.[32] As Lord Denning has observed:

> [I]f [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known.[33]

[32] Pinto 'How sacred is the rule against the disclosure of journalists' sources?' *Entertainment Law Review* (2003) 170.

[33] *British Steel Corporation v Granada Television Ltd* [1981] A.C. 1096 at 1129.

[31] The court also accepts that journalists in open and democratic societies throughout the world, recognise the importance of preserving the confidentiality of their sources and that they consider it to be their duty to protect their sources' confidentiality. The *Sunday Times* gives examples of a variety of media codes of conduct which recognise this duty in its answering affidavit. These codes include the SABC's Editorial Code of Ethics which provides that "We shall not disclose confidential sources of information".[34]

[32] The duty to preserve the confidentiality of sources is recognised in South African law. Almost a hundred years ago, it was held in *Spies v Vorster*,[35] that an editor should not be compelled to disclose the identity of the author of an anonymous letter because it was contrary to the public interest to compel him to do so:

> If an editor were bound to disclose the name of his correspondent there would be an end of the confidential relationship between the correspondent and the newspaper which has existed for generations, to the advantage of the public, and many an abuse would go unremedied and many a grievance unredressed because those who knew, for reasons good or bad, were unwilling or unable to allow their name to be published. However

[34] SABC's Editorial Code of Ethics SS5
[35] (1910) 31 NLR 205

> much it may be abused, as it often is, to air personal grievances and to injure, there can be no doubt that many anonymous communications have been the means of effecting valuable and wide-reaching reforms. A decision in favour of the applicant if applied in other cases might lead to very serious consequences and do much to restrain freedom of communication and breed suspicion and distrust. Its application to other causes of action might destroy that freedom of communication which is so essential to comfort and well-being.[36]

[33] In *S v Cornelissen*[37] it was recognised that, although a journalist did not enjoy any privilege against compelled testimony, he nonetheless had a just excuse for not testifying in a criminal trial where the police had not attempted to interview any other witnesses who could be called to give the same evidence without impinging upon the public interest in preserving the independence of journalists.

[34] In the *Prinsloo* case Van Der Westhuizen J acknowledged that:

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[36] P 216
[37] 1994 (2) SACR 41 (W)

> it is a well-known and important consideration on the part of the media not to disclose information made available to it or their sources of information. Without going into the detail of areas or situations where this principle may be subject to debate, I accept that it is an important element of the integrity of a free press.[38]

[35] The European Court of Human Rights has held that a violation of the protection of confidential sources, is an unlawful interference with the fundamental right to freedom of expression. It said in the case of *Goodwin v United Kingdom* that

> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the 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 effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of

[38] At 475 A – B.

> the Convention unless it is justified by an overriding requirement in the public interest."[39]

[36] In England journalists are protected from revealing their sources by section 10 of the Contempt of Court Act, 1981 which provides that no person is obliged to disclose a source of information unless such disclosure is 'necessary in the interests of justice ... or for the prevention of disorder or crime'. In applying this section, the English courts have held as follows:

> In *X v Morgan Grampian Publishers Ltd & Others*,[40] the House of Lords held that the question for the court is whether the interests of justice in supplying the name of the source to the applicant 'are of such preponderating importance in the individual case that the ban on disclosure imposed by the opening words of the section really needs to be overridden.

[37] In *Saunders v Punch Ltd*,[41] the plaintiff applied under section 10 of the Contempt of Court Act for disclosure of the

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[39] *Goodwin v United Kingdom* (1996) 22 EHRR 123 para 39. See also *de Haes and Gijsels v Belgium* (1998) 25 E.H.R.R. 1; *Roemen and Schmidt v Luxenbourg* [2003] ECHR 102 and *Ernst and Others v Belgium* (2004) 39 E.H.R.R. 35

[40] (1991) 1 AC 1 (HL)

[41] (1998) 1 WLR 986 (Ch.D)

magazine's source in respect of confidential material relating to communications between the plaintiff and his solicitors that had been published in an article. The court refused to order disclosure even though there had been a breach of legal professional privilege because first, there was also a public interest in the protection of journalistic sources;[42] secondly, there was no evidence that the confidential information was still in circulation;[43] and thirdly, the court was not satisfied that it was necessary in the interests of justice.[44]

[38] In *Sir Elton John v Express Newspapers*,[45] the Court of Appeal refused to compel a journalist to disclose the identity of the source who had given him a copy of a draft opinion which had been stolen from counsel's chambers and published in breach of Elton John's legal professional privilege.

[39] In *Ashworth Hospital Authority v MGN Ltd*,[46] the House of Lords adopted the principles of the European Court in Goodwin and emphasised the importance of the right to freedom of expression in a democratic society. Lord Woolf stated that "any disclosure of journalists' sources does have a

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42 at 999
43 at 1001
44 at 1002
45 [2000] 3 All ER 257 (CA)
46 [2002] 1 W.L.R. 2033

chilling effect on freedom of the press"[47] and 'the fact that information which should be placed in the public domain is frequently made available to the press by individuals who would lack the courage to provide the information if they thought there was a risk of their identity being disclosed. The fact that journalists' sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public'.[48]

[40] The court accepts counsel for the respondents' submissions that numerous other foreign jurisdictions also recognise the importance of protecting journalists' sources.[49]

[41] At the end of the hearing, one could not escape the impression that the respondents were hoping that this was a case in which some ground-breaking precedent on the protection of journalists' sources would be set. Of course, I accept, in general terms, the importance of protecting journalists' sources. Nevertheless, one of the "golden rules" for

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[47] at 2050.
[48] At 2050.
[49] See, for a general survey of comparative jurisdictions: Banisar "Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources" prepared for Privacy International accessible at: www.privacyinternational.org/foi/**silencingsources**.pdf accessed on 29.09.2009 by counsel for the respondents.

judges is “If you can decide a case without deciding a controversial point, then don’t decide the controversial point”. It would only become necessary to decide whether or not to expose the source to the risk of being uncovered, if it appears that a balancing act has to be undertaken between this and a competing interest which vests in the SABC. In my view the SABC has failed to establish any right or interest justified in law in receiving the delivery of the copy of the report.

[42] To summarise: The SABC has no proprietary right to delivery of a copy of the report; the respondents owe the SABC no obligation to do so in terms any contractual relationship with the SABC; the respondents have committed no delict against the SABC; the respondents have not violated any right to privacy or confidentiality of the SABC; there has been no copyright violation by the respondents; their has been no unlawful competition by the respondents; there is no statutory right upon which the applicant stakes its claim, other than broad and, in my view, mistaken, reliance upon the Constitution. There appears to be no legal peg upon which the SABC can hang the relief which it seeks. Among lawyers there is a maxim, cast once again in the redoubtable Latin, *ubi ius, ibi remedium* (where there is a right there is a remedy). The converse seems to be true as well: in the absence of a right,

there is no remedy.[50] In *Dalrymple and Others v Colonial Treasurer*[51] Innes J, as he then was, said:

> But the far more difficult question remains, Are the applicants vested with a right; is there any right resident in them, in respect of which they are entitled, by reason of the breach of the statute, to claim the protection of an interdict? The general rule in our law is that no man can sue in respect of a wrongful act unless it constitutes a breach of a duty owed by him by the wrong-doer, or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence.

[43] I should mention that counsel for the parties made passing reference to the case of *Tshabalala-Msimang and Another v Makhanya and Others*[52] which has a certain superficial resemblance to this case in certain respects. In that case my brother Jajbhay J ordered the respondents to return certain health records to the second applicant. In doing so, however, he relied on the provision of the National Health Act, No.61 of 2003.[53] Counsel for the parties agreed that this case was not legally relevant to the one now before me.

[44] I shall now deal with the question of the admission of the Freedom of Expression Institute ("the FXI") as *amicus curiae*.

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[50] A useful discussion on the issue can be found in "*Locus Standi in Judicio or Ubi Ius Ibi Remedium*" by Andrew Beck, 1983 SALJ 278
[51] 1910 TS 372 at 379
[52] 2008 (6) SA 102 (W)
[53] See para[32]

The SABC opposed the admission of the FXI as an *amicus*. The respondents agreed to abide the decision of the court. At the commencement of the hearing, in order not to protract the hearing needlessly, I provisionally agreed to admit the FXI as an *amicus* but indicated that I would neither hear the FXI's counsel or read his prepared heads of argument before I had fully considered the question of the FXI's admission as *amicus* and made a final determination on the issue. *Mr Van Blerk* relied on *Fose v Minister of Safety and Security*[54] and *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others*[55]to submit that, in the absence of the consent of the parties, it is not sufficient that the applicant for such admission must have an interest in the matter but, in addition, must be able to show that it will raise new contentions which may be useful to the court. Mr *Van Blerk* submitted that the FXI would not "bring anything new to the party" and, accordingly should not be admitted. Rule 16A of the High Court rules which relates to admissions of *amici curiae* in matters in which a "constitutional issue" has been raised, requires applicants for admissions as *amici curiae* to set out reasons for believing that their submissions "are different from those of other parties". On the other hand, in *Minister of Justice v Ntuli*[56] the Constitutional Court decided that even though there was

[54] 1997 (3) SA 786 (CC) at para [10}
[55] 2002 (5) SA 713 (CC) at para [3]
[56] 1997 (3) SA 772 (CC)

nothing to indicate that the argument for the Human Rights Commission would differ from that of another party, it should nevertheless be admitted as an *amicus* as it had a interest in the matter. The FXI is certainly no interfering busybody in this case. It obviously has an interest in the matter, in the sense recognized by the Consiutional Court in such matters (and the SABC did not seem to consider it otherwise). The FXI's submissions will not protract proceedings in any significant way. It has been commended previously by the Constitutional Court for its submissions as an *amicus*.[57] It seems to me that the possibility that an aspirant *amicus* may or may not raise new or different matter is a factor to be considered but the absence of novelty is not necessarily, and in itself, destructive of the application. Although the FXI has raised nothing which the respondents have not done (other than to submit that I should apply my mind to the test in *Setlogelo v Setlogelo*[58] for mandatory interdicts, which, with due respect, I consider to be hardly novel), it seems to me to be a proper exercise of a judicial discretion to admit it as *amicus*. A relaxed but not a slack approach towards *amici* seems appropriate in these types of cases. It is useful to the court to know what the stance of a respected body like the FXI is in a matter such as this.

[57] See the *NM v Smith* case (*supra*) at para [6}
[58] 1914 AD 221 at 227

[45] Not only the applicant but also the repondents employed two counsel. The employment of two counsel has been warranted in view of the wider implications of this matter. There is no reason why costs should not follow the result. The costs order will in no way impact upon the admission of the *amicus curiae*.

[46] The following is the order of the court:

(i) The application is dismissed with costs which costs are to include the costs of two counsel;

(ii) The admission of the *amicus curiae* is to have no bearing on the order as to costs and the *amicus* is neither awarded any costs nor is to pay any portion of any party's costs.

DATED AT JOHANNESBURG THIS 14th DAY OF OCTOBER, 2009.

N.P. WILLIS
JUDGE OF THE HIGH COURT

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Counsel for the Respondents: W.H. Trengove SC (with him, K. Hofmeyr)

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Date of hearing: 7 October, 2009

Date of judgment: 14 October, 2009