THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

…….. ……..

DATE SIGNATURE

CASE NO 2015/33205

SOUTH AFRICAN AIRWAYS SOC **APPLICANT**

AND

BDFM PUBLISHERS (PTY) LTD **FIRST RESPONDENT**

MONEYWEB HOLDINGS LTD **SECOND RESPONDENT**

MEDIA 24 HOLDINGS (PTY) LTD **THIRD RESPONDENT**

JUDGMENT

Headnote

Legal advice privilege - nature of – it is a species of confidential information – it is not an absolute right in SA law - it is a negative right to prevent admission into evidence of advice obtained from a legal advisor in confidence - it is not a positive right to preserve confidentiality of advice if information disclosed by unauthorised means – legal advice privilege not available to invoke against the world learning of the communications between client and legal advisor

A person may rely on a right to the preservation of confidentiality in one' own information, inclusive of legal advice in respect of which legal advice privilege can be claimed – if confidentiality not yet breached, an interdict may be an appropriate form of relief to preserve confidentiality - if confidentiality in information subject to a claim of legal advice privilege is lost or any other information loses its attribute of confidentiality – unlikely that any interdictory relief can be effective – such order inappropriate

Waiver of right of privilege or of right to confidentiality of information – concept of imputed waiver – applicant had on four occasions communicated with journalists without claiming any of its rights were violated – question of whether this course of conduct amounted to a constructive intention to waive any rights which ought to be imputed to applicant- imputed waiver not to be lightly inferred – a claim of privilege can be belated – on the facts no waiver proven

Any claim of a right to confidentiality subject to the public interest in the information being published to the public – section 16 of the constitution to be weighed – on the facts, applicant was an organ of state who financial and governance affairs were of legitimate interest to all South Africans – applicant having been subject to critical scrutiny for a long time – little of what was claimed as confidential information was not already in the public domain before the document containing the confidential legal advice was leaked to the media – no harm demonstrable by applicant that outweighed publication in the public interest – publication appropriate

Applicant sought an interdict against three media houses to prevent publication of a document or its contents in order preserve confidentiality of legal advice contained therein which was subject to a claim of privilege - publication already had occurred when application served – urgent order granted – upon reconsideration ito Rule 6(12) (c) held that order was futile and was set aside

Urgent applications ito rule 6(12) – responsibility of applicant's attorney to take reasonable steps to achieve effective service - not a collegial courtesy, rather a mandatory duty – default procedure set out for matter in respect which less than one days' notice is to be given –

Applicants' attorney not fulfilling responsibilities regarding service- unprofessional management of logistics of service – service of 30 minutes late at night by email to persons not responsible for management of the newspapers – service a farce – inadequate disclosure of such facts to urgent judge – attorney and client costs awarded against applicant

Sutherland J:

Introduction

1. This case is about what remedies are available to a person whose confidential legal advice, in respect of which that person claims legal professional privilege, is by some or other unauthorised means, released into the public domain. Moreover, the case also is about the appropriate way to approach a court for an urgent interdict. These issues arise in an application by the respondents, all media houses, for a reconsideration in terms of Rule 6(12)(c) of the Uniform rules of the High Court of an ex parte order obtained by the applicant, South African Airways (SAA) to interdict them from publishing information derived from a particular document belonging to SAA.[1]

2. In addition to condoning non-compliance with the Rules of court on grounds of urgency, the relevant portion of order granted at the urgent hearing provided thus:

> '(2) The respondents are interdicted from publishing the legal opinion including all or any of its contents, signed by Ms Fikilepi, an attorney employed by the applicant as a general manager in its legal risk and compliance department.
> (3) Publication, including the press, on the internet and/or in the social media or any other media of the contents of the opinion is prohibited and interdicted.
> (4) The respondents are to remove all references to the opinion, including all or any of the contents of the opinion that has already been published on the internet and social media.
> (5) Publication as set out in (2) – (4) above is interdicted pending the determination of an application for a final order interdicting the publication of the legal opinion of Ms Fikilepi.'

[1] Rule 6(12) (c) provides that: ' A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order' The approach by the court is a comprehensive revisit of the circumstances as they present at the time of the reconsideration. See: ISDN Solutions (Pty) Ltd v CSN Solutions CC & Others 1996 (4) SA 484 (W) at 486H-J; Lourenco & Others v Fenela (Pty) Ltd & Others (No 1) 1998 (3) SA 281 (T); Industrial Development Corporation of South Africa v Sooliman & Others 2015 (5) SA 603 (GSJ)

3. I have had the benefit of not only counsel for the litigants, but also counsel representing two amici curia, the *South African National Editors Forum* and *Section 16*, both organisations concerned with the promotion of freedom of expression, pursuant to Rule 16A of the Rules of Court, the litigants having consented thereto.

4. SAA, is a public company and an organ of state, whose financial affairs have been the subject of intense public interest and media scrutiny for several years in which its viability as a going concern has been the main theme together with the financial support given to it by the state. A selection of reportage over the year preceding this application was attached to the answering affidavit of the respondents illustrating the controversies. Among the controversies has been the process of acquisition of new aircraft and how SAA might be able to pay for them.

5. According to Ursula Fikilepi, who describes herself as the General Manager: Legal Risk and Compliance, of SAA, she was asked in confidence by the acting CEO to provide advice to the executive on this matter, and to that end, she composed a submission, including her legal opinions, with recommendations to be put to the board of directors. A document was created which is titled 'Advice on the legal impact of the correspondence from Airbus dated 2 and 26 October 2015 relating to the predelivery payments under the A320-200 purchase agreement' which was co-signed by her and by the acting CEO on 5 November 2015. The correspondence referred to was pertinent to whether a novation of an existing agreement might be concluded which would relieve SAA from the imminent obligation to pay money it did not have, and if required to pay up, what effect the embarrassment of not being able to pay that debt would have on the triggering of various penalties, on the risk of trading under insolvent circumstances, on committing breaches of provisions of the Companies Act 71 of 2008, and in the absence of another financial

bale-out from the state, on the need to apply for business rescue in terms of the Companies Act. That the contents of the document were confidential to SAA is incontrovertible.

6. This is the document which SAA alleges contains legal advice, in respect of which privilege is claimed on the premise that it is confidential legal advice given to SAA by its in-house legal advisor, Fikilepi. The evidence adduced in Fikilepi's affidavit demonstrates that the information was obtained in confidence and was given by her in her capacity as legal advisor. She says she is an attorney, but does not say whether she is a practising attorney on the practising roll or is on the non-practising roll. [2] Prima facie, it seems that the required conditions which would have to be present to make the advice contained in the document *eligible* for a claim of privilege by SAA are indeed present. No serious challenge was made to the proposition that the contents of the document are eligible to be the subject matter of a claim of privilege.[3]

7. SAA insists on a confirmation of the interdict, and at the reconsideration stage formally amended the terms of the prayers sought to seek a final interdict. There are several controversies in relation to whether the order should be confirmed or set aside, which I deal with in turn. They are:

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[2] The notion that an attorney who is not in private and independent practice but who is an employee of an entity, is a person who is contemplated as an appropriate 'legal advisor' for the purposes of the legal professional privilege is recognised in our law. See: Van der Heever v Die Meester 1997 (3) SA 93 (T) & Kommissaris van Binnelandse Inkomste v Van der Heever 1999 (3) SA 1051 (SCA) and Mohamed v President, RSA 2001 (2) SA 1145 (C), these decisions drawing inspiration from the dictum of Lord Denning in Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2) [1972] 2 All ER 353 (QB) at 376.

[3] An argument was raised in the papers that the document, properly construed, was that of the acting CEO, who signed it and that it was a communication by the CEO to the board, rather than a legal opinion from Fikilepi to the CEO. The contention was not pressed. Indeed, in my view, appropriately so, because Fikilepi herself also signed it, and moreover, the particular form in which an opinion is captured or stored, ought not to be dispositive of the status of the document or of its contents. The allegation by Fikilepi that her confidential opinion was encapsulated in the document ought to be accepted as prima facie proof of that assertion.

7.1. The absence of effective service of the urgent application.

7.2. The futility of the order, given the extent of publication prior to the application being served and the order being granted.

7.3. Whether legal professional privilege can be invoked to obtain an interdict against publication.

7.4. If legal professional privilege ever existed in respect of the information in the document, whether such privilege, by reason of SAA's conduct in not claiming it when interacting with certain journalists, ought to be held to mean that SAA waived the privilege on the premise of an 'imputed waiver'.

7.5. Assuming a right by SAA in the confidentiality of the contents of the document, whether the public interest, including, but not limited to, the rights of free expression pursuant to section 16 of the Constitution should trump such confidentiality rights of SAA.

7.6. The overbreadth of the order.

8. Because of the view I take of the matter, it is not strictly necessary to address each of these themes in this judgment to dispose of it. However, as all these issues are generic to disputes of this nature and are likely to come up again, it is appropriate to express a view on them all.

A Narrative of the events leading to the taking of the urgent order

9. Sometime between 5 November 2015 and Saturday 21 November 2015, at latest, the document entered the public domain. Whether a person who had legitimate and authorised access to the document revealed it, or a person not authorised to have access to it, stole it, is unknown. The only certain fact is that SAA's right to the confidentiality of the document was violated.[4]

10. This much SAA knew, because it was on 21 November that the first of the journalists, Tina Weavind, writing for City Press, a publication of the Third respondent, made contact with Yakhe Kwinana, the chair of the Finance and Audit Committee to ask questions relating to information derived from the document.

11. On Sunday 22 November 2015, the City Press published Weavind's story, 'SAA's CEO turbulence' which quoted from the text of the document. Ostensibly, Kwinana, who at the time of the telephone conversation with Weavind, was weekending at Keiskammahoek in rural Transkei, did not have the presence of mind to alert her colleagues to the conversation. Kwinina claims that she was unaware Weavind had the document, but on the probabilities this is implausible. Weavind had initially tried to speak to the Board Chair, Dudu Myeni, but was unable to reach her, and then troubled to track down Kwinina. The likelihood that she did not try to elicit comment about the contents of the document or so contrived to ask questions so as to conceal she had the document, is, in my view, nil when the story she must have already had in preparation drew heavily on the

[4] As to the right of a person to protect the confidentiality of its own records, See: Janit & Another v Motor Industry Fund Administrators (Pty) Ltd & Another 1995 (4) SA 293 (SCA). In that matter, the confidential records of the respondent had been stolen and given to the appellant, who was privy to the unlawful act. The appellant wished to adduce the records in evidence. The court a quo excluded the records from evidence. The appellant was also ordered to hand over the records and was interdicted from passing the information on to third parties. (See, esp at 331). Also, SABC v Avusa & another 2010 (1) SA 280 (GSJ) at esp [18].

text. What is not stated by Kwinina is whether she had read the document, but the likelihood that she had not, given her role in SAA and the contents of the document, make that improbable; alternatively, if so, quite startling.

12. From that Sunday, 22 November there were three more occasions when one or other journalist was in contact with Tlali Tlali, who is SAA's public affairs spokesman. These contacts were made between the time of the City Press's distribution, and the purported attempt to serve an application for an urgent interdict on the three respondents late on Monday night. Those occasions were these:

12.1. On Sunday 22 November, Antoinette Slabbert, a freelance journalist, writing for Moneyweb, a publication of the second respondent, emailed Tlali at 10h59 with questions about the contents of the document. She asked for responses by 18h00 on 22 November. Tlali replied on Sunday evening and said a response would be forthcoming, perhaps as early as that night. Tlali had passed the questions to Lusanda Jiya, the General Manager: Stakeholder/ Shareholder Relations. She had notified Fikilepi, and suggested to her that the board should respond. Fikilepi had embraced that suggestion.

12.2. On Monday 23 November, at 13h39, Carol Paton, who writes for Business Day, a publication of the first respondent, emailed questions to Tlali. The questions pertinently interrogated SAA's stance on the contents of the document. She asked for comment by 17h00 that day. Tlali acknowledged receipt of this request at 13h50. Tlali called her well after 17h00, at about 19h35. He asked if the story had been filed.

She confirmed that it had been. She said changes could be made up to 20h00. Although saying he would try to get a response to pass on, Tlali did not call again.

12.3. On Monday 23 November at about 20h00, Tlali called Slabbert. She offered to make changes to her story if comment was received by 22h00. She also confirmed publication would be triggered between 03h00 and 04h00 the next day, Tuesday 24 November. However, alerted to social media reportage emanating from Business Day on the issue, it was decided by Paul Jenkins, the Moneyweb manager, that to compete with Business Day, he would post Slabbert's article on line earlier. Slabbert then called Tlali and told him of the earlier publication time. The story was published in Moneyweb at 20h18 as "SAA board should apply for business rescue – SAA legal Head".

13. The importance of these four interactions lies not as much in what was actually said, which was precious little, but in what was not said. On not a single occasion did any representative of SAA demand that publication be stopped. On not a single occasion did any representative of SAA claim privilege. Indeed, the very first moment when privilege was claimed was in the founding affidavit deposed to by Fikilepi. To this significance of this point I shall return. More immediately, there are several aspects about the urgent application itself, to be addressed.

14. According to Fikilepi, a decision was taken by the Acting CEO, at 17h00 on Monday 23 November to launch an urgent application to stop the three respondents from publishing stories referring to the document. At 19h00, apparently, counsel was consulted, and advice was given upon which the application was prepared.

15. Taken at face value, the earliest opportunity to alert the responsible persons in charge of the three respondents who, it could be reasonably supposed, had control over the publication process, of an impending urgent application, was shortly after 17h00, or, if it be regarded as prudent to have first taken counsel's advice, probably by 20h00, at latest. Nothing of the sort took place, despite the fact that Tlali was in touch with Slabbert and with Paton until about 20h00.[5] To the significance of the failure of a demand to stop publication and the failure to notify any respondent of an impending urgent application, I shall return.

16. The so called 'service' of the application occurred at about 22h00, by email to Slabbert, Paton and Ferial Hafajee, editor of City Press, who was on extended leave of absence, and then when, so it is assumed, her auto reply indicated she was away, it was emailed to the acting editor, Dumisani Lubisi, and one other staff member. As indicated earlier, not one of these persons had been forewarned. The editorial staff of the third respondent were emailed, but not the editorial staff of the first and second respondents.

17. Of the three, only Slabbert (a freelancer with no authority to do anything about the logistics of publication) was up and about, studying for an exam the next day, to see the email with the draft application arrive at about 22h00. In it SAA declared an intention to seek an interdict against publication at 22h30, half an hour hence. SAA's attorney phoned Slabbert at about 23h30, 90 minutes after transmission, and about thirty minutes before SAA actually went before a judge, to ask if she had received the papers. She confirmed that she had. Slabbert had, in the interim, reported the events to Jenkins, who took the

[5] Apparently, Tlali flew out of OR Tambo Airport at 20h35 on 23 November and returned on 28 November 2015.

view that nothing could be done to resist in time. Notably, Slabbert referred the attorney to Jenkins. The attorney saw fit to call Jenkins at 01h43, more than two hours later and after the order had been taken, and when, predictably, Jenkins was asleep. Jenkins got the missed message in the morning.

18. The order was taken just after midnight. It was emailed to the respondents variously between 01h24 and 01h43. Paton and the editor of Business Day, Songezo Zibi learned of the order from about 05h30 on 24 November by which time two editions of Business Day had been distributed. The Third respondent's editorial staff learned of the matter after 07h00 on 24 November. A physical copy of the order was left at the security desk at the office of Business Day at 02h30 on Tuesday morning, ostensibly with no note to the security staff of its significance. It reached the editor at 10h00.

19. It is notable that the notice of motion emailed does not say where the order shall be sought. In the absence of any express statement, it would have been assumed the venue was the Johannesburg High court, not a judge's home. Moreover, no provision is made in the notice of motion what the respondents could do if they wished to oppose. In any event, as the example of the second respondent plainly shows, even though it had actual knowledge of the application before the papers were placed before a judge, half an hour's notice at 22h00 to a freelance journalist of an order to be sought at an unspecified place was ineffective service, to say the least. The other two respondents did not and could not have become aware of the application until after the order had been granted; the inefficacy of the service on them is even more demonstrable. In the case of the third respondent, the service was effected about two and a half days after City Press had published the story.

20. Moreover, at the time the *decision* was taken to bring an application, the City Press had already published details from the contents of the document and the Tweets circulating about the document from the editor of Business Day were known to Fikilepi. At the time the *order was taken*, Moneyweb had already published. By the time the *existence of the order* came to the attention of the first respondent, two editions of Business Day had been published, in which appeared Paton's story 'Dire choices for Airline SAA'.

21. In addition, by way of illustration of the widespread dissemination of the document, references appeared in Legalbrief, an online news service on 24 November, and, perhaps among others, Max du Preez, an independent journalist and leading commentator on public affairs, unaware of the events already described, posted a copy on his website at on 24 November. Subsequently, he took down that post under threat of an interdict in which the urgent order obtained was plainly invoked *in terrorem*. However, not merely comment on the document but the full text is accessible to the world on the internet. In the nature of the internet and information shared on it, the document has and presumably, continues to be accessed by any number of people. The metaphor of a horse having bolted is inadequate; a better image might be that virus has infected the world's literate population.

The ineffective service of the urgent application and its implications

22. The principle of *audi alterem partem* is sacrosanct in the South Africa legal system. Although, like all other constitutional values, it is not absolute, and must be flexible enough to prevent inadvertent harm, the only times that a court shall consider a matter behind a litigant's back are in exceptional circumstances. The phrase "exceptional circumstances' has regrettably through overuse, and the habits of hyperbole, lost much of

its impact. To do that phrase justice, it must mean very rarely, only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established.[6]

23. In this case the purported service was, *de facto*, no service at all. The order was taken *ex parte,* and the service was a farce. The single paragraph in the founding affidavit which stated that service had been performed by email, was true only in the meanest possible way.

24. The nature of the relief sought is not such that an *ex parte* order could ever have been justified. Doubtless, SAA appreciated this obvious fact that service was necessary. However, what it and its legal representatives did pursuant to a responsibility to achieve effective service in order to respect the principle of *audi alterem partem,* was not simply clumsy, but unprofessional. When a litigant contemplates any application in which it is thought necessary to truncate the times for service in the Rules of Court, care must be taken to use all reasonable steps to mitigate such truncation. In a matter in which less than a day's notice is thought to be justifiable, the would-be applicant's attorney must take all reasonable steps to ameliorate the effect thereof on the would-be respondents. The taking of all reasonable steps is not a collegial courtesy, it is a mandatory professional

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[6] Section 6(12) (a) and (b) provides:

> (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.
> (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

See too: Luna Meubel Vervaardigers (Edms) Bpk v Makin & another 1977 (4) SA 135 (W). More recently, Wepener J, addressed at length the importance of compliance and the responsibility of practitioners: IN RE Several Matters on the Urgent Court Roll 2013 (1) SA 549 (GSJ) esp at [17]

responsibility that is central to the condonation necessary to truncate the times for service. When there is the prospect of a hearing before a judge after business hours, and even more so, when there is the prospect of the hearing taking place elsewhere than in a courthouse, the duty to take reasonable steps is ever more important and imperative.

25. In this case, without any forewarning, on, at most, 30 minutes notice, the application was emailed at 22h00, at time at which it is unreasonable to have expected that the email would at once be read. The phone calls from SAA, 30 minutes later, reached one out of the three persons to whom the papers had been sent, who was fortuitously awake, to receive it. The notice omitted to state the venue for the hearing. In any event, by then it was too late to offer even token opposition. None of this could not have been appreciated by SAA.

26. In my view it is incumbent on the attorney of any person who contemplates an urgent application on less than 24 hours' notice, to undertake the following default actions in fulfilment of the duty to ensure effective service:

26.1. At once the respondents are properly identified, the names and contact details, ie phone, cell, email, fax, and physical addresses of persons who have the authority to address the application must be ascertained. Obviously, if the issue has already been the subject of debate between the parties and an attorney has already been retained by a respondent, such attorneys contact details will top the list.

26.2. At the earliest moment after deciding to bring an urgent application, contact must be made to demand compliance with the relief to be sought and to alert one or more of such persons of the intention to bring an application, stating where it is likely

to be heard, when it likely to served, and the identity of the judge on urgent duty. Agreement should be reached about who should receive service on behalf of the respondent by email or fax or other method.

26.3. Next, the urgent judge shall be alerted, and a report made whether or not the respondents have been alerted.

26.4. When the papers are ready for service, direct contact shall again be made with the persons dealing with the matter on behalf of the respondent. Where delays occur, the respondents must be kept informed by interim calls to report progress.

26.5. Sufficient time must be allowed for the respondents to read and digest the papers. It is appropriate to send a notice of motion in advance of the founding papers to give the respondents a chance to formulate a view about the relief being sought.

26.6. When the papers are about to be served electronically or otherwise, the urgent judge should be consulted about when and where the hearing will occur, if at all, and how much notice must be given, in the context of earlier alerts to the respondents.

26.7. Once served in any manner other than by personal physical delivery, the attorney must immediately call the respondent's representatives directly to confirm actual receipt of all the papers.

27. The argument was advanced that there was a failure by the legal representatives of SAA to make full disclosure to the urgent judge. That argument addresses two aspects, first, the inefficacy of the service, and secondly, factors which made the grant of the order futile. I

address the latter topic elsewhere in this judgment. As regards the aspect concerning the logistics of the service of the urgent application and a failure to properly inform a judge in an *ex parte* application, there is no doubt that a failure to properly inform a judge of all material facts, whether inadvertently or deliberately, may lead to a dismissal on such grounds alone.[7]

28. The replying affidavit of SAA does not illuminate what oral disclosures about service were made, if any. It would have been important to know, why contemporaneous calls were not made when service was emailed, and whether the judge was informed calls were later made to switched-off cellphones, thereby highlighting the impossibility of a response by the respondents. Moreover, it would have been important to know if the judge was alerted to the fact that the respondents had no forewarnings at all prior to the emails. The affidavits of SAA do not contain any rebuttals of the allegations in the answering affidavit that falsehoods appear in the founding affidavit. [8] These falsehoods include the pretence that Slabbert in conversation with Tlali did not 'threaten' publication, when the exchange with Tlali was quite plain that publication would occur with or without SAA's comment, a stance plainly obvious from the questions she had emailed to Tlali on Sunday. Further, it was incorrect to claim that Tlali had asked for undertakings not to publish from the journalists, and that they had refused, because no such remark was made by Tlali. The respondents' allegations in this regard are not challenged in reply. These were misrepresentations that were calculated to positively mislead the judge and obscure the unprofessionalism attendant on the service of the application.

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[7] De Jager v Heilbron & Others 1947(2) SA 415 (W) at 419-420; Hassan v Berrange N.O. 2012 (6) SA 329 (SCA) at [14]. On the duty of disclosure itself: Schoeman v Thompson 2001 (1) SA 673 € at 283; Power N.O. v Bieber 1955 (1) SA 490 (W) at 503A-504C. Estate Logie v Priest 1926 AD 312 at 323.

[8] On the application of the rule in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 E-G the respondent's version prevails in such circumstances.

29. In my view, these misrepresentations, together with the sham service do justify considering, in the exercise of a judicial discretion, a dismissal of the application on those grounds alone. It was argued by counsel on behalf of SAA that the deficiencies in the manner in which the application was managed were deserving of criticism but were to be explained by the intensity of the pressure under which the application was prepared. That explanation may plausibly address the practitioners' shortcomings. There is however no excuse for the misrepresentations of fact which emanate from the employees of SAA. Counsel submitted that the deficiencies be addressed by way of a costs order rather than dismiss the application on such grounds. As it is appropriate to address the substantive merits of the application, I shall not exercise my discretion to dismiss the application for these reasons but shall indeed address the matter by way of a costs order.

The Futility of the relief sought

30. In my view, the facts adduced in the evidence contained in the affidavits demonstrates abundantly that the order, as granted, was futile even as the ink dried upon it, and at the reconsideration stage, that condition is even more plain. As a matter of policy, courts have long recognised that, in general, they should not make orders to which effect cannot be given. This is of course, not an inflexible rule. It is now commonplace for courts to give judgments on issues which are moot, a radical departure from earlier practice. What characterises these decisions is that despite mootness, some public interest is served by the issues being decided. It is a species of judicial discretion underpinned by a demonstrable broader utility.[9]

[9] Leading examples of decisions on moot issues include: Sebola & others v Standard Bank of SA 2012(5) SA 142 (CC) at [32]ff; Buthelezi v Minister of Home Affairs & Others 2013 (3) SA 325 (SCA)

31. But in circumstances, such as the present, even when the court may recognise that a wrong has been committed, ie a violation of a person's right to the confidentiality in that person's own information, where a court cannot conceive of any utility in an order and which would, if granted, be a mere sterile gesture, the approach of the courts has been to refuse relief. There are several examples.

32. The spectacular cases often, like this case, involve publications, because, it may be supposed, in the nature of disseminated information, once it is released it cannot be retrieved, and no court, limited by territorial jurisdiction can enforce its judgments abroad. In the controversy about the publication in Great Britain, and elsewhere, of the book 'The Spycatcher', which supposedly revealed British state secrets, in refusing an injunction against the publishers, the remarks of Sir Nicolas Browne-Wilkinson echo still:

> " ….I have borne in mind, rightly or wrongly, one further factor of the public interest. In think that the public interest requires that we have a legal system and courts which command public respect. It is frequently said that the law is an ass. I, of course, do not agree. But there is a limit to what can be achieved by orders of the court. If the courts were to make orders manifestly incapable of achieving their avowed purpose, such as to prevent the dissemination of information which is already disseminated, the law would to my mind indeed be an ass."[10]

33. In Giggs v New Group Newspapers Ltd & another [2012] EWHC QB at [11] a celebrity figure whose social indiscretions were made public failed in an application for an injunction because once his identity was known, no order could put the confidentiality back into the bottle.

34. South African courts recognise the futility of such orders too. In South Atlantic Development Corporation v Buchan 1971 (1) SA 234 (C) at 239G, a court gave an

[10] Attorney- General v Guardian Newspapers Ltd [1987] 1 WLR 1248 at 1249.

interim order prohibiting a fishing vessel from sailing from the Cape with the intention of fishing in the waters off Tristan da Cunha. When the matter came up for the order to be made final, it was refused because it was not practical to enforce. Diemont J held at 239G that:

> 'An interdict is essentially a practical remedy and if it appears that in the form in which it is cast it will not afford the applicant the protection which he seeks the court will hesitate to come to his assistance.'

35. In Tshabalala-Msimang v Makhanya & Others 2008 (6) SA (W), Jajbhay J addressed the theft of a patient's private and confidential medical records which were leaked to the press. The invasion of her privacy was held to egregious. Asked to interdict further comment on the information, which was in the public domain, Jajbhay J refused, remarking at [56] that:

> 'Whatever I may think of the conduct and reporting behaviour of the respondents in the present matter, it would be false to the precepts of our Constitution if I allowed the interdict against the respondents, from further commenting on the issues that have already entered the public domain. The prospect of favouring the applicants with this remedy may suspend journalism in a manner too dangerous to accept'.

36. In Manyathse v M & G Media [2009] ZASCA 96 at [12], the appellant had been defamed by a premature identification of him as an Accused in criminal proceedings. Despite the violation of his rights, the court held an interdict would be of no useful effect and refused the application, a finding upheld on appeal.

37. In SABC v Avusa 2010 (1) SA 280 (GSJ), Willis J dealt with a demand by the SABC to return to it a confidential document revealing various irregularities that had fallen into the hands of the Sunday Times. The court affirmed a right to the protection of a person's confidential information, distinguishing that right from privacy rights. At [26] Willis J

remarked that: '….confidentiality was lost when the copy of the report was handed over to the Sunday Times, and handing it back will not restore the confidentiality which has been lost'. The absence of any duty of confidentiality by the reporters of the Sunday Times to the SABC, unlike the duties of persons who stood in some form of relationship to the SABC from which such a duty could derive, like employees, meant that possession and dissemination of the information by the newspaper could not attract a liability to desist.(at [18])

38. Moreover, an interdict is an appropriate form of relief to *prevent future* harm, not afford redress for past harm.[11] Once confidentiality is shattered, like Humpty Dumpty, it cannot be put back together again.[12] It is not apparent how frank SAA was when addressing the urgent judge and whether the difficulties arising from the extent of publication were properly drawn to her attention and moreover whether the case law on the approach of the courts to lost confidentiality were mentioned. It seems rather plain that had these matters, no less the real inadequacies of service, been fully dealt with, the order might not have been so readily granted.

39. None of these remarks should be understood to mean that the grievance which SAA harbours about the breach of its rights of confidentiality in its internal documentation is unworthy of protection, or that a person has no remedies to protect confidentiality in information.

Can 'legal advice privilege' be invoked against the world to protect confidentiality?

[11] Philp Morris Inc v Marlboro Shirt Co Ltd 1991 (2) SA 720 ADS at 735B-C.
[12] Bank of Lisbon and South Africa v Tandrien Beleggings (Pty) Ltd & Others 1983 (2) 626 (W) per Van Dijkhorst J; at 629G: 'The basis of privilege is confidentiality. When confidentiality ceases, privilege ceases. See Wigmore, 3rd ed, para 2311.'

40. The principal jurisprudential controversy ventilated in this matter has been about the claim by SAA of a right of legal professional privilege over the information in the document, and the implications of such a claim, including whether SAA can invoke such a claim against the world and whether, in any event, its failure to claim privilege, despite the engagement with the journalists on four occasions, can be taken as a basis to counter argue that a waiver of privilege must be imputed.

41. On behalf of SAA it has been argued that legal professional privilege is a human right. That proposition has direct support in the judgment of Lord Hoffmann, in Special Commissioner & another , Ex P Morgan Grenfell & Co Ltd v R [2002]UKHL 21 at [7], where it was held that:

> '[Legal Professional Privilege] is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.'

42. Moreover, Lord Scott in Three Rivers District Council & Others v Governor and company of the Bank of England [2004] UKHL 48 at [25] remarked that:

> ' ….if a communication or document qualifies for legal professional privilege the privilege is absolute. It cannot be overridden by some supposedly greater public interest.'

43. Building upon that proposition it was further argued on behalf of SAA that once a person has exercised the human right to claim privilege over given information, the right of privilege in respect thereof can be invoked as against the world to protect and preserve the confidentiality of the information which is subject to a claim of privilege.

Accordingly, so runs the argument, even when that confidentiality has been breached, the right to protection is not extinguished, but continues in perpetuity. Thus, the confirmation of the order is appropriate, because a clear right has been established in the right to privilege so described, further publication will perpetuate the harm, and no other suitable remedy can achieve the suppression of further dissemination of the information. Accordingly, on that premise, it is argued that the requirements for a final interdict as held in Setlogelo v Setlogelo 1914 AD 221 at 227 have been met.

44. It seems to me to be necessary to deal first with various aspects of the terminology used to describe the right of 'privilege' before embarking on an analysis of the contentions advanced in the debate. I do so because, in my view, several conceptual clarifications are necessary.

45. The point of departure is to identify exactly what is meant by the concept of 'privilege' in the context of legal advice taking. With the possible exception of Section 201 in the Criminal Procedure Act 51 of 1977,[13] the idea of a legal right to the confidentiality of communications between a client and a legal adviser, is judge-made law. As such the rationale for the idea of privilege has evolved over time in response to judicial

[13] Section 201 of the criminal procedure Act 51 of 1977 provides:

> 'No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.' This provision create a privilege for the lawyer in contradistinction to the common law concept which is that the privilege is that of the client.

perceptions and evolving social mores about how court proceedings might appropriately be conducted. In our era, it is incontrovertible that the 'right' vests in the client. Also, it is clearly recognised that there are two sub-species of this right. One is called legal professional privilege, or legal advice privilege. I prefer the label legal advice privilege on the grounds that this phrase actually tells one what it is about, whilst the former phrase demands further explanation. The other sub-species is litigation privilege, which label too, is self- explanatory.[14] What SAA claims is legal advice privilege.

46. The more interesting question is the *content* of the right; ie, what does the right which vests in the client, entitle the client to do? In the discourse about the privilege it is commonplace to read or hear it said that a 'document is privileged'. This is a convenient shorthand way to express oneself, but it suffers from three drawbacks in distilling the exact content of the right.

46.1. First, it is not, in truth, the document which is 'privileged'; rather, what is really meant to be said is that the *information* which is contained in the document is privileged. This distinction is less precious than it may seem, at first glance, to be.

46.2. Secondly, to describe the *information* as privileged, obscures the point that the right *vests in the client* not in the information and the right is an *entitlement to claim* 'privilege' over the information. This can and must mean no more than *a right to refuse to divulge the information and prevent it being adduced in evidence in any proceedings,* usually legal proceedings, but also any sort of adversarial proceedings

[14] The study of this topic by D T Zeffertt and A P Paizes in The South African Law of Evidence, 2nd Edition, at pp 625 – 671 furnishes an historical account of the conceptualisation of 'legal privilege'. See too: Three Rivers District Council & Others Governor and Company of the Bank of England [2004] UKHL 48 at esp [10]

where the recipient of legal advice is involved. [15]The information is, thus, never more than the subject matter of a claim of privilege.

46.3. Third, the 'privilege' cannot reside in the information anyway, because it only becomes the subject matter of the claim of privilege *when that right not to disclose it is claimed, and not before*. At most, the information *per se*, can never be more than *eligible* to be the subject matter of legal advice privilege; ie, if it satisfies the test of being (1) legal advice, (2) given by a legal advisor (3) in confidence to a client and (4) is claimed.[16] If privilege is not claimed the information about the legal advice can be adduced in legal proceedings because then, to use the shorthand, it is not 'privileged'.

47. Moreover, in divining the exact nature of the right, its rationale must dictate the nature of the right. The rationale for the concept of legal advice privilege has been distilled from what has been understood to be the essence of the adversarial legal system. The right of a person to a guarantee of confidentiality over communications with that person's legal advisor is an indispensable attribute of the right to counsel and the adversary litigation system. The professional duty of legal practitioners towards their clients is inseparable from the duty to respect their clients' wishes about the secrets revealed by the clients and the confidential advice given to the clients. The legal advisor is by reason of that relationship forbidden to reveal the communications in any proceedings because the relationship between the legal advisor and the client establishes a right by the client against the legal advisor to preserve confidentiality. It is plain that the privilege is so-called precisely because it is an exception to the rule about what *must* be adduced.

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[15] Ferreira v Levin N.O. & Others 1996 (1) SA 984 SCA at [96]

[16] See: Thint (Pty) Ltd v NDPP 2009 (1) SA (CC) per Langa CJ at [184] and footnote 124, citing Schwikkard et al, Principles of Evidence, 2nd Ed , Juta (20020 at 135-7.

48. By invoking such legal advice privilege, no less than litigation privilege, the client invokes a 'negative' right, ie, the right entitles a client to refuse disclosure by holding up the *shield of privilege*. What the right to refuse to disclose legal advice in proceedings cannot be, is a 'positive right'; ie a right to protection from the world learning of the advice if the advice is revealed to the world without authorisation. The client may indeed restrain a legal advisor on the grounds of their relationship, and may also restrain a thief who takes a document evidencing confidential information, on delictual grounds.

49. But if the confidentiality is lost, and the world comes to know of the information, there is no remedy in law to restrain publication by strangers who learn of it. This is because what the law gives to the client is a 'privilege' to refuse to disclose, not a right to supress publication if the confidentiality is breached. A client must take steps to secure the confidentiality, and if these steps prove ineffective, the quality or attribute of confidentiality in the legal advice is dissipated. The concept of legal advice Privilege does not exist to secure confidentiality against misappropriation; it exists solely to legitimise a client in proceedings refusing to divulge the subject matter of communications with a legal advisor, received in confidence.[17] This vulnerability to loss of the confidentiality of the information over which a claim of privilege can and is made flows from the nature of the right itself. The proposition about the consequences of loss of confidentiality is endorsed by the authorities.

50. Wigmore, Evidence in Trials at Common Law, (1961) (Ed J T McNaughton) Vol 8, at paragraphs 2325- 2326. States:

[17] This notion does not, in my view, contradict the dictum by Botha JA in State v Safatsa 1988 (1) SA 868 (AD) at 886G in which he expressed agreement with the perspective expressed by Dawson J in Baker v Campbell (1983) 49 ALR 385 that the rule about privilege is not a mere rule of evidence, but rather, by implication, a substantive law rule. The central idea is that it is a rule which underpins the legal system and is not merely a procedural aid. I agree.

> 'All involuntary disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle (Paragraph 2326 infra) that, since the law has granted secrecy so far as its own process goes, it leavers to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents.
>
> The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but no more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are largely in the client's hands and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain the knowledge of the communications. One who overhears the communication, whether with or without the clients knowledge is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy.(Paragraph 2325 supra)'

51. The idea, propounded by Lord Scott, as cited above, and relied upon by counsel for SAA that no (further) balancing is required in respect of legal advice privilege, is an attractive notion, if it is understood to operate within the confined zone of legal proceedings, in which it might to thought that the concept of privilege is already the outcome of a balancing between contending social values about the efficacy of the adversarial legal system and all the necessary compromises have already been accomplished. However, that is not our law. Lord Scott, recognised that the law of Canada did not regard privilege as absolute, and although he did not allude to South Africa, neither does our law regard it as absolute. In Thint (Pty) Ltd v NDPP 2009 (1) SA 1 at [183] – [185] Langa CJ held:

> 'The right to legal professional privilege
> [183] The applicants did not assert that the Constitution itself protects legal professional privilege and I therefore do not need to explore that question now. We are thus primarily concerned with the common-law right to legal professional privilege, and with how that right is protected by s 29 (11) of the Act. Again, because it is accepted by all the parties to this case that the legislation and common-law principles in question are consistent with the Constitution, the applicants' arguments must be assessed, in the first instance, in the light of the applicable provisions of s 29 of the Act. Of course, both the common-law right and the statutory provisions must be dealt with in a way

> that complies with s 39(2) of the Constitution. I turn first to consider the right to privilege and then deal with s 29(11).
>
> [184] The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right a fair trial in terms of s 35 of the Constitution, and for that reason it is to be taken very seriously indeed.
>
> [185] Accordingly, privileged materials may not be admitted as evidence without consent. Nor may they be seized under a search warrant. They need not be disclosed during the discovery process. The person in whom the right vests may not be obliged to testify about the content of the privileged material. It should, however, be emphasised that the common-law right to legal professional privilege must be claimed by the right-holder or by the right-holder's legal representative. *The right is not absolute; it may, depending upon the facts of a specific case, be outweighed by countervailing considerations.'* (Emphasis supplied, footnotes omitted)

52. As held in Midi TV t/a E-TV v DPP 2007 (5) SA 540 (SCA) by Nugent JA at [9] ff, a balancing is unavoidable to reconcile contending values protected in the constitution. The way in which the Promotion of Access to Information Act 2 of 2000 (PAIA) deals with legal privilege illustrates its place in the legal normative system. Section 40 requires a public body to refuse to hand over information which is 'privileged from production in legal proceedings'. But that is subject to the section 46 public interest override. That section provides:

> 'Despite any other provision in this chapter [ie including section 40] the information officer of a public body must grant a request for access to a record of the body contemplated in [various sections of the chapter] if
> (a) The disclosure of the record would reveal evidence of:
> (i) A substantial contravention of or a failure to comply with the law, or
> (ii) An imminent and serious threat to safety or environmental risk; and
> (b) The public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

53. In summary therefore, in my view, the law is as follows:

53.1. Legal advice privilege is a negative right to refuse to disclose, in proceedings, any confidential information exchanged between attorney and client.

53.2. Legal advice privilege cannot be invoked to assert a positive right to the protection or preservation of information whose confidentiality has or may be breached through unauthorised means as a result of which the information has become or may become known to strangers.

53.3. The limitations on the application of legal advice privilege position does not inhibit a person from seeking relief to prevent publication of confidential information, whether confidential because of the claim of privilege or because its confidential in a general sense.

53.4. Any relief sought from a court to protect any form of confidential information is subject to any recognised public interest overrides, an exercise which requires a balancing of contending values in a fact-specific context.

54. It follows that the contention advanced on behalf of SAA that legal advice privilege is absolute cannot succeed. The understanding of legal advice privilege, as described in this judgment, does not detract from the right, eg, in the case of SAA, to an interdict to protect *confidential information*, regardless of whether it was information that is subject to a claim of privilege or simply any other confidential information. On the facts of this case,

SAA had a right protect its right to confidentiality, which is its true cause of action, rather than legal advice privilege. Information which is the subject of a claim of privilege is simply an example of one form of confidential information. However, as addressed elsewhere, at the time relief was sought and granted, the confidentiality of the information had already been lost.

Was there waiver of confidentiality of the information in the document?

55. The contention to be tested is whether SAA should be held to an imputed waiver of confidentiality. Again this is a shorthand way of expressing the position where, by reason of the ambivalent conduct of a client, such conduct is held to be inconsistent with a claim of privilege and a constructive intention to waive confidentiality is to be imputed.[18] An imputed intention it is to be assessed by external manifestations which induce strangers to commit themselves to a course of conduct premised on an absence of a claim of confidentiality

56. In State v Tandwa 2008(1) SACR 613 (SCA) Cameron JA recognised that the rationale for imputing such a constructive intention was fairness. At [18] it was held that;

> 'Imputed waiver occurs where- regardless of the holders intention- fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment'

57. Because, in my view, it was not open to SAA to articulate a claim to privilege to found the interdict, the question of waiver of privilege *per se* does not arise on the facts.

[18] Eg, Mann v Carnell (1999) 201 CLR 1; Kommisaris Van Binnelandse Inkomste v Van der Heever 1999 (3) SA 1051 (SCA) at [24], citing Wigmore, (1961) Vol 8, Paragraph 2327, on 'waiver by implication' – a label equivalent to 'imputed waiver'.

However, as I have held that SAA could have invoked confidentiality, the same test would apply to that question.

58. The contestation about waiver crystallised thus: On behalf of the respondents, it was argued that SAA, on four opportunities to do so, repeatedly failed to claim a right to privilege, and that course of conduct is sufficient to impute a waiver. On behalf of SAA it was argued that the time period that elapsed between knowledge of the breach of confidentiality and the service of the application was brief, ie two days, and furthermore, that the several authorities cited all illustrate instances where the imputed waiver was linked to the client's culpability in some degree in causing the release or partial release of the information. [19] In this case, it was argued, no basis exists to hold that SAA was culpable in the revelation of the confidential information. Moreover, a belated claim is not *per se* a reason to deny a claim of privilege, as Langa CJ, in Thint Ltd v NDPP 2009(1) SA 1 (CC) at [193] held:

> 'If a searched person does not know or appreciate that items are privileged, and therefore fails to claim the privilege during the search, *he or she does not lose the right to claim subsequently the common law protections provides to privileged items.* The right to object to the admissibility of privileged items will remain and the matter will only be determined when the State seeks to have the items admitted in evidence.'(Emphasis supplied)

59. In my view, SAA can properly be criticised for not proclaiming a right to confidentiality earlier. However, if it is correct that waiver requires clear proof, and is not lightly to be

[19] Examples of waiver in which the holder of privilege was implicated in its loss include: Euroshipping Corporation of Monrovia Minister of Agricultural Economics and Marketing 1979 (1) SA 637 (C); Competition Commissioner v ArcelorMittal 2013 (5) SA 538 SCA; Derby & Co Ltd v Weldon [1990] 3 All ER 762; Guiness Peat Properties Ltd v Fitzroy Robinson Partnership (a firm) [1987] 2 All ER 716; Bank of Lisbon and South Africa Ltd v Tandsrien Beleggings (Pty) Ltd (No 2) 1983 (2) SA 626 (W) ; State v Nhlapo 1988 (3) SA 4812 (T); Ex Parte Minister Van Justistie: In Re S v Wagner 1965 (4) SA 507 (AD); Peacock v SA Eagle Insurance Co Ltd [1991] 3 ALL SA 602 (C); Spedley Securities Ltd (in Liq) v Bank of New Zealand (1991) 26 NSWLR 711.

inferred, then in order to impute such an intention to waive from conduct, the test must for that can be no less strict. On the probabilities, it cannot be assumed that the employees of SAA construed the document as being eligible for a claim of privilege earlier than the consultation with their attorney and counsel. That probability and the clumsiness that attended the urgent application seem to me to go hand in hand. Self-evidently, a litigant who has a right, but who is ignorant of it or uncertain if it can be invoked in given circumstances, ought not to be unsuited because of a delay matching the time taken to get advice about the very right being asserted.

60. Accordingly, in my view the circumstances evidenced in this matter do not justify imputing a waiver of confidentiality of the information to SAA.

The Public Interest

61. Assuming I were to be wrong to find that futility disposes of the matter, and that SAA remains entitled to an order, at least to protect its confidential information, the question arises whether in the public interest further suppression of the information should be allowed. I am of the view that it does not.

62. The information in the document that was not previously in the public domain or was not subsequently put into the public domain by a public statement on 3 December 2015 by the Treasury about the Airbus transaction, is very little. Indeed, the only revelation of note seems to me to be the knowledge that at least two executives of SAA were diligently applying their minds to the predicament in which SAA found itself, appreciated that it

was inappropriate to trade recklessly in insolvent circumstances, appreciated that positive steps were necessary, and advised the board of directors candidly and fully on what steps could be taken to avoid embarrassment, both financially and in terms of governance protocols.

63. The harm alleged in the founding affidavit is said to be financial and reputational damage to SAA and to the government. In the replying affidavit, these allegations were amplified by suggesting that the way SAA responds to the airbus correspondence might result in an action against SAA by creditors or might trigger unspecified provisions of the companies Act. In my view these allegations are vacuous. Moreover, knowledge that the executive is applying it mind to problems which were already well known, is unlikely to diminish SAA's reputation any further than the controversy that had raged beforehand had damaged it. The options alluded to in the document about what to do about the Airbus transaction are self-evident and do not address strategies, indeed on the crucial legal aspects, it calls for expert advice to be procured on English law, which law governs the transaction, and about which Fikilepi quite properly advised should be obtained from an English Law legal advisor.

64. Over and above those factors, it would be precious indeed to inhibit further comment about the issues that derive from the contents of the document. The approaches as illustrated in SABC v Avusa and in Tshabalala-Msimang v Makhanya, (supra), in my view, commend themselves to me.

65. Moreover, the controversy about SAA and its dependence on taxpayer funds seems to me to be a demonstrably obvious topic about which every citizen has a tangible interest to be informed. If the constitutional promise of transparency in public administration is to mean

anything, then awareness of what public bodies do with the nation's money is a low threshold to demand. When an existing controversy is raging, this is all the more so. Accordingly, the public interest in being informed outweighs the right of SAA to confidentiality in the contents of the document.

Overbreadth of the Order

66. The criticism advanced relates to paragraph 3 of the order. In my view were the plain text to have been intended to apply to the world it would have unequivocally been overbroad. However, I am satisfied that the text is intended to be confined to the three respondents and appearances to the contrary are simply the result of poor drafting. If indeed, as has been suggested, but about which I have made no firm finding, the demand made to Max du Preez to remove the document from his website was based on this order, rather than a threat of a further interdict against him, the demand made of him was wholly improper. No further comment is necessary.

Costs

67. The Respondents having been successful must be awarded their costs. The scale of costs is dictated by the conduct of the urgent application. What I have described as unprofessionalism in the management of the application is a sufficient reason to award punitive costs. Barring that factor, an attempt by a justifiably aggrieved person to seek relief against a breach of its confidential information would have, in general, attracted a sympathetic reception on costs. However the egregious conduct by SAA described above, in my view, warrants a costs order on the attorney and client scale.

The Order

68. I make this order:

68.1. The order granted on 24 November 2015 is set aside.

68.2. The applicant shall pay the costs of the respondents, including the costs of two counsel, on the attorney and client scale.

_____

Roland Sutherland
Judge of the High Court,
Gauteng Local Division, Johannesburg.
Hearing: 9 December 2015
Judgment: 17 December 2015

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