IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

GP Case No.: 46074/18
SCA Case No.: 1032/19
CC Case No.: 39/21

In the matter between

UNITED DEMOCRATIC MOVEMENT	First Applicant
BANTUBONKE HARRINGTON HOLOMISA	Second Applicant

and

LEBASHE INVESTMENT GROUP (PTY) LTD	First Respondent
HARITH GENERAL PARTNERS (PTY) LTD	Second Respondent
HARITH FUND MANAGERS (PTY) LIMITED	Third Respondent
WARREN GREGORY WHEATLEY	Fourth Respondent
TSHEPO DUAN MAHLOELE	Fifth Respondent
PHILLIP JABULANI MOLEKETI	Sixth Respondent

APPLICANTS' WRITTEN SUBMISSIONS

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INTRODUCTION: AN EVERGREEN 'INTERIM' INTERDICT THAT SUPPRESSES POLITICAL SPEECH

1. The leader of an opposition political party writes to the President.[1] He reports his suspicions of conflicts of interest involving a former employee of the Public Investment Corporation, as well as the PIC's former chairperson (who also served as the Deputy Finance Minister), and their relationship with PIC-funded companies.[2] They all rush to urgent court and ask for an interim interdict pending a defamation action. The High Court grants the interdict, and orders the political-party whistleblower to stay silent about his allegations while the defamation action winds its way through trial court. The High Court also orders tweets about the allegations be taken down and removed from Twitter, today's town square.

2. Recognising the importance of the issues involved and the far-reaching nature of its order, the High Court exercises its discretion and grants leave to appeal despite the interim nature of the interdict. A splintered SCA, over two strident dissents, second-guesses the High Court's ruling on leave to appeal and on appealability, and strikes the appeal from the roll.

3. Nearly three years after the High Court granted its 'interim' interdict, its order still muzzles the leader of the opposition party, and the town square remains shut for robust debate on this important public issue.

4. The dissents in the SCA got it right: interim interdicts against already-published and substantially true allegations about public figures should not be so "eas[y]",[3]

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[1] Record v 1; p 48.
[2] Record v 1; p 48.
[3] Record v 5; p 450, para 57.

especially when the interdict is against a Member of Parliament and an opposition political party.

5. Nor should it be so "eas[y]" for the SCA to second-guess and revisit a High Court's decision that an interim interdict is appealable and that leave to appeal should be granted. The new, more structured framework for appeals in the Superior Courts Act 10 of 2013 restricts the SCA's options when it comes to hearing appeals. A rehearing on appealability and leave to appeal is not one of them.

6. The High Court was wrong to grant an interim interdict, and the SCA was wrong to strike the UDM and Mr Holomisa's appeal from the roll. This Court should grant leave to appeal and set aside the decisions of the SCA and High Court.

THE FACTS

7. During 2018, concerning allegations about the PIC and two former public officials came to Mr Holomisa's attention.[4] Mr Holomisa believed it was his duty to bring these allegations to light.[5] After all, in our party-dominant system of government, opposition parties like the UDM play a vanguard role in holding the Executive accountable.

8. The allegations involve conflicts of interest in breach of section 96 of the Constitution and other impropriety relating to PIC funding.

9. This is the cast:

[4] Record v 5; p 462, para 8.
[5] Record v 5; p 462, para 8.

9.1. The PIC. The PIC is a state-run investment vehicle and asset-management firm. The government owns it and the Minister of Finance its representative shareholder.[6] Its clients are, according to its website, mostly "public sector entities which focus on provision of social security." These include the Government Employees Pension Fund, and Unemployment Insurance Fund. The PIC is a National Government Business Enterprise under the Public Finance Management Act 1 of 1999, subject to a host of prudential obligations that flow from that Act. The PIC is also subject to tailored obligations and requirements in its empowering statute. In short, the PIC is a public body with a public mandate managing public money.

9.2. Jabu Moleketi, the sixth respondent. Mr Moleketi served as Deputy Minister of Finance from 2004 to 2008.[7] In that role, he also served as chairperson of the PIC.[8]

9.3. Tshepo Mahloele, the fifth respondent. Mr Mahloele worked at the PIC from 2003 to 2006.[9] He held a senior position: Head of Corporate Finance.[10] He was also at the helm of the PIC's Isibaya Fund.[11] According to the PIC's website, the Isibaya Fund is a "division" of the PIC that invests in "commercially viable African projects that have a strong, positive developmental impact and transformation."

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[6] Section 3 of the Public Investment Corporation Act 23 of 2004.
[7] Record v 1; p 14, para 5.8.
[8] Record v 1; p 14, para 5.8.
[9] Record v 1; p 13, para 5.7.
[10] Record v 1; p 13, para 5.7.
[11] Record v 1; p 13, para 5.7.

9.4. Lebashe Investment Group (Pty) Limited, Harith General Partners (Pty) Limited, and Harith Fund Managers (Pty) Limited, the first to third respondents. They are private companies that are, to varying degrees, beneficiaries of PIC funds and loans or otherwise involved with the PIC. The fourth respondent, Warren Wheatley, is a director and the chief investor officer of Lebashe.

10. Mr Mahloele resigned from the PIC in March 2006. A month later, the PIC, then still under Mr Moleketi's chairmanship, tasked Mr Mahloele to set up the Pan African Infrastructure Development Fund with R25 million seed capital from the PIC.[12] Part of the Fund's strategy was to extend loans to companies in the private sector.

11. About a year later, in January 2007, Mr Mahloele set up Harith Fund Managers, a private company, to manage the Fund.[13] Harith Fund Managers was set up using PIC funds. The PIC owned 46% of Harith Fund Managers.[14] Up to 30% was owned by the Harith Share Incentive Scheme Trust for the benefit of employees of Harith Fund Managers.

12. Mr Moleketi, while chairperson of the PIC, was appointed as a non-executive director and chairperson of Harith Fund Managers.[15] Mr Mahloele also became a director.[16]

[12] Record v 3; p 281, para 8.
[13] Record v 3; p 281, para 9.
[14] Record v 3; p 282, para 9.3.
[15] Record v 3; p 282, para 9.4.
[16] Record v 3; p 282, para 9.4.

13. In September 2008, Mr Moleketi resigned as Deputy Minister of Finance and chairperson of the PIC. Despite his resignation, he stayed on as chairperson of Harith Fund Managers.

14. At some point, another private company was established, Harith General Partners. For some reason, Harith Fund Managers subcontracted its management agreement in respect of the Fund to Harith General Partners.[17] As much as 70% of this new company, Harith General Partners, is owned by a third iteration of Harith, Harith Holdings (Pty) Limited, and the remaining 30% by the PIC.[18] In turn, Harith Holdings is wholly owned by the Harith Share Incentive Scheme Trust. Mr Moleketi and Mr Mahloele are directors of Harith General Partners.[19] Harith General Partners later raised a second iteration of the Pan African Infrastructure Development Fund.[20] The Government Employees Pension Fund and the Development Bank of South Africa invested close to $360 million in this second iteration of the Fund.[21]

15. As it transpires, Mr Mahloele and Mr Wheatley go back: Mr Wheatley used to work at Absa Capital (Pty) Limited, where Mr Mahloele was one of his clients.[22] Mr Mahloele owned shares in the exotically named investment vehicle, Coral Lagoon (Pty) Limited.[23] Carol Lagoon owned a lot of Capitec shares.[24] It purchased the shares using loan funding from another government entity, the

[17] Record v 3; p 285, para 11.1.
[18] Record v 3; p 285, para 12.2.
[19] Record v 3; p 286, para 12.4.
[20] Record v 3; p 286, para 12.5.
[21] Record v 3; p 286, para 12.5.
[22] Record v 3; p 287, para 13.1.
[23] Record v 3; p 287, para 13.1.
[24] Record v 3; p 287, para 13.1.

Industrial Development Corporation.[25] In 2012, Coral Lagoon wanted to pay off its debt to the IDC. Where did Coral Lagoon go to get the funds to do so? None other than Mr Mahloele's former employer, the PIC.[26]

16. In 2013, Mr Wheatley left Absa to set up an advisory company called TSS Capital (Pty) Limited. Two years later, Lebashe, the first respondent, was established. Lebashe's three directors are the now-familiar names: Mr Wheatley, Mr Mahloele and Mr Moleketi. Lebashe ended up buying the same Capitec shares that the PIC bought from Coral Lagoon.[27] Where did Lebashe get the funds to buy the Capitec shares from the PIC? It got R720 million from the PIC.[28]

17. In 2016, Lebashe bought another tranche of Coral Lagoon's Capitec shares.[29] Lebashe used loan funding to buy the shares. Where did Lebashe get the loan funding from for this round of shares? No points for guessing: the PIC, to the tune of R1.1 billion.[30]

18. The UDM and Mr Holomisa grew concerned that Mr Mahloele and Mr Moleketi abused their positions of high public office for personal gain. The intricate web connecting the respondents to the PIC suggests, at very least, that significant amounts of money has flowed from the PIC to the benefit of certain individuals and private entities in circumstances where conflicts of interest—actual or

[25] Record v 3; p 287, para 13.1.
[26] Record v 3; p 288, para 14.1
[27] Record v 3; p 289, para 16.3.
[28] Record v 3; p 289, para 16.5.
[29] Record v 3; p 289, para 16.5.
[30] Record v 3; p 289, para 16.5.

perceived—loom large. If this were the case, it would amount to a breach of section 96 of the Constitution.

19. Near the end of June 2018, the UDM and Mr Holomisa wrote to President Ramaphosa.[31] After explaining some of the allegations that had come to his attention, Mr Holomisa urged President Ramaphosa to expand the mandate of the State Capture Commission to include them. It is this letter that the respondents do not want the world to see.

20. Or, rather, they do not want the world to see it *again*: by the time the High Court granted its order, the letter was already published and widely disseminated. The UDM published the letter on its website. Links to the letter were tweeted from the UDM's and Mr Holomisa's Twitter accounts. The content of the letter was reported on in several online publications, on the radio and on television. Mr Holomisa gave interviews to the media.

21. President Ramaphosa did not ignore the letter. In October 2018, he appointed a commission of inquiry into the PIC, which was chaired by former President of the SCA, Justice Lex Mpati.

22. The commission was tasked with investigating, amongst other things, "[w]hether any alleged impropriety regarding investment decisions by the PIC in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefit for any PIC director, or employee or any associate or family member of any PIC director or employee at the time" and "[w]hether any PIC director or employee used his or her position

[31] Record v 1; p 48.

or privileges, or confidential information for personal gain or to improperly benefit another person".[32]

23. Justice Mpati released his report in March 2020. The full report is available at https://tinyurl.com/3cfdjp2p. The respondents feature in the report, and it reveals a few more strands to the tangled web just described:

23.1. The PIC appointed Mr Mahloele to lead the Pan African Infrastructure Development Fund "[w]ithout any due selection process or consideration or other candidates".

23.2. Harith Fund Managers, a "shelf company secured by Mahloele in his personal capacity" was then transferred to the PIC.

23.3. Before his appointment to "head up" Harith Fund Managers, and while he was still employed by the PIC, Mr Mahloele authored a memo "wherein the PIC, in November 2005, requested a mandate from the [Government Employees Pension Fund] to invest US$250 (R1,65 billion) in the [Pan African Infrastructure Development Fund]" (which, recall, Mr Mahloele would later "head up" at Harith Fund Managers).

23.4. According to Justice Mpati, the "fees charged by Harith Fund Managers were "punitive" and its management agreement was "certainly not…standard".

23.5. Speaking about the establishment of Harith Fund Managers, Justice Mpati summed things up like this:

[32] Record v 5; p 490.

> *"This meant that the PIC essentially funded an entity in which the person seconded from the PIC and later appointed as CEO, who had part of a 30% stake in the company, benefitted without incurring any financial cost."*

24. The report's ultimate findings involving Harith are at pages 67, and 433 to 435 of the report. They do not make for easy reading. Perhaps the most damning is Justice Mpati's description of the Harith saga as "exemplif[ying] using a position of trust for personal enrichment". Another example that Justice Mpati lists? VBS—quite the company for Harith and others to find themselves in. These are some of Justice Mpati's other findings:

    24.1. "Harith's conduct was driven by financial reward to its employees and management, and not by returns to the GEPF. In essence, the PIC initiative, created in keeping with government vision and PIC funding was 'privatised' such that those PIC employees and office bearers originally appointed to establish the various Funds and companies reaped rich rewards."

    24.2. "The Commission recommends that the GEPF and the PIC should jointly appoint an independent investigator as soon as possible after receiving this report. The mandate must be to examine the entire PAIDF initiative to determine that all monies due to both parties have been paid and properly accounted for; to determine whether any monies due to overcharging or any other malpractice should be recovered, and to provide the results of such investigation within six months to the Boards of both the GEPF and the PIC."

24.3. “The Board of the PIC should examine whether the role played by either Mr Moleketi and Mr Mahloele breached their fiduciary duties or the fit and proper test required of a director in terms of the Companies Act.”

24.4. “Harith was a company established precisely to manage the two Funds, and at significantly high fees. The Deputy Minister and Chair of the PIC, Mr Moleketi, was appointed chairman of Harith. Through various processes, two employee bodies were created, the HSIST and Harith Holdings, which was held 100% by an employees’ equity trust of the same type as the HSIST, in which its skilled employees participated.”

24.5. “The earnings and incentive schemes provided rich rewards for those selected by the PIC to fulfil these roles, confirming that PIC directors and employees used their positions for personal gain and/or to benefit another person.”

24.6. “Legal structures can be engineered such that they obfuscate substance for form. In other words, the substance may still be legal. The ‘arm’s length’ loan, based on the minutes of the PIC, clearly shows that this was not done at an arms’ length. This leaves the Commission with several unanswered questions: was any other fund manager considered? Was a competitive process run? If it was intended to be independent of government, why was Harith so PIC- employee heavy and had the former Chairman of the PIC as its chairman? It is the Commission’s view that there is no question that the approach taken provided easy access to PIC funds, influence and including an enhanced ability to secure additional investment, including from the GEPF.”

24.7. “Harith’s conduct was driven by financial reward to its employees and management, and not by returns to the GEPF. In essence, the PIC initiative, created in keeping with government vision and PIC funding was ‘privatised’ such that those PIC employees and office bearers originally appointed to establish the various Funds and companies reaped rich rewards.”

25. The respondents did not want the public to know about these allegations. After the UDM and Mr Holomisa published the letter to President Ramaphosa, they rushed to urgent court for an interim interdict.

26. The respondents asked for far-reaching relief: an interdict against the UDM and Mr Holomisa—that is, an order stopping a Member of Parliament and an opposition political party—from, in effect, repeating the allegations. They also asked for a final-in-effect order that the letter be taken down from the UDM’s website and the UDM’s and Mr Holomisa’s Twitter accounts.

27. Ironically, the respondents asked for this relief in the form of an interim interdict pending an obvious alternative remedy to the interim interdict: a defamation action for damages.

28. In July 2018, The High Court granted an interim interdict.[33] Reasons came four months later in November 2018.[34]

[33] Record v 4; p 366.
[34] Record v 4; p 369.

29. The UDM and Mr Holomisa applied for leave to appeal. Judge Tlaphi carefully applied this Court's discretionary interests of justice test for appealability in *OUTA*, *Informal Traders*, and *Tshwane City* and granted leave to appeal.[35]

30. At the SCA, a narrow majority second-guessed the High Court's discretionary decision on appealability and leave to appeal.[36] The three-Justice majority applied this Court's interests of justice test in name only. In substance, they reverted to the old final-in-effect test for appealability and outdated cases like *Zweni*.[37] The majority struck the appeal from the roll.

31. For the majority, a "temporary silence in public discourse" is not irreparable.[38] But by the time this application is heard, the "temporary silence" will have been "temporary" for three years and counting. And during that "temporary silence", there's been a whole commission of inquiry into these allegations and a 700-plus page report on the PIC.

32. Justice Molemela and Justice Makgoka dissented from the majority's cavalier treatment of the High Court's decision on appealability and leave to appeal.

33. Justice Molemela correctly summarised this Court's test for the appealability of interim orders: "an interim order may be appealed if the interests of justice, based on the specific facts of a particular case, so dictate".[39] According to Justice Molemela, it was "not open to [the SCA] to second-guess the reasons

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[35] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at paras 22-28; *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC) at para 20; *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) at paras 39-42.

[36] Record v 5; p 417,

[37] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

[38] Record v 5; p 433, para 23.

[39] Record v 5; p 437, para 31.

advanced by [the High Court] simply because it held a different view on the matter", and that it was not shown that the High Court's discretion "was not judicially exercised".[40]

34. Justice Molemela rightly noted that "[a]n interdict of the nature sought in [the High Court] is seldom granted", and that one of the key considerations should be "whether the factual foundation emanating from the respondent's affidavit discloses a defence of truth and public benefit".[41]

35. Applying that test, Justice Molemela found that the UDM and Mr Holomisa "laid a factual foundation of a defence of truth and public interest in their answering affidavit".[42]

36. Dissenting with even more force, Justice Makgoka found it "disquieting and deeply troubling that a former politician and those with whom he is accused of corruption, should obtain an interim interdict pending the outcome of a defamation action, with the ease with which the present one was granted".[43] On Justice Makgoka's analysis of the High Court affidavits, the UDM and Mr Holomisa did not "merely content themselves with bold assertions" but "set out facts from which their allegations can be deduced."[44]

37. Justice Makgoka also rightly questioned the purpose of the interdict, noting that "the allegations contained in the letter have been widely published in the mainstream and social media", that, in any event, the very same allegations

[40] Record v 5; p 438, para 32.
[41] Record v 5; p 438, para 33.
[42] Record v 5; p 440, para 36.
[43] Record v 5; p 450, para 57.
[44] Record v 5; p 450, para 57.

would be "publicly repeated" during the defamation trial, and that Mr Holomisa's parliamentary immunity under section 58 of the Constitution lets him repeat the very same allegations in Parliament.[45]

38. Justice Makgoka summed things up well with this damning description of the interdict: "not only impotent, but artificial" and a "useless thunderbolt".[46]

39. Finally, Justice Makgoka was of the view that the SCA was "not at large to revisit" the High Court's "careful and anxious consideration" of appealability and leave to appeal.[47] Instead, according to Justice Makgoka, the SCA's power to interfere with a High Court's order granting leave to appeal should be used "sparingly" and only in the "clearest cases of an error or misdirection".[48]

THIS COURT HAS JURISIDCTION AND SHOULD GRANT LEAVE TO APPEAL

40. This Court has jurisdiction over this appeal because it involves constitutional matters and raises arguable points of law of general public importance that ought to be considered by this Court.

<u>This Court has constitutional-matter jurisdiction</u>

41. The SCA's decision deprives the UDM and Mr Holomisa of an effective way to challenge what they consider to be an unconstitutional "gagging order".[49]

42. The result is that their rights under sections 16 and 19 of the Constitution are infringed, in addition to infringing sections 55 and 58 of the Constitution. More

[45] Record v 5; p 450, para 59.
[46] Record v 5; p 451, para 60.
[47] Record v 5; p 452, para 57.
[48] Record v 5; p 452, para 63.
[49] Record v 5; p 443, para 43.

broadly, the impact of the decision is to stifle the constitutional duties of members of parliament and political parties meaningfully and effectively to advance transparency and accountability in the face of allegations of pervasive corruption involving public officials and public funds.

43. The High Court's order imposes much more than a "temporary silence". The interdict has meant that, for nearly three years, the UDM and Mr Holomisa have laboured under an overbroad and severely restrictive prior restraint on speech and on the exercise of Mr Holomisa's duties and political rights as a Member of Parliament.

44. In addition, the SCA's recurring use of the old approach to the appealability of interim orders falls within this Court's constitutional-matter jurisdiction. Time, time, and time again—in *OUTA*, in *Informal Traders*, and in *Tshwane City*—this Court has told lower courts that the test is whether an appeal is in the interests of justice. The message has not reached the SCA, which seemingly continues to read those cases as just another version of *Zweni* and the old final-in-effect test. Only this Court can correct this recurring error.

<u>This Court has public-importance jurisdiction</u>

45. This appeal also raises arguable points of law of general public importance that ought to be considered by this Court.

46. The splintered SCA judgments are a clear indication that this appeal raises arguable points of law relating to interim interdicts pending defamation actions and the appealability of interim orders generally.

47. The merits of the appeal also relate to matters in the public interest relating to far-reaching allegations of the abuse of public office for personal gain. There is general importance to these questions because the test for interim interdicts in defamation actions is a recurring issue and, as far as we can tell, a question of first impression in this Court.

48. There is also general and recurring importance in the appealability of interlocutory orders and whether the SCA has the power to revisit appealability and leave to appeal despite a High Court already deciding those issues. The Superior Courts Act circumscribes the SCA's inherent jurisdiction, and the options that the Act gives the SCA are limited: hear the appeal, dismiss it for lack of practical effect, or send it to a full bench of the High Court. The Act does not contemplate a rehearing of the application for leave to appeal. Yet the SCA has developed a practice of doing just that.[50] Either the SCA does not have that power at all, or the SCA should at least apply the usual high standard for interfering with discretionary decisions of lower courts (as the two dissents here noted, and as at least one other dissent has noted in the past[51]).

49. This Court's judgment will guide the way in which political parties and parliamentarians engage in reporting and publicising corruption allegations.

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[50] Other than this case, see, for example, *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation* 2018 (6) SA 440 (SCA); *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd* (260/2017) [2018] ZASCA 26 (23 March 2018); *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service* (301/2017) [2018] ZASCA 36 (27 March 2018); *FirstRandBank Limited t/a First National Bank v Makaleng* (034/16) [2016] ZASCA 169 (24 November 2016); *Director of Public Prosecutions, Gauteng v Mphaphama* (20450/2014) [2016] ZASCA 8 (3 March 2016); *Wingate-Pearse v Commissioner of the South African Revenue Service* 2017 (1) SA 542 (SCA) (1 September 2016); *Absa Bank Ltd v Mkhize and Two Similar Cases* 2014 (5) SA 16 (SCA); *Ngqula v South African Airways (Pty) Ltd* 2013 (1) SA 155 (SCA); *Atkin v Botes* 2011 (6) SA 231 (SCA); *National Union of Mineworkers v Samancor Ltd (Tubatse Ferrochrome)* (625/10) [2011] ZASCA 74 (25 May 2011).

[51] *FirstRandBank Limited t/a First National Bank v Makaleng* (034/16) [2016] ZASCA 169 (24 November 2016) (Willis JA, dissenting).

Precedent from this Court may further assist lower courts when confronted with applications for interlocutory interdicts aiming to restrict the reporting of corruption allegations.

50. It is in the interests of justice for this Court to consider these issues. This Court has made clear that the interim nature of a High Court order is no absolute bar to appealability. This appeal raises important, principled questions about the appropriateness of interim interdicts pending defamation actions. That type of question can be grappled with only at an interim stage of litigation before the main action makes the interim interdict moot. This Court's reasoning in *OUTA* avoids an otherwise absurd Catch 22: a litigant cannot appeal an interim order *before* the main order because it is not final, but cannot appeal an interim order *after* the main order because it is moot.

This Court should grant leave to appeal to decide the important and recurring questions presented

51. An appeal has reasonable prospects of success, as the three splintered judgments in the SCA show.

52. There are also reasonable prospects of success in the main appeal given that affidavits in the High Court "laid a factual foundation of a defence of truth and public interest".[52] In addition, the respondents' own notice of motion reveals they had an obvious alternative remedy that they in fact chose to follow: an action for damages. And as Justice Makgoka pointed out, it is not even clear

[52] Record v 5; p 440, para 36.

what purpose the interdict serves given that the allegations had already been published far and wide.

53. Given the important issues at stake, the interests of justice favours this Court granting leave to appeal—over both the appealability question and the interim interdict.

THE SCA WAS WRONG TO REHEAR APPEALBILITY AND WRONG TO APPLY THE OLD *ZWENI* TEST

54. In the application for leave to appeal in the High Court, the respondents made the tired argument that the order was not appealable because it was not final in effect. The three years (and still counting) that have come and gone since then shows that lawyers labelling something as 'interim' often belies the facts on the ground. As the Appellate Division recognised decades ago, 'temporary' bans on speech "may, in substance though not in form, amount to a permanent interdict."[53]

55. Judge Tlaphi carefully applied what the law actually is—this Court's discretionary interests of justice test from *OUTA* and *Tshwane City*—to find that the interim interdict was appealable and that leave to appeal should be granted.

56. Below, the three-judge majority applied this Court's interests of justice test in name only. In substance, they reverted to the old final-in-effect test for appealability and outdated cases like *Zweni*.[54]

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[53] *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) at 402.
[54] See, for example, Record v 5; p 443, para 43.

57. This was the wrong approach. In dissent, Justice Molemela correctly summarised this Court's test for the appealability of interim orders: "an interim order may be appealed if the interests of justice, based on the specific facts of a particular case, so dictate".[55] Moreover, according to Justice Molemela, it was "not open to [the SCA] to second-guess the reasons advanced by [the High Court] simply because it held a different view on the matter", and that it was not shown that the High Court's discretion "was not judicially exercised".[56]

58. Also in dissent, Justice Makgoka rightly observed that the SCA should not be "at large to revisit" the High Court's "careful and anxious consideration" of appealability and leave to appeal.[57] Instead, according to Justice Makgoka, the SCA's power to interfere with a High Court's order granting leave to appeal should be used "sparingly" and only in the "clearest cases of an error or misdirection".[58] There was none here, and the majority did not even try to meet that test.

59. Justice Molemela and Justice Makgoka were right on both counts: the SCA is not "at large to revisit" a High Court's determination on appealability and leave to appeal, and, in any event, the majority applied the wrong test for appealability. The majority even erred in applying the old final-in-effect test: its Twitter take-down order is final in effect; so is a prohibition on speech that lasts for three years and counting.

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[55] Record v 5; p 437, para 31.
[56] Record v 5; p 438, para 32.
[57] Record v 5; p 452, para 62.
[58] Record v 5; p 452, para 63.

60. The SCA has developed a recurring practice of second-guessing High Court determinations on appealability.[59]

61. The Superior Courts Act circumscribes the SCA's powers on appeal. The SCA may:

61.1. hear and decide the appeal;

61.2. dismiss the appeal for lack of practical effect under section 16(2); or

61.3. send the appeal to a full bench under section 16(6)(b).

62. A rehearing on leave to appeal or appealability is not an option. Nor is a High Court's order granting leave to appeal a "decision" for the purposes of section 16 and 17 of the Superior Courts Act.

63. It is no answer to point to the SCA's "inherent jurisdiction".[60] A court's inherent jurisdiction "can only be applied to address a lacuna which, in the absence of judicial intervention, would result in injustice."[61] The Superior Courts Act leaves no "lacuna". It gives the SCA three paths: hear the appeal, dismiss it for lack of practical effect, or refer it to a full bench.

64. It makes sense that the SCA should not have the power to revisit preliminary issues like appealability and leave to appeal. It is a waste of scarce judicial resources to convene a panel of five justices in the SCA, require them to read

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[59] See the cases in note 51.

[60] Record v 6; p 513, para 12.

[61] *Standard Bank of SA Ltd v Thobejane* (38/2019 & 47/2019) (999/2019) [2021] ZASCA 92 (25 June 2021) at para 53. See also *Phillips v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) at paras 47-51.

and consider the entire record and written argument, and hold a hearing only for the panel to avoid dealing with the merits altogether.

65. Even if the SCA has some extra-statutory power to reconsider appealability and leave to appeal, it must at least apply this Court's test for appealability, not the old final-in-effect test. The SCA must also do so with due deference to the High Court's discretionary decision on appealability. For the reasons addressed in the previous section, the interests of justice favoured an appeal against the High Court's order.

THE HIGH COURT WAS WRONG TO SUPPRESS POLITICAL SPEECH

66. The High Court granted the respondents far-reaching relief. The UDM and Mr Holomisa are—present tense, because the order still applies almost *three years later*—interdicted from "making or repeating" any allegations "in any form" that are "the same as, or similar to" or "arising from or based on … any allegations or statements" in Mr Holomisa's letter to the President. The order also required the UDM and Mr Holomisa to take down already-published statements made online, including tweets which, by then, had already been retweeted hundreds of times.

67. Said simply, the High Court order barred the UDM and Mr Holomisa from saying what they already said, and ordered them to unpublish what they had already published.

68. Two things should stand out. The first part of the order is a ban on speech—the type of prior restraint that courts have disfavoured for decades.[62] The second part of the order required the UDM and Mr Holomisa to somehow scrub from Twitter—today's town square—tweets that hundreds had, for several weeks, read and retweeted.[63] In effect, the order muzzled the applicants and ordered them to obliviate their followers and, well, the internet. And all this on an interim basis, without the respondents even having to finally prove their case.

69. The test for interim interdicts pending defamation actions should be strict. It should not be enough for an applicant to parse through the usual four requirements. In *OUTA*, this Court tailored a heightened form of the test for when an interim interdict is sought against the Executive. A similarly heightened test should apply to interim interdicts against political speech.

70. This Court raised the usual test in *OUTA* because temporary restraints against "the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government" risks harm to the separation of powers. This intrusion may, of course, be justified if the applicant finally proves its case. But restraining the government on an interim basis—when, ordinarily, an applicant faces a far lower hurdle—calls for pause.

71. Equivalent concerns apply to prior restraints on political speech. Political speech serves accountability. And accountability, as a founding value, requires an analogous type of heightened protection that *OUTA* offers the separation of powers. Courts here and abroad have long recognised that prior restraints are

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[62] See *Hix* (note 28) and *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA).

[63] Record v 1; p 61.

a “drastic interference” and should be ordered only where there is a “substantial risk of grave injustice”.[64] Temporary prior restraints are even more dangerous and deserve even stricter scrutiny: they allow a litigant to silence speech without the bother of proving the requirements for final relief.

72. It is no answer to shrug off the harm to free speech as mere “temporary silence” as the SCA did.[65] The impact of speech—and the impact of political speech in particular—is often time-sensitive. Said another way, *when* something is said often matters just as much as *what* is said. Take one example that this Court knows well. In November 2011, the Mail & Guardian broke the story about irregular upgrades to then-President Zuma’s home at Nkandla. Complaints were made to the then-Public Protector, Thuli Madonsela, within weeks, and she started her investigation “immediately”.[66] She released her report two-and-a-half years later, in March 2014 (the ‘interim’ interdict here has lasted longer). Opposition political parties demanded accountability. They spoke. They tweeted.[67] And, ultimately, there was accountability.[68]

73. Things might’ve worked out very differently if the Mail & Guardian, the Public Protector, or the opposition political parties had been silenced from speaking and tweeting about Nkandla through an ‘interim’ interdict for as long as the respondents have been silenced here. Like justice and equality, accountability delayed is accountability denied.[69]

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[64] *Midi Television* (note 62) at paras 15-16.
[65] Record v 5; p 433, para 23.
[66] See paragraph 2.2 of the Public Protector’s report, available at: https://tinyurl.com/9f6pu6s4.
[67] See, for example, some of the EFF’s and DA’s tweets in 2014 (https://tinyurl.com/58u4kafy and https://tinyurl.com/9fh567fc).
[68] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC).
[69] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 60.

74. The SCA majority claimed that section 18(3) of the Superior Courts Act provides an "obvious remedy for a litigant who believes it is faced with irreparable harm in having to comply with an interim order".[70] But there is an obvious hole in that argument: if, as the majority held, the interim interdict is not appealable, then section 18, by definition, does not apply.

75. At best, section 18(3), read with section 18(2), provides potential relief in the form of a suspension of an interim order "pending the decision of the application [for leave to appeal] or appeal." For interim orders pending main proceedings—like the High Court's interim interdict pending the trial—section 18(3) offers no relief *pending the main proceedings*. Said another way, the UDM and Mr Holomisa could apply to suspend the High Court's order *pending their application for leave to appeal*, but they could *not* apply to suspend the High Court's order *pending the trial*.

76. Mr Holomisa wrote his letter at the end of June 2018. The High Court granted its order two weeks later, but delivered its judgment only in November that year. The respondents' defamation action is meandering through the trial process (with an interim interdict in their back pockets, they have no incentive to move things along). By the time this application is argued, the 'interim' interdict will have celebrated its third birthday. If this Court does not intervene, and the interdict expires only once the trial has run and inevitable appeals heard, the 'interim' interdict's lifespan is likely going to be five years, maybe more. It is, in short, 'interim' in name only.

[70] Record v 5; p 433, para 22.

77. And look what happened during this ‘interim’ three-year period and the court-ordered “temporary silence”: a whole commission of inquiry into the PIC and a damming 700-plus page report that substantially corroborates and justifies what the applicants said in their letter.

78. An appropriately stricter test for interim interdicts in this context would have prevented this chilling effect and harm to free speech. The test in *OUTA* provides necessary protection against harm to the separation of powers. Equivalent safeguards should apply to temporary restraints against political speech. A court should “assess carefully how and to what extent” an interdict would implicate the freedom of expression and chill political accountability. A temporary restraint should be granted only when a “proper and strong case” is made out and “only in the clearest of cases.”

79. The respondents’ case falls far short. The letter to the President dealt with matters of obvious public concern: public officials accused of abusing their positions at a public body for private gain. Mr Holomisa sent the letter, and tweeted about it, in discharge of the UDM’s watchdog role that opposition political parties play in holding public institutions accountable. The affidavits in the High Court—including the respondents’ own facts in their replying affidavit—laid an adequate factual basis for the statements in the letter.

80. Justice Mpati’s report substantially corroborates what the letter said. In the end, this is simply not one of the “clearest of cases” for interim relief.

81. Even under the existing law, the High Court’s order does not satisfy the test that the Appellate Division set almost thirty years ago in *Hix*. Under *Hix*, an interim interdict against publication is not justified if the respondent “la[ys] a sustainable

foundation" for truth and public interest and "set[s] up the facts" for that defence.[71] The affidavits in the High Court—including the respondents' own version in the replying affidavit—did just that. Justice Mpati's report provides an even firmer "foundation", as we showed in the first section of these submissions.

82. We catalogue, in an annexure to these submissions, some of the key facts that emerge from the respondents' own affidavits in the High Court and from Justice Mpati's report. When read side-by-side with Mr Holomisa's letter, more than a "sustainable foundation" for truth and for fair comment emerges.

83. The respondents shy away from dealing with Justice Mpati's report, describing it as "wholly irrelevant".[72] Facts matter more than adverbs: the report is relevant because it substantially corroborates the allegations in the letter. And "substantially" is the keyword: it is not the law that each and every statement must be established as true.[73]

84. The report shows that the High Court was wrong to brush aside the UDM and Mr Holomisa's version in their answering affidavit. Moreover, the report's publication and wide dissemination shows that the order serves no purpose. This Court's assessment of the order must, with respect, take into account all relevant facts, including facts that have been confirmed through a commission of inquiry since the High Court hearing.

85. To be sure, Justice Mpati's report does not repeat, word-for-word, Mr Holomisa's letter. The letter is more strident. But Justice Makgoka's analysis is

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[71] *Hix* (note 53) at 399-402.
[72] Record v 6; p 541, para 111.
[73] *Modiri v Minister for Safety and Security* 2011 (6) SA 370 (SCA) at paras 13-15.

the right way to look at this issue: even if the letter is "littered with outlandish, perhaps exaggerated, claims and comments", courts "allo[w] for a good deal of latitude for comment" when one deals with "politicians or political matters.[74] This Court has said much the same before: "our country is known for robust political discourse. The language we often use is as colourful as our rainbow nation and as informal and unruly as our people sometimes are".[75]

86. The UDM and Mr Holomisa properly "laid a sustainable foundation" for truth and public interest and "se[t] up the facts" for that defence.[76] On a fair reading of the letter and their affidavit, they did the same for a defence based on fair comment. And so whether on the existing law or on a suitably stricter test, the High Court erred.

87. Three other features of this litigation stand in the way of interim relief.

88. The first is that by the time the application was heard in the High Court, the allegations "were already in the public domain."[77] Textbook interdict law teaches that an interdict is "not a remedy for the past invasion of rights: it is concerned with the present and the future."[78] An interdict is inappropriate here because Mr Holomisa's letter was posted online for the world to see, on the UDM's website and to Mr Holomisa's more than half-a-million followers on Twitter. The respondents' remedy was a backward-looking damages claim for defamation, not a practically pointless forward-looking remedy of an interdict.

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[74] Record v 5; p 450, para 57.
[75] *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at para 174.
[76] *Hix* (note 53) at 399-402.
[77] Record v 5; p 429, para 17.
[78] *Tau v Mashaba* 2020 (5) SA 135 (SCA) at para 26.

89. The second feature is Mr Holomisa's role as a Member of Parliament. The interdict has meant that, for nearly three years, Mr Holomisa has laboured under an overbroad and severely restrictive prior restraint on speech. The interdict prevents him from demanding accountability for alleged wrongdoing involving public funds. In the SCA, the majority's only answer was that, in effect, the interdict is not that bad because Mr Holomisa can use his section 58 privilege in Parliament to say exactly what the interdict orders him not to say.

90. That reasoning either turns the interdict into a paper tiger (because Mr Holomisa can simply say in Parliament what the interdict tries to silence), or it puts Mr Holomisa to an unconscionable choice (because Mr Holomisa must decide between respecting a court order or exercising his section 58 privilege in Parliament). It also undermines the appropriateness and constitutionality of the interdict given the UDM's role as a political party—particularly because the accountability and watchdog role of opposition political parties does not start and end within the four walls of the National Assembly.

91. Justice Makgoka summed things up well with this damning description of the interdict: "not only impotent, but artificial" and a "useless thunderbolt".[79]

92. The third and final hurdle is the respondents' obvious alternative remedy. The respondents sued for defamation as their primary relief; the interim interdict is, after all, pending the final determination of their action. If the trial court finds that Mr Holomisa's letter was defamatory, then a damages claim will vindicate the respondents' rights and compensate them for any alleged harm. The High

[79] Record v 5; p 429, para 60.

Court's drive-by treatment of this requirement for interim relief—or rather the absence of this requirement—is at odds with the respondents' own litigation strategy. How can it be "difficult" to "compute" the respondents' damages when the respondents themselves chose to sue for damages?

93. A damages award is "usually capable of vindicating the right to reputation" if allegedly defamatory statements are later found to be defamatory.[80] This case is no different. The respondents themselves sued for defamation. They accepted in their founding affidavit in the High Court that a damages award would "vindicate and compensate" them for the "wrongs already committed and the losses already incurred."[81]

94. The respondents try to sidestep this by characterising the interim interdict as targeting "on-going harm and loss" caused by publication "pending the determination" of the action.[82] But a damages award would adequately "vindicate and compensate" the respondents for that "harm and loss" even without interim relief. The damages quantification would take into account the amount of time that the alleged defamatory statements were published, as well as any subsequent publications of the same or similar statements after institution of proceedings. In this way, if the respondents finally proved their case at trial, they would have been "vindicate[d] and compensate[d]" for the full period that they were defamed.

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[80] *Midi Television* (note 62) at para 20.
[81] Record v 1; p 39, para 47.
[82] Record v 1; p 39, para 48.

95. For these reasons, the High Court was wrong to grant an interim interdict. Though 'interim' in name, it has muzzled the UDM and Mr Holomisa—and chilled speech on this important issue—for close on three years.

96. Justice Makgoka was right to express "disquie[t]" about how "eas[y]" it was for the respondents to silence their accusers.[83] Those accused of wrongdoing—especially wrongdoing involving public bodies and public funds—should not be able to so easily rush to the nearest urgent court for prior restraints and far-reaching take-down orders. This Court should right the dangerous path that the High Court's judgment sets.

CONCLUSION

97. The orders of the SCA and the High Court should be set aside and replaced with an order dismissing the respondents' application with costs. Costs in this Court should follow.

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TEMBEKA NGCUKAITOBI SC

JASON MITCHELL

Counsel for the UDM and Mr Holomisa

6 August 2021

[83] Record v 5; p 450, para 57.

ANNEXURE:

CATALOGUE OF KEY FACTS FROM THE RESPONDENTS' HIGH COURT AFFIDAVITS AND JUSTICE MPATI'S REPORT

Founding affidavit	
Wheatly is the Chief Investment Officer of Lebashe.	para 1.1
Lebashe has a 7.27% shareholding in Capitec.	para 5.4.1
Lebashe has a 74.92% shareholding in Rainfin.	para 5.4.2
Lebashe has a 16.94% shareholding of 4AX.	para 5.4.3
Harith General Partners (Pty) Ltd manages two funds held by the Pan African Infrastructure Development Fund (PAIDF).	para 5.5
Mahloele headed the Corporate Finance and Isibaya Fund divisions of the PIC, and is one of the originators of PAIDF.	para 5.7
Moleketi in his role as Chairperson of PIC gained exposure affording him non-executive positions including that of Chairman of MMI Holdings and Aluwani Capital.	para 5.8
Wheatly is a founder of Lebashe and is non-executive director of Aluwani Capital.	para 5.9
PIC funded one of Lebashe's projects.	para 16.1.4
Lebashe has a 20% shareholding in Coral Lagoon, which in turn owns a substantial number of Capitec shares.	para 16.2.2
As a result of Lebashe's shareholding, Wheatly became a director of Coral Lagoon.	para 16.2.2

Lebashe apparently has no relationship with TSS (Pty) Ltd or TSS Capital (Pty) Ltd. Yet, Wheatly started both of them, TSS sold its shareholding in TSS Capital to Lebashe, and TSS Capital is now called Lebashe Capital (Pty) Ltd.	para 16.2.6
Rainfin, 4AX and Aluwani have independent boards, but Wheatly and Moleketi are both directors of Aluwani, the latter being the chairman.	para 16.8.2
The PIC loaned money to Lebashe.	para 16.9
Replying affidavit	
In 2006, Mahloele resigned from the PIC and was tasked with setting up PAIDF.	para 8.2
In 2007, Mahloele set up Harith FM to manage PAIDF; the PIC was a 46% shareholder of Harith FM.	para 9.2 para 9.3
Mahloele and Moleketi are directors of Harith FM and Harith General Partners.	para 9.4 para 12.4
In 2012, Harith FM subcontracted its management agreement with PAIDF to Harith GP.	para 11
While Wheatly was working at ABSA, one of his clients was Mahloele.	para 13.1
Mahloele was a shareholder in Coral Lagoon.	para 13.2
Coral Lagoon owned 10 million shares in Capitec.	para 13.2
Because of it's shareholding, Coral Lagoon could appoint a director to the board of Capitec. It appointed Mahloele.	para 13.3
PIC funded Coral Lagoon's paying off of its debt to the IDC by purchasing some of its shares in Capitec.	para 14.1.

Lebashe then purchased those same Capitec shares from the PIC.	para 16.3
The PIC loaned Lebashe some of the money used to purchase these shares.	para 16.5
Lebashe then purchased the remaining Capitec shares held by Coral Lagoon.	para 17.1
That purchase was largely funded by the PIC	para 17.1
Justice Mpati report	
Mahloele was the head of the Corporate Finance and the Isibaya Fund at PIC.	page 421
Mahloele was appointed to lead PAIDF without a proper selection process.	page 421
Mahloele was appointed as CEO of Harith FM after his contract to establish PAIDF ended.	page 422
Before Harith FM, Mahloele requested Government Employees Pension Fund invest R1.65 billion in PAIDF.	page 422.
Moleketi was deputy Finance Minister and Chair of PIC, and became chairman of the board at HFM where he received a “modest emolument.”	page 422.
Moleketi became non-executive director of HGP.	page 423
Harith GP is 70% owned by Harith FM and 30% owned by PIC.	page 423
Mahloele became Chairman of Lebashe.	page 423
Employees of Harith FM (including Mahloele) got equity shares in PAIDF over and above salaries.	page 424

Harith FM, and later Harith GP earn annual management fee of 1.75% of the total value of the funds plus a “carry”.	page 424
Harith FM fees appear punitive and not a standard management agreement	page 425
Mahloele benefitted from arrangement without incurring financial cost.	page 426
Earning and incentive schemes provided rich rewards for those selected by the PIC to fulfil these roles—confirming that they used their positions for personal gain.	page 434

LIST OF AUTHORITIES

Democratic Alliance v African National Congress 2015 (2) SA 232 (CC)

Economic Freedom Fighters v Speaker, National Assembly 2016 (3) SA 580 (CC)

* Hix Networking Technologies v System Publishers (Pty) Ltd 1997 (1) SA 391 (A)

* Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA)

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National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)

* National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC)

Phillips v National Director of Public Prosecutions 2006 (1) SA 505 (CC)

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* Tau v Mashaba 2020 (5) SA 135 (SCA)

* Tshwane City v Afriforum 2016 (6) SA 279 (CC) at paras 39-42

Zweni v Minister of Law and Order 1993 (1) SA 523 (A)