IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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' PRACTICE NOTE

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1 **NATURE OF PROCEEDINGS**

In June 2018, Mr Holomisa wrote to President Ramaphosa to raise allegations about mismanagement of public funds involving the Public Investment

Corporation and the respondents. The respondents sued for defamation. They also sought an urgent interim interdict pending the final determination of the trial.

The High Court granted an interim interdict. The UDM and Mr Holomisa applied for leave to appeal, which the High Court granted. The SCA splintered. A three-judge majority second-guessed the High Court's decision on appealability and struck the appeal from the roll. Justice Molemela and Justice Makgoka wrote strident dissents. They would have heard and upheld the appeal. The UDM and Mr Holomisa now apply to this Court for leave to appeal.

2 ISSUES THAT THE UDM AND MR HOLOMISA WILL ARGUE

- The SCA was wrong to second-guess the High Court's determination of appealability and leave to appeal, and wrong to apply the old common law test for the appealability of interim orders.
- The test for interim interdicts against political speech should be stricter.
- In any event, the respondents did not comply with the existing test for prior restraints, and the interim interdict should not have been granted.

3 SUMMARY OF ARGUMENT

The High Court's order is an impermissible prior restraint on political speech. An interim interdict should not have been granted, whether on an appropriately stricter test or on the existing test set out in *Hix*. The affidavits in the High Court—including the respondents' own version in the replying affidavit—laid a sustainable foundation for a defence of truth and fair comment.

The High Court was, however, right to grant leave to appeal and to dismiss the respondents' argument that its order was not appealable. The majority of the SCA applied the old final-in-effect test instead of this Court's broader interests of justice analysis.

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.

4 **RELIEF SOUGHT**

Leave to appeal should be granted, and the orders of the High Court and the SCA should be set aside. The High Court's order should be replaced with an order dismissing the respondents' application with costs. Costs in this Court should follow.

5 **DURATION OF ARGUMENT**

Two hours.

6 **PORTIONS OF RECORD THAT NEED TO BE READ**

In the UDM and Mr Holomisa's view, the entire record does **not** need to be read. This is enough:

- Notice of motion and founding affidavit in this Court: 455 to 488.
- Answering affidavit in this Court: 509 to 548.
- SCA judgment: 417 to 453.
- High order and reasons, and judgment on leave to appeal: 366 to 387 and 395 to 404.

- High Court notice of motion and founding affidavit and Mr Holomisa's letter: 1 to 41 and 48 to 53.
- High Court answering affidavit: 127 to 158.
- High Court replying affidavit: 275 to 303.

7 **AUTHORITIES ON WHICH PARTICULAR RELIANCE IS PLACED**

These are marked with * on the list of authorities attached to the Applicants' written submissions.

DALI MPOFU SC
TEMBEKA NGCUKAITOBI SC
JASON MITCHELL

Counsel for the applicants
6 August 2021