REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/29700

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

26/4/2017
DATE

SIGNATURE

In the matter between:

BOSASA OPERATION (PTY) LTD Plaintiff / Applicant

and

ADRIAAN BASSON First Defendant / Respondent

M&G MEDIA LIMITED Second Defendant / Respondent

JUDGMENT

TSOKA, J:

[1] On 20 July 2009 the plaintiff instituted an action for defamation against Mr Adriaan Basson (Mr Basson) as the first defendant and Mail & Guardian Media Limited ("*M&G*") as the second defendant.

[2] The plaintiff alleges that on 22 May 2009 Mr Basson, then an employee of M&G, wrote an article entitled "*You are very brave for a young man*" alternatively "*Very brave for a young man*", in which article Mr Basson allegedly, over a period of three weeks, exposed a corrupt relationship between the plaintiff and the Department of Correctional Services. It is plaintiff's further allegations that the said article was *per se* defamatory of the plaintiff and that such publication was wrongful.

[3] Mr Basson and M&G filed two special pleas. The first was that the alleged corrupt relationship was also exposed by various other widely read newspapers throughout South Africa with the result that the plaintiff has no reputation that could have been injured by the article written by Mr Basson and published by M&G. Secondly, that for the period between 9 July 2008 and 29 January 2010 there have been no less than 33 articles, 18 of which were published in different newspapers, and that the suing of Mr Basson and M&G is arbitrary and not *bona fide*. Furthermore, that M&G was selected because it is small and lacks resources. It is Mr Basson and M&G's defence, therefore, that the action instituted against them by the plaintiff is an abuse of the Plaintiff's right to sue and abuse of the court process.

[4] In their main plea Mr Basson and M&G deny that the article complained of is defamatory of the plaintiff. In the alternative, they plead truth and public benefit, further alternatively, fair comment on a matter of great public interest, further alternatively, reasonable publication in that the article was published in good faith, a matter of great public interest and that the

information in the article was based on reliable information received by Mr Basson and M&G from reliable sources. In the further alternative, Mr Basson and M&G plead qualified privilege as the allegations complained of were contained in a report of the Special Investigation Unit, which report was placed before Parliament.

[5] After the pleadings were closed, the plaintiff filed a notice of discovery of documents in terms of Rule 35(1). After Mr Basson and M&G filed their discovery affidavits, the plaintiff, as it still believed that there were further documents in possession of the defendants, filed a notice in terms of Rule 35(3). After some wrangling, Mr Basson and M&G filed a further discovery affidavit wherein the names of their sources were redacted. The plaintiff further filed a request for further particulars for trial in terms of Rule 21. The further particulars were furnished, but like the documents served pursuant to Rule 35(3), the names of the defendants' reliable sources were also redacted.

[6] The plaintiff was of the view that the defendants had not complied with their Rule 35(3) notice and the request for further particulars, in that the names of their reliable sources have been redacted. They therefore filed two applications in terms of Rule 37, one compelling the defendants to file further and better discovery and the other in terms of Rule 21(4) compelling further and better particulars. The plaintiff particularly sought to compel the defendants to reveal the names of their reliable sources. These are the two applications before me. For convenience I shall refer to the parties as plaintiff and defendants respectively, unless the context suggests otherwise.

[7] The gist of plaintiff's complaint is that the defendants, in furnishing the documents with the redacted names of the alleged reliable sources, infringe their right to fair trial. The defendants opposed the applications. The basis of their opposition is that the names of their reliable sources are not germane to the issues between the parties, and that to compel them as contended for by the plaintiff, would infringe their right to freedom of the press, as enshrined in section 16 of the Constitution. They furthermore resist the applications on the basis that they gave undertakings to their sources that their identities would not be revealed.

[8] During the hearing of the applications, two entities brought an application to be admitted as friends of the court. The two entities that seek to be admitted are Section 16, a non-governmental organisation working in the areas of freedom of expression and access to information and the South African Editors Forum, also a non-profit and non-governmental voluntarily association. The basis of their application was to bring to the court's attention comparative foreign law which, according to them, in perusing the parties' written submissions, they realised were not addressed. The application was unopposed. It was accordingly granted.

[9] The gravamen of the two applications brought by the plaintiff is the necessity of revealing the identity of the reliable sources of the defendants. The answer to whether in terms of Rule 35(3) the plaintiff is entitled to the identity of the defendants' reliable sources will, in my view, also resolve the

Rule 21(4) application for further particulars. I therefore proceed to examine the provisions of Rule 35(3).

[10] Rule 35 provides that any party to any action may in writing require any other party thereto to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question, whether such matter arises between the parties or not, which are, or have been in such party's possession or control. The request only occurs when the pleadings are closed, which is the case in the present matter. The party required to make the discovery is expected to respond thereto within 20 days of such request having been made

[11] In the discovery affidavits, the party making the discovery shall, separately, specify such documents or tape recordings in his possession or possession of his agent or if he or his agent no longer has such documents or tape recordings must state their whereabouts, if known. Such party is, however, in terms of paragraph (b) of subrule (2) not expected to disclose documents or tape recordings to which "*he has a valid objection*".

[12] It is common cause in this matter that the documents requested both in terms of Rule 35 and Rule 21 were, after some wrangling, disclosed. It is only the identity of defendants' reliable sources that have not been produced. The plaintiff insists on the disclosure of the identity of such sources. The defendants refuse to disclose the identity of its sources, relying on freedom of

the press as enshrined in terms of section 16 of the Constitution and the undertaking given to their sources that their identities would not be revealed.

[13] The crisp issue in the two applications is whether the defendants have a valid objection to revealing the identity of their sources.

[14] As pointed above, it is defendants' contention that section 16 of the Constitution and the undertaking given to their sources not to reveal their identities, constitute a valid objection. The plaintiff contends to the contrary. It contends that without identifying the so-called reliable sources, its right to a fair trial is infringed.

[15] It is defendants' argument, both written and oral, that the plaintiff is not entitled to the identity of their sources. Their argument being that the identity of their sources is irrelevant to the issue of defamation. Furthermore, that in terms of section 16 of the Constitution, the right of freedom of the press is guaranteed, and in most democracies of the world, journalists do not, except under certain circumstances, reveal the identity of their sources, particularly where such sources gave a journalist information on the understanding that their identity would not be revealed.

[16] On the other hand, the plaintiff also, both in its written and oral submissions, argues that it is entitled to the identity of the sources, and that it would be inimical to the right of freedom of the press if only journalists, by the mere fact that they are the carrier of news, should be entitled not to reveal

their sources, which may be unreliable. Freedom of expression as guaranteed under section 16 of the Constitution is thus juxtaposed with the object of discovery and of further particulars.

[17] It is therefore imperative to determine whether indeed it is so that the plaintiff is entitled to the identity of defendants' sources or not. If so, one should then determine whether section 16 of the Constitution, and the fact that the journalists gave undertakings to their sources that their entity would not be revealed, constitute a valid reason for refusal to reveal such sources.

[18] The object of discovery of documents was aptly described in *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083, in the following terms –

> *"A party is required to discover every document relating to the matters in question, and that means relevant to any aspect of the case. This obligation to discover is in very wide terms. Even if a party may lawfully object to producing a document, he must still discover it. The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated. It is easy to envisage circumstances in which a party might possess a document which utterly destroyed his opponent's case, and yet be withheld from discovery on the interpretation which it is sought to place upon the rules. To withhold a document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation."*

[19] In the present matter it is common cause that documents or tape recordings are not an issue. Neither in terms of Rule 35(3) nor Rule 21(4) are the documents or tape recordings an issue. The issue is the identity of the

reliable sources upon which the defendants rely in publishing the alleged defamatory article concerning the plaintiff

[20] As has been said, section 16 of the Constitution guarantees freedom of speech. It provides as follows –

> "***16 Freedom of expression***
>
> *(1) Everyone has the right to freedom of expression, which includes*
>
> *(a) freedom of the press and other media;*
>
> *(b) freedom to receive or impart information or ideas;*
>
> *(c) ...*
>
> *(d) ...*"

[21] To appreciate freedom of expression it is instructive to restate what Lord Denning said in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096. At 1129 Lord Denning said the following –

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

[22] Closer to home in *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at paras [22] to [24] of the judgment, the Constitutional Court said the following –

"*[22] The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. As Deane J stated in the High Court of Australia,*

'. . . the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media.'

The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

[23] Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. As Joffe J said in Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another 1995 (2) SA 221 (T) at 227I - 228A:

'It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. . . . It must advance communication between the governed and those who govern.'

[24] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16."

[23] In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para [6], the Supreme Court of Appeal, in emphasising that the freedom of the press is for all citizens, not only for the press, said the following –

> *"The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself."*

[24] With regard to the protection of confidential sources, the Supreme Court, as early as 1910, in *Spies v Vorster* [1910] 31 NPD 205, in deciding whether an editor of a newspaper should be compelled to disclose the identity of the author of an anonymous letter, said the following –

> *"If an editor were bound to disclose the name of his correspondent there would be an end of confidential relationship between correspondent and newspaper which has existed for generations, to the advantage of the public, and many an abuse would go unremedied and many a grievance unredressed because those who knew, for reasons good or bad, were unwilling or unable to allow their names to be published. However much it may be abused, as it often is, to air personal grievances and to injure, there can be no doubt that many anonymous communications have been the means of effecting valuable and wide-reaching reforms. A decision in favour of the applicant if applied in other cases might lead to very serious consequences and do much to restrain freedom of communication and breeds suspicion and distrust. Its application to other causes of action might destroy that freedom of communication which is so essential to comfort and well-being."*

[25] Recently, in this division, the court in alluding to the fact that journalist sources are fundamental to the freedom of the press, in *South African*

Broadcasting Corporation v Avusa Ltd and Another 2010 (1) SA 280 (GSJ) at paras [30] and [31], the court stated that –

> *"[30] The court accepts that one of the most valuable assets of a journalist is his or her source. Sources enable journalists to provide accurate and reliable information. Sources are often in possession of sensitive facts which they would be unwilling to disclose without a guarantee that their identities will not be revealed. The protection of journalists' sources is therefore fundamental to the protection of press freedom. As Lord Denning has observed:*
>
> *'(I)f [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known.'*
>
> *[31] The court also accepts that journalists in open and democratic societies throughout the world recognise the importance of preserving the confidentiality of their sources and that they consider it to be their duty to protect their sources' confidentiality. The Sunday Times gives examples of a variety of media codes of conduct which recognise this duty in its answering affidavit. These codes include the SABC's Editorial Code of Ethics which provides that, 'We shall not disclose confidential sources of information.'"*

[26] The second defendant has a comprehensive policy on sources for their stories. It is stated therein that it is always preferable that on-the-record sources are used. This code, simultaneously, recognizes that there may be circumstances such as in the present, that sources may not be willing to reveal what they know unless their identity is kept confidential. If this happens, the second defendant would protect such sources as it regards the undertaking sacrosanct.

[27] In terms of section 39 of the Constitution, the court is, in interpreting the Bill of Rights, enjoined to consider both international and foreign law.

[28] What then is the position of revealing journalists' sources in foreign democratic jurisdictions?

[29] In *Goodwin v United Kingdom* [1996] 22 E.C.H.R 123 in para [39] the court stated the following –

> *"...Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest..."*

See also *de Haes and Gijsels v Belgium* [1998] 25 E.C.H.R. 1; *Roemen and Schmit v Luxenbourg* [2003] E.C.H.R. 102; *Ernst and Others v Belgium* [2004] 39 E.C.H.R. 35 and *Financial Times v United Kingdom* [2010] 50 E.C.H.R. 4.

[30] In *Ashworth Hospital Authority v MGN Ltd* 2002 1 W.L.R. 2033 at 2050 the court, in alluding to the fact that disclosure of journalistic sources would have a chilling effect on freedom of the press, stated that –

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

[31] In *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 (HL), at 1120, the court said the following –

> "*... There has long been a practice, which may have ripened into a rule of law, that at the interlocutory stage the press will normally not be required to disclose their source information ...*"

[32] In *R v National Post* 2010 SCC 16 [2010] S.C.R. 477 the court reasoned that, to a certain extent, "*the element of confidentiality is essential to the full and satisfactory maintenance of the journalist-confidential source relationship*".

[33] In *Globe and Mail v Canada (Attorney-General)* 2010 SCC 41 [2010] 2 SCR 592 at para [60] the court stated –

> *"[60] ... While the identity of a confidential source may be relevant to the dispute, particularly given the broad definition of relevancy in civil proceedings, that fact may be nevertheless be so peripheral to the actual legal and factual dispute between the parties that the journalis ought not to be required to disclose the source's identity."*

[34] In *Sanoma Uitgewers B.V. v Netherlands* (2010) 51 E.C.H.R. 31, the principle in *Goodwin* as set out in paragraph [29] above was confirmed.

[35] The plaintiff, in argument, further referred me to the decisions of *Judy Garland v Marie Torre*, No. 325, Docket No. 24951, United States Court of Appeals, Second Circuit, 30 September 1958 and *Langley v Age Company Ltd* [2001] VSC 370, 3 October 2011 (an Australian case), as authority that the defendants are obliged to disclose their sources.

[36] The matter of *Garland* is distinguishable from the present matter. In *Garland*, the plaintiff brought an action against the defendant based on false and defamatory statements concerning the plaintiff. The defendant denied, amongst other things, that it made false and defamatory statements concerning the plaintiff. The plaintiff bore the onus to prove malice. In the present matter no malice need be alleged and proved. In *Garland*, the identity of the sources was relevant to the issues between the parties, because of the fact that malice had to be proved. In the present matter, malice need not be alleged and proved. Identity of the sources is therefore irrelevant.

[37] Similarly, in *Langley*, the plaintiff, in rebutting the defendant's fair comment and qualified privilege defences, raised actual malice on the part of the defendant. This was done by proving that in the article complained of by Langley, the defendant "*published the first and second articles without an honest belief in the truth of the imputations conveyed thereby, alternatively, did not care whether the imputations conveyed thereby were true or false*". In the present matter, the plaintiff does not complain that the defendants did not have reasonable grounds for believing in the truth of the defamatory statements. The plaintiff's complaint is that the publication of the article is *per se* defamatory. In any event, there is no Bill of Rights in Australia. In the present matter, section 16 of the Constitution, as stated above, is applicable. The right of freedom of the press is guaranteed.

[38] Having regard to the authorities cited above, it is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of the press is fundamental and *sine qua non* for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy, founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded.

[39] In order to determine relevance of the identity of defendants' sources, the starting point is the pleadings. The issue defined by the pleadings is

defamation. The defendants deny that the article is defamatory of the plaintiff. They then raise several defences in justification of writing the article. The plaintiff thus only has to prove that the article is defamatory. There is no *onus* whatsoever on the plaintiff to rebut the defences raised by the defendants in order for it to succeed with its action. The defendants, in raising these defences as they did, nailed their colours to the mast. In the forthcoming trial, if they are unsuccessful with their defences, the plaintiff will succeed with its claim against the defendants. Those then are the issues: the defamatory nature of the article, which the plaintiff has to prove, and then the defences which the defendant must prove to escape liability, once the defamatory nature of the article has been established. The identity of the sources, in my view, is irrelevant between the parties.

[40] The issue of the identity of the sources is peripheral to the actual and real dispute between the parties. According to the defendants the sources are in the plaintiff's employment. The sources are fearful of reprisals, should their identities be revealed. They gave the information to the first defendant on the understanding that their identities would not be revealed.

[41] The plaintiff, in my view, is expected to deal with the correctness or otherwise of the contents of the article; not the identity of the defendants' sources.

[42] Inasmuch as the plaintiff is entitled to a request for further particulars to enable it to prepare for the forthcoming trial, it is not entitled to the identity of

the defendants' reliable sources. As pointed out above, there is neither an *onus* nor evidentiary burden on it to rebut the defendants' defences. In the event that the defendants failed to justify the defences raised, the plaintiff will succeed. It will recover its damages. Its good name and the manner in which it won the tender from the Department of Correctional Servicers would have been restored.

[43] The definition of defamation is also helpful in resolving the issue of revealing a journalist's sources. Defamation is defined as unlawful and intentional publication of a defamatory matter concerning another. (See J.R.L Milton *South African Criminal Law and Procedure*, Volume 2 Common Law Crimes, Third Edition (1996) at page 525.) Although defamation is a criminal offence, it may also give rise to delictual liability (See P.Q.R Boberg *Law of Delict*, Volume 1 (1984) at page 1). This is the position in the present matter. The plaintiff's complaint is that the article published by the defendants, which concerns itself, was intentional and unlawful. It is *per se* defamatory, hence the plaintiff issued summons against the defendants. In the definition of defamation, it can hardly be said that the sources of the defamatory material is an essential element of the delict.

[44] In its written and oral arguments, the plaintiff submits that the defendants are not entitled to a blanket exemption. Furthermore, that neither in our law nor in comparative jurisdictions is there a blanket journalistic privilege.

[45] The plaintiff further argues that journalists are not entitled to raise a media-card, on which basis alone, would exempt them from revealing their sources, which sources may be unreliable.

[46] It is indeed so that journalists are not entitled to a blanket journalistic privilege which entitles them not to reveal their sources. This is so in our country and the comparative democracies of the world.

[47] The defendants do not plead blanket journalistic privilege. Not in the manner as argued by the plaintiff. In their papers, the defendants plead their right to freedom of the press as enshrined in section 16 of the Constitution and the undertaking given to their sources not to reveal their identities. Both in their written and oral submissions, the defendants disavow reliance on blanket journalistic privilege. They contend that the facts of this matter call-out for protection of their sources.

[48] It must be borne in mind that the plaintiff won its tender from a government department. The department is expected to comply with the Constitution, the supreme law of the country. In dealing with the public, the department is expected to act openly. In terms of the Public Finance Management Act 1 of 1999 ("*the PFMA*"), which Act was passed pursuant to the Constitution, the department is expected to award tenders issued by it, fairly, equitably, transparently and in the most competitive and cost effective way. The sources in the employment of the plaintiff, believing that the department acted in breach of its obligations, supplied the defendants with the

information on which the article is based. The revelation of the information, in the view of the sources, is in compliance with the PFMA and the Constitution. This, in my view, is a laudable civic duty expected of every citizen in a democratic society founded on openness and fairness. This civic duty is in the interest of the public and serves the public good in determining whether the Department of Correctional Services lives up to expectations in awarding tenders fairly, equitably, transparently and in the most competitive and cost effective way.

[49] A further argument raised by the plaintiff is whether the defendants' refusal to reveal their sources is contrary to the terms of their own code, on the use of sources.

[50] Failure to state whether the defendants complied with their code is a matter of evidence. In any event it is instructive to have regard to what was said in *Reynolds v Times Newspapers* [1999] 4 All ER 609 (HL) where Lord Hobhouse of Woodborough stated that –

> *"The present law is consistent with the publisher being able, if he so chooses, to preserve the confidentiality of his sources. The burden of proving circumstances justifying privilege is upon the publisher. Whether or not he chooses to disclose his sources in order to assist him to do so is (in general) a matter for him."*

See also *Khumalo v Holomisa* 2002 (5) SA 401 CC.

[51] Whether the defendants acted reasonably in the circumstances of this case, will be revealed in the fullness of time. If indeed cross-examination still

remains the greatest tool ever invented to discover the truth, the defendants' compliance or their failure to comply with their code, will be revealed in the forthcoming trial. At this stage, in my view, the defendants are not expected to reveal whether they complied with their code or not. It would be surprising, however, if they did not.

[52] It is self-evident that the defendants are not entitled to a blanket privilege. In a case where a journalist obtains information concerning the commission or pending commission of a serious crime, it would be foolhardy for a journalist to raise the provisions of section 16 of the Constitution as his defence, in refusing to reveal his/her sources. In the present matter, the sources appear to have acted out of civic duty, to expose, what in their view, constitutes corruption. The sources appear to have acted in the public interest and for the public good. The right to freedom of the press is limited in terms of section 36 of the Constitution. However, in the present matter, I find no basis to limit such right. Neither did the plaintiff argue for such limitation.

[53] With regard to the further particulars in terms of the Rule 35(3) dated 10 February 2010, the plaintiff seeks a series of documents relating to fifty other articles published by the defendants. Amongst the documents requested are all notes and recording of interviews with sources and communication between the first defendant and his editors.

[54] The plaintiff complains of a particular article and not of any of the 50 articles published. It complains of an article that was published by the

defendants on 22 May 2009. It has nailed its colours to the mast. Although it may, on wider interpretation of the rule, be entitled to such information, it does not say the documents requested were defamatory or were wrongfully published. The relevance of these articles has not been established. The request is, in my view, interrogatory. It is in any event irrelevant between the parties. The plaintiff does not require these documents in preparation of the forthcoming trial.

[55] In the circumstances of this matter I find that the plaintiff has failed to prove that its right to a fair trial has been infringed. On the contrary, to order the defendants to reveal their sources would infringe their freedom of the press. Had it not been the defendants' sources, the public's right to know whether the plaintiff won the tender fairly would never have been known. The public would be poorer for it. The public interest will, in my view, be served by not revealing the identity of the defendants' sources at this stage. The defendants have a valid objection to revealing their sources.

[56] In the result, the plaintiff's two applications are dismissed with costs, including costs of two counsel where two were employed.

M TSOKA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF JUDGMENT	:	26 APRIL 2012