

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

**CASE NO 33205/15**

In the matter between:

**SOUTH AFRICAN AIRWAYS SOC LTD**

Applicant

and

**BDFM PUBLISHERS (PTY) LTD**

First Respondent

**MONEYWEB HOLDINGS LTD**

Second Respondent

**MEDIA 24 HOLDINGS (PTY) LTD**

Third Respondent

and

**SOUTH AFRICAN NATIONAL EDITORS' FORUM**

First Amicus Curiae

**SECTION 16**

Second Amicus Curiae

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**AMICI'S HEADS OF ARGUMENT**

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## TABLE OF CONTENTS

|  |           |
|--|-----------|
| <b>INTRODUCTION.....</b>                                       | <b>3</b>  |
| <b>LOSS OF PRIVILEGE.....</b>                                  | <b>5</b>  |
| <i>Chronology.....</i>   | <b>5</b>  |
| <i>The test for waiver.....</i>                                | <b>12</b> |
| <i>SAA's conduct.....</i>                                      | <b>15</b> |
| <i>Conclusion.....</i>   | <b>17</b> |
| <b>PUBLIC INTEREST IN DISCLOSURE .....</b>                     | <b>17</b> |
| <b>PUBLIC DOMAIN: AN INTERDICT IS INEFFECTIVE RELIEF .....</b> | <b>21</b> |
| <b>THE OVER BREADTH OF THE ORDER.....</b>                      | <b>28</b> |

## INTRODUCTION

1. This matter concerns the right of a public body – South African Airways – to interdict the media from disclosing the contents of a document prepared by an internal legal adviser which is already substantially in the public domain.
2. Even at the time the interdict was initially sought, in effective ex parte conditions, the document had already been substantially disclosed to the public.
3. SAA claims that it is entitled to a final interdict prohibiting publication of the document or any of its contents because the document is legally privileged.
4. It asserted that the document was privileged for the first time in court papers and only after a substantial number of interactions with the media, during which it knew that the media had the document and that its contents had already been disclosed publicly.
5. Over more than a day and a half, SAA's executive and the legal adviser who authored the document knew that the media had the document in its possession and yet failed at any point to assert privilege over the document, or to caution the media from publishing its contents because they were privileged.
6. This conduct means that any privilege, which may have attached to the document when it was initially created, was lost. When SAA moved for its

interim interdict in the early hours of Tuesday 24 November 2015, it had already lost its claim to privilege for the document.

7. Despite this, it pressed for and secured an order that not only limits the free speech rights of the media respondents who were cited in the case, but also, according to SAA, the public at large.

8. SANEF and Section 16 have sought admission as amici curiae in the matter in terms of Uniform Rule 16A(2). All parties have consented to their admission.

9. They propose to make submissions on four issues.

9.1 The first is the question of waiver and whether, by SAA's own conduct, it lost any privilege that may have attached to the document.

9.2 The second considers whether in the circumstances of this case the public interest in the document is so overwhelming that any prohibition on publication cannot be reasonable and justifiable.

9.3 The third relates to the extent to which the document is already in the public domain and the inappropriateness of interdictory relief in the circumstances.

9.4 The fourth engages the breadth of the interdict sought and explains why an interdict that precludes everyone for all time from publishing the contents of the document is inconsistent with the rule of law and violates the public's right of access to courts.

10. We address each of these four arguments in the sections that follow.

## LOSS OF PRIVILEGE

11. The parties in the matter have set out the chronology of events as they pertain to the applicant and each individual respondent. It is however important for the court to understand the extent of the interactions between SAA and the media as they unfolded in real time between Sunday 22 November 2015 and Tuesday 24 November 2015. We therefore set out below the pertinent facts in a “real time” chronology.

### Chronology

12. The chronology of events reveals that there were numerous occasions over the period of a day and a half during which it was clear to different, high-ranking SAA representatives that the media were in possession of the document and intended to publish it. Despite this knowledge, they repeatedly failed to object to its use or to claim privilege over it.

### Saturday 21 November 2015 – Ms Kwinana and Ms Myeni

13. On Saturday 21 November 2015, the author of the *City Press* article entitled “SAA’s CEO turbulence”, Ms Tina Weavind, telephoned representatives of SAA in order to afford it an opportunity to reply to the allegations contained in the article.<sup>1</sup>

14. First, she called the SAA Chairperson, Ms Dudu Myeni, on her cellphone. The person who answered claimed not to be Ms Myeni.<sup>2</sup> Ms Myeni has

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<sup>1</sup> Respondents' Affidavit, p 31, para 17.35.

<sup>2</sup> Respondents' Affidavit, p 31, para 17.35.

not come on oath to dispute that this call to her phone took place or to explain the circumstances around another person answering her cellphone on a weekend.

15. Thereafter, Ms Weavind called Ms Yakhe Kwinana, the Chairperson of SAA's Audit and Risk Committee. Ms Weavind says that Ms Kwinana was fully aware that *City Press* had access to the document and intended to report on its contents.<sup>3</sup> Ms Kwinana disputes this but she confesses that she was asked to comment on the alleged reckless trading of SAA, which is one of the topics addressed in the document.
16. In any event, however, the respondents' version that Ms Kwinana knew that *City Press* had the document and was intending to publish about its contents must be accepted by this court because this is an application for a final interdict.<sup>4</sup>
17. At no point did Ms Kwinana, or anyone else on behalf of the applicant, claim that the document was subject to legal professional privilege or demand that publication be withheld.<sup>5</sup>
18. Ms Kwinana did not discuss these calls with anyone else at SAA before publication.<sup>6</sup>

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<sup>3</sup> Respondents' Affidavit, p 31, para 17.34 read with Ms Weavind's confirmatory affidavit at p 130.

<sup>4</sup> *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A)

<sup>5</sup> Respondents' Affidavit, p 31, para 17.35.

<sup>6</sup> Replying Affidavit, p 136, para 7.

19. *City Press* published the front-page article in its business section on Sunday 22 November 2015.<sup>7</sup> The article was partly based on the document and included several quotes from it.<sup>8</sup>

Sunday 22 November 2015 - Mr Tlali; Ms Jiya; Ms Fikelepi

20. The second respondent, represented by Ms Antoinette Slabbert who is a journalist at *Moneyweb*, sent an e-mail to Mr Tlali Tlali on Sunday 22 November 2015, at 10h59, containing a list of questions.<sup>9</sup> The questions expressly related to the document that *City Press* had reported on that very same Sunday. The questions were the following:

*1. Can you confirm that the Board of SAA received a report from the Acting Chief Executive of SAA on the legal impact of the correspondence from Airbus dated 2 and 26 October relating to the pre delivery payments under the A320-200 purchase agreement? The report was signed on November 5 by Thuli Mpshe.*

*2. If so, when did it serve before the board?*

*3. The report advises that SAA is insolvent and trading recklessly. It advises the board to file for business rescue. What did the board decide to do?*

*4. Has the content of the report been reported to the minister of finance, the parliamentary portfolio committee and CIPC? If not, why not?*

*5. Has the board engaged Airbus on the content of its correspondence? If not, why not? If it did, where does the matter stand now?*

*6. Have any of SAA's other creditors/lenders given notice of acceleration of SAA's obligation or put SAA on terms following reports about developments regarding the Airbus agreement? If so, please give detail.*

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<sup>7</sup> Respondents' Affidavit, p 31, para 17.34.

<sup>8</sup> Respondents' Affidavit, p 31, para 17.34.

<sup>9</sup> Annex SZ 6 to Respondents' Affidavit, p 105.

7. The report also advises that SAA should ask government for an urgent equity injection. How much does SAA need and has such a request been made?" (Emphasis added.)

21. Mr Tlali is SAA's spokesperson. The media routinely put questions for comment from SAA to Mr Tlali.<sup>10</sup>
22. Ms Ursula Fikelepi concedes that "*it is apparent from paragraph 7 of the email that Moneyweb had sight of the opinion.*"<sup>11</sup>
23. Ms Slabbert's email also plainly states: "*[c]an you please respond by 18:00 tonight (Sunday 22 November).*"
24. Mr Tlali forwarded Ms Slabbert's e-mail to his supervisor, Ms Lusanda Jiya, the General Manager of Stakeholder/Shareholder Relations, at 13h47 on Sunday 22 November.<sup>12</sup> Ms Jiya is an EXCO member and was aware that Ms Fikelepi had submitted an opinion on request from EXCO.<sup>13</sup>
25. Thus once Ms Jiya had seen the questions, SAA's EXCO knew that the document was in the hands of the media.
26. After receiving Ms Slabbert's email from Mr Tlali, Ms Jiya called Ms Fikelepi saying that there were media enquiries about Ms Fikelepi's legal opinion.<sup>14</sup> Once Ms Fikelepi knew that the media had her document,

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<sup>10</sup> Respondents' Affidavit, p 23, para 17.6.

<sup>11</sup> Applicant's Supporting Affidavit, p 100, para 14.

<sup>12</sup> Replying Affidavit, p137, para 9.

<sup>13</sup> Replying Affidavit, p137, para 10.

<sup>14</sup> Replying Affidavit, p137, para 10.



SAA's own in-house legal adviser knew that the document was in the hands of a third party.

27. Ms Jiya then sent Ms Fikelepi the questions and advised that she believed the Board would be better placed to respond to the questions since the questions were addressed to the Board. Ms Fikelepi agreed in an e-mail after 17h00 and Ms Jiya said that she would refer the questions to the Board.<sup>15</sup>

28. At no point did Ms Jiya or Ms Fikelepi caution that the document was privileged, nor did they contact *Moneyweb* to assert privilege over the document.

29. On Sunday evening, Mr Tlali told Ms Slabbert that her questions were being attended to and that she may get a response that same night. At no point during this conversation did Mr Tlali assert that the document was privileged.<sup>16</sup>

Monday 23 November 2015 - the Company Secretary and the acting CEO

30. At approximately 13h37 on Monday, 23 November 2015, Mr Tlali received an e-mail from Ms Paton from *Business Day* requesting answers to a number of questions. In the fifth paragraph on the first page of the e-mail,

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<sup>15</sup> Replying Affidavit, p 137, para 10.

<sup>16</sup> Respondents' Affidavit, p 27, para 17.21.

Ms Paton's e-mail says that *Business Day* is in possession of a legal opinion drafted by Ms Fikelepi.<sup>17</sup>

31. At 14h03 on Monday 23 November, Mr Tlali forwarded Paton's e-mail and Slabbert's e-mail to several other very high-ranking SAA officials, including<sup>18</sup> Ms Jiya, Ms Fikelepi, the Company Secretary and the acting CEO.<sup>19</sup>
32. The Company Secretary and the acting CEO had previously had sight of the opinion as they were sent a copy by Ms Fikelepi.<sup>20</sup>
33. Despite the widespread knowledge at this point within SAA that the media had access to the document, no-one asserted privilege over it.
34. It appears that sometime between Mr Tlali's email of 14h03 and 17h00, the acting CEO made a provisional decision to proceed with an application to interdict the publication. However, SAA's affidavit makes it clear that the application would only be proceeded with if SAA had a case to interdict publication and this still had to be confirmed with SAA's lawyers.<sup>21</sup>
35. Even at this stage, when a provisional decision to go to court had been made, no-one at SAA notified the media that the document was privileged and should not be published.

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<sup>17</sup> Applicant's Supporting Affidavit, p 100, para 15.

<sup>18</sup> Replying Affidavit, p 137, para 10.

<sup>19</sup> Replying Affidavit, p 137, para 11.

<sup>20</sup> Applicant's Supporting Affidavit, p 99, para 11.

<sup>21</sup> Replying Affidavit, p 138, para 11.

36. Ms Fikelepi got hold of TGR Attorneys (TGR) after 17h00 and confirmed the instruction at 17h24.<sup>22</sup> Subsequently a consultation with counsel, Ms Fikelepi and Ms Jiya was held at 19h00.<sup>23</sup> This is when the applicant took advice from counsel about whether it could obtain an interdict and after counsel advised that it could papers were drafted.<sup>24</sup> It was not long after the consultation started that counsel advised that SAA could proceed on an urgent basis to court on the ground that the opinion was privileged.<sup>25</sup>
37. After 19h00 Ms Jiya asked Mr Tlali to phone Ms Slabbert and Ms Paton to enquire about the publication date - this was purportedly because the e-mails did not say when they intended publishing.<sup>26</sup> Mr Tlali therefore phoned Ms Paton and Ms Slabbert from the airport shortly before his departure for Istanbul.<sup>27</sup>
38. The call to Ms Paton was at 19h35. At no point during that call did Mr Tlali claim that the document was privileged. He seemed unperturbed by the fact that *Business Day* had the document because he said that other journalists also had it.<sup>28</sup> Ms Paton told him that the story had been filed but

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<sup>22</sup> Replying Affidavit, p 138, para 11.

<sup>23</sup> Replying Affidavit, p 138, para 11.

<sup>24</sup> Replying Affidavit, p 138, para 12.

<sup>25</sup> Replying Affidavit, p 139, para 17.

<sup>26</sup> Replying Affidavit, p 138, para 13.

<sup>27</sup> Replying Affidavit, p 138, para 14.

<sup>28</sup> Respondents' Affidavit, p 23, para 17.8.

that SAA could add any responses until 20h00.<sup>29</sup> Mr Tlali said that he would talk to management and get back to her.<sup>30</sup> He never did.<sup>31</sup>

39. The call to Ms Slabbert was at about 20h00. Ms Slabbert told Mr Tlali that she had already submitted her article for publication but that they could incorporate any responses within the next two hours. Ms Slabbert said the article would be published between 02h00 and 03h00 on Tuesday 24 November 2015.<sup>32</sup> Mr Tlali never contacted Ms Slabbert again. At no point during, the call did Mr Tlali assert privilege over the document or demand that it not be published.<sup>33</sup>

#### Tuesday 24 November 2015

40. At 01h43 in the morning of 24 November the applicants' attorneys served the court order on various representatives of the respondents.<sup>34</sup>

#### *The test for waiver*

41. The test for waiver has most recently been set out by the Supreme Court of Appeal in *Competition Commission v ArcelorMittal*<sup>35</sup> where the court held:

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<sup>29</sup> Respondents' Affidavit, p 23, para 17.7.

<sup>30</sup> Respondents' Affidavit, p 23, para 17.7.

<sup>31</sup> Respondents' Affidavit, p 23, para 17.7.

<sup>32</sup> Respondents' Affidavit, p.27 para 17.22.

<sup>33</sup> Respondents' Affidavit, p 27, para 17.23.

<sup>34</sup> SZ 5 to the Respondents' Affidavit, p 103.

<sup>35</sup> 2013 (5) SA 538 (SCA) ("*ArcelorMittal*") at para 33.

*"[33] Waiver may be express, implied or imputed. It is implied if the person who claims the privilege discloses the contents of a document, or relies upon it in its pleadings or during court proceedings. It would be implied too if only part of the document is disclosed or relied upon. For a waiver to be implied the test is objective, meaning that it must be judged by its outward manifestations; in other words from the perspective of how a reasonable person would view it. It follows that privilege may be lost, as the English courts have held, even if the disclosure was inadvertent or made in error. Imputed waiver occurs when fairness requires the court to conclude that privilege was abandoned. The respondents contend that in this case the loss of privilege is implied or to be imputed to the Commission. The Commission submits that the bare references to the leniency application in the referral affidavit did not amount to a waiver of privilege.*

*[34] I appreciate that a bare reference to a document in a pleading, without more, may be insufficient to constitute a waiver, whereas the disclosure of its full contents may constitute a waiver. Where the line is drawn between these extremes is a question of degree, which calls for a value judgment by the court. When that line is crossed the privilege attached to the whole document, and not just the part of the document that was referred to, is waived. The reason is that courts are loath to order disclosure of only part of a document because its meaning may be distorted. But it must also be so that it does not inevitably follow that because part of document is disclosed, privilege is lost in respect of the whole document. This would be so where a document consists of severable parts and is capable of severance." (Footnotes omitted.)*

42. In our law, a distinction has been drawn between an implied waiver and an imputed waiver of the legal professional privilege. In *S v Tandwa and Others*<sup>36</sup> Cameron JA (as he then was) described the distinction between the two types of waiver as follows:

*"Implied waiver occurs (by analogy with contract law principles) when the holder of the privilege with full knowledge of it, so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where – regardless of the holder's intention – fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective*

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<sup>36</sup> 2008 (1) SACR 613.

*inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment”.*<sup>37</sup>  
(Emphasis added.)

43. As regards waiver by implication, Wigmore<sup>38</sup> notes the following:

*"Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicted in every waiver. I.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final."*

44. This passage has been endorsed in numerous South African cases.<sup>39</sup>

45. In *Mann v Carnell*<sup>40</sup> the Australian High Court explained imputed waiver as follows:

*"Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though*

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<sup>37</sup> At para 18.

<sup>38</sup> Wigmore - *Evidence in trials at Common Law* (revised by McNaughton) (1961 Volume 8 paragraph 2327)

<sup>39</sup> *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *Msimang v Durban City Council and Others* 1972 (4) SA 333 (D) at 337; *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics & Marketing and Others* 1979 (1) SA 637 (C) at 645H-646A; *S v Nhlapo and Others* 1988 (3) SA 481 (T) at 482D-H; *Peacock v SA Eagle Insurance Co. Ltd.* 1991 (1) SA 589 (C) at 590I-591C; *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd And Others* 1983 (2) SA 626 (W) at 628A-C and 629H; *Harksen v Attorney-General of the Province of the Cape of Good Hope and Others* 1999 (1) SA 718 (C) at para 62; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at para 24.

<sup>40</sup> (1999) 201 CLR 1.

such consequences may not reflect the subjective intention of the party who has lost the privilege." (Emphasis added.)

46. Imputed waiver is therefore not concerned with the subjective intention of the client. The client can genuinely and adamantly protest that it never intended to waive privilege over the document. But nonetheless, there will come a point where fairness demands a determination that the privilege has been lost. This is an objective assessment.<sup>41</sup>
47. The New South Wales Supreme Court has held that where a client knows that a privileged document is in the hands of third parties and, despite numerous opportunities over a period of time, fails to assert privilege over the document, the privilege will have been lost. In the case of *Spedley Securities Ltd (in liq) v Bank of New Zealand*,<sup>42</sup> the court confirmed that legal professional privilege can be lost through implication.<sup>43</sup> The court held that "an implied waiver occurs when, by reason of some conduct on the privilege holder's parts, it became unfair to maintain the privilege".<sup>44</sup>

### SAA's conduct

48. The chronology set out above shows that over the course of more than a day and a half, high-ranking officials within SAA (including EXCO

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<sup>41</sup> *ArcelorMital* at paras 33-34.

<sup>42</sup> (1991) 26 NSWLR 711

<sup>43</sup> *Ibid* 710.

<sup>44</sup> *Ibid* 730

members, the Company Secretary and the acting CEO) knew that the media had access to the opinion and intended publishing its contents.

49. The author of the opinion, Ms Fikelepi, who is an admitted attorney and clearly aware of the rules of legal professional privilege, knew since Sunday 22 November 2015 that the media had her opinion and were intending to publish its contents. She did not once over this entire period assert that the document was privileged.
50. Mr Tlali, SAA's official spokesperson, had five separate interactions with journalists over this day and a half and at no point did he assert privilege over the document. He was also never instructed by his superiors to assert privilege over the document.
51. Ms Kwinana knew that *City Press* had access to the opinion and intended reporting on its contents. She did not raise the issue of privilege and did nothing to prevent its publication. As a result of this inaction, extracts from the opinion were published by *City Press* on Sunday 22 November 2015.
52. Viewed cumulatively, this conduct constitutes an imputed waiver of any privilege in the document. In the current environment of electronic media and the speed with which information can be made public, fairness dictates that where a party is aware that its legally privileged document is in the hands of third parties (including the media), and does nothing to caution against publication or claim privilege over it for a significant period of time, the privilege will be lost.



53. That is precisely what occurred in this case. SAA's own conduct resulted in its abandonment of any privilege in the document. It therefore has no basis for the interdict that it claims.

Conclusion

54. In the light of what is set out above, a final interdict ought not to be granted because any privilege that may have attached to the document has been lost.

**PUBLIC INTEREST IN DISCLOSURE**

55. Legal professional privilege is not absolute; our law recognises that disclosure of privileged documents may be required in the public interest.

56. SAA is therefore incorrect to contend that there are only two recognised exceptions to the legal rule prohibiting disclosure of privileged documents.

57. In its replying affidavit, SAA claims that the only exceptions to the bar on production of legally privileged documents is where a) the document is communicated in furtherance of a crime or fraud or b) the privilege has been waived.<sup>45</sup>

58. But this approach to the law fails to take into account the important rights of access to information and freedom of expression under our Constitution.

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<sup>45</sup> Replying Affidavit, p 142, para 33.3.

59. The very statute that Parliament has passed to give effect to the right of access to information itself recognises that even legally privileged documents must be disclosed where the disclosure of the document would reveal evidence of a substantial contravention of or failure to comply with the law and the public interest in disclosure clearly outweighs the harm of disclosing the privileged material. This provision is contained in section 46 of the Promotion of Access to Information Act 2 of 2000 (“PAIA”).
60. It provides a clear example of where the legislature has determined that there can be countervailing public interest grounds on which even legally privileged documents must be disclosed. If it can be shown that a document will reveal evidence of a failure to comply with the law and the public interest in disclosing the document outweighs the harm that may be caused by its release, the document must be provided.
61. This is just such a case. Although it is not possible here to go into great detail about the contents of Ms Fikelepi’s document (given the extant interdict), it is clear from what has already been said in the papers about it that the document confirms that SAA is trading recklessly.<sup>46</sup> Such conduct is unlawful under both the Companies Act 71 of 2008 and the Public Finance Management Act 1 of 1999.
62. The document therefore meets the first requirement for disclosure under PAIA. In so far as the second requirement of relative advantage is

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<sup>46</sup> Annex SZ 6 to Respondents' Affidavit, p 105.

concerned, the media respondents' affidavit sets out in detail the public interest in access to the document.

63. Their affidavit explains that despite the advice contained in the document, SAA made a presentation to Parliament twelve days after the document served before the Board, in which no mention was made of the concerns raised in the document. This raises serious questions about the manner in which SAA is currently being managed and the extent to which its Board is playing open cards both with the government and the public at large.

64. SAA is no ordinary party. It has constitutional obligations as an organ of state to be accountable and transparent.<sup>47</sup> It is answerable to the public for its conduct. Ms Fikelepi's opinion makes a compelling case that the situation at SAA is so dire that mechanisms created by the Companies Act such as business rescue or liquidation should be invoked.<sup>48</sup>

65. There can also be no real prejudice to SAA by the lifting of the ban on publication of the document. Substantial portions of the document are already in the public domain. In fact, the entire document can currently be accessed on a website.<sup>49</sup> SAA's claims that it will suffer harm if debtors or creditors in dispute with SAA could use the opinion against SAA in litigation of their disputes, have no traction because the interdict does not prevent them making use of the document. It is currently available to them.

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<sup>47</sup> Section 195 of the Constitution.

<sup>48</sup> Respondents' Affidavit, p 41, para 18.18.

<sup>49</sup> Respondents' Affidavit p. 35 para 18

66. PAIA is generally not applicable during the course of legal proceedings.<sup>50</sup>

Therefore any decision by this court to refuse the requested interdict on the basis that the public interest in the disclosure of the opinion outweighs the harm to SAA in disclosing it, could not be based on PAIA itself.

67. However, the fact that PAIA recognises a limitation to legal professional privilege and demands disclosure of legally privileged documents in some circumstances is relevant to this court's assessment of whether the interdict sought by SAA unjustifiably limits the public's right of access to information and the media's free speech rights.

68. The Constitutional Court has made it clear that interdicts to restrain publication will only be justified in the rarest of circumstances. In *Print Media* it held that:

*"In the context of court interdicts, the Supreme Court of Appeal has, correctly in my view, endorsed the following statement of Lord Scarman:*

*'(T)he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice.'*

*The case law recognises that an effective ban or restriction on a publication by a court order even before it has 'seen the light of day' is something to be approached with circumspection and should be permitted in narrow circumstances only.*"<sup>51</sup>

69. That the legislature itself has recognised that there can be such pressing public interest in the disclosure of certain information that not even legal

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<sup>50</sup> Section 7 of PAIA.

<sup>51</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) para 44

professional privilege can stand as a bar to disclosure, is relevant to the assessment this court must make of whether prohibiting publication of Ms Fikelepi's opinion is justifiable.

70. We submit that a prohibition on publication would not be reasonable and justifiable because:

70.1 as we set out in more detail below, the document is already in the public domain;

70.2 the document provides evidence of breaches of the law; and

70.3 there is considerable public interest in the affairs of SAA and how it is currently being managed.

### **PUBLIC DOMAIN: AN INTERDICT IS INEFFECTIVE RELIEF**

71. The opinion has by now been published on countless websites and social-media platforms; references to its essential findings have appeared in three large print media publications in the country and the full version has no doubt been seen by thousands of members of the public.

72. SAA itself concedes that extensive publication in the national media has occurred:<sup>52</sup>

*"42 Publication is admitted as follows:*

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<sup>52</sup> Replying Affidavit, p 144, para 42.

*42.1 City Press published information and/or contents and/or paraphrased extracts from the opinion on 22 November 2015.*

*42.2 Business Day published information and/or contents and/or paraphrased extracts or quotes from the opinion on 24 November 2015;*

*42.3 Moneyweb published information and/or contents from the opinion on 23 November 2015;*

*42.4 Max du Preez published the entire opinion on his twitter site and SAA became aware of that publication at around 16:00 on 24 November 2015. It appears that the publication happened around 15:00 on 24 November 2015. He removed it from that site at around 10:00 on 24 November 2015 after SAA's attorneys demanded withdrawal on the ground that there was a court order prohibiting publication of the opinion because it is privileged."*

73. The report was also published on *Legalbrief* on 24 November 2015.<sup>53</sup> And it is still, at this very moment, available on social media.<sup>54</sup>

74. Even if this Court were to find that the opinion is privileged and, contrary to the submissions of the amici curiae, that the privilege has not been lost, it still does not follow that the interdictory relief sought should be granted. That is so because interdictory relief is manifestly inappropriate in circumstances where a document is already widely in the public domain. This is so even if that document is a legally privileged opinion.

75. It is trite law that, in these circumstances, an interdict could never be an effective remedy. An interdict is not a remedy that addresses the past invasion of rights.<sup>55</sup>

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<sup>53</sup> See Annexure SZ10 to the Respondents' Affidavit at 110.

<sup>54</sup> Respondents' Affidavit at p35, para 18.

76. We begin with the position in South African law and then discuss a few of the leading cases in England and the European Court of Human Rights.

### South Africa

77. It is basic to the principle of confidentiality that information cannot be protected from disclosure once it loses its secrecy. The principle has been recognised in South African law relating to commercial confidentiality,<sup>56</sup> and in our law of privacy.<sup>57</sup>

78. Two recent South African cases demonstrate the application of this principle in the context of interdicts:

78.1 In *Manyatshe v M&G Media Ltd and Others*<sup>58</sup> the Supreme Court of Appeal found that an appeal against a dismissal of an interim interdict was moot, given that the publication sought to be prevented had already taken place. The Court reasoned as follows:

*"[C]ourts of law exist for the settlement of live, concrete controversies and not to pronounce on hypothetical or abstract questions of law ... On the facts of this case I think it is plain that the appeal has indeed become moot. Even if we should find that on the facts of this case an interim interdict should have been granted, it will not help the appellant because the publication he sought to prevent had taken place. It is water under the bridge. Nor will it assist in the resolution of future*

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<sup>55</sup> *Philip Morris Inc v Marlboro Shirt Co SA Ltd* 1991 (2) SA 720 (A) at 735A-B.

<sup>56</sup> See e.g. *Valunet Solutions Inc t/a Dinkum USA v eTel Communications Solutions (Pty) Ltd* 2005 (3) SA 494 (W) at para 17.

<sup>57</sup> See generally J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2ed (2003).

<sup>58</sup> [2009] ZASCA 96 (17 September 2009).

*factual disputes, because every future case will have to be decided on its own facts.*<sup>59</sup>

78.2 In *South African Broadcasting Corporation v Avusa Limited and Another*,<sup>60</sup> the SABC sought an order compelling Avusa to deliver to it a copy of an internal SABC report that had been obtained from a confidential source. This Court declined to grant the order on the basis that the report had already been widely published in print and electronic media. It explained that "*the horse has bolted*" and thus any infringement of the applicants' rights could not be restored by an interdict.<sup>61</sup>

#### *The United Kingdom and the European Court of Human Rights*

79. The public domain doctrine in the context of national security restrictions has been especially prominent in the jurisprudence of the English courts and in the European Court of Human Rights.

80. The leading case is *Attorney-General v Guardian Newspapers (No 2)*<sup>62</sup> ("the Spycatcher case"), where the House of Lords was requested by the government to interdict the distribution of a book by a former MI5 agent, the contents of which contained names of colleagues, details of operational techniques and of specific operations (including a plan by MI6

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<sup>59</sup> Ibid at para 12.

<sup>60</sup> 2010 (1) SA 280 (GSJ).

<sup>61</sup> At paras 18, 26.

<sup>62</sup> [1988] 3 All ER 545.



to assassinate President Nasser of Egypt). The book had already been widely published worldwide.

81. Given the extent of this prior publication, the House of Lords ultimately refused to grant the interdict. In refusing the relief, Sir Nicolas Browne-Wilkinson famously emphasised the damaging impact that ineffective remedies have on the integrity of the court:

*"Finally, I have borne in mind, rightly or wrongly, one further factor of the public interest. I think 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. Mr. Browne on behalf of 'The Guardian' likened the Crown's attitude to Canute forbidding the tide to come in, and I confess there have been occasions recently when I have felt like the little Dutch boy being asked to put a finger in the hole in the dyke when in fact the whole embankment has broken down two hundred yards upstream. The checking of small leakages when in fact the whole of the news is out in the form of a book is likely in my judgment to give rise to a degree of lack of respect for the court in seeking to achieve the unachievable.*

*The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere. But whilst the news is international, the jurisdiction of this court is strictly territorial. Once the news is out by publication in the United States and the importation of the book into this country, the law could, I think be justifiably accused of being an ass and brought into disrepute if it closed its eyes to that reality and sought by injunction to prevent the press or anyone else from repeating information which is now freely available to all. It is an old maxim that equity does not act in vain. To my mind that is good law and the court should not make orders which would be ineffective to achieve what they set out to do. For those reasons I prefer, and on balance with considerable hesitation, the arguments against granting any further injunction in this matter."<sup>63</sup>*

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<sup>63</sup> *Attorney General v Guardian Newspapers Ltd* [1987] 1 Weekly Law Reports 1248 at 1269.

82. Sir Donaldson MR for the Court of Appeal stated:

*"As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e. made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality".*<sup>64</sup>

83. And Lord Keith for the House of Lords held:

*"[G]eneral publication in this country would not bring about any significant damage to the public interest .... All such secrets as the book may contain have been revealed to any intelligence services whose interests are opposed to that of the United Kingdom."*<sup>65</sup>

84. Lord Goff's decision is also instructive:

*"[T]he principle of confidentiality only applies to information to the extent that it is confidential .... [O]nce it has entered ... the public domain ... then, as a general rule, the principle of confidentiality can have no application to it."*<sup>66</sup>

85. The European Court of Human Rights adopted the same approach, holding that once publication had occurred in the United States and copies of the book had become available in the United Kingdom, the order sought *"was no longer necessary in a democratic society"*.<sup>67</sup>

86. And in *Vereniging Weekblad Bluf! v the Netherlands*,<sup>68</sup> the European Court of Human Rights held that the Netherlands had infringed article 10 (the free speech guarantee) of the European Convention of Human Rights where its courts ordered the withdrawal of an issue of a magazine

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<sup>64</sup> *Attorney General v Guardian Newspapers (No.2)* [1990] 1 A C 109 at 177.

<sup>65</sup> *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 All ER 545 at 642.

<sup>66</sup> *Ibid* at 659.

<sup>67</sup> *The Observer and the Guardian v United Kingdom, European Court of Human Rights*, (1992) 14 E.H.R.R. 153 at paras 66-70.

<sup>68</sup> (1995) 20 EHRR 189.

containing a report on the internal security service dated six years before the issue. The Court held that withdrawal of the magazine could no longer be regarded as necessary to safeguard national security, as the information was already in the public domain.<sup>69</sup> The Court noted that 2,500 copies of the magazine had already been sold in Amsterdam and that the media had commented on the information in the report.

Application to the present case

87. The extent of the publication in the present case is manifest. Interdicting further publication would be futile. The dam has literally burst and no further interdict from this court will undo the publication that has already occurred.

88. Granting an interdict in these circumstances would also undermine the administration of justice. As the House of Lords highlighted in the *Spycatcher* case, where there has been extensive prior publication of information, the administration of justice would be brought into disrepute if courts closed their eyes to that reality and sought, by an interdict, to prevent the press or anyone else from repeating information which already freely available to all.

89. In the circumstances, there is no basis for an interdict against publication of the document that is already freely available on the electronic media.

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<sup>69</sup> Ibid at 203.

## THE OVER BREADTH OF THE ORDER

90. Paragraph (c) of the interim order granted by this court reads as follows:

*“publication, including in 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”.*

91. In its amended notice of motion, SAA seeks a final interdict prohibiting publication *“in the press, on the internet and/or in the social media and/or any other media and/or publication”.*

92. Although there may have been some debate whether this ban on publication was confined to publication by the media respondents or extended to all publication (by anyone) of the contents of the opinion, it is clear from the replying affidavit that SAA interprets this paragraph of the order to apply to all publication, by anyone, of the opinion.

93. This is clear from paragraph 42.4 of the replying affidavit.

94. In that paragraph, SAA refers to Max du Preez’s publication of the entire opinion on his twitter site at approximately 3pm on 24 November 2015. The publication therefore occurred after SAA had obtained the interim interdict in this matter.

95. SAA explains in its affidavit that after it became aware of the post, its attorneys contacted Mr du Preez and *“demanded withdrawal on the*

*ground that there was a court order prohibiting publication of the opinion because it [was] privileged".<sup>70</sup>*

96. Mr du Preez was not a party to the interim interdict application and yet SAA's attorneys asserted that the interim interdict it had obtained prohibited publication of the opinion. They could only have adopted this approach if they viewed paragraph c) of the interim order as applying to all media, over and above the named respondents in the matter.
97. If that is the proper scope of the interim interdict, it is incompetent.
98. It purports to bind the public at large in circumstances where those affected by the order have not been heard. This constitutes a violation not only of their right to freedom of expression but also of the right of access to courts.
99. The Constitutional Court has identified a fair hearing component to the right of access to courts. Section 34 of the Constitution gives everyone a right to have disputes that can be resolved by the application of law decided in a fair public hearing. The Constitutional Court has therefore interpreted section 34 to affirm the rule of law in the following terms:

*"The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the*

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<sup>70</sup> Replying Affidavit, p 144, para 42.4.

*proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected.”<sup>71</sup>*

100. It would accordingly be inconsistent with the rule of law and in breach of the right of access to courts to grant an order in the broad terms sought in paragraph b) of the amended notice of motion. As interpreted by SAA, that order would preclude the public at large from ever publishing any of the contents of the opinion. An interdict against publication by the world at large is an incompetent order because it will affect parties who are not before the court and have not been heard.

101. The most that SAA can obtain in these proceedings is an order limited to publication by the three media respondents cited and whose views on the proposed order have been heard.

102. That order should however not be granted for at least the reasons set out in the sections above:

102.1 Any privilege that may have attached to the document has been lost as a result of SAA's own conduct;

102.2 Even if the privilege has not been lost, an interdict on publication cannot be justified because the public interest in its disclosure is overwhelming;

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<sup>71</sup> *De Beer NO v North-Central Council and South-Central Local Council and Others* 2002 (1) SA 429 (CC) at para 11.

102.3 In any event, the contents of the opinion are already in the public domain and so any interdict on further publication would be futile.

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8 December 2015**