REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: Yes

Date: 16 July 2025
Signature:

CASE NO: 2024-030693

In the matter between:

SHIPOYILA ERNEST KHOZA **Applicant**

and

ORGANISATION UNDOING TAX ABUSE **Respondent**

Summary: Right to pre-publication comment – A person implicated in acts of corruption in a report published by a private actor does not have the right to a hearing prior to publication. *Langa CJ and Others v Hlophe* 2009 (4) SA 382 (SCA) applied.

JUDGMENT

Fourie AJ

Introduction

1. This is an opposed application in which the applicant, Mr Ernest Khosa, the Chairperson of the National Student Financial Assistance Scheme ("NSFAS") seeks declaratory and interdictory relief against the respondent, the Organisation Undoing Tax Abuse ("OUTA").

2. On 4 February 2024, OUTA released a report that it had conducted into alleged irregularities in NFSAS The report, and the article that accompanied it, contained allegations to the effect that Mr Khosa was directly involved in acts of corruption with suppliers. OUTA announced in the article that it had referred the report to the authorities for investigation and prosecution. Various other individuals were also implicated in the report.

3. The OUTA report and article were published on its website. The matter was widely reported on by the media, and also generated some interest on social media.

4. When he came to learn of the report, the applicant, via his attorneys, wrote to OUTA to demand that the report be taken down from its website, that he be given an opportunity to provide his response to the allegations against him, and that the report only be republished once this process had been completed to his satisfaction, and that the republished report contain an accurate recordal of his responses to each allegation. OUTA refused to remove the report, but did offer to meet to hear the applicant's version, and to update its report accordingly.

5. The applicant declined this offer, and instead brought the present application in the normal course. It seeks final relief in the following terms:

> "1 Declaring, alternatively, reviewing and setting aside the respondent's report titled "Report on recorded conversations between the NSFAS Chairperson and individuals closely linked to Coinvest Africa (Pty) Ltd, a service provider contracted by NFSAS for the direct payments of allowances to NSFAS" published on 4 January 2024 (the "report") as unlawful.
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> 2 Ordering the respondent to remove the report from its website and –
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> 2.1 publish a statement on its website, within 24 hours from the date of the order, to the effect that the report has been retracted.
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> 2.2 compelling the respondent to engage the applicant on mutually agreeable terms whereby the respondent will afford the applicant the right to rebut any adverse content of the report which the respondent in turn must faithfully and reasonably produce.
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> 2.3 compelling the respondent to advise every organ of state to whom the report has been provided of the content of the judgment and the impact on that organ of state placing any reliance on the report.
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> 3 In the event that the applicant and respondent are unable to agree mutual terms for the purposes of paragraph 2.4 above, then the parties shall be entitled to approach the court to make a determination of those terms on these papers, duly supplemented.
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> 4 Directing the respondent to pay constitutional damages in the amount of R50,000, which amount shall be paid directly to the Assemblies of God Church at Mageva Village, Giyani.
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> 5 Costs on an attorney and own client scale, which costs include the costs of two counsel.
>
> 6 Further and/or alternative relief as may be appropriate in the circumstances".

The applicant's case

6. The applicant's principal complaint is that OUTA released its report without granting him an opportunity to respond prior to publication, and states that the purpose of this application is to "*assert my right to dignity by obtaining an order directing OUTA to afford me a right of reply prior to the publication of OUTA's report which implicates me*."[1]

7. The applicant further states that "*It has never been my intention to prevent OUTA from publishing a report on its investigation or from using such a report to lay a criminal complaint, nor do I seek such relief in this application. I simply wish to be given my right of reply and therefore have no objections to the report being published provided that it includes a faithful and accurate recordal of my responses after each allegation against me in the report*."[2] This is the essence of the Applicant's case.

8. The key issue for determination in this matter is therefore whether the applicant has a right to a pre-publication hearing. This is primarily declaratory relief, as expressed in the first prayer of the notice of motion (I deal with the application to review and set aside OUTA's report in due course). Aside from any other relief sought, the declaratory relief is justiciable in these

[1] Founding affidavit, para 12.

[2] Founding affidavit, para 34.3 – 34.4.

proceedings. In *Langa CJ and Others v Hlophe* 2009 (4) SA 382 (SCA) ("*Langa*"), the SCA said in this regard:

> "Declaratory orders
>
> [27] In terms of s 38(a) of the Constitution any person acting in his or her interest has the right to approach a competent court on the ground that a fundamental right has been infringed, and the court may grant appropriate relief, including a declaration of rights.
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> [28] The jurisdiction of a High Court to grant a declaration of rights is derived from s 19(1)(a)(ii) of the Supreme Court Act. The court may, at the instance of any interested person, enquire into and declare any existing, future or contingent right or obligation, notwithstanding that the applicant cannot claim any relief consequential upon such determination."

9. The applicant has no right to a pre-publication hearing if the defamatory statement (or, as the applicant frames it, the statement injurious to his dignity) is made by a private person. In *Langa*, the SCA stated that "*The duty to hear a person was at common law always limited to judicial or some administrative organs; and a person acting in a private capacity has never had such a duty. The Constitution is not different. The audi principle can only be sourced in either s 33 or s 34 of the Bill of Rights: the former deals with just administrative action and the latter with a fair public hearing before courts*."[3]

10. The applicant argues that OUTA's conduct in publishing the report amounts to the exercise of a public power or performance of a public function. As a result, OUTA owes affected parties such as the applicant *audi*, and its failure

[3] *Langa* at para 34.

to do so renders its conduct procedurally unlawful, and thus liable to attack in judicial review proceedings.

11. In the alternative, the applicant argues that Section 8(2)(iii) and (iv) of the Constitution, which provides for the horizontal application of fundamental rights, should be applied here. In addition to the right of reply and to fair process, the applicant asserts that his fundamental right to dignity includes the right to be heard and to preserve his reputation.

Does OUTA exercise a public power or perform a public function?

12. The applicant sought to argue that OUTA was no mere private party, and that therefore the default common law position did not apply to it. The applicant's argument in this regard as pleaded in its founding affidavit can be summarised as follows:

    12.1. OUTA proclaims to the world that it exercises a public interest function. It undertakes quasi-public functions, which must attract commensurate public duties.

    12.2. Although lacking any legal authority or mandate to do so, OUTA purports to conduct investigations into allegations malfeasance and corruption in the public sphere.

    12.3. OUTA holds itself out as following a fair investigation process, described on its website as its "5-step methodology", which includes investigations, engagement with those implicated, exposure of its findings to the public, mobilisation of public

interest in the matter, and litigation aimed at achieving what it perceives as the appropriate remedy.

12.4. OUTA seeks to convey the message that it follows a fair investigation process, and that its findings can therefore be trusted. This in turn creates a legitimate expectation on the part of a person implicated in wrongdoing in an OUTA report to be heard prior to publication.

12.5. In publishing its investigation reports, OUTA (a reputable organisation) reaches a wide audience, and therefore acts as a quasi-media organization, and attracts similar duties to the recognised media, in particular the duty to allow implicated parties prior notice and an opportunity to comment, prior to publication.

12.6. Section 8(2)(iii) and (iv) of the Constitution provides for the horizontal application of fundamental rights, and should be applied in the circumstances. In addition to the right of reply and to fair process, the applicant asserts that his fundamental right to dignity includes the right to be heard and to preserve his reputation.

13. In its answering affidavit, OUTA describes itself as a non-profit civil action organisation supported and publicly funded by ordinary South Africans. Its mission includes challenging and taking action against maladministration and corruption, and where possible, holding those responsible to account.

14. As part of its work, OUTA conducted an investigation into alleged maladministration in the administration of publicly funded bursaries and student accommodation by the Department of Education and NFSAS, the government-funded bursary and loan organization. OUTA received recordings of a telephone conversation purportedly involving the applicant, duly investigated, and in January 2024 it published the article and impugned report.

15. OUTA pleads that the report contains accurate quotes from the recordings, and that it is truthful and has been published in the public interest. OUTA also pleads that the applicant fails to plead a proper case on review.

16. While accepting that OUTA is a private actor, the applicant argued that it is possible for private actors to exercise public power, with reference to cases such as *Allpay*.[4] This is not a controversial statement, and is entirely dependent on the facts.

17. I now turn to consider whether, in publishing reports alleging malfeasance and corruption, OUTA performs a public function or exercises a public power.

Analysis

18. OUTA is not an organ of state. It is a private not for profit company, funded by way of donations from the public, whose stated goals include exposing corruption in South Africa, and pushing for those responsible to be held to

[4] Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2) 2014 (4) SA 179. See also AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2004 (6) SA 557 (T).

account. Its board has complete discretion to decided what to investigate and whether to litigate in any particular matter that seizes its interest.

19. OUTA has no statutory powers of any kind. No bearer of statutory power has delegated any function or powers to it. When performing its investigations, OUTA possesses no statutory investigatory powers, power of arrest or seizure of documents, or powers of subpoena. Aside from potentially making *prima facie* defamatory allegations against third parties, OUTA's report has no legal consequences.

20. OUTA claims to have referred the report to the investigating authorities, but the effect of this is no more than the presentation of a well-motivated complaint of *prima facie* criminal conduct. Whether the police or prosecuting authorities take action on the basis of OUTA's report is entirely within the discretion of those authorities. While OUTA may seek to bring public pressure to bear on the authorities to take action against perpetrators of corruption, and may even litigate to challenge decisions not to bring legal action, in doing so it acts as a private actor. While it claims to be acting in the public interest in its work, this is not the same thing as performing a public function.

21. *Allpay* concerned the administration by a private company of the statutory functions of the State in distributing social grant and related payments to millions of recipients. The Constitutional Court held that in doing so, Allpay exercised public powers.

22. *AAA Investments*[5] concerned the delegation of regulatory powers to make binding rules over the microlending industry to a private entity, which was held to be exercising public powers in making such rules.

23. These cases are far removed from the position occupied by OUTA.

24. Professor Cora Hoexter, in an illuminating article titled "*A Matter of Feel? Public Powers and Functions in South Africa*"[6], summarised some of the further leading cases on private actors exercising public powers as follows:

> "…*Calibre Clinical Consultants*[7] involved a procurement decision of the bargaining council for the road freight industry, established under section 27 of the Labour Relations Act 66 of 1995. The bargaining council had established an AIDS programme and 'wellness fund' for the industry and wished to procure a service provider to manage these. The applicant, an unsuccessful bidder for the contract, sought PAJA review of the council's decision to award the tender to a competitor.
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> Its challenge failed, however, as Nugent JA concluded that this was the performance of a quintessentially domestic function rather than a function that called for public accountability. This conclusion was fortified by other factors, including the council's voluntary nature and that it was not spending public money, and by a possibly fatal concession that the council would not have been under a statutory duty to invite tenders at all. In short, Nugent JA saw none of the elements he had quoted from the English cases. The programme was not 'integrated into a system of statutory regulation' or 'woven into a system of governmental control', and ultimately it was not one for which the public had assumed responsibility.

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[5] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2004 (6) SA 557 (T).

[6] C. Hoexter, "A matter of Feel? Public Powers and Functions in South Africa", chapter 7, p149 in Elliott, Varutas and Stark (eds) *The Unity of Public law? doctrinal, theoretical and comparative perspectives (2018) Hart, London*.

[7] Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 (5) SA 457.

…

In *AMCU v Chamber of Mines*[8] a decision by non-governmental actors (employers and unions) to conclude and extend a collective agreement under section 23(1)(d) of the Labour Relations Act was held to be distinctly public in nature, though not administrative action. 68 In the 'public' diagnosis the unanimous judgment of Cameron J relied on features such as the legislative context, the mandatory and coercive effects of the decision and the rationale for extension, which was the 'plainly public goal' of improving workers' conditions through collectively agreed bargains."

25. It is evident that none of the factors relied on by the courts to classify the conduct in those matters as being public in nature, apply here.

26. I now turn to the relevant authorities on *audi* in the context of an investigation, to consider whether these authorities assist the applicant's contention that OUTA exercise a public power when it published the report, and that its conduct should therefore be subject to the same constraints.

The right to a hearing pre-publication

Msiza v Motau

27. In their heads and during oral argument, counsel for the applicant placed heavy reliance on the decision of the High Court in *Msiza v Motau SC (NO) and Another* 2020 (6) 604 GP ("Mzisa"), where the Court set aside the report of an investigation conducted in terms of the Financial Sector Regulation Act ("the FSR Act"), because of the failure by the investigator to provide a person

[8] AMCU v Chamber of Mines of South Africa 2017 (3) SA 242

implicated in criminal conduct in the report with an opportunity to be heard prior to publication.

28. While the applicant argued that *Msiza* is of critical importance here, it emerged during argument that *Msiza* was overturned on appeal to the Full Bench in *Prudential Authority of the South African Reserve Bank v Msiza and Another* [2023] ZAGPPHC 2098; A294/2021 (2 May 2023).

29. Counsel for the applicant sought to argue that despite having been overturned in its entirety on appeal, certain statements and findings in *Msiza* remained relevant statements that were good in law. These efforts were continued in lengthy supplementary written submissions filed after the hearing. I struggle to see the benefits of sifting through the wreckage of a judgment whose central findings were roundly rejected and reversed on appeal, to see whether anything of value remains.

30. Conversely, the majority decision in the *Msiza* appeal is directly relevant, and is binding on this court. The majority agreed with the minority finding that the impugned conduct was not reviewable under PAJA. The majority held that the impugned conduct was also not reviewable under the broader principle of legality either. The investigation was conducted in terms of empowering provisions contained in section 135(1) of the FSR Act. The purpose of the investigation was not to make a determination, but to gather information to enable the Prudential Authority to comply with its statutory objectives. The empowering provision grants the investigator broad discretionary powers to conduct the investigation.

31. The Court did not find that a party implicated in wrongdoing in an investigation conducted in terms of the FSR Act, was entitled as a matter of law to a hearing. A critical reason was that the investigation did not finally determine anything. It made *prima facie* findings of fact and provided the Prudential Authority with recommendations on further action to be taken by it.

32. The same can be said here – OUTA's report contains recommendations, including the referral of criminal complaints to the relevant authorities. None of the findings or recommendations contained in OUTA's report are binding on anyone, and the police and National Prosecuting Authority will decide independently whether to investigate OUTA's complaints or to prosecute anyone accused by OUTA of wrongdoing.

33. OUTA performs investigations and makes recommendations in its capacity as a private actor. Unlike the investigation in *Mzisa*, OUTA's investigatory powers are not derived from statute – in fact it has no investigatory powers at all. This is an important factor weighing against imposing public law duties on OUTA.

National Treasury and Another v Kubukeli 2016 (2) SA 507 (SCA) ("*Kubukeli*")

34. The headnote to the reported decision in *Kubukeli* provides a useful summary of the facts:

> "During May and June 2013 the National Treasury conducted a forensic investigation into financial irregularities in the hiring and use of mayoral cars by the OR Tambo District Municipality. The investigation arose from a newspaper article alleging that the mayor had hired luxury cars for two

months at a cost of R500 000, and that two of them were then crashed, resulting in liability for the municipality of R225 000.

The treasury asked the municipality to make Mr Kubukeli, the mayor's bodyguard and driver, available for an interview, but Mr Kubukeli was never informed of the request. The treasury completed its investigation without interviewing Mr Kubukeli, made findings of financial mismanagement and lack of internal controls at the office of the mayor, and offered certain recommendations. In respect of Mr Kubukeli the treasury found that car-hire costs had mushroomed when he became the mayoral driver and that he had negligently crashed the two cars. It recommended that the resulting damages be recovered from him.

Mr Kubukeli complained that he received no notice of the treasury's request to make himself available for an interview."

35. The High Court upheld Mr Kubukeli's complaint. The Supreme Court of Appeal overturned this decision, holding that the failure to provide Mr Kubukeli with a hearing (it being common cause that the invitation never reached him) did not render the investigation unlawful or infringe on his rights. It reasoned as follows:

"[24] As I have said, the national treasury exercised the public power to investigate any system of financial management and internal control of the municipality, and to recommend improvements, with the object of securing sound and sustainable management of the fiscal and financial affairs of the municipality. The purpose for which the power was given was not to investigate the conduct of any particular person and to make linal findings in respect thereof. What a particular person did or did not do was incidental to the object of the power. It follows that the request, that Mr Kubukeli and others attend interviews, did not constitute recognition of a right to be heard, but was intended to assist the national treasury to achieve its purpose. The treasury team was in no way to blame for the absence of that assistance.

[25] Viewed objectively, the purpose for which the power was given was achieved. The main import of the investigation and the report was to identify

shortcomings in the financial management and internal control of the municipality and to recommend improvements thereto. Unlike the decisions in *Albutt* and *Scalabrini*, the national treasury made no final or binding decision. The municipality was under no obligation to accept any of the recommendations.

[26] Although some loose language may have been used in this regard, it is clear in the context of the report that what was said in respect of Mr Kubukeli (and other officials) was in the nature of prima facie findings. These findings are clearly not binding on Mr Kubukeli and could be challenged in any subsequent proceedings. Paragraph 7.16.4 of the report must be seen in this light, namely that in the absence of an explanation by Mr Kubukeli the treasury team found no record of account for the amount of R8000 advanced to Mr Kubukeli. Most importantly, objectively it was beyond doubt that if the recommendations in respect of disciplinary proceedings or recovery of losses were to be implemented, the implementation would take place in terms of processes that would afford Mr Kubukeli a full opportunity to present his case.

[27] I therefore conclude that the investigation, report and recommendations of the national treasury, without the participation of Mr Kubukeli, were founded on reason and were not arbitrary or irrational. It follows that the appeal must succeed." (Emphasis added)

36. While (as in *Msiza*) the present matter is distinguishable in that OUTA exercises no statutory powers and performs no statutory functions, the underlined portions of the above quote apply with equal force here – OUTA's findings are at best *prima facie*, and can be challenged in any subsequent proceedings; and, critically, if further proceedings (such as criminal prosecution) are instituted, the applicant will enjoy the full range of procedural rights, including the right to answer to the allegations against him.

37. Several cases have reached similar findings, to the effect that even where investigations are carried out by a statutory authority, persons implicated in wrongdoing do not as a matter of course enjoy a right to *audi*. A critical distinction is drawn between the investigation process, and the process of determination or making of findings of wrongdoing, with the latter requiring *audi,* but not the former. See for example and *Competition Commission v Yara*[9]*:*

> "[24] But as I see it, the CAC's motivation conflates the requirements of an initiating complaint and a referral and misses the whole purpose of an initiating complaint. In fact, it is in direct conflict with the judgment of this court in Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd 2003 (3) SA 64 (SCA) para 17, which in turn relies on statements in the decision of the Tribunal in Novartis SA (Pty) Ltd v Competition Commission (CT22/CR/B Jun 01 paras 35-61). What these statements of Novartis make plain is that the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case."

38. *Masuku v Special Investigations Unit*[10]*,* a Full Bench decision in this division, concerned an investigation undertaken by the SIU, which implicated him in wrongdoing and recommended that action be taken to determine his suitability

[9] Competition Commission v Yara (South Africa) (Pty) Ltd and Others 2013 (6) SA 404 (SCA) at para 24:

[10] Masuku v Special Investigations Unit and Others (P55372/2020) [2021] ZAGPPHC 273 (12 April 2021)

as a provincial MEC, and which resulted in him losing his position in government. Dr Masuku challenged the legality of the SIU report. His challenge is distinguishable, as he was interviewed by the SIU during the investigation. Of interest and relevance to this matter are the following findings by Sutherland DJP.

39. The statutory function of the SIU is to investigate matters, not to make a determination about matters. This is a significant point of distinction. While the SIU exercises a statutory function, its expression of an opinion in the form of a report or recommendation is not determinative or final in any way.

40. Despite this, Sutherland DJP found that the consequence of the exercise of the SIU's statutory powers (a report that, in itself, had a devastating impact on Dr Masuku's reputation, employment and political career), were such that the public interest was best served by holding the SIU accountable by allowing review proceedings (see judgment para 21-30). The learned Judge concluded as follows:

> "[28]…There can be no doubt that the SIU report has had prejudicial consequences for Dr Masuku , as evidenced by his loss of office, unlike the position in which N found itself in Rhino. But the example of Dr Masuku goes beyond his personal mishap; it is a significant illustration that should a report of a statutory body, (even when no decision-making authority can be compelled to adopt it,) express criticism of a person implicated in its realm of activity, material harm can flow therefrom. It is therefore wholly appropriate, as a matter of principle and of policy, that accountability for its actions should be recognised and, thus, the ripeness of the report to be reviewed under the expanding scope of the principle of legality is demonstrated.
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> [29] In the circumstances experienced by Dr Masuku , whose grievance is a shattered reputation, perhaps it could sensibly be asked whether he should

> be left to exercise a private law remedy for defamation rather than be entitled to utilise a public law remedy in the form of a review. Whether the SIU could plausibly be protected from a defamation action by pleading that it is the essence of its very function to make accusations is not a question that this judgment needs to answer. An example of a defamation claim against the SIU for charging a person before the Special Tribunal is Stafford v SIU 1999 (2) SA 130 (ECD). Mrs Strafford was brought before the special tribunal by an SIU known as the Heath Commission. She was aggrieved at the decision to charge her. She sued for defamation. Notably, she did not seek a review. The case was decided on other grounds irrelevant to the present debate. However, that decision assumed that the action for defamation against a SIU was a valid cause of action. This case is an illustration that a decision by the SIU to charge a person is probably actionable. Whether or not an accusation by the SIU is actionable was not addressed. In Dr Masuku 's case, the SIU took no steps against him, yet accused him of dereliction of duty.
>
> [30] In my view, policy considerations are pertinent to answer the question about what form of remedy is appropriate. The criticism of Dr Masuku is about his role as an MEC; ie, a role performed by him in public life in the governing of the province. This factor decisively tips any balance in the direction of a public law remedy. Accordingly, on that premise the conduct of the SIU should be held accountable by way of review. The report of the SIU, albeit "non-final", is an exercise of public power for which it can be held accountable on the test for rationality." (Underlining added)

41. The Court proceeded to consider and dismiss Dr Masuku's complaints against the SIU's conduct and report.

42. *Masuku* is probably the high-water mark in support of the applicant's assertion that an investigation report, even of a preliminary and non-binding nature, can attract public law level scrutiny. But the distinguishing features are in my view significant. The SIU, a creature of statute, exercising powers assigned by statute, is a completely different animal from a private pressure group such as OUTA.

43. As for the argument that OUTA should be regarded as a quasi-media like organisation because of its influence and reach, I think that this conflates public interest in a particular matter, and the exercise of a public power. The two things are different – "… *mere public interest in a decision does not make it an exercise of public power*[11] ..."

44. OUTA's hard-earned reputation for being a reputable player in the public space does not, in my view, change the fact that it exercises private powers.

Langa v Hlophe

45. The decision of the SCA in *Langa* is relevant to this case in several important respects, including the question of making media statements. The then Judge President of the Western Cape High Court, Judge Hlophe, was accused of having attempted to influence two justices of the Constitutional Court to rule in favour of Mr Jacob Zuma in an important criminal case. The Justices of the Constitutional Court all signed a complaint to the Judicial Services Commission against Judge Hlophe. The JSC is the body with the statutory duties and powers to investigate and take disciplinary steps against judges. At the same time, the Justices issued a press release containing details of the complaint against Judge Hlophe.

46. Judge Hlophe turned to the courts, alleging *inter alia* that the Constitutional Court Justices had violated his constitutional rights to dignity and privacy (among others). One of the key grounds of attack was the failure to grant him an opportunity to be heard prior to releasing the media statement. The High

[11] *Marais v Democratic Alliance* 2002 (2) BCLR 171, at para [28].

Court found for Judge Hlophe on this issue. On appeal, the SCA overturned the finding, and made findings that are directly applicable to this matter:

> "[34] The finding that the appellants had not acted institutionally meant ineluctably that the respondent's cause of action fell away. The duty to hear a person was at common law always limited to judicial or some administrative organs; and a person acting in a private capacity has never had such a duty. The Constitution is not different. The *audi* principle can only be sourced in either s 33 or s 34 of the Bill of Rights: the former deals with just administrative action and the latter with a fair public hearing before courts. Since the appellants did not 'act as a court' the fair trial provision did not arise and since they did not act as an administrative body the administrative justice provision did not apply either.
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> …
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> [39] It has been difficult to pin down precisely where the rights that are asserted by the respondent are said to be sourced. Although reliance was placed upon the Constitution that reliance was at times expressed in broad and unspecific terms. A court cannot overlook what was said by Kentridge AJ in the earliest case that came before the CC, namely that *'it cannot be too strongly stressed that the Constitution does not mean whatever we choose it to mean*' (S v Zuma and Others 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401) at para 17).
>
> [40] It nonetheless became clear early in argument that, whatever the source of the alleged right might be, the respondent does not assert a right on the part of a judge to be heard by complainants generally before they lay complaints before the JSC, and that is undoubtedly correct. … While a judge is obviously entitled to be heard in the course of the investigation of a complaint (as appears from the various cases and protocols referred to by the High Court and referred to in the heads of argument) that is not what we are concerned with in this appeal. We are concerned instead with the act that initiates such an enquiry (the 'trigger'), which is the decision to lay a complaint. In that respect there is no authority to which we were referred or of which we are aware - whether in decided cases or in judicial protocols anywhere in the world - that obliges a complainant to invite a judge to be

heard before laying the complaint. Indeed, the authorities all say the opposite … and a rule to that effect would be absurd, because it would altogether undermine the process of investigating complaints.`" (References to authorities omitted).

47. With regard to the press release, the SCA held as follows:

"[49]…it was not the case of the respondent that the publication of the allegations, in itself, violated his rights. His case was that it violated his rights because he had not been permitted an opportunity to refute them.

[50] Once having found the appellants did not act unlawfully in laying the complaint we can see no basis for finding that they were obliged to keep that secret for the reasons dealt with more fully below. On the contrary there is much to be said for the contrary proposition (bearing in mind the circumstances in which it occurred) that the constitutional imperatives of transparency obliged them to make the fact known.

…

[51] So far as counsel sought to rely upon the constitutional protection of the respondent's right to dignity he was constrained to confine that aspect of his dignity that was impaired to the personality rights that attach to his reputation but in that respect counsel moved onto slippery ground. For it is well established in our law, and not in conflict with the Constitution, that the prima facie wrongful violation of the right to dignity may be justified (Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) (2002 (8) BCLR 771) at paras 29 - 34). Justification, as Gildenhuys J pointed out (at para 51), can be raised validly if the statement was true and for the public benefit; constituted fair comment; or was made on a privileged occasion. These are all specific applications of the broader principle that conduct, which is reasonable, having regard to all the circumstances of the case, is not wrongful (Hardaker v Phillips 2005 (4) SA 515 (SCA) at para 15; Wentzel v SA Yster en Staalbedryfsvereniging en 'n Ander; Wentzel v Blanke Motorwerkersvereniging en 'n Ander 1967 (3) SA 91 (T) at 98).

[52] An allegation that a judge is guilty of judicial misconduct by having sought to influence another judge is defamatory and violates that judge's

dignity. The media release contained at least such an innuendo and was therefore prima facie unlawful. To consider whether the publication was in fact unlawful on that score would call for us first to decide whether the factual averments made by the appellants (following the standard approach that is adopted in motion proceedings – Delta Motor Corporation J (Pty) Ltd v Van der Merwe 2004 (6) SA 185 (SCA) ([2004] 4 All SA 365)) establish the truth of the innuendo.

…

[54] The fallacy of the finding that the appellants had failed to strike a balance between the right of the public to know and the need to maintain public confidence in the judiciary is that the court would seem to have considered the truth or untruth of the defamatory allegation to be irrelevant. Disclosure of an allegation of gross misconduct against a judge may in certain circumstances not be for the public benefit but that could hardly be the case if the allegation is true. If the respondent in fact approached the two justices in an attempt to influence their judgment it would have been to the public benefit that that fact be made known. The fact that the respondent is a judge does not give him special rights or special protection. Judges are ordinary citizens. What applies to others applies to them (Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another 2005 (3) SA 238 (SCA) (2005 (6) BCLR 576;[2005] 1 All SA 326) at para 39). They, too, like government, pressure groups, or other individuals, 'may not interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision' (The Queen in Right of Canada v Beauregard (1986) 30 DLR (4th) 481 (SCC) quoted with approval in De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) (1998 (7) BCLR 779) at para 70).The Belize judgment, it may be added, was not concerned with the issue whether the publication of a complaint against a judge was improper or wrongful. It also did not suggest that it was - only that publication must be handled with care and circumspection.

[55] It will always be distressing for a judge to learn in the media that he or she has been accused of misconduct but that seems to us to be an inevitable hazard of holding public office. The remedy that is available to a judge who finds that he or she is in that position is to insist that the body charged with

> investigating such a complaint does so with expedition so as to clear his or her name. Nor should it be thought that such accusations may be made with impunity: a judge, like any member of the public, is entitled to the consolation of damages for defamation if the publication of the statement cannot be justified (Argus Printing and Publishing Co Ltd and Others v Esselen's Estate 1994 (2) SA 1 (A)). But we do not think that his or her remedy lies in stifling the fact that a complaint has been made (Moran v Lloyd's (a statutory body) [1981] 1 Lloyd's Rep 423 (CA) at 427)."(Underlining added)

48. The reasoning and findings in *Langa* are in my view directly applicable here. OUTA is a private citizen. It exercise no public powers or powers that are public in nature. It performs no statutory functions. It wields no power other than that brought about by its reputation for integrity and for exposing public corruption. Even when acting as a pressure group, OUTA remains a private actor, and its obligations remain that of a private citizen.

49. OUTA's report and recommendations constitute the 'trigger', being the lodging of a complaint to the authorities with the statutory powers to investigate and prosecute if they decide to do so. The fact that OUTA holds out that it has conducted its own investigations prior to lodging the complaint, and that it has found compelling evidence to support its complaints, do not elevate its report beyond what it is – a complaint to the authorities, backed up with credible information and evidence, aimed at bringing pressure to bear on the authorities to take action against those implicated, or risk adverse public opinion (and the publication of the report by OUTA is clearly aimed at increasing public pressure on the authorities to take action against corruption.

50. I therefore conclude that the applicant does not have the right to pre-publication notice or to be granted the opportunity to be heard prior to publication, as OUTA, a private actor, did not exercise a public power when it published the report. It follows that no right of review lies against the report.

The horizontal application argument

51. In the alternative, the applicant argues that Section 8(2) of the Constitution, which provides for the horizontal application of fundamental rights[12], should be applied here. In addition to the right of reply and to fair process, the applicant asserts that his fundamental right to dignity includes the right to be heard and to preserve his reputation.

52. The Constitutional Court dealt with the horizontal application of fundamental rights in the context of defamation in *Khumalo v Holomisa*[13], where the right to freedom of expression was held to be of direct horizontal application.[14] The Court emphasized the critical importance of the right to freedom of expression as being integral to a democratic society, and constitutive of the dignity and autonomy of human beings, without which they would not be able to effectively participate in public life. The Court emphasized that:

[12] In terms of s 8(2), [a] provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

[13] Khumalo and Others v Holomisa 2002 (5) SA 401 (CC).

[14] Hoexter and Penfold Administrative Law in South Africa, 3rd Ed 2021, Juta, at p164, fn 180: "The right to freedom of expression was famously held to be of direct horizontal application in Khumalo v Holomisa 2002 (5) SA 401 (CC) para 33. While the approach in Governing Body of the Juma Musjid Primary School v Essay NO 2011 (8) BCLR 761 para 58 suggested that the Constitutional Court conceived of horizontal obligations primarily as negative ones, the same court took a considerably broader view in Daniels v Scribante 2017 (4) SA 341 (CC) and AB v Pridwin Preparatory School 2020 (5) SA 327 (CC)."

> "[41] In deciding whether the common law rule complained of by the applicants does indeed constitute an unjustifiable limitation of s 16 of the Constitution, sight must not be lost of other constitutional values and, in particular, the value of human dignity. To succeed, the applicants need to show that the balance struck by the common law, in excluding from the elements of the delict a requirement that the defamatory statement published be false, an appropriate balance has been struck between the freedom of expression, on the one hand, and the value of human dignity, on the other."

53. In *Langa*, the SCA stated that "*The duty to hear a person was at common law always limited to judicial or some administrative organs; and a person acting in a private capacity has never had such a duty. The Constitution is not different. The audi principle can only be sourced in either s 33 or s 34 of the Bill of Rights: the former deals with just administrative action and the latter with a fair public hearing before courts*."[15] (Emphasis added)

54. The Court in *Langa* also pointed out that the common law of defamation provided adequate protection against the infringement of dignity by defamatory content.[16]

55. I see no merit in the applicant's attempt to invoke section 8(2) in an attempt to limit OUTA's (equally) fundamental rights to freedom of expression, particularly where the applicant has sought to bypass the existing, constitutionally balanced common law of defamation in its entirety. In *Khumalo*

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[15] *Langa* at para 34.

[16] Langa at para 51: So far as counsel sought to rely upon the constitutional protection of the respondent's right to dignity he was constrained to confine that aspect of his dignity that was impaired to the personality rights that attach to his reputation but in that respect counsel moved onto slippery ground. For it is well established in our law, and not in conflict with the Constitution, that the prima facie wrongful violation of the right to dignity may be justified (Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) (2002 (8) BCLR 771) at paras 29 - 34). Justification, as Gildenhuys J pointed out (at para 51), can be raised validly if the statement was true and for the public benefit; constituted fair comment; or was made on a privileged occasion. These are all specific applications of the broader principle that conduct, which is reasonable, having regard to all the circumstances of the case, is not wrongful (Hardaker v Phillips 2005 (4) SA 515 (SCA) at para 15; Wentzel v SA Yster en Staalbedryfsvereniging en 'n Ander; Wentzel v Blanke Motorwerkersvereniging en 'n Ander 1967 (3) SA 91 (T) at 98)..

v Buthelezi, the Court remarked that "*no person can argue a legitimate constitutional interest in maintaining a reputation based on a false foundation*."[17] Here, the applicant does not allege that the allegations against him are false. He does not deal with the veracity of the allegations against him at all. He does not even claim that OUTA's report contains material that is defamatory. He went as far as not including the report in his founding papers, and only attached it in reply, in response to criticism raised in the answering papers. He states in his founding affidavit that OUTA's report is based on two recordings of phone calls, but that *"… it is not necessary for me to engage with those recordings, how they were obtained and their content, because these proceedings are not an opportunity for OUTA to remedy their breach of my rights*."[18]

56. What then are these proceedings about? Lord Denning has the answer[19]:

> ""Today we have to deal with a modern phenomenon. We often find that a man (who fears the worst) turns around and accuse those – who hold a preliminary enquiry – of misconduct or unfairness or bias or want of natural justice. He seeks to stop the impending charges against him. It is easy enough for him to make such an accusation. Once made, it has to be answered …. so he gets which he most wants – time to make his dispositions – time to put his money in a safe place – time to head of the day when he has to meet the charge, and who knows? If he can stop the preliminary enquiry in its tracks, it may never start up again.
>
> To my mind the law should not permit any such tactics. They should be stopped at the outset. It is no good for the tactician to appeal to 'rules of

[17] At para 35.

[18] Founding affidavit, para 25.

[19] Moran v Lloyd's (a statutory body) [1981] 1 Lloyd's Rep 423 (CA) at 427as approved in Langa & Others v Hlope 2009 (4) SA 382 (SCA) par. 40, and quoted in Prudential Authority of the South African Reserve Bank v Msiza and Another [2023] ZAGPPHC 2098; A294/2021 (2 May 2023), para 73.

> natural justice'. They have no application to a preliminary enquiry of this kind. The enquiry is made with a view to seeing whether there is a charge to be made. It does not decide anything in the least. It does not do anything which adversely affects the man concerned or prejudices him in any way. If there is, there will be a hearing, in which an impartial body will look into the rights and wrongs of the case. In all such cases, all that is necessary is that those who are holding the preliminary enquiry should be honest men – acting in good faith – doing their best to come to the right decision"

57. Accordingly, there is little point in engaging with the alternative challenge in any detail, save to note that the restrictions that the applicant seeks to impose on OUTA are extreme. On the applicant's case, prior to publication OUTA would be required indulge him (and any other potentially implicated party) with lavish rights of reply, and an effective veto on the publication of the report, or at least the ability to significantly delay and distort it. The impact on the ability of whistleblowers and other private actors to expose corruption would be significant. This is precisely the mischief that Denning LJ warned against in the above quote.

58. Lastly, it is worth noting that even a serious and properly pleaded attempt to limit freedom of speech by way of section 8(2) is likely to face difficulties, given the nature and importance of the right to freedom of speech. In *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) ("Hix"), the Supreme Court of Appeal cautioned that "…*the proper recognition of the importance of free speech is a factor which must be given full value in all cases. … cases involving an attempt to restrain publication must be*

approached with caution. … though circumstances may sometimes dictate otherwise, freedom of speech is not a right to be overridden lightly."[20]

The application for an interdict

59. As explained above, while the report is clearly defamatory of the applicant, OUTA bore no legal duty toward the applicant to notify him of its contents or to provide him an opportunity to comment, prior to publication thereof. The full spectrum of the applicant's remedies against OUTA lie within the established boundaries law of defamation. This includes an allegation of an infringement of the applicant's dignity, as is apparent from paragraph 51 of the judgment in *Langa*, quoted above.

60. Given that the applicant has failed to prove a clear right it is unnecessary to deal with the relief sought in prayers 2-4 of the notice of motion in any detail, but as the applicant persisted with this relief, and as both parties seek punitive costs against the other, I deal briefly with the interdict application.

61. In light of several recent decisions of the Supreme Court of Appeal, I have doubts as to whether the further relief sought in prayers 2-4 of the notice of motion is competent relief in motion proceedings for final interdictory relief.[21]

[20] *Hix* at 401-402.

[21] See Ird Global Ltd v the Global Fund to Fight Aids, Tuberculosis and Malaria 2025 (1) SA 117 (SCA); NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators [2021] 4 All SA 652 (SCA); Malema v Rawula [2021] ZASCA 88; Tau v Mashaba and Others 2020 (5) SA 135 (SCA).

62. There is no threat of imminent harm. The proverbial horse has bolted - the report was published in February 2024. It is trite that Interdictory relief is aimed at preventing future harm, not atoning for a past invasion of rights.[22]

63. There are many alternative remedies available to the applicant, an action for damages for defamation being the obvious remedy. The Supreme Court of Appeal has made it clear that claims for retraction, acknowledgement of wrongoing amendment and other suitable relief (aside from urgent interim relief) are to be dealt with by way of action proceedings only. [23]

64. The claim for alleged constitutional damages need not be dealt with, give the failure of the applicant to establish a breach of any of his constitutional rights.

Costs

65. Both parties sought punitive costs against the other. The application raises interesting issues of some novelty and of potential importance, and while I see no reason why costs should not follow the result, I do not intend granting costs on a punitive scale.

66. I therefore make the following order:

Order:

1. The application is dismissed with costs on the "C" scale, including costs of counsel.

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[22] United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others 2023 (1) SA 353 (CC), at para 48: "In granting an interdict, the court must exercise its discretion judicially upon a consideration of all the facts and circumstances. An interdict is "not a remedy for the past invasion of rights: it is concerned with the present and future". The past invasion should be addressed by an action for damages. An interdict is appropriate only when future injury is feared."

[23] See the authorities quoted at footnote 19 above.

GA Fourie

Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON: 16 April 2025

DATE OF JUDGMENT: 16 July 2025

FOR THE APPLICANT: Adv K Premhid and Adv Z Ngakane

INSTRUCTED BY: Ian Levitt Attorneys

FOR THE RESPONDENT: Adv NG Louw

INSTRUCTED BY: Jennings Incorporated
