

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 58969/2018

<p>1. REPORTABLE: NO 2. OF INTEREST TO OTHER JUDGES:NO 3. REVISED.</p> <p>04 November 2022</p> <p><i>[Handwritten Signature]</i></p> <p>..... DATE</p> <p>SIGNATURE</p>
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In the matter between:

UNITED DEMOCRATIC MOVEMENT

First Applicant

HOLOMISA, BANTUBONKE HARRINGTON

Second Applicant

and

LEBASHE INVESTMENT GROUP (PTY) LIMITED

First Respondent

HARITH GENERAL PARTNERS (PTY) LIMITED

Second Respondent

HARITH FUND MANAGERS (PTY) LTD

Third Respondent

WHEATLEY, WARREN GREGORY

Fourth Respondent

MAHLAOLE, TSHEPO DAUN	Fifth Respondent
MOLEKETI, PHILLIP JABULANI	Sixth Respondent

In re:

LEBASHE INVESTMENT GROUP (PTY) LIMITED	First Plaintiff
HARITH GENERAL PARTNERS (PTY) LIMITED	Second Plaintiff
HARITH FUND MANAGERS (PTY) LTD	Third Plaintiff
WHEATLEY, WARREN GREGORY	Fourth Plaintiff
MAHLAOLE, TSHEPO DAUN	Fifth Plaintiff
MOLEKETI, PHILLIP JABULANI	Sixth Plaintiff

and

UNITED DEMOCRATIC MOVEMENT	First Respondent
HOLOMISA, BANTUBONKE HARRINGTON	Second Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicants (defendants in the main action) are seeking, in terms of Uniform Rule 28, leave to amend their plea, and costs in the event of opposition.

[2] The first applicant is the United Democratic Movement, a political party registered in terms of the Electoral Act 73 of 1998. The second applicant is Mr Bantubonke Harrington Holomisa, the President of the first applicant and a

Member of Parliament. The first respondent, Lebesha Investment Group (Pty) Limited, a company duly registered in terms of the company laws of the Republic of South Africa. The second respondent is Harith General Partners (Pty) Ltd, a company duly registered in terms of the company laws of the Republic of South Africa, doing business as a fund manager, investing funds on behalf of investors in infrastructure projects in Africa. The third respondent is Harith Fund Managers (Pty) Ltd, an investment Fund manager and advisor. The fourth respondent is Mr Warren Gregory Wheatley, a director and Chief Investment Officer of the first respondent. The fifth respondent is Mr Tshepo Dawn Mahloele, a director and chairman of the first respondent; and Chief Executive Officer of the second and third respondents. The sixth respondent is Mr Phillip Jabulani Moleketi, a non-executive director of the first respondent and chairman of the second and third respondents.

[3] The plea sought to be amended relates to an action instituted by the respondents (plaintiffs in the main action) on 16 August 2018 against the applicants in which the respondents are claiming damages in the amount of R2 million for each respondent, for alleged defamatory statements made by and conduct of the second applicant, in his personal capacity and in his capacity as President of the first applicant. The first applicant is sought to be held vicariously liable for the statements and conduct of the second applicant.

[4] In the summons (dated 16 August 2018) the respondents allege that the content of a letter written by the second applicant dated 26 June 2018, addressed to the President, Mr CM Ramaphosa, and published in the official website of the first applicant; the Twitter accounts of the first and second

applicants and summaries of the letter published in various media within the country and internationally, was per se defamatory and injurious to their dignity. Further that, inter alia, that such publication was intended to mean and to be understood by the ordinary reader to mean that the respondents are “heavily implicated (“knee-deep) in a long-standing (“more than a decade’s worth”) and ever- increasing corrupt scheme (an “iceberg of corruption ... rising day-by-day”; “a complicated system”) by which they are unlawfully depleting (“fleecing”; “pillaging”) the Public Investment Corporation (“PIC”) of billions of rand”.

[5] It is the respondents’ allegation that on 1 July 2018, the second applicant further defamed the respondents by publishing in his Twitter account, which publication was directed at the public both within the country and internationally the following:

“The proximity of Harith and Lebashe directors to the PIC is making an interesting read. We are spot on. They seem to be trusted indunas. The sooner President Ramaphosa agrees to investigate his fellow comrades like Jabu Moleketi & other hyenas, the better.”

[6] On 9 October 2018 the applicants filed a notice of intention to defend and a plea. In their plea, the applicants allege that there was uncontroverted evidence of impropriety in the business of the respondents which sparked public interest considerations.

[7] On 7 November 2021 the applicants served the respondents with a notice to amend their plea. On the 11 November 2021, by agreement between the parties, the trial was postponed *sine die* and the applicants were

directed, amongst others, to again serve the respondents with a Notice to Amend.

[8] In the main the Notice to Amend their plea by inserting a new paragraph 6A and 15A which consists of extracts and quotes from a PIC Report titled “Judicial Commission of Inquiry into the Allegations of Impropriety at the Public Investment Corporation” released on 13 December 2019; and amending paragraph 10 which seeks to correct a misdescription of the applicants by substituting the phrase ‘first and second plaintiffs’ with ‘first and second defendants’.

[9] The Notice to Amend reads in part as follows:

“1. By inserting the following new paragraph 6A immediately following the current paragraph 6.9, for context:

‘6A.1 As requested by the Defendants following the impugned letter, the President established a Judicial Commission of Inquiry into the Allegations of Impropriety at the Public Investment Corporation. A final report thereto, released on 13 December 2019, has been discovered (“**PIC Report**”). In material terms the following are incorporated in this plea.

6A.2 ‘As outlined above, negative media coverage escalated over the past few years. External parties have had access to confidential information and placed it in the public domain. General Holomisa was also provided with much of the information, which was integral to his allegations against the PIC (014-631 at 4).

6A.3 (From 014-962 to 014-9700 This Term of Reference will be answered by way of illustration using the case study of Harith, which exemplifies using a position of trust for personal enrichment, the case study of the Venda Building Society Mutual Bank (VBS) and the Edcon Mandate letter.

6A.4 General Holomisa said the following in his testimony before the Commission:

‘One of the most difficult tasks regarding dealing with the type of corruption that is alleged to have happened at the PIC is the sophisticated nature of the transactions. Corruption can come in two forms, legal and illegal corruption. Legal corruption occurs when the elite build a legal framework that protects corruption or manipulate existing legal framework without necessarily breaking the law.’²⁵⁸Hon. B Holomisa, 2019-04-10, testimony on day 27 of the Commission of Inquiry.

6A.5 When going through the story of Harith, these words resonate. The layering of legal entities (state owned corporations, pension funds, banks, companies and trusts and partnerships etc), when applied by financiers and corporate structure experts, can make finding the substance, and not form, of a transaction or series of transactions complex and quite perplexing. These layers also give the players in such a formation the ability to use ‘plausible deniability’ most effectively, as looking through all the conduits is challenging and time consuming.

6A.6 Presidential vision and ambition to catalyse an African Renaissance led to the idea of creating an Africa Fund. In a PIC board meeting on June 6, 2005 it is noted that President Mbeki mandated the then CEO, Brian Molefe, to initiate the creation of an Africa Fund as a core investment. This new fund’s creation would require the GEPF to change the PIC’s investment mandate to include non- South African investments. It would, as a starting point, also need the GEPF to express a desire and approval for such an investment, as neither the President nor his government had a mandate to direct or commit GEPF investment.

6A.7 The PIC initiated a multi-year process to establish a pan- African investment fund which materialised as the Pan African Infrastructure Development Fund (PAIDF). The object of the PAIDF was to primarily invest in private equity interests in infrastructure development projects in sectors such as power and energy, telecommunications, transportation, as well as water- and sanitation sectors in the African continent. The goal of the PAIDF managers was to secure funding of at least US\$1 billion. PAIDF, a 15-year Fund, was set up as a vesting

Trust and commenced operations on 14 September 2007 with commitments totalling US\$625 million from nine investors, including US\$250 million from the GEPF. Only the Social Security and National Insurance Trust (SSNIT) of Ghana and the African Development Bank (AfDB) were non-South African investors.

6A.8 In his testimony before the Commission, Dr Matjila stated that:

‘The formation of PAIDF led to the establishment of Harith Fund Managers ... Harith was set up in 2006 (sic) by the PIC to manage PAIDF.’

6A.9 The PIC provided around R22m as seed capital from its own funds, and obtained all the statutory approvals, he said. This seed money was repaid in full in due course. Dr .Matjila said that, ‘Mr Tshepo Mahloele resigned from the PIC but was persuaded by the PIC to become the CEO of Harith Fund Managers.

6A.10 This statement is incorrect as Mr Tshepo Mahloele (Mr Mahloele) was employed by the PIC as Head of Corporate Finance and of the Isibaya Fund. Without any due selection process or consideration of other candidates, he was appointed by the PIC to lead the PAIDF Secretariat which was to coordinate the processes to bring PAIDF to fruition. Harith Fund Managers (HFM), initially a shelf company secured by Mahloele in his personal capacity, was then transferred to the PIC ‘as a matter of convenience and as the nominal shareholder’, according to Mr Mahloele.

6A.11 In Mr Mahloele’s statement it is stated that:

‘The PIC’s Management Executive Committee identified me (I believe) as the best candidate for the job of establishing the PAIDF ... With effect from 31 March 2006, I resigned from the PIC with the specific task of establishing the PAIDF, outside of the PIC...’

6A.12 He was employed as the CEO of HFM with effect from 1 September 2007, for a period of seven years, after his service agreement with the PAIDF Facilitation Trust, established to create PAIDF, ended.

6A.13 Mr Mahloele noted in his testimony that he was hired by HFM. What that obfuscates is that HFM was 100% owned by the PIC. Therefore, he was put in place by the PIC. This could also be seen as an ‘internal transfer’.

6A.14 Prior to his appointment to head up HFM Mr Mahloele was the author of a memo wherein the PIC, in November 2005, requested a mandate from the GEPP to invest US\$250 million (R1,65 billion) in the PAIDF.

6A.15 Mr Jabu Moleketi served as Deputy Minister of Finance and Chairperson of the PIC from 2004 to 2008. In his statement Mr Moleketi said that,

‘...by virtue of my chairmanship of the PIC I, together with two other non- executive directors of the PIC, was appointed as the PIC’s nominee to the Board as a non-executive director of HFM. In that capacity, I was then elected as the Chairman of the Board of HFM ... As I have already mentioned, in September 2008, I resigned as Deputy Minister of Finance and accordingly as ... Chairman of the PIC. However, at the request of the shareholders of HFM, who obviously had the necessary confidence in me and who were probably motivated by considerations of continuity and stability, I remained on as the Chairman of HFM, and from then onwards received a modest emolument.’

6A.16 He continues,

‘I became a non-executive director, and the Chairman, of HGP [Harith General Partners].’

6A.17 At this point the PIC was the sole shareholder that owned 100% of HFM, therefore Mr Moleketi was appointed by the PIC.

6A.18 Harith General Partners’ shareholders are Harith Holdings (Pty) Ltd at 70% and the PIC at 30%. Harith Holdings is held 100% by an employees’ equity trust of the same type as the Harith Share Incentive Scheme Trust (HSIST), in which its skilled employees participate. Mr Moleketi stated that he has never had any interest in the shareholding of HGP and was not a beneficiary of the Trust.

6A.19 In March 2007 Mr Mahloele proposed that the PIC retain 70% of Harith Fund Managers (HFM) and management obtain 30% for R5 million, which was approved by the PIC Board. Among the reasons given for the establishment of Harith Fund Managers was to diversify the PIC’s revenue.

- 6A.20 In his testimony, Mr Mahloele said he was a director of Harith Fund Managers (HFM), HGP of which he is the CEO, and is the chairman of Lebashe Investment Group, an unlisted investment holding company. He refers to both HGP and HFM as Harith.
- 6A.21 Mr Mahloele testified that the PIC intended to remain the sole shareholder of the management company, a position that was opposed by the GEPP and other investors. In this regard, he stated that,
- ‘A compromise was reached and Harith Fund Managers shareholding was restructured with the approval of then Minister of Finance Mr Pravin Gordhan and the PIC board...’
- 6A.22 The restructuring resulted in the PIC owning 46%, while the HSIST held a 30% stake and two other investors, ABSA and Old Mutual Life Assurance each held 12%. The HSIST permits employees of HFM, including Mr Mahloele, to participate in an equity share in PAIDF as a form of incentive over and above their salaries.
- 6A.23 HFM, and later HGP, earned an annual management fee averaging out at 1,75% of the total value of the funds. In addition, they earned a ‘carry’, which is determined as a percentage of the value of the funds under administration beyond a certain threshold.
- 6A.24 HFM was intended to only manage PAIDF. Consequently, when the Fund was closed it was anticipated that it would be necessary to incorporate a multi-fund entity to manage further funds. Harith General Partners (HGP) was established for this purpose and with effect from 1 April 2012 HFM, under the chairmanship of Mr Moleketi and with Mr Mahloele as the CEO, resolved to subcontract to HGP its management agreement with the PAIDF. As a result, all employees were transferred to HGP, but HFM remained with a board of directors constituted of investee representatives whose task was to oversee the execution of the management agreement by HGP.
- 6A.25 On 23 April 2012, the PIC wrote to Minister Gordhan to request authorisation for the PIC to acquire a 30% shareholding in the issued share capital of Harith General Partners (for R30), which Harith management incorporated and was intended to manage

PAIDF II funds as well as those of other funds. This was approved by the Minister.

6A.26 HGP became active in October 2012 with the following shareholders: Harith Holdings (Pty) Ltd with 70% and the PIC with 30%.

6A.27 The establishment of HGP led to the creation of PAIDF II, which was closed in June 2014 with total capital commitments of US\$435 million, of which US\$350 million came from the GEPF. Thus, the GEPF invested a total of US\$600 million in the PAIDF initiative.

6A.28 According to Mr Mahloele,

‘The Fund was never intended to be a public sector led initiative. On the contrary, the investors agreed to invest in the PAIDF expressly on the basis that they would not be subject to a fund, governed by the structures of the PAIDF...’

6A.29 Simply put: The PIC, with government support and using its influence and the provision of R22 million seed funding as a loan created for PAIDF I, drew in other South African investors, particularly the GEPF and two other investors. This loan was repaid via the ‘establishment fee’ of 1% on the US\$625 million raised, of which US\$250 million was government employee savings through the GEPF. When PAIDF II was established, the establishment fee was dropped to 0.25%, 75% lower than that charged in PAIDF I.

6A.30 The fees charged by HFM appear punitive: management fees, advisory fees, transaction fees, costs of covering HFM operating expenses, incentive fees from 2015 on returns in excess of 8% per annum and a poison pill termination clause. On termination HFM is to be paid 12 months management fee (2% of investments) and 13% of the market value of all investments. To illustrate, assuming assets had not grown and stayed at US\$625 million, they would be paid 13% of that amount. This is certainly not a standard management agreement.

6A.31 HFM was permitted to use US\$6,25 million of the original US\$625 million raised to establish itself. It would appear that the US\$6,25

million was used from the funds raised for investment into the PAIDF to establish HFM. This meant that the PIC essentially funded an entity in which the person seconded from the PIC and later appointed as CEO, who had part of a 30% stake in the company, benefitted without incurring any financial cost.

6A.32 An estimate of management fees between 1 April 2009 and 31 December 2014 was US\$72,45 million, while the estimate of management fees paid between May 2014 and the end of March 2019 stood at US\$37,4 million or R542 million, 70% of which would have gone to Harith.

6A.33 This can be illustrated quoting from the PIC Annual Integrated Report (AIR) of 2009, which shows HFM generated revenue of R93 million, with costs of R57 and a net profit of R36. The revenue shown is partly a drawdown on the establishment fees that are part of the management agreement. In the PIC AIR of 2008, this is reflected as:

‘Harith’s turnover amounted to R83m, consisting of an organisational fee of R40m and a management fee of R43m. The fees are calculated based on the management agreement between HFM and PAIDF’.

6A.34 In the 2010 report the following is stated:

‘On 30 June 2009 the PIC disposed of 54% of its controlling stake in HFM ... the cash profit on the sale of 54% of Harith is R57m’.

6A.35 Moreover, there were concerns about Harith such that the GEPF, in 2009, obtained a legal opinion from TWB and Partners as to who actually owned the shares. An extract from the opinion states that the, ‘GEPF’s contention is that:

6A.35.1 PIC set up the PAIDF and Harith entirely in the course of its activities as GEPF’s asset manager;

6A.35.2 GEPF is the single largest investor in PAIDF – in fact GEPF’s capital commitment to PAIDF amounts to 40% of the aggregate of all the capital commitments made by all the investors;

6A.35.3 PIC accordingly setup PAIDF and Harith with GEPF’s money; and

6A.35.4 In the circumstances GEPF is entitled to both (1) the dividend which will be declared at the end of March 2009, and (2) PIC's remaining shares in Harith.'

6A.36 The legal opinion concluded that 'there is virtually no doubt that GEPF is entitled both to the dividend which Harith will declare and to PIC's shares in Harith ... (and) in the circumstances PIC is not entitled, without GEPF's written consent, to realise a profit ...'

6A.37 The GEPF was advised that, to enforce the above, it should write a letter of demand to the PIC in which it claims immediate transfer of the shares. This matter remained unresolved as at the last evidence presented to the Commission.

Findings in relation to Harith (014-976 and 014-077)

6A.38 From the evidence and testimony before the Commission, the PIC created two funds – PAIDF I and PAIDF II – and appointed a senior employee, Mr Mahloele, to establish the funds and who, in due course, became the CEO of Harith in its various forms.

6A.39 Harith was a company established precisely to manage the two Funds, and at significantly high fees. The Deputy Minister and Chair of the PIC, Mr Moleketi, was appointed chairman of Harith. Through various processes, two employee bodies were created, the HSIST and Harith Holdings, which was held 100% by an employees' equity trust of the same type as the HSIST, in which its skilled employees participated.

6A.40 The GEPF, the most significant investor in the Funds, initiated a legal process to enforce its rights to both dividends and share ownership.

6A.41 The earnings and incentive schemes provided rich rewards for those selected by the PIC to fulfil these roles, confirming that PIC directors and employees used their positions for personal gain and/or to benefit another person.

6A.42 Legal structures can be engineered such that they obfuscate substance for form. In other words, the substance may still be legal. The 'arm's length' loan, based on the minutes of the PIC, clearly shows that this was not done at an arms' length. This leaves the Commission with several unanswered questions: was

any other fund manager considered? Was a competitive process run? If it was intended to be independent of government, why was Harith so PIC- employee heavy and had the former Chairman of the PIC as its chairman? It is the Commission's view that there is no question that the approach taken provided easy access to PIC funds, influence and including an enhanced ability to secure additional investment, including from the GEPF.

6A.43 Harith's conduct was driven by financial reward to its employees and management, and not by returns to the GEPF. In essence, the PIC initiative, created in keeping with government vision and PIC funding was 'privatised' such that those PIC employees and office bearers originally appointed to establish the various Funds and companies reaped rich rewards.

Recommendations in relation to the whole of ToR 1.3 (014-979 and 014-980)

6A.44 The Board of the PIC must ensure due legal process is pursued to recoup investment funds lost in so far as this is possible. This is dealt with in more detail in Chapter V: Next Steps: Investment Risks and Losses.

6A.45 The PIC, going forward, should not be seen to be rewarding work performed in one area of responsibility, when fulfilling other responsibilities, the same person is being significantly enriched and/or involved in the theft of monies and not complying with their fiduciary duties – at great cost to the PIC and investors.

6A.46 The Board of the PIC must institute due legal process to recover the ill-gotten gains from both Mr Nesane and Mr Magula, who were in their employ at the time of the theft.

6A.47 The PIC should explore recovering any bonus or enhanced payments made to both men during the period that they served on the VBS board, whether related to the VBS matter or their regular duties.

6A.48 The actions of both Mr Nesane and Mr Magula should be referred to the relevant regulatory and professional bodies to consider what action they should take, should this not have been done already.

6A.49 The criminal conduct of Mr Nesane and Mr Magula should be referred to the National Prosecuting Authority.

Other Relevant Provisions (014-609 and 014-610)

6A.50 The PIC Report also found the following.

6A.51 From the evidence and testimony before the Commission, the PIC created two funds – PAIDF I and PAIDF II – and appointed a senior employee, Mr Tshepo Mahloele (Mr Mahloele), to establish the funds and who, in due course, became the CEO of Harith in its various forms.

6A.52 Harith was a company established precisely to manage the two Funds, and at significantly high fees. The Deputy Minister and Chair of the PIC, Mr Moleketi, was appointed chairman of Harith. Through various processes, two employee bodies were created, the HSIST and Harith Holdings, which was held 100% by an employees' equity trust of the same type as the HSIST, in which its skilled employees participated.

6A.53 The GEPF, the most significant investor in the Funds, initiated a legal process to enforce its rights to both dividends and share ownership.

6A.54 The earnings and incentive schemes provided rich rewards for those selected by the PIC to fulfil these roles, confirming that PIC directors and employees used their positions for personal gain and/or to benefit another person.

6A.55 Legal structures can be engineered such that they obfuscate substance for form. In other words, the substance may still be legal. The 'arm's length' loan, based on the minutes of the PIC, clearly shows that this was not done at an arms' length. It is the Commission's view that there is no question that the approach taken provided easy access to PIC funds and influence including an enhanced ability to secure additional investment, including from the GEPF.

6A.56 Harith's conduct was driven by financial reward to its employees and management, and not by returns to the GEPF. In essence, the PIC initiative, created in keeping with government vision and PIC funding was 'privatised' such that those PIC employees and office bearers originally appointed to establish the various Funds and companies reaped rich rewards.

6A.57 The Commission recommends that the GEPF and the PIC should jointly appoint an independent investigator as soon as possible after receiving this report. The mandate must be to examine the entire PAIDF initiative to determine that all monies due to both parties have been paid and properly accounted for; to determine whether any monies due to overcharging or any other malpractice should be recovered, and to provide the results of such investigation within six months to the Boards of both the GEPF and the PIC.

6A.58 The Board of the PIC should examine whether the role played by either Mr Moleketi and Mr Mahloele breached their fiduciary duties or the fit and proper test required of a director in terms of the Companies Act.

6A.59 The Board of the PIC should develop appropriate policies and guidelines for the secondment/transfer/appointment of employees to external entities such that the interests of the PIC and its clients are duly protected.

[our emphasis]

6A.60 The PIC Report further found that:

The Lancaster/Steinhoff transaction, Harith/PAIDF investment, the Sakhumnotho/Kilicap and Ascendis transactions are illustrations of the weaknesses of the PEPs (Politically Exposed Persons) policies in practice (014-647 at 22).

[parenthesis our insertion]

6A.61 It further found that (014-963 and 964 from 6):

6A.61.1 In his testimony before the Commission, Dr Matjila stated that:

‘The formation of PAIDF led to the establishment of Harith Fund Managers ... Harith was set up in 2006 (sic) by the PIC to manage PAIDF.’

6A.61.2 The PIC provided around R22m as seed capital from its own funds, and obtained all the statutory approvals, he said. This seed money was repaid in full in due course. Dr Matjila said that, ‘Mr Tshepo Mahloele resigned from the PIC but was persuaded by the PIC to become the CEO of Harith Fund Managers.’

6A.61.3 This statement is incorrect as Mr Tshepo Mahloele (Mr Mahloele) was employed by the PIC as Head of Corporate Finance and of the Isibaya Fund. Without any due selection process or consideration of other candidates, he was appointed by the PIC to lead the PAIDF Secretariat which was to coordinate the processes to bring PAIDF to fruition. Harith Fund Managers (HFM), initially a shelf company secured by Mahloele in his personal capacity, was then transferred to the PIC 'as a matter of convenience and as the nominal shareholder', according to Mr Mahloele.

[our emphasis]"

6A.62 The PIC Report (014-962 to 014-970; 014-976 [from 57] to 014-977; 014-978 [from 66 to 68]), has meticulously set out the problematic affairs and relations between the Plaintiffs, inter se, on the one hand and with the PIC on the other. It has gone on to give recommendations in this regard.

6A.63 It is these facts, which have since found expression in the PIC Report as stated above, that gave rise to the impugned letter. These facts also augment the contents of the current paragraph 6 of the Plea.

6A.64 The above important contents of the PIC Report are extensive; and to avoid overburdening this Plea, we incorporate those contents as if specifically pleaded in this new paragraph 6E.

6A.65 The PIC Report concluded that (014-1321 to 014-323):

6A.65.1 ...

6A.65.2 The Commission, through public hearings and the consideration of written testimony from a broad range of witnesses, has concluded that, among other things, there has been substantial impropriety at the PIC, poor and ineffective governance, inadequate oversight, confusion regarding the role and function of the Board and its various sub-committees, victimisation of employees and a disregard for due process.

6A.65.3 ...

6A.65.4 While the PIC has, in many instances, sound policies, processes and frameworks, in many instances these were not adhered to, deliberately

by-passed and/or manipulated to achieve certain outcomes. However, there are definite gaps and shortcomings in existing policies. There is a need to review existing policies and ensure that a comprehensive policy framework is put in place that includes, but is not limited to, policies as they relate to PEPS, intermediaries, whistle blowing, compliance, IT security, record and document keeping.

6A.65.5 ...

6A.65.6 ...

6A.65.7 The Board was found to be divided and conflicted. The involvement of non- executive directors in transaction/investment decision making structures of the PIC rendered their oversight responsibilities ineffective, if not absent. Their independence is questionable, particularly as, together with executive and senior staff members, NEDS are also appointed to serve on the boards of investee companies.

6A.65.8 The Board essentially was a rubber stamp for the decisions driven by Dr Matjila. It repeatedly abdicated its responsibilities in deference to delegations of authority, even in instances when it expressed concern about a particular investment.

6A.65.9 The Commission found that there was both impropriety and ineffective governance in a number of investments. This was compounded by the dishonesty of and material non- disclosure by Dr Matjila, both during his evidence at the Commission and in decision-making processes regarding various transactions.

6A.65.10 ...

6A.65.11 There are clear instances where the Commission found that directors and/or employees benefited unduly from the positions of trust that they held.

[our emphasis]

6A.66 Accordingly, given the proper interpretation of the impugned letter, the fact that the President yielded to the Defendants' request and the PIC Report made the foregoing findings must contextually, axiomatically and objectively mean that the impugned letter is not defamatory, and certainly not per se defamatory.

6A.67 To the best of our knowledge, the PIC Report has never been challenged by the Defendants or the PIC.

2. By deleting the words "The first and second plaintiffs called for their investigation" where they appear in the current paragraph 10 and replacing them with the words "The first and second defendants called for their investigation".

3. By inserting the following new paragraph 15A immediately following the current paragraph 15.4:

"15A To avoid unnecessarily repetition, we incorporate the above new paragraph 6A as if specifically pleaded in this new paragraph 15A, and the word "letter" be substituted with the word "tweet" were the context so requires."

[10] The respondents filed a Notice of objection in terms of Uniform Rule 28(3) to the proposed amendment on the grounds that the contents of the PIC Report constitute a mixture of evidence and opinion of another tribunal and also that the contents of the PIC Report are irrelevant to the issues to be determined in the main action. Further, it is the respondents' contention that there is no rational basis upon which the PIC Report could have affected the meaning that would have been attributed to the contents of the by the persons to whom it was published. Furthermore, it is the respondents' contention that if the amendment is granted, it would render the plea excipiable.

[11] Having conceded that part of the words used in the letter to the President are strong epithets, it is the applicants' contention that the

amendment sought seeks to give credence to the contents of the impugned publications and to affirm that what was happening at the PIC amounted to impropriety and was of public interest. It is further the applicants' contention that the amendment would not cause its plea to be excipiable as its defence to the respondents' claim remains the same.

[12] The issue to be determined is whether the amendment is sought in good faith and that if it causes any injustice to the respondents, whether such injustice cannot be cured by an order of costs.

[13] Uniform Rule 28 dealing with amendments to pleadings and documents, reads in part as follows:

“(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

...

(3)

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2) the party wishing to amend may within 10 days lodge an application for leave to amend.

...

(10) The court may notwithstanding anything to the contrary in this rule at any stage before judgment grant leave to amend any pleading or documents on such other terms as to costs or other matters as it deems fit.”

[14] A court has a discretion to allow a party to amend its pleadings at any time before judgment. In *Moolman v Estate Moolman and Another*¹ the court said the following:

“The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.”²

[15] The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties³. The main determining factor on whether or not to allow an amendment is prejudice. If when the proposed amendment is considered, taking into account the circumstances of the case and the proposed amendment does not prejudice the respondent that cannot be cured by a cost order, the amendment will invariably be allowed.

[16] In its answering affidavit, the respondents have not alleged any prejudice that may be suffered should the amendment be allowed. The main objection appears to be that the PIC Report is a combination of opinion and evidence. Any opinion contained in the Report is just that, an opinion, and the trial court is not bound by such opinion. At the trial, the onus will be on the applicants to prove that the words and conduct complained of are not defamatory.

¹ 1927 CPD 27 at 29.

² See also *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC) at para [9].

³ *Trans-Drakensberg Bank Ltd (under Judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A.

[17] Whether the allowing of the amendment will render the applicants' plea excipiable is debatable and is an issue which could be dealt with by the trial court, should the respondents raise an exception to the plea.

[18] With regard to relevancy, I am of the view that seems the dispute relates to the respondents' involvement in relation to the PIC, the amendment sought seeks to ventilate the issues properly before the court. The interpretation of the impugn letter falls within the discretion of the trial court.

[19] There is no prejudice to the respondents if the amendment is allowed since the issues relating to the contents of the PIC were already in the public domain and discussed even before the Commission was appointed and its contents has been read and is published.

[20] I am satisfied that the amendment sought has not been brought with mala fides on the part of the applicants and the respondents have also not alleged any mala fides on the part of the applicants. Further I am not convinced that allowing the amendment would cause any prejudice to the respondents which cannot be cured by a cost order.

[21] Accordingly the following order is made:

1. The applicants are granted leave to amend their plea in accordance with its Notice of Amendment in terms of Rule 28(1) dated 08 November 2021.
2. The respondents to pay the costs of the application, including costs for two counsel.



MNGQIBISA-THUSI J

Judge of the Gauteng High Court Division

Date of hearing: 11 April 2022

Date of judgment: 04 November 2022

Appearances:

For First & Second Applicants: Adv I Semanya SC assisted by Adv M Ka-Siboto (instructed by Mabuza Attorneys)

For First to Sixth Respondents: Adv D I Berger SC, assisted by Advocates BM Slon and TB Makgalemele (instructed by Nicqui Galaktiou Inc)