IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 12770/22P

In the application of:

DEMOCRACY IN ACTION NPC Applicant

Re: Application for admission as *Amicus Curiae*

In the matter between:

KARYN MAUGHAN Applicant

and

JACOB GEDLEYIHLEKISA ZUMA Respondent

DEMOCRACY IN ACTION'S SUBMISSIONS

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INTRODUCTION

1. Democracy in Action ("*DIA"*) seeks admission as an *amicus curiae* in these proceedings. The DIA will make submissions that are relevant to the proceedings before Court which we understand are now scheduled for hearing on 20 and 22 March 2023. In these submissions we highlight material in support of DIA's application for admission. We also highlight some of the issues we intend addressing if admitted as *amicus*.

2. First, the DIA will deal with how private prosecutions are dealt with in some of the other jurisdictions in developed democracies. The point is to show that absence of a *nolle prosequi* certificate is not an impediment to the administration of justice, especially in the face of a recalcitrant prosecuting authority. In fact, the insistence on a certificate could well be an unjustifiable obstacle to a potential private prosecutor's right of access to court as enshrined in section 34 of the Constitution.

3. Second, to the extent that the SLAPP suit defence forms part of our law, [1] it should only be allowed in the clearest exceptional circumstances. This is not one of those clearest of cases. The clearest of exceptional circumstances would include a "pattern of conduct".

[1] The judgment of the apex court in *Reddell* (CCT 66/21) [2022] ZACC 37 (14 November 2022) leaves a sense of confusion as we shall explain later. This confusion, however, has no material bearing on the outcome of the Applicant's case in her review. Whether SLAPP is part of South African law or not, the court must still consider all the relevant factors in an abuse of court process claim as the apex court has found that SLAPP "may conceivably be accommodated under that doctrine of our law.

4. Third, and only if the SLAPP suit defence is available, it can arguably only be raised as a defence in the criminal proceedings when one is charged, not in separate proceedings – such as opposed motion proceedings – aimed at avoiding facing criminal charges.

5. Fourth, the right to freedom of expression relied upon by the Applicant is not absolute. Ideally, as in this case, it must yield to the individual rights to dignity and privacy as dignity (of which privacy is a surrogate) is one of the inalienable rights which the Courts have found that even the most atrocious criminals deserve. Thus, the Applicant cannot properly claim that the right to freedom of expression trumps the right to human dignity. At best for the Applicant, the two competing rights are of equal importance. But specific circumstances in each case will determine which of the two should hold sway over the other.

6. Fifth, the role of the South African National Editors Forum ("*SANEF"*), Media Monitoring Africa ("*MMA"*) and Campaign for Free Expression ("*CFE"*) is that of a party as opposed to an *amicus curiae*. They seek to abuse the discretion of the Court in terms of section 16A and hide behind the protection of the Court regarding costs. This conduct should not be countenanced by the Court. The Court should see the conduct of these parties for what it is. We urge this Court to consider the conduct of these parties, as we have highlighted in DIA's supporting affidavit, when evaluating their application to be admitted as *amici curiae*.

PRIVATE PROSECUTION

South Africa

7. The Criminal Procedure Act, 1977 (*"the CPA"*), provides for private prosecutions on certificate *nolle prosequi*.

8. Section 7(1)(a) provides that in any case in which the Director of Public Prosecutions (*"the DPP"*), declines to prosecute for an alleged offence, any person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence, may, either in person or by a legal representative institute and conduct a prosecution in respect of such offence in any Court competent to try that offence.

9. In terms of Section 7(2)(a) the private prosecutor may only act in terms of Section 7 through the process of summoning any person to answer to any charge only after he or she has obtained a certificate signed by the DPP that he has seen the statements or affidavits on which the charge is based and declines to prosecute.

10. Section 7(2)(c) provides that the certificate issued by the DPP shall lapse in a period of three months.

11. Thus, in South Africa, private prosecutions can only be brought after the certificate is issued by the DPP.

12. In the main proceedings, DIA will address the impact that this requirement may have on a person's right of access to court as enshrined in section 34 of the Constitution, and whether the requirement constitutes a justifiable limitation to that right.

The United Kingdom

13. The Prosecution of Offences Act[2], provides for the establishment of the Crown Prosecution Service for England and Wales.

14. As in South Africa, prosecutions are conducted by the Director of Public Prosecutions, who is the head of the Service. There are also Chief Crown prosecutors. The Chief Crown prosecutors are members of the Service and responsible to the Director for supervising of the Service in his or her area. Section 6 the Prosecution of Offences Act provides as follows:

> *"6.* ***All prosecutions instituted and conducted otherwise than by the Service***
>
> *(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.*
>
> *(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage"*.

15. It would thus seem that a private prosecution does not require the acquiescence of, or a certificate from, the prosecuting authority in the United Kingdom.

Canada

16. Section 504 of the Criminal Code provides that *"anyone"* may lay information in writing and under oath before a Justice if he or she believes, on reasonable grounds, that a person has committed an indictable offence.

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[2] Section 1

17. According to the Court of Appeal for Ontario, the word *"anyone"* in Section 504 applies to anyone who lays an information including private citizens[3].

18. Section 504 of the Canadian Criminal Code reads:

> *"**In what cases Justice may receive information:***
>
> > ***504** any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a Justice, and the Justice shall receive the information, where it is alleged*
> >
> > *(a) that the person has committed, anywhere an indictable offence that may be tried in the province in which the Justice resides and that the person*
> > *(i) is or is believed to be, or*
> > *(ii) resides or is believed to reside,*
> >
> > *within the territorial jurisdiction of the Justice;*
> >
> > *(b) that the person, wherever he or she may be, has committed an indictable offence within the territorial jurisdiction of the Justice".*

19. Again, there appears to be no requirement for the acquiescence of the prosecuting authority in Canada before a private prosecution can commence.

New Zealand

20. Section 26 of the Criminal Procedure Act 2011, provides that:

> *"**26 Private Prosecutions:***

[3] *R v McHale,* 2010 ONCA prayer 6.1 at para 5

(1) If a person who is proposing to commence a private prosecution seeks to file a charging document, the Registrar may –

(a) accept the charging document for filing; or

(b) refer the matter to a District Court Judge for a direction that the person proposing to commence the proceeding file formal statements, and the exhibits referred to in those statements, that form the evidence that the person proposes to call at trial or such part of that evidence that the person considers is sufficient to justify a trial.

(2) The Registrar must refer formal statements and exhibits that are filed in accordance with subsection (1)(b) to a District Court Judge, who must determine whether the charging document should be accepted for filing.

(3) A Judge may issue a direction that a charging document must not be accepted for filing if he or she considers that –

(a) the evidence provided by the proposed private prosecutor in accordance with subsection (1)(b) is insufficient to justify a trial; or

(b) the proposed prosecution is otherwise an abuse of process.

(4) If the Judge determines under subsection (2) that the charging document should not be accepted for filing, the Registrar must –

(a) notify the proposed private prosecutor that the charging document will not be accepted for filing; and

(b) retain a copy of the proposed charging document.

(5) Nothing in this section limits the power of a Registrar to refuse to accept a charging document for want of form."

21. Again, New Zealand does not seem to require the obtaining of a nolle prosequi certificate – or similar permission from the prosecuting authority – for a private prosecution to commence.

FREEDOM OF SPEECH AND THE SLAPP SUIT DEFENCE

22. Section 7 of the Constitution provides for rights in the Bill of Rights. It provides that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms democratic values of human dignity, equality, and freedom.

23. Section 7(2) provides that the State must respect, protect, and promote and fulfil the Bill of Rights.

24. Section 7(3) provides that the rights contained in the Bill of Rights are subject to limitations contained or referred to in Section 36, or elsewhere in the Bill.

25. Section 16 of the Constitution provides for freedom of expression. It provides as follows:

> *"16.* ***Freedom of Expression*: -**
>
> *(1) Everyone has the right to freedom of expression, which includes –*
>
> *(a) freedom of the press and other media;*
>
> *(b) freedom to receive or impart information or ideas;*
>
> *(c) freedom of artistic creativity; and*
>
> *(d) academic freedom and freedom of scientific research."*
>
> *(2) The right in subsection 1 does not apply to –*
>
> *(a) propaganda for war;*
>
> *(b) incitement of imminent violence; or*
>
> *(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

26. The Constitutional Court in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others,*[4] had to determine whether the South African Law prohibited a SLAPP suit under the abuse of process doctrine and, if not, whether it should be developed in that regard.[5]

27. In the said determination, the Constitutional Court dealt with the characteristics of a SLAPP suit as follows:

27.1. They are often described as cases without merit brought to discourage a party from pursuing or vindicating their rights, often with the intention not necessarily of winning the case, but simply to waste the resources and time of the other party, until they abandon their defence[6].

27.2. A common feature of SLAPP suits is that the primary aim of the litigation is not to enforce a legitimate right. The objective is to silence or fluster the opponent, tie them up in paperwork or bankrupt them with legal costs. Therefore, the hallmark of a SLAPP suit is that it often (but not necessarily always) lacks merit.[7]

27.3. They are primarily legal proceedings that are intended to silence critics by burdening them with costs of litigation in the hope that their criticism or opposition will be abandoned or weakened.[8]

27.4. In a typical SLAPP suit the Plaintiff does not necessarily expect to win its case but will have accomplished its objective if the

4 (CCT 66/21) [2022] ZACC 37 (14 November 2022)
5 Paragraph 2
6 Paragraph 42
7 Paragraph 43
8 Paragraph 43

Defendant yields to the intimidation, mountain of legal costs or exhaustion and abandon its defence.

27.5. SLAPP cases use the process of the Court with no evident abuse but to achieve and that may be harmful for other reasons.[9]

27.6. The case before the Constitutional Court which the parties referred to as a SLAPP suit was a form of abuse of process which may be called abusive litigation which would fall within the common law doctrine of abusive process.

27.7. The SLAPP type of defence can be accommodated in the doctrine of abuse of process where a Defendant can prove that suit brought by the Plaintiff is:

27.7.1. An abuse of process of Court;

27.7.2. Is not brought to vindicate a right;

27.7.3. Amounts to an abuse of process to achieve an improper end and to use litigation to cause the Defendants financial and/or other prejudices in order to silence them; and

27.7.4. Violates and is likely to violate the right to freedom of expression entrenched in Section 16 of the Constitution in a material way.

[9] Para 76(d)

28. What is essential is that the defence must be raised in the proceedings brought by the person who is alleged to be abusing the process [i.e., in the private prosecution].[10]

29. If the Court, in the criminal proceedings, should find that the private prosecuting party is abusing court process, that this is a pattern of conduct intended for an ulterior purpose not related to the charge or charges preferred against the Accused, then the Criminal Court (not a motion or civil court) may throw out the criminal charge. But that is for the criminal court to do, not the motion court or civil court.

30. To illustrate the point, one only has to consider the facts in the recent Constitutional Court judgment in *Reddell*[11] where the special plea was raised in the defamation court proceedings to which it related. It was not raised in a preceding or antecedent motion or civil court with a different case number, before a different Judge, thereby seeking to avoid answering the merits of the defamation claim.

31. In *Maphanga* (admittedly a frivolous and vexatious litigation case), the SCA said what is required is *"habitual and persistent institution of legal proceedings"* which are, as a certainty, *"obviously unsustainable"*.[12]

32. Some of the questions the criminal court (not the motion court) must then answer include

    32.1. whether Mr Zuma is an habitual and persistent litigator against journalists (or this journalist). If not, there the Applicant's case founders,

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[10] See *NDPP v Zuma* 2009 (2) SA 277 (SCA), para 37
[11] (CCT 66/21) [2022] ZACC 37 (14 November 2022)
[12] *MEC, Department of Co-operative Governance and Traditional Affairs v Maphanga* 2021 (4) SA 131 (SCA), para 26.

32.2. if so, whether as a certainty, each of these cases is *"obviously unsustainable"*,

32.3. whether by instituting this prosecution, Mr Zuma seeks to vindicate a right. Does he seek to vindicate the right to privacy, to human dignity, access to court, or no right at all?

32.4. whether Mr Zuma's motive is to suppress the Applicant's right to free expression or freedom of the media.

33. Having said that, it would in our submission be constitutionally untenable to allow a criminally accused person to launch a private prosecution against a journalist for reporting on cases involving that accused person, however biased or defamatory the reporting, as there are perfectly legitimate constitutional remedies for that sort of thing, including defamation suits.

34. However, if this Court were to be faithful to section 9(1) of the Constitution, which guarantees the equal protection and benefit of the law to everyone, including journalists, then this Court would not exempt a journalist from prosecution (whether by the State or privately) where the journalist is facing a legitimate charge for an alleged criminal offence. A "SLAPP suit defence" should not be used by Courts as a get-out-of-jail-free card for journalists who are alleged to have committed a criminal offence. The innocence or otherwise of the journalist must be determined by the Criminal Court, not *"gerrymandered"* by the Fourth Estate through motion court in order to avoid answering a criminal charge.

35. Journalists should not be allowed to pick and choose which criminal charges they are prepared to answer to, depending on the identity of the person charging or prosecuting them.

36. The motive for any criminal prosecution – whether by the State or privately – is irrelevant to the decision to prosecute. It is only relevant to the question of guilt or innocence of the accused. But that defence must be raised in the Criminal Court. In other words, a criminal accused cannot stave off a prosecution in civil court by advancing an argument that the decision to prosecute him or her is founded on an ulterior motive. This principle must apply as much to a journalist as it does to a former President. Equal protection and benefit of the law, as enshrined in section 9(1) of the Constitution, must be seen to be implemented and not simply articulated, or reserved for a protected class of litigants – such as journalists claiming freedom of the media.

37. A journalist is as a journalist does. The "SLAPP suit defence" – if it forms part of South African law at all – can only be available to journalists legitimately in the name of media freedom. If the impugned conduct is not synonymous with journalism, or there exists evidence of a pattern of behaviour that places the alleged journalist outside the definition of *"journalist"*, then the "SLAPP suit defence" is not available.

38. DIA knows of no constitutional justification for a journalist to avoid facing a criminal charge by mere dint of being a journalist – whether in pursuit of his or her craft or not – where it is not constitutionally justifiable for a non-journalist to do so. This raises the spectre of the right to equal protection and benefit of the law in terms of section 9(1). There is no discernible basis for Ms Maughan on the facts of her case (where she faces a criminal charge) to receive the protection and benefit of the law that is not available to a non-journalist. By making this submission, DIA is not saying Ms Maughan is guilty of the offence with which she is charged. It says she must answer that charge in the criminal court and cannot avoid criminal court by pleading media freedom in motion court.

39. Whether "SLAPP suit defence" forms part of South African law or not, the prosecutor's motive for instituting a prosecution [whether as the State or through a private prosecution] does not provide a valid basis for an Accused person to avoid a criminal trial altogether. Our courts have already pronounced on this issue, most recently the apex court itself in *Reddell*.[13] In paragraph 68, Justice Majiedt, writing for the unanimous court, said:

> *"[B]ad motive in and of itself can never be an adequate ground for escaping arrest and prosecution. The criminal law can simply not countenance it."*

40. The apex court in *Reddell* repeatedly says that the merits of the case sought to be avoided by the party resorting to abuse of process defence must be considered by the court considering the soundness of the defence.[14] The criminal court, not the motion or civil court, will then have to consider the merits of the charge based on breach of section 41(6) of the National Prosecuting Act. That is not an issue for the motion or civil court to consider as it is not seized with the criminal charge.

41. Assuming that the "SLAPP suit defence" forms part of South African law, and that the prosecutor has instituted prosecution against a journalist for an ulterior motive (including getting the journalist "off his back"), the existence of an ulterior motive does not absolve the journalist from facing a criminal charge for his or her alleged criminal conduct. The Accused must answer that charge in the criminal court on the merits and prove her innocence in that court.

42. Where the journalist has not challenged the constitutional validity of the statutory provision in terms of which his or her conduct constitutes

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[13] See *Reddell*, para 60. See also *NDPP v Zuma* 2009 (2) SA 277 (SCA), paras 37-38 and the authorities cited therein

[14] See eg, paras 68, 70, 78, 95, 97, 98

a criminal offence, a SLAPP suit defence does not avail him or her in civil or motion proceedings outside the criminal trial itself. The defence – if defence it is – must be raised during the criminal trial itself. Otherwise, an undesirable precedent will emerge where journalists enjoy a special right to commit criminal offences in the name of media freedom. There is, in our respectful submission, plainly good reason for the law to refuse to provide a route for a person who commits a crime to avoid prosecution by asserting ulterior motives against a prosecutor.[15]

43. There appears to be a contradiction in the judgment of the apex court in *Reddell*. On the one hand, the court seems to say SLAPP suit defence does not form part of South African law. It says:

> *"What bears consideration is whether the defence as set out in the defendants' special plea [SLAPP] constitutes a good defence in our law. There is certainly room for an argument that where a court recognises a species of abuse of that kind, as either completely new or as a variation or expansion of an existing type of abuse, it does so merely as part of regulating its own processes. In that instance, there is no need to develop the common law as the doctrine of abuse of process can accommodate this kind of defence, of the SLAPP nature."*[16]

44. At best for those who seek to argue SLAPP suit as part of our law, the apex court says it can ***"conceivably"*** be ***"accommodated"*** under the doctrine of abuse of process as that doctrine operates now in our law.

45. Yet, on the other hand, the apex court – in one sentence and in the middle of a long paragraph – says

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15 *Reddell*, para 60
16 *Reddell*, para 83

"I have found that the SLAPP suit defence does form part of our law."[17]

46. Yet, a paragraph later, this equivocation appears

"The foregoing conclusion means that it is not necessary to consider whether the common law needs to be developed, since it already has room for this type of defence in the doctrine of abuse of process. It is for Parliament to consider whether a more comprehensive, specific SLAPP suit defence of the kind developed in Canada and the United States of America, ought to be legislated here…"[18]

47. Nevertheless, whether or not SLAPP forms part of our law, it is important to note from the apex court's judgment in *Reddell* that the Accused in this case will have to prove ***"at the trial"*** (not in antecedent motion proceedings) that the private prosecution instituted by Mr Zuma:

47.1. is an abuse of process of court;

47.2. is not brought to vindicate a right;

47.3. amounts to the use of court process to achieve an improper end and to use litigation to cause her financial and/or other prejudice in order to silence her; and

47.4. violates, or is likely to violate, the right to freedom of expression entrenched in section 16 of the Constitution in a material way.[19]

48. It is also worth mentioning that SLAPP is a different concept from ulterior motive or vexatious litigation. Thus, the case for a SLAPP suit defence sought to be advanced by the other applicants for admission

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[17] *Reddell*, para 98
[18] *Reddell*, para 99
[19] *Reddell*, para 96

as *amicus curiae* would seem to us to be off the mark as they seem to confuse SLAPP with ulterior motive. This, as the apex court has now pronounced, is an erroneous approach. The apex court in *Reddell* says the following in this regard:

> *"[T]rue SLAPP suits, as they operate in other jurisdictions, have particular features which require a more nuanced approach than simply ulterior purpose. It appears that both parties have used the term "abuse of process" too broadly and interchangeably with ulterior purpose and frivolous and vexatious proceedings, respectively. This is problematic in light of the fact that each of them relied on case law relating to a particular form of an abuse of process which have features and characteristics which are distinguishable from one another. A pure SLAPP suit defence is somewhat more nuanced than that of ulterior purpose and it seems to me that the respondents have conflated the two. It also does not fall within the category of frivolous and vexatious proceedings…"*[20]

49. In light of this pronouncement by the apex court, it would seem that the case for SLAPP sought to be made by the other applicants for amicus curiae in the journalist's case – which seems to confuse SLAPP with ulterior motive – may be unhelpful to the Court that has to decide this issue.

FREEDOM OF EXPRESSION MUST YIELD TO INDIVIDUAL RIGHTS

50. The Constitution is founded on democratic values which include, human dignity, equality and freedom. Section 10 of the Constitution provides that everyone has inherent dignity and the right to have that dignity respected.

51. In *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC), O'Regan J observed:

[20] *Reddell*, para 82

"*The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern*."

52. Justice O'Regan also found that:

"Respect for dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common dignity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus, recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."

53. Still in *Makwanyane*, Chaskalson CJ said the following about dignity:

"[57] Although the United States Constitution does not contain a specific guarantee of human dignity, it has been accepted by the United States Supreme Court that the concept of human dignity is at the core of the prohibition of "cruel and unusual punishment" by the Eighth and Fourteenth Amendments. For Brennan J this was decisive of the question in Gregg v. Georgia.

> *The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."*

[58] Under our constitutional order the right to human dignity is specifically guaranteed. It can only be limited by legislation which passes the stringent test of being 'necessary'. The weight given to human dignity by Justice Brennan is wholly consistent with the values of our Constitution and the new order established by it. It is also consistent with the approach to extreme punishments followed by courts in other countries."

54. The Court found that the death penalty offended, among others, the right to dignity and thus unconstitutional.

55. In *Dawood and Another v Minister of Home Affairs and Others* at para 35, the Constitutional Court said[21]:

> *"The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels."*

56. The Constitutional Court has dealt with the balance between freedom of expression and other rights on different occasions.

57. In *S v Mamabolo*[22] the Constitutional Court, although it declined to determine how the right to freedom of expression and dignity are balanced, found that:

> *"the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression."*

58. The Court also found that "*what is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law".*

59. In *Islamic Unity Convention v Independent Broadcasting Authority and Others*,[23] the Court dealt with the constitutionality of section 2(a)

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[21] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC)
[22] (CCT44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2002 (5) BCLR 449 (CC) (11 April 2001)
[23] (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002)

of the Code of Conduct for the Broadcasting Services ("*the Code"*)[24] and whether it was consistent with section 16 of the Constitution.

60. The Constitutional Court found as follows:

60.1. Section 1 of the Constitution declares that South Africa is founded on the values of human dignity.

60.2. Open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself.

60.3. Many societies also accept limits of free speech in order to protect the fairness of trials.

60.4. There is a recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as dignity. The right is not absolute.[25]

60.5. Section 16 is in two parts. Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right.[26]

61. The Constitutional Court in *Khumalo v Holomisa*,[27] had to determine whether section 16 had direct application and alternatively if the common law should be developed to promote the spirit, purport and objects of the Bill of Rights.[28]The Court said the following regarding freedom of expression:

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[24] At para 21
[25] At para 30
[26] At para 31
[27] (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771(14 June 2002)
[28] At para 2

61.1. Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.[29]

61.2. The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate.[30]

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

61.4. Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require.[31]

61.5. In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the

[29] At para 21
[30] At para 22
[31] At para 23

exchange of ideas which is crucial to the development of a democratic culture.[32]

61.6. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.[33]

61.7. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled.[34]

61.8. However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.[35]

62. The Court continued and said the following regarding the constitutional value of dignity:

62.1. *Dignitas* concerns the individual's own sense of self-worth but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights.

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[32] At para 24
[33] At para 24
[34] At para 24
[35] At para 25

62.2. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth but constitutes an affirmation of the worth of human beings in our society.

62.3. Reputation of each person is built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.

62.4. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity.

62.5. No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution.

63. Based on the above, it is clear that section 16(1) right to freedom of the press and other media is, like other rights in the Bill of Rights Chapter, not absolute. The right to freedom of the media is not an absolute defence to a criminal charge against a journalist.

64. Section 16 right to freedom of expression, including freedom of the press and other media, does not assume a superior status to the section 10 right to human dignity. Each case must be treated on its own facts. On the facts of this case, the Applicant faces a statutory

criminal charge. Media freedom cannot lawfully be advanced as a shield in motion proceedings (such as launched by the Applicant in this Court) against accountability on a criminal charge in separate criminal proceedings. But even if media freedom were a valid defence to a criminal charge against a journalist, that defence must be raised in the criminal proceedings themselves, not in motion proceedings intended to avoid criminal proceedings.

65. Section 16 right to freedom of the media does not rank higher than other rights in the Bill of Rights, including the section 14 right to privacy.

66. Section 16 right to media freedom and/or section 32 access to information right do not trump the section 10 human dignity right, the section 14 privacy right and the section 34 right of access to court to contest publication of personal private information before it is published.

67. Allowing section 16 to trump all the other rights – especially where there is a criminal charge in play – would create an undesirable precedent of self-help by journalists to defame, invade privacy unjustifiably and invoke a SLAPP suit defence to shield themselves from prosecution or civil claims in the name of media freedom. Weaponizing media freedom in this way can never be justifiable in a free and democratic society.

SANEF, MMA AND CEF ARE APPLICANTS IN *AMICI* CLOTHING

68. The role of an *amicus curiae* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn in return for the privilege of participating in the proceedings without having to qualify as a party. The *amicus* thus has a special

duty to the Court. It is the duty of the *amicus* to provide helpful submissions to the Court and not repeat submissions already made by the parties.[36]

69. The three applicants for *amicus* status do not meet the crucial element of disinterested friend of the court. Their submissions are those of *imbongi* or praise-singers of the Applicant in the main proceedings. They have each issued media statements strongly supporting the Applicant in these proceedings. We submit this is not the stuff of which a friend of the court is made.

CONCLUSION

70. In the result, we ask:

70.1. that DIA be admitted as amicus curiae in the main proceedings,

70.2. that DIA be granted permission to make written and oral submissions in the main proceedings,

70.3. that SANEF, MMA and CEF be declared not to meet the requirements for *amicus curiae* and not be admitted as *amicus curiae*.

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NONTSASA MEMELA

Pro Bono Counsel for Democracy in Action
Chambers, Sandton & Pretoria
6 December 2022

[36] In Re Certain *Amici Curiae:* Minister of Health & Others v Treatment Action Campaign & Others 2002 (10) BCLR 1023 (CC) at para 5

LIST OF CASES

1. *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*(CCT 66/21) [2022] ZACC 37 (14 November 2022)

2. *NDPP v Zuma* 2009 (2) SA 277 (SCA)

3. *MEC, Department of Co-operative Governance and Traditional Affairs v Maphanga* 2021 (4) SA 131 (SCA)

4. *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC)

5. *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC)

6. *S v Mamabolo* (CCT44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2002 (5) BCLR 449 (CC) (11 April 2001)

7. *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002)