4/93

CASE NO 612/90

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

FINANCIAL MAIL (PTY) LIMITED	1st Appellant
TIMES MEDIA LIMITED	2nd Appellant
MICHAEL COULSON	3rd Appellant
JIM JONES	4th Appellant
KNL PUBLISHING (PTY) LTD	5th Appellant

and

SAGE HOLDINGS LIMITED	1st Respondent
LOUIS SHILL	2nd Respondent

CORAM: CORBETT CJ, VAN HEERDEN, KUMLEBEN, et GOLDSTONE JJA, et HOWIE AJA.

DATE OF HEARING: 24 August 1992

DATE OF JUDGMENT: 18 February 1993.

J U D G M E N T

/CORBETT CJ ....

<u>CORBETT</u> CJ:

The parties concerned in this litigtion are the following: (1) Financial Mail (Pty) Ltd, first appellant and first respondent in the Court **a quo**, which is the proprietor of a weekly magazine, registered as a newspaper and known as the "Financial Mail"; (2) Times Media Ltd, second appellant/second respondent, which publishes the Financial Mail; (3) Mr Michael Coulson, third appellant/third respondent, who at the time of the proceedings in the Court **a quo** was the acting editor of the Financial Mail (in the absence of the editor, Mr Nigel Bruce, abroad); (4) Mr James (Jim) Jones ("Jones"), fourth appellant/fourth respondent, who at all relevant times was employed by the first appellant as a financial journalist and the senior assistant editor of the Financial Mail; (5) KNL Publishing (Pty) Ltd, fifth appellant/fifth respondent, the printer of the Financial

Mail; (6) Sage Holdings Ltd ("Sage"), first respondent and first applicant in the Court a quo, which is a South African corporation listed on the Johannesburg Stock Exchange and carries on business from its principal place of business in Johannesburg as a holding and investment company; and (7) Mr Hyme Louis Shill ("Shill") second respondent/second applicant, the chairman of and a substantial shareholder in Sage.

At the time of the proceedings in the Court below Sage had two operating subsidiaries, Sage Financial Services Ltd ("Sage Financial") and Sage Property Holdings Ltd ("Sage Property"), both of which were listed companies. They, together with various other subsidiaries, formed the Sage group of companies. Sage Financial was engaged in the business of life assurance, mutual fund services, trust company and financial planning services and investment services. It held what were termed "strategic investments" in the Allied

Group Ltd ("Allied") and in the Rand Merchant Bank Ltd ("Rand Bank"). Sage Property headed a large property group which managed or controlled assets totalling approximately R1 billion. Sage and its subsidiaries employed about 3000 persons and was said (in the founding affidavit) to have "a 25 year old record of strong long term profit growth, financial stability and business integrity". More than 50 per cent of the shares in Sage were owned by the Mines Pension Fund, the Rembrandt Group and Shill.

On Tuesday, 11 September 1990 the respondents launched an urgent application in the Witwatersrand Local Division seeking interdicts restraining the appellants from publishing, disclosing or disseminating certain information concerning Sage and its business activities which was derived from sources said to be unlawful; and from publishing in the Financial Mail a certain article written by Jones concerning Sage and its business

activities. The matter came before Joffe J who, having heard argument on 11, 14 and 17 September, delivered a judgment on 25 September granting final interdicts, with costs. This judgment has been reported: see Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others 1991 (2) SA 117 (W). With leave of the Judge a quo, appellants now come on appeal to this Court, seeking a reversal of the decision of the Judge a quo.

In the two years which have intervened since the granting of the interdicts the information and the draft article which was the subject-matter of this litigation have ceased to be pertinent or topical. The appeal is nevertheless being pursued because of the important legal issues which it raises, and also, I need hardly add, because of costs.

The facts of the matter may be stated as follows. On 17 August 1990 an article entitled "Reading Between the Lines" and written by Jones appeared in the

Financial Mail. It is a wide-ranging and critical commentary upon the financial position of Sage and three of the themes to which it gives prominence are the possibility that Sage could be, or become, short of ready cash (or "cash-hungry", as the article puts it); the relationship between Sage and Allied; and a business venture in the United States of America embarked upon by Sage through the medium of an American subsidiary, Independent Financial Services ("Independent"). In accordance with what is termed "normal Financial Mail policy" a draft of the proposed article was submitted before publication to Shill and a Mr B Nackan ("Nackan"), an executive director of Sage, for comment. Discussions took place, certain corrections were made and comments were incorporated in the article.

On 31 August 1990 Jones sent a copy of a further draft article which it was proposed would be published in the Financial Mail during the course of the

week commencing Monday, 3 September 1990. According to Shill, much of the information and many of the statements contained in this draft article (which I shall refer to by its exhibit number, "LS4") were inaccurate, untrue and defamatory and were calculated to have the effect of injuring the business status, reputation and goodwill of Sage. Shill was also "intrigued and disturbed" by the fact that certain of the information contained in the article was of the kind that would not ordinarily be available to the public or capable of being obtained by financial journalists through normal channels.

After Shill had consulted with Sage's attorney a meeting was arranged between him (accompanied by his attorney) and Jones and Bruce, representing the Financial Mail. During this meeting it transpired that Jones had used information gleaned from a confidential document, which had been prepared by certain members of the management of Allied and had been submitted to the

executive committee of Allied, but rejected by it ("the Allied document"). The document never came before Allied's board and Allied never gave permission for it to be disclosed to third parties, apart from Shill, to whom a copy was sent in confidence. The Allied document was evidently critical of the relationship between Allied and Sage and recommended that this be terminated. It was marked "Strictly private and confidential".

Shill informed Jones and Bruce of the confidentiality of the Allied document and pointed out to them that the use of "unsubstantiated information" of this nature would be severely damaging to Sage. The parties failed to agree upon a postponement of the publication of the article. Sage's attorney thereupon informed Bruce that unless first appellant undertook not to publish the article the Court would be approached for an urgent interdict to restrain publication. Bruce indicated that he wished to consult first appellant's

legal representatives.

Immediately thereafter both sides, through their respective attorneys, consulted counsel and certain further negotiations took place between the parties and their legal representatives in counsel's chambers. During the course of these negotiations an additional source of information utilized by Jones in his article emerged. First appellant's counsel disclosed that his client was in possession of certain tape recordings of telephone conversations between Nackan and various third parties. Subsequent investigation revealed that an eavesdropping or tapping device had been secretly and unauthorisedly installed in the basement of Sage's premises which enabled conversations on the telephone line used by Nackan to be intercepted and tape-recorded. No other lines had been tapped. It is stated by Bruce and Jones that the appellants were in no way party to the making of these tapes and did not solicit them. Accord-

ing to Jones, they were made available to him by a "confidential source", whose identity he was not prepared to divulge. At a certain meeting between the parties Bruce suggested (on hearsay information) a reason for the tapes having been made, but this was not substantiated. Be that as it may, the telephone-tapping was a reality and Jones candidly conceded (in an affidavit filed by appellants) that some of the information in the article LS4 was derived from these tapes.

According to Shill, he was concerned and surprised by these revelations of how Sage's "privacy and confidentiality" had been breached and by the fact that the appellants wished to exploit these sources of information for the benefit of their publication and to the detriment of Sage's business status, reputation and goodwill. He also realized that Jones had "substantially misunderstood and misconstrued" certain "delicate negotiations" and other transactions which may have been

referred to "intermittently and cryptically" during the course of these tapped telephone conversations.

In the negotiations which followed this latest revelation counsel expressed Shill's wish to have full access to Jones's next draft of the article in order to approve and vet it in all respects, including both fact and opinion. The Financial Mail representatives were not prepared to permit such approval rights and late on the afternoon of 3 September negotiations broke down.

Later, that evening, and after reconsidering the matter, Shill indicated that he would be prepared to accept the position that -

> ".... the applicants would approve the article only in order to see that its answers and views were fairly represented."

In the result an agreement in principle was arrived at by the parties that evening.

On the following morning (4 September) the agreement was reduced to writing in the form of a handwritten document ("LS5") and thereafter the substance of LS5, with certain minor alterations, was incorporated in a letter dated 4 September 1990 and addressed by Sage's attorneys to appellants' attorneys ("LS6"). This letter reads:

> "This serves to confirm the following arrangement between Sage Limited and the Financial Mail.
>
> 1. Financial Mail will not publish the draft article shown to Sage.
>
> 2. Sage (Mr L Shill) and Allied (Mr N Alborough) will meet the Editor and journalist of Financial Mail on the morning of 7 September 1990 from 11h00 to 13h00 at Sage headquarters and be interviewed concerning the relationship and state of affairs between Sage and Allied.
>
> 3. Insofar as any question may require research, it will be researched and then answered.
>
> 4. Sage may be interviewed concerning

non-Allied topics canvassed in the article and Sage will in is own words present its view and facts on these topics.

5. The article will be an exclusive but Financial Mail is aware that Sage is about to issue a statement concerning industrial espionage.

6. Before publication Sage will approve (vet) the article only in order to see that its answers and views are fairly represented."

On the same day appellants' attorneys replied in the following terms ("LS7"):

"We are in receipt of your letter of the 4th September 1990. We are instructed to advise you as follows:

1. Our client accepts that you have recorded the arrangement accurately.

2. With regard to point 6, we confirm that it was agreed that the vetting will not mean that if your client is unhappy with the article as a whole, our client will be precluded from publishing.

3. Kindly provide us with a copy of the press release in relation to indus-

trial espionage as soon it is available (by telefax if necessary)".

The date for the interview referred to in par 2 of the letter LS6 was chosen with a view to the fact that Sage's interim results for the six months ended 30 June 1990 were due to be published on Wednesday, 5 September and it was envisaged that the interview would take place "against that background". Sage duly presented its interim results on 5 September and the interview took place on Friday 7 September as arranged. The latter was tape-recorded by agreement between the parties and a transcript thereof (an exhibit) reveals a long and rather rambling discussion, in which the main participants were Shill, Nackan, Mr N Alborough (the chairman of Allied), Bruce and Jones.

During the afternoon of Saturday, 8 September Jones gave to Nackan a new draft of the article ("LS9") prepared (purportedly) in accordance with the agreement

evidenced by the letters LS6 and LS7. According to Shill it was immediately apparent from LS9 that in drafting the article appellants had not complied with the agreement and indeed had made no endeavour to do so. It was essentially a revision of the former draft LS4 in which certain materially incorrect statements had been excluded, but in which the gist remained the same. This description of LS9 is disputed by Jones in an answering affidavit, but he concedes that it contained "elements of what had appeared in the previous proposed article". The founding affidavit particularizes the respects in which LS9 is alleged to be "substantially inaccurate, defamatory and damaging". I shall deal with some of these later in this judgment. It was also apparent to Shill that much of the article was based upon Jones's interpretations of the confidential information derived from the telephone tapes and the Allied document.

Thereafter there were various exchanges between

the parties, the details of which are not important. The general attitude of Sage and Shill was that the proposed article LS9 was not in accordance with the agreement between the parties and they demanded an immediate undertaking that it would not be published. Appellants were not prepared to give such an undertaking: hence the urgent application. The details of the relief claimed and that granted by the Court a quo appear from the reported judgment, pages 120 F-I and 137 C-F.

The case, as presented by the parties on appeal, raises three main issues:

(a) whether the use by appellants of information derived from the tapes and the Allied document (for convenience when referring to them collectively I shall speak of "the confidential sources") in a published article in the Financial Mail would have been unlawful;

(b) whether the proposed article contained

statements which were defamatory of the respondents and actionable or amounted to injurious falsehoods concerning them;

(c) if (a) and/or (b) be answered in the affirmative, whether the agreement evidenced by the letters LS6 and LS7 (which I shall call "the publication agreement") precluded respondents from taking action to prevent publication of the article LS9.

These issues will be considered in turn.

Use of Information derived from Confidential Sources

In determining whether or not appellants were entitled to use in a published article information derived from the confidential sources, the Judge a quo turned his attention to two legal concepts, a person's right to privacy and the law relating to unfair (or rather unlawful) competition. After surveying the

former and referring to a number of decided cases on the subject the learned Judge concluded that (at 131 F) -

> ".... the right to privacy, being a real right of personality, only applies to natural persons and does not apply to a company."

The question whether the publication of information derived from the confidential sources would constitute an invasion of Sage's right to privacy was accordingly not pursued.

Joffe J then proceeded to consider unlawful competition as a basis for denying appellants the right to publish the information. Again, having referred to various authorities on the topic, he concluded as follows (at 132 F - 133 A):

> "Any person's conduct which interferes with the trader's right to carry on his lawful business, whether he is a competitor or not, may constitute unlawful competition. Does a company's right to

trade without wrongful interference from others encompass the right to have the confidentiality of its internal oral and written communications respected? To put it another way: Are the secret boardroom deliberations of a company to be respected, or is it open season on information so that he with the best listening device or bugging apparatus can ascertain the business secrets and plans, indeed the innermost business secrets, of a company?

To my mind it is clear that the ordinary conduct of business postulates the need that, included in the right to conduct business without unlawful interference, is the right of a company that its internal communications will not be eavesdropped upon, nor recorded, nor intercepted.

In exercising the right to trade and carry on a lawful business, a company or other juristic person would be entitled to regard the confidential oral or written communications of its directors and employees as sacrosanct and would in appropriate circumstances be entitled to

> enforce the confidentiality of the aforesaid oral and written communications. To my mind, such right would in appropriate circumstances be enforceable against whosoever is in possession thereof and whosoever seeks to utilise it. The fact that the person who is in possession thereof was not party to the unlawful conduct in obtaining it does not exclude the right which the applicants would have."

He further held that in determining whether in the circumstances of this case information from the confidential sources could be utilised as source material for the article regard should be had to the interests of Sage, the appellants and the general public, more particularly those who held a financial interest in Sage (at 133 F-G). Having weighed these various interests he concluded that the respondents were entitled to the interdicts claimed (at 133 F - 134 I).

For the reasons which follow I agree that it

would have been unlawful for appellants to use information gleaned from the confidential sources in the proposed article. And in stating those reasons I propose to deal first with information derived from the tapes.

I think, with respect, that the learned Judge a quo erred in concluding that it had been held, or stated, in Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1979 (1) SA 441 (A) that the right to privacy pertains only to natural persons and that an artifical person, such as a company, enjoys no such right. It is clear from the passage in the judgment of Rabie JA which appears at the bottom of page 456 that the Court proceeded on the assumption, without deciding the matter, that the appellant, a university and an artificial person, would in appropriate instances ("gepaste gevalle") enjoy a right to privacy.

Since the decision in the Tommie Meyer case, supra, this Court has held that a trading corporation can

sue for damages in respect of a defamation which injures its good name and business reputation; and that it may recover such damages without having to prove actual loss (see Dhlomo N O v Natal Newspapers (Pty) Ltd and Another 1989 (1) SA 945 (A), at 952 E - 953 D). In so holding this Court endorsed what had been stated in G A Fichardt Ltd v The Friend Newspapers Ltd 1916 AD 1 and other cases decided after 1916. In addition, a corporation so defamed may also claim damages to compensate it for any actual loss sustained by it by reason of the defamation (Caxton Ltd and others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A), at 560 I - J). In Dhlomo's case the Court went on to consider the question whether the right to sue for defamation should be restricted to trading corporations or whether such right should also be extended to non-trading corporations and held that (at 954 D) -

> ".... a non-trading corporation can sue

> for defamation if a defamatory statement concerning the way it conducts its affairs is calculated to cause it financial prejudice."

(Per Rabie ACJ, who delivered the unanimous judgment of the Court.)

The Court left open the question whether a non-trading corporation could sue for defamation if the defamation related to the conduct of its affairs but was not calculated to cause it financial prejudice (at 954 E); and Rabie ACJ added this further rider (at 954 F-G):

> "My aforesaid finding must not be taken to mean that I hold the view that every non-trading corporation will in all circumstances be entitled to sue for defamation. It is conceivable, I think, that such a corporation may, in certain circumstances, be denied the right to sue on the ground of considerations of public or legal policy. (Such considerations moved the Court in the Spoorbond case, supra, to hold that a department of the

> State should not be permitted to sue for defamation.) The present case can conceivably give rise to the question whether it would be in the public interest to permit attacks on political bodies, whose policies and actions are normally matters for debate on public and political platforms, to be made the basis of claims for damages in Courts of law. However, I express no opinion thereon."

The point left open by this rider came before this Court for decision in the recent case of <u>Argus Printing and Publishing Co Ltd v Inkatha Freedom Party</u> 1992 (3) SA 579 (A) and it was held as follows (I quote the headnote):

> "Public policy, and in particular the need to protect freedom of political expression, does not require that any class of persons should be prevented from bringing proceedings for defamation. Where a right to sue exists, the law of defamation itself recognises the importance of freedom of political

> expression, and makes provision for it. Moreover, this provision is tailored to the needs of particular situations and does not entail that a large class of juridical persons, including some which may be very deserving, would be entirely prevented from protecting their reputations by recourse to law. There is accordingly no good reason for excluding political bodies from the class of non-trading corporations which are entitled to sue for damages for defamation."

These developments in the law of defamation are not directly pertinent to the issues in the present case, but I refer to them to indicate that as a matter of general policy the Courts have, in the sphere of personality rights, tended to equate the respective positions of natural and artificial (or legal) persons, where it is possible and appropriate for this to be done. In the sphere of defamation this can be done for, as Schreiner JA explained in <u>Die Spoorbond and Another v</u>

South African Railways 1946 AD 999, at 1010:

> "Our action for defamation is derived ultimately from the Roman **actio injuriarum** which 'rested on outraged feelings, not economic loss' (Buckland, Textbook of Roman Law, sec 202). Even in the early days of recorded Roman law mention was specifically made, in this connection, of public insults, but the gist of the action was the intentional and unjustified hurting of another's feelings and not the damage to his reputation considered as something that belonged to him. In our modern law, as often happens, the wide old delict of **injuria** has split up into different delicts, each with its own name, leaving a slight residue to bear the ancient title. The particular delict now known as defamation has lost a good deal of its original character since it is no longer regarded primarily as an insulting incident occurring between the plaintiff and the defendant personally, with publicity only an element of aggravation by reason of the additional pain caused to the plaintiff. Although the remnant of

> the old delict of **injuria** still covers insults administered privately by the defendant to the plaintiff, the delict of defamation has come to be limited to the harming of the plaintiff by statements which damage his good name."

Although a corporation has "no feelings to outrage or offend" (see Spoorbond case, at 1011), it has a reputation (or **fama**) in respect of the business or other activities in which it is engaged which can be damaged by defamatory statements and it is only proper that it should be afforded the usual legal processes for vindicating that reputation. (Cf. Neethling, Potgieter and Visser, Deliktereg, 2 ed, at 324, also the article by Neethling and Potgieter in (1991) 54 THRHR 120, at 122-3.)

In Deliktereg the learned authors discuss (at pp 324-5) the question whether the protection thus afforded to a legal person in regard to defamation can be

extended to other personality rights; and in regard to some such rights conclude that because they relate essentially to wounded feelings, they are not available to a legal person. The authors continue (at 325)

> "Hierteenoor kan die persoonlikheidsnadeel by krenking van die regte op privaatheid en identiteit op dieselfde wyse as by dié op die **fama** ontleed word en sal daar tot dieselfde gevolgtrekking geraak word as in die geval van aantasting van die **fama**. Dit beteken dat ook in geval van privaatheid en identiteit 'n persoonlikheidskrenking sonder 'n gevoelskrenking kan bestaan (privaatheid en identiteit kan immers ook geskend word sonder dat die benadeelde daarvan bewus is). Gevolglik behoort die actio **iniuriarum** 'n regspersoon teoreties ook by privaatheid- en identiteitskending toe te kom al kan daar nie van gekrenkte gevoelens sprake wees nie."

I am in general agreement with this viewpoint in regard to the right to privacy.

I need not essay a definition of the right to privacy. Suffice it to identify two forms which an invasion thereof may take, viz (i) an unlawful intrusion upon the personal privacy of another and (ii) the unlawful publication of private facts about a person (see McQuoid-Mason, The Law of Privacy in South Africa, at 37-9, 86-8, 135 et seq, 169 et seq; Deliktereg, at 346-7; Neethling Persoonlikheidsreg, 2 ed, at 217-34). Of course, not all such intrusions or publications are unlawful. And in demarcating the boundary between lawfulness and unlawfulness in this field the Court must have regard to the particular facts of the case and judge them in the light of contemporary **boni mores** and the general sense of justice of the community, as perceived by the Court (cf Schultz v Butt 1986 (3) SA 667 (A), at 679 B-C; S v A and Another 1971 (2) SA 293 (T), at 299 C-D; S v I and Another 1976 (1) SA 781 (RAD), at 788 H - 789 B; Deliktereg, p 346). Often, as was pointed out

by Joffe J (see reported judgment at 130 C - 131 E), a decision on the issue of unlawfulness will involve a consideration and a weighing of competing interests. For example, in the case of S v I and Another, **supra**, the Appellate Division of Rhodesia held (in a prosecution for criminal **injuria**) that where an estranged wife, together with a private detective employed by her, had peeped at night into her husband's bedroom, this invasion of his privacy was "justified" in that they did so solely with the **bona fide** motive of obtaining evidence of the husband's adultery; and that accordingly the wife and private detective were not guilty of criminal **injuria**. Here the Court had to weigh the husband's right to privacy against the wife's interest in obtaining evidence of his infidelity. Similarly, in a case of the publication in the press of private facts about a person, the person's interest in preventing the public disclosure of such facts must be weighed against the interest of the

public, if any, to be informed about such facts. In this weighing-up process, there are usually a number of factors to be taken into account (see Persoonlikheidsreg, at 243 et seq). Whether the defendant's competing interest should be regarded as a ground of justification ("regverdigingsgrond" - see Persoonlikheidsreg, at 237 et seq) which rebuts a **prima facie** unlawfulness or whether it is simply one of the factors to be taken into account in determining unlawfulness in the first place, need not now be considered.

I now return to the facts of this case. The telephone-tapping which occurred was manifestly an unlawful invasion of the privacy of Sage and its corporate executives and appellants did not seek to justify the tapping; nor is there any acceptable evidence on record which would possibly provide such justification. Indeed I did not understand appellants' counsel to argue to the contrary. The actual tapping, however, is not the

real issue in the case. The real issue is whether appellants, having come into possession of the tapes that were produced in the tapping process, were entitled to use information derived therefrom in an article to be published in the Financial Mail. Furthermore, it should be pointed out that in the Court **a quo** the legal proceedings were for an interdict to prevent unlawful publication; not for damages arising from an unlawful publication which had taken place.

In considering this issue, the fact that the information in question was obtained by means of an unlawful intrusion upon privacy is a factor of major significance. In Persoonlikheidsreg, Prof Neethling states (at 223):

> "Dit behoef myns insiens geen betoog nie dat indien 'n persoon kennis van private feite deur 'n onregmatige indringingshandeling bekom, enige openbaarmaking van sodanige feite deur daardie persoon, of trouens enige ander persoon, die be-

nadeelde se reg op privaatheid skend."

While I agree, with respect, with this as a general proposition, I would be hesitant to hold that it is subject to no exceptions. It might well be that if in the case of information obtained by means of an unlawful intrusion the nature of the information were such that there were overriding grounds in favour of the public being informed thereof, the Court would conclude that publication of the information should be permitted, despite its source or the manner in which it was obtained.

In this connection the English case Lion Laboratories Ltd v Evans and Others [1984] 2 All E R 417 (CA) provides an interesting analogy. There the plaintiff company manufactured and marketed an instrument known as an intoximeter which was used by the police for measuring levels of intoxication by alcohol. Plaintiff

discovered that two technicians who had worked on the instrument and had thereafter left the plaintiff's employ were in possession of copies of some of the plaintiff's internal and confidential correspondence, which indicated doubts as to the reliability and accuracy of the intoximeter, and that they had given this correspondence to a national daily newspaper with a view to publication. At first instance the plaintiff obtained an injunction (pending trial) against the newspaper restraining publication. An appeal against this order succeeded and the injunction was discharged. It was held that even though the confidential information in question had been unalwfully obtained "in flagrant breach of confidence", it was necessary to weigh two competing public interests: firstly the public interest in the preservation of the right of organizations to keep secret confidential information, and secondly the interest of the public in being kept informed of matters which are of real public

concern. In the instant case this meant weighing the public interest in maintaining the confidentiality of the plaintiff's documents against the public interest in the accuracy and reliability of an instrument on which depended the liability of a person to be convicted and punished for a drink-driving offence. The Court concluded that the latter interest should prevail. Three points made in the judgments in this case are worthy of repetition for present purposes:

(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known. (See at 423 c.)

(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest.

(See at 423 d.)

(3) "There is a public interest of a high order in preserving confidentiality within an organisation. Employees must be entitled to discuss problems freely, raise their doubts and express their disagreements without the fear that they may be used to discredit the company and perhaps imperil the existence of the company and the livelihood of all those who work for it. And I am old-fashioned enough to think that loyalty is a virtue that it is in the public interest to encourage rather than to destroy by tempting disloyal employees to sell confidential documents to the press, which I am sure would be the result of allowing the press to publish confidential documents under cover of a shadowy defence of public interest." (Per Griffiths LJ at 433 d - e.)

(See also Attorney General v Guardian Newspapers Ltd and Others (No 2) and related appeals [1988] 3 All E R 545 (HL), the well-known "Spycatcher" case.) With respect, I would enthusiastically endorse this viewpoint. In my view there is a public interest in preserving confidentiality in regard to private affairs and in discouraging the leaking of private and confidential information, unlawfully obtained, to the media (and others).

The proposed article LS9 (which for convenience of reference has been divided into 24 paragraphs), like its predecessor, concentrates on Sage's financial situation, using as its opening salvo Sage's interim report which announced a 2c cut in the interim dividend (from 22c to 20c). The article commences with the somewhat sensational statement that when this announcement was made "the alarm bells started to ring all over Diagonal Street". The article makes passing

reference to the dispute between the parties and the threat of an interdict, and to the alleged differences between Sage and the Allied Group, and then concentrates for the next nine paragraphs on what are termed Sage's "American problems", i e the financial problems associated with Independent and Sage's decision to dispose of its interest in Independent. The general theme is that, as the article puts it, "(t)he cash crunch is now very close". The following six paragraphs revert to the problems in the relationship between Sage and Allied; and the final four paragraphs purport to be an analysis of Sage's interim results.

It is common cause (or at any rate not in dispute) that six of the nine paragraphs relating to Sage's "American problems" were based on information gleaned from the tapes. The actual contents of the tapes are not before us, but it is accepted that they include recordings of discussions and negotiations

between Nackan and third parties of a confidential and sensitive nature relating to Sage's American interests. All that Jones, in his supplementary answering affidavit, says in this regard is that he did not make the recordings or instigate their making. This is beside the point. As I have held, the tapes were made in the course of an unlawful intrusion into Sage's privacy and at all material times Jones and the other appellants were well aware of this fact.

Assuming, in favour of the appellants, that in a case where the information sought to be published was obtained by means of an unlawful intrusion, there may nevertheless still be overriding considerations of public interest which would permit of it being published, it seems to me that such a case would be a **rara avis** and that the public interest in favour of publication would have to be very cogent indeed. In my opinion, this was not such a case. Here the information in question

related to sensitive and confidential information concerning Sage's internal affairs and delicate business negotiations being conducted by it and no good reason was advanced by the appellants as to why the public should have been informed about all this or why indeed the appellants should have been permitted to use this information as the springboard for what is generally a fairly hostile article concerning Sage and its financial affairs.

The Allied document was also a confidential, internal document belonging to Allied, but a copy of which was sent to Shill. It had a very limited circulation within Allied and was not even placed before the full board of directors. It dealt with confidential and sensitive matters concerning the relationship between Sage and Allied. Mr Alborough filed an affidavit in these proceedings confirming these facts and stating that Allied had never given, and would never give, permission

for the document to be disclosed to third parties. The recommendations contained in the document were never accepted by Allied. There is no explanation on record as to how the Allied document came to be abstracted from Allied's possession and passed on to Jones. When questioned about this at the meeting of 7 September Jones appears to have been vague and evasive. It must have been obvious to Jones from the start that the document was a confidential one and that his possession of it was unlawful. And certainly after the first meeting with Sage's representatives on 3 September he would have been under no illusions in this regard.

It seems to me that in substance the Allied document stood on the same footing as the tapes. It contained private information relating to the relationship between Sage and Allied and Jones's possession thereof was unlawful. There was, in my view, no overriding consideration of public interest justifying

publication. It was argued by appellants that because it was an Allied document Sage did not have **locus standi** to seek an interdict restraining its publication. The argument is artificial and without substance. Alborough made it clear what Allied's attitude was and at the interview on 7 September he associated himself with the demand that the contents of the document were not to be disseminated. Having regard to the contents of the document, it seems to me that Sage also had a direct and substantial interest in ensuring that information which it contained was not unlawfully published.

In the result, therefore, the position is that at least half of the article LS9 (twelve paragraphs) was based on information derived from the tapes and the Allied document and that the publication by appellants of this information would have infringed Sage's right of privacy. Although the appellants tendered in the supplementary answering affidavit to delete or reformu-

late a few sentences in the proposed article, this obviously did not meet the gravamen of Sage's complaint. There was never any tender to excise from the article the portions based upon information derived from the confidential sources. And it was not for the respondents or the Court to attempt such an excision. Subject, therefore, to the defence based upon the publication agreement, the respondents were, in my view, entitled to the interdicts granted.

Defamation and/or Injurious Falsehood

The Court a *quo* (see reported judgment at 135 I) held that the proposed article LS9 was defamatory of both Sage and Shill. Because of the confidential nature of the information concerned the learned Judge did not particularize the defamation and forbade reporting of the contents of the papers in the case (at 137 F-G).

In argument before us respondents' counsel

identified five separate defamations in the proposed article. The alterations to the article which, as I have indicated, were tendered in appellants' supplementary answering affidavit were designed to meet certain charges of defamation. In addition, it was contended on appellants' behalf that in so far as certain portions of the article were defamatory of respondents they constituted fair comment. It was argued, on the authority of Heilbron v Blignaut 1931 WLD 167, at 169, that it was sufficient for appellants merely to have "set up" such a defence in order to defeat a claim for an interdict restraining publication and that the meaning attributed to the phrase "set up" in Buthelezi v Poorter and Others 1974 (4) SA 831 (W) was incorrect.

In view of the conclusion to which I have arrived in regard to the use by appellants in the proposed article of information derived from the confidential sources and in regard to the relief to which

respondents were entitled, it is not necessary for me to finally decide the various issues relating to defamation. I would, however, stress that in all five instances there were reasonable grounds for respondents feeling that they had been defamed (in other words, the averments were not frivolous); and that in two instances, at least, my **prima facie** view is that the relevant passages in the article were defamatory. I refer in this connection to par 17 of the article LS9 in which the following statement appears:

> "Some of Allied's executives believe Sage attempted unduly to influence the Allied's lending policies over a R26m loan request from Sacib, then a troubled encyclopedia company equally owned by Sage and the now-collapsed Sprintex. In turn Sprintex was 14%-owned by Sage. The loan request was eventually turned down";

and also to par 18 in which it is suggested that at some stage salesmen attached to Sage Financial "took unaccept-

able advantage of Allied's branch network and client lists".

The Publication Agreement

It was submitted by appellants' counsel that the publication agreement, as evidenced by the letters LS6 and LS7 (quoted above), precluded respondents from approaching the Court for the relief which it claimed. It seems to me that this defence, to be effective, must go the length of establishing that in terms of the agreement respondents consented in advance to the article LS9 being published in its entirety in the Financial Mail or (which seems to amount to the same thing) that the respondents waived their right to object to the publication of the entire article.

It is to be noted that although this defence was placed at the forefront of counsel's submissions to us, the point was never taken by appellants on the

papers. Whether respondents would have wished to place additional facts before the Court had the point been so taken is uncertain. In view, however, of the conclusion to which I have come as to the merits of the argument it is not necessary to pursue this aspect of the matter.

In determining whether the publication agreement should be interpreted as appellants suggest it is important to note that the article which was to be published was not yet in existence at the time when the agreement was entered into. All that then existed was the draft article LS4, which it was agreed in terms of par 1 of LS6 would not be published.

LS6 proceeds to provide for the meeting described in par 2 thereof and pars 3 and 4 regulate the nature of the interview to be conducted at that meeting. Where par 4 speaks of Sage being "interviewed concerning non-Allied topics canvassed in the article", it presumably refers to the draft article LS4, since at the

time that the meeting was due to take place that would have been the only relevant article in existence. Par 5, by contrast, appears to refer to the proposed article (which later came into existence in the form of LS9); and so does par 6. This last paragraph is a critical one and I quote it again:

> "Before publication Sage will approve (vet) the article only in order to see that its answers and views are fairly represented."

With this must be read par 2 of the letter LS7 reading:

> "With regard to point 6, we confirm that it was agreed that the vetting will not mean that if your client is unhappy with the article as a whole, our client will be precluded from publishing."

(In all the circumstances respondents must be taken to have accepted this gloss upon par 6 of LS6.)

These two paragraphs, read together, are far from clear. For instance, though Sage appears to have

been given the right in par 6 to "approve (vet)" the article in respect (only) of the representation of its answers and views, it is not clear what its position would be if it did not approve the article in these respects. Moreover, it is also not clear whether par 2 means that if Sage were unhappy about the presentation of its answers and views, the article might nevertheless be published; or whether par 2 should be confined to matters unrelated to the presentation of Sage's answers and views (which I shall call "extraneous matters").

Be that as it may, it would seem that as far as extraneous matters are concerned (and these would for the most part include the portions later objected to in LS9), Sage's unhappiness therewith would not, in terms of par 2, result in the appellants being "precluded from publishing". The essential question is: do the words quoted mean -

(1) that appellants are not precluded <u>by the</u>

publication agreement from publishing; or

(2) that appellants are not precluded on any grounds from publishing, i e are given carte blanche to publish?

In deciding this question of interpretation the following background facts and surrounding circumstances should be borne in mind:

(a) It was clearly contemplated that the proposed article referred to in par 6 and par 2 would be a revised version of and cover more or less the same ground as the draft article LS4.

(b) Respondents had voiced fierce objection to the use in LS4 of information derived from the confidential sources and to statements therein which it regarded as being damaging and defamatory. Appellants, on the other hand, were unyielding in their determination to use information from the confidential sources and

the parties had failed to reach agreement, save on a very limited basis.

(c) Respondents accordingly had good reason to believe, or at any rate suspect, that the proposed article would similarly use information from the confidential sources and might contain damaging or defamatory material.

In the circumstances it seems to me to be improbable in the extreme that Sage would have intended, in exchange for the very limited (and dubious) advantage of being entitled to "vet" (whatever that may mean) the manner in which the article represented its answers and views, to forego all its rights to prevent the publication of an article which had not yet seen the light of day, the contents of which were at that stage an unknown quantity, but concerning which Sage had grounds to believe that it might be subject to the same or similar objections as those raised in respect of LS4.

(And, of course, as events turned out the proposed article LS9 was in fact subject to such objections.) It also seems improbable that appellants intended to exact so one-sided a bargain. In a case such as this, where the meaning of the words used in the contract is not clear, there is room for the rule of interpretation which puts an equitable construction on the contract and does not adopt a meaning which gives one party an unfair or unreasonable advantage over the other (Wessels The Law of Contract in South Africa, 2 ed, secs 1974-77; Rand Rietfontein Estates Ltd v Cohn 1937 AD 317, at 330-1; Christie, The Law of Contract in South Africa, 2 ed, at 253; Paddock Motors (Pty) Ltd v Igesund 1975 (3) SA 294 (D), at 298 D-F).

Moreover, as I have said, the interpretation advanced by appellants' counsel amounts to a waiver by respondents of the right to object (and to enforce that objection by legal action) on any ground to this future

article, whatever it might contain, however much it might also be based on the confidential sources of information and however injurious or defamatory it might also turn out to be. The **locus classicus** on waiver is the following statement by Innes CJ in Laws v Rutherfurd 1924 AD 261, at 263:

> "The **onus** is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances."

(See also Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 772 (A), at 778 D - 779 A.) In considering whether waiver has been established in a particular case the Court may take cognizance of the fact that persons do not as a rule lightly abandon their rights (see Alfred McAlpine & Son (Pty) ltd v Transvaal Provincial

Administration 1977 (2) SA 310 (T), at 324 A - 325 A and the authorities there cited; Le Roux v Odendaal and Others 1954 (4) SA 432 (N), at 441 D - E).

As the case of Ellis and Others v Laubscher 1956 (4) SA 692 (A) shows, this general approach to the establishment of a waiver also applies to the interpretation of an ambiguous contractual provision. In delivering the majority judgment Fagan JA stated (at 702 E - F):

> "'n Afstand van regte word nie vermoed nie, maar moet streng bewys word; en selfs as ek gemeen het dat die dokument in hierdie opsig dubbelsinnig is (wat nie my mening is nie), sou ek die vertolking moet laat geld wat regte onaangetas laat. Ek mag vir hierdie stelling verwys na 'n lang reeks gewysdes waarin hierdie Hof die beginsel neergelê en toegepas het,....."

This is a further cogent reason for adopting the interpretation of the publication agreement which is

set out in (1) above.

Accordingly I hold that the publication agreement did not preclude the respondents from seeking the interdicts which they obtained on the grounds advanced by them.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

KUMLEBEN JA)
HOWIE AJA) **CONCUR**

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Case No 612/1990

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal between:

FINANCIAL MAIL (PTY) LIMITED	1st Appellant
TIMES MEDIA LIMITED	2nd Appellant
MICHAEL COULSON	3rd Appellant
JIM JONES	4th Appellant
KNL PUBLISHING (PTY) LIMITED	5th Appellant

and

SAGE HOLDINGS LIMITED	1st Respondent
LOUIS SHILL	2nd Respondent

CORAM: CORBETT CJ, VAN HEERDEN, KUMLEBEN, GOLDSTONE JJA et HOWIE AJA

HEARD: 24 AUGUST 1992

DELIVERED: 18 FEBRUARIE 1993

JUDGMENT

VAN HEERDEN JA:

If the agreement reached by the parties on 3 September 1990 is left out of consideration, I agree with the Chief Justice that it would have been unlawful for the appellants to use information derived from the tapped telephone conversations ("the tapes"). I have some doubt, however, as to whether the respondents would have been entitled to prevent publication of material gleaned from the Allied document, which was not compiled by or on behalf of the respondents. But I shall assume that publication and dissemination of such information would also have been unlawful vis-à-vis the respondents.

I respectfully disagree, however, with the Chief Justice's construction of the agreement. I do so for the following reasons.

The agreement falls to be interpreted against the following background:

1) The first draft article (LS4), which

was received by the second respondent ("Shill") on 31 August 1991, contained material culled from the tapes as well as from the Allied document. This included references to the book-over of 50 000 Sage shares; the financial difficulties experienced by American affiliates of the first respondent ("Sage"); attempts by Sage's officials to influence the Allied's lending policy; the use made by salesmen of FPS (a so-called financial off-shoot of Sage) of the Allied's computer network, and negotiations between Shill and Mr Ball of First National Bank regarding a take-over of the Allied by Sage or that bank.

2) When the respondents threatened to apply for an interdict prohibiting publication of LS4, Shill knew that the fourth respondent had utilised information derived from the Allied document.

3) During the subsequent negotiations ...

between the parties' legal advisers it was disclosed that the tapes constituted an additional source of information upon which portions of LS4 were based.

4) Shill was concerned about the breach of Sage's "privacy and confidentiality". Hence, as stated in the founding affidavit, he wished "to have full access to the ... next draft article in order to approve and vet that article <u>in all respects</u> including both fact and opinion". (My emphasis.)

5) Subsequently Shill relented somewhat. This led to the conclusion on 3 September 1990 of an agreement "in principle". The following morning the wording of the agreement was settled in the form of a handwritten document (LS5) which in turn was confirmed by letters written by the parties' attorneys.

For ease of reference I quote the full contents of LS5:

"1. FM [the first appellant] will not publish the draft article shown to

Sage [the first respondent].

2. Sage (L Shill) and Allied [?] will meet the editor or his deputy and journalist of FM on 10 September 1990 and be interviewed concerning the relationship and state of affairs between Sage and Allied.

3. In so far as any question may require research it will be researched and then answered.

4. Sage may be interviewed concerning any tapes canvassed in the article and Sage will in its own words present its view and facts of these tapes.

5. The article will be an exclusive but FM is aware that Sage is about to issue a statement concerning industrial espionage.

6. Before publication Sage will approve (vet) the article only and in order to see that its answers and views are fairly represented."

One notes the following important features of the agreement. Firstly, the first appellant undertook not to publish LS4 in its then existing

form. In return Sage would arrange a meeting at which representatives of Sage and the Allied would be interviewed on the relationship between those concerns. Clearly this interview would focus on the contents of the Allied document. Thirdly, the respondents consented to be interviewed on those portions of LS4 gleaned from the tapes. Finally, Sage obtained the right to veto the article to be written as a result of the interviews but only if its "answers and views" were not fairly represented.

In my view the parties to the agreement clearly envisaged that the revised article would, to a considerable extent, be based on information derived from the tapes and the Allied document ("the confidential sources"). LS4, of course, also contained material culled from those sources, but the agreement contemplated that the rewritten article would also embody the answers given and views

expressed during the envisaged interviews - and Sage could prevent publication of the whole article if it did not fairly represent such answers and views ("the condition"). If the parties did not contemplate that, subject to the condition, information obtained from the confidential sources could be published notwithstanding its confidentiality, I have difficulty in grasping the purpose of the agreement. On such a construction the envisaged interviews would have been futile. After all, those interviews, which would primarily focus on the confidential sources, would serve no purpose if the answers given and views expressed in regard thereto could not be published in conjunction with the confidential matter to which they pertained. Moreover, the fact that Sage was granted the right to veto the article if the condition was not fulfilled, irresistibly leads to the conclusion that it could be published if the condi-

tion was in fact satisfied.

It should also be borne in mind that the agreement conferred very real benefits upon Sage. Firstly, it obtained a conditional rigth to veto publication of material irrespective of whether such publication would be unlawful because of the confidentiality of its sources. Secondly, Sage could "vet" the whole article and not only those parts relating to the confidential sources.

In the final analysis the effect of the agreement may be thus summarised.

1) If the condition were not fulfilled the article could not be published.

2) If it were fulfilled the respondents could not prevent publication on the sole ground that it contained confidential information - which was to be the very subject of the envisaged interviews.

It is unnecessary to determine whether Sage

could "vet" the rewritten article in its unfettered discretion (which, of course, would have to be arrived at honestly), or whether it had to exercise an arbitrium boni viri. I say so because, whatever the true import of the condition may have been, the respondents effectively and deliberately prevented its fulfilment. Firstly, at the outset of the interview, Shill stated that he was not prepared to answer any questions relating to the tapes (although it would appear that subsequently its contents were discussed to some degree). Secondly, and more importantly, Shill declined to "vet" the revised article before the date on which, to his knowledge, it was to be published. Indeed, it seems clear that Shill would have refused to approve of the article even if satisfied that the condition had been fulfilled. Such refusal would have stemmed from his attitude that the article "was founded substantially

upon ... unlawful information".

It is true that in their opposing affidavits the appellants did not specifically rely on the agreement as a defence to the application. However, all the relevant facts were set out in the founding affidavit, and since the application was an urgent one the appellants, without filing any papers, would have been entitled to contend that that affidavit did not, or did not fully, warrant the granting of the orders sought by the respondents.

I am consequently of the view that the respondents should not have been granted an injunction on the basis that publication of the confidential material without more would have been unlawful. I do not think, however, that the agreement provided a licence for publishing matter, and in particular unlawful defamatory material, which would be objectionable on a ground not relating to its confi-

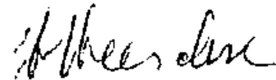
dentiality. Properly construed, the agreement merely prevented the respondents from objecting to the publication of information which would have been unlawful because, and only because, of its confidentiality (provided, of course, that the condition was fulfilled). Clearly, therefore, the agreement also did not cover defamatory inferences drawn from confidential information.

In my view paragraphs 7, 17, 18 and 19 of the rewritten article contain defamatory matter. I am furthermore of the opinion that the appellants failed to justify the proposed publication of those paragraphs. Since this is a minority judgment no purpose would be served in spelling out my reasons for those conclusions.

I would therefore uphold the appeal with costs, including the costs of two counsel, and substitute the following for the orders made by the

court a quo:

> "1. The respondents are interdicted from printing, publishing or distributing paragraphs 7, 17, 18 and 19 of annexure LS5.
>
> 2. The respondents are ordered to pay the costs of the application, including the costs reserved on 11 September 1990."



H J O VAN HEERDEN JA

GOLDSTONE JA CONCURS