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

CASE NO: 2021/22885

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

25/1/2023
DATE

SIGNATURE

In the matter between:

IRD GLOBAL LIMITED Applicant

and

THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA Respondent

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JUDGMENT

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[1] The applicant in this matter is IRD Global Limited ("IRD"), a company duly incorporated in terms of the laws of Singapore, with its registered address at 583 Orchard Road, #06-01 Forum, Singapore 238884. Although IRD is in the process of formally changing its legal name

from IRD Global Limited to IRD Global, it will, for the sake of convenience, be referred to as IRD.

[2] The respondent is the Global Fund to Fight Aids, Tuberculosis and Malaria ("the Global Fund"), an international organisation established in Switzerland and with its registered address at Global Health Campus, Chemin du Pommier 40, 1218 Grand-Saconnex, Geneva, Switzerland.

[3] For the sake of convenience, the respective parties will be referred to as IRD and the Global Fund.

[4] IRD invokes the court's assistance in combatting what is alleged to be continuous harm as a consequence of the Global Fund publishing, on its website, a document titled "*Global Fund Grant in Pakistan – Prohibited practices compromised procurement in a tuberculosis program*" ("the published report") prepared by a division of the Global Fund known as the office of the Inspector General ("OIG"). IRD alleges that the published report contains numerous defamatory statements having the effect of lowering the esteem of IRD in the eyes of the public.

[5] The report it alleges is ostensibly a culmination of an investigation by the OIG into one of the Global Fund's tuberculosis ("TB") grants in Pakistan under which IRD acted as a technical assistance provider or supplier to a Global Fund Principal Recipient ("PR") and implemented

various TB-related healthcare projects and programmes through funds provided by the Global Fund. The OIG investigated the conduct of the programme and, despite IRD having made numerous and factually grounded representations and submissions in refutation of the material contents of the report over the course of the OIG's investigation to the OIG, the Global Fund nevertheless published the report setting forth certain findings against IRD, including, *inter alia*, conflicts of interest, collusive and anticompetitive practices, data inflation, overcharging and exaggeration in the implementation of projects funded by the Global Fund.

[6] In order to combat the continuous publishing of this report on the World Wide Web, IRD seeks the following relief:

> "2. *Pending the final determination of an action or application to be instituted by the applicant within 30 days of the order for defamation against the respondent.*
>
> 2.1 *the report published on the respondent's website, titled Global Fund Grant Grant in Pakistan – Prohibited practices compromised procurement in a tuberculosis program annexed marked "FA1" to the founding affidavit of the applicant ("the Published Report"), and the letter published on the respondent's website titled 'Letter from the Executive Director: Global Fund Grant in Pakistan' annexed marked "FA2" to the founding affidavit of the applicant "the Published Letter" are within 1 (one) day of this Order, to be retracted and removed by the respondent from its website;*
>
> 2.2 *the respondent, within 5 (five) days of this Order, is to publish the following statement on its website:*
>
> *'The High Court of South Africa has granted an interim order against the Global Fund, requiring it to*

remove from its website its report titled 'Global Fund Grant Grant in Pakistan – Prohibited practices compromised procurement in a tuberculosis program' ("the Report") including the letter from the Executive Director of the Global Fund accompanying the Report, and preventing and interdicting the Global Fund from making statements pertaining to IRD (a partner to a former Principal Recipient of the Global Fund in Pakistan and a Global Fund sub-recipient) as set forth in in (sic) *the Report, pending the final determination of an application or action to be instituted by IRD to obtain a permanent interdict against the Global Fund in respect of the Report on the basis that the statements contained therein are defamatory and untruthful as against IRD';*

2.3 *interdicting the respondent and its officials from making any further statements of a defamatory nature and effect against the applicant, including but not limited to repeating the contents of the Published Report and the Published Letter;*

2.4 *restraining the respondent and its officials from sharing, distributing or disseminating the Published Report or any other iteration of a report prepared pursuant to the OIG's investigation, with any person, entity or the public at large;*

2.5 *interdicting the respondent from making any recommendations or imposing any sanctions in respect of IRD pursuant to the 'Sanctions Panel Procedures Relating to the Code of Conduct for Suppliers, annexed marked "FA60" to the founding affidavit of the applicant, or on any other basis';*

3. *ordering the respondent to pay the applicant's costs, on the scale as between attorney and own client, including the costs of counsel; and*

4 *ordering further and/or alternative relief"*[1]

[1] See p 1-3 of the Notice of Motion

[7] Before I refer to the legal issues raised in this matter it is necessary to deal with an application for security for costs which was heard together with this application.

[8] The respondent, from the outset, insisted that it requires security from IRD given that it is a peregrine. IRD ultimately did put up such security by agreement and without the taxing master fixing same.

[9] The matter was initially heard by Fisher J in the Urgent Court and dismissed for lack of urgency and although the costs order was initially in dispute same was later clarified. Thereafter, the wasted costs in respect of that urgent application were paid to the Global Fund's attorneys leaving an amount of approximately R91 000.00 for security in respect of the balance of the matter.

[10] The Global Fund pursued a further application for security of costs and this subsequent application could not be heard prior to the hearing of the main matter. I was approached by the parties prior to the hearing to make some kind of ruling as to when the application should be heard and given that there was no time to hear same prior to the matter, I directed that same be heard with the matter.

[11] During the course of argument the applicant submitted that the application was brought late and that no order should be made in respect thereof on the basis that the costs have already been incurred and that same would be of no effect. The respondent nevertheless

persisted therewith submitting that such order for security of costs could always be granted subject to the proviso that the judgment and order in this matter not be uplifted until such security is paid.

[12] I have noted that the applicant's attorneys at all times paid security under certain terms and conditions. Notwithstanding same, I have a discretion in the matter and am of the view that security should be put up for the hearing of the matter. I intend to adopt the course suggested by the respondent's counsel but am not prepared to fix such amount myself (although I am persuaded that I have such inherent jurisdiction).

[13] I have adopted this stance due to the unforeseen delay in this matter and the rather unusual course it took.

[14] The present hearing of this matter was delayed for a long time after Tsautse AJ heard same during September 2021. Tsautse AJ gave no judgment, notwithstanding an undertaking to give such judgment timeously, and after an expiry of a period of six months, the parties met with the Deputy Judge President and formally agreed to have a rehearing of the matter.

[15] This rehearing took place on 12 September 2022 in front of me as a special motion. Towards the end of the day, I noticed a commotion in the court and enquired as to what the problem was. I was informed by the respondent's counsel that Tsautse AJ had apparently uploaded

the judgment in the matter during the course of the proceedings on 12 September 2022.

[16] Although counsel for the Global Fund initially conceded that they cannot rely on such judgment given the undertaking to rehear the matter and, to my mind, effectively abandoned same, it was granted a short period within which to consider its position.

[17] I also gave an undertaking that, should I have to give judgment in this matter, I will not read the judgment by Tsautse AJ and merely take cognisance of that which was argued in front of me and put up before me in the papers.

[18] I have subsequently been informed that both parties required me to give judgment. Hence I prepared a judgment on the issue of security for costs and the remaining issues.

[19] But for the above delay I would probably have been *au fait* in respect of what the appropriate additional amount of security would be, based on the original amount put up.

[20] Because the rehearing took place approximately a year later I am not in a position to assess the additional amount of security to be paid. Hence I intend to make an order referring the matter to the Taxing Master to fix such amount unless the parties are able to agree on a satisfactory amount.

[21] I point out that the aforesaid application for security was made with the reservation that the respondent does not concede that this court has jurisdiction to hear the matter on the merits.

[22] Hence the following order is made:

"1 The applicant is ordered to put up such additional security for costs as the Taxation Master may determine or in the alternative such additional security for costs as the parties may agree upon;

2 The applicant is ordered to pay the costs of the application for security of costs such costs to include the use of Senior Counsel;

3 The judgement on the merits of the application will only be distributed once my secretary is notified by the respondent that the applicable amount for security for costs has been put up."

S VAN NIEUWENHUIZEN AJ 24/01/2023

Representation for applicant

Counsel:	Adv M du Plessis SC Adv D Wild.
Instructed by:	Webber Wentzel Ref: V Movshovich

Representation for respondent

Counsel:	Adv A Franklin SC
Instructed by:	Bowman Gilfillan Inc. t/a BOWMANS Ref: J Andropoulos / A Graham

[23] I now turn to the merits of the application for interim relief.

[24] In order to establish jurisdiction before this court, IRD alleged, in its founding affidavit, that its affiliate company in South Africa is IRD South Africa NPC, a company incorporated in the Republic of South Africa, with its offices located at 64 Grant Avenue, Cnr Algernon Road, Norwood, Johannesburg and the deponent to the founding affidavit, one Mr Aamir Javed Khan, is also a director of the South Africa IRD affiliate.

[25] The first question that must be decided in this matter is, of course, whether or not the applicant has made out a case of jurisdiction for this court to hear this matter at all. In this regard, it should be pointed out that the respondent has taken the point of jurisdiction upfront and should it be been unsuccessful in that regard, it, in any event, raised further defences and requires leave to file a further affidavit. IRD objects to what is styled "the bifurcation" which I assume means the piecemeal adjudication of the various defences. In view of the conclusion I have arrived at this does not matter and requires no adjudication

BACKGROUND FACTS

[26] It is further clear, from paragraph 14 of the founding affidavit, that IRD is a renowned global health delivery and research organisation, initially founded in Karachi, Pakistan in 2004 and, as already stated, registered in Singapore, with an established project profile in 17 countries and IRD affiliates in nine countries, including South Africa.

[27] IRD claims to have had a broad portfolio of successes, including in vaccine coverage, integrated health services for TB, comorbidities, including diabetes, mental health and smoking cessation and creating unique referral networks in schools to galvanise adolescent girls to join the fight against TB and other diseases. It is allegedly also at the forefront of building novel health infrastructure with the primary goal to improve access to, and the quality of, health services delivered to under-resourced areas in both rural and urban communities. Significantly, IRD is one of the very few organisations established in the Global South that is capable of competing in scope, network and impact with other similar entities based in the developed world, and it alleges that it consistently outperforms such similar entities. IRD has also been at the forefront of promoting gender equality in a male dominated field.

[28] By the nature of its work, IRD partners with hospitals and other entities for the implementation of certain healthcare projects and programmes. The Indus Hospital ("Indus") is one such IRD partner,

and is a multidisciplinary health network, with hospitals and public healthcare outreach extending throughout Pakistan. In particular, IRD and Indus collaborate in the implementation of public health projects, such as, amongst others, the control of infectious diseases.

[29] In 2007, IRD and Indus jointly launched the Multi-Drug Resistant Tuberculosis ("MDR-TB") programme and built it from the ground up. IRD provided free technical expertise, invested IRD funds in training and advocacy for the programme, and brought multiple small and large grants to the programme by leveraging IRD's networks, and led the programme.

[30] In 2008, IRD and Indus concluded a memorandum of understanding ("MoU") to better collaborate and cooperate in joint activities in terms of which IRD which leverage its networks for the purposes of obtaining grants and funds for Indus to further its healthcare work. The MoU was signed for a duration of five years and was subsequently renewed for a further five years in 2013.

[31] During or around 2016, Indus and IRD established the Global Health Directorate ("GHD") as an internal structure within Indus. According to IRD, this signified one of the most crucial steps in the consolidation of a longstanding collaborative relationship between IRD and Indus as the GHD became the body through which IRD and Indus would cooperate on the implementation of public health projects in Pakistan, including combating infectious diseases, such as TB.

[32] It is further alleged that the partnership between IRD and Indus was yet again bolstered in or around April 2016 when IRD and Indus concluded the Long-Term Technical Assistance Agreement ("the LTTA") through which IRD was appointed as Indus' technical adviser for the implementation of its TB projects.

[33] All of the aforesaid was done in the open and was well-known to and endorsed by the Global Fund at all material times.

[34] Between 10 September 2015 and February 2016, IRD and Indus were repeatedly invited and encouraged by the Global Fund's Senior Fund Portfolio Manager ("the FPM") for Pakistan to bid as a consortium for the Global Fund's TB grant in Pakistan.

[35] I interpose here to note that, although they described themselves as a consortium, they also seem to be acting as partners.

[36] The consortium was ultimately successful and Indus was conferred Global Fund Principal Recipient ("PR") status on 11 February 2016 and subsequently awarded the TB grant on or about 1 May 2016, entailing an allocation of funds of approximately USD39.7 million under the Global Fund's "*BAK-T-TIH Grant*", with IRD having been appointed in April 2016 as technical adviser to Indus in respect of the GF TB Grant ("the grant") pursuant to the LTTA.

[37] The Grant Confirmation is annexed to the founding papers, marked "FA3", as well as an email from the Global Fund to the CEO of Indus, Dr Abdul Bari Khan, conferring the readiness of the Grant Confirmation annexed, marked "FA4".

[38] The Grant Confirmation in respect of the grant specifically refers to the Global Fund Grant Regulations (2014) which sets out the key entities and associations involved in the allocation and implementation of the grant from the Global Fund. The key participants include the following:

38.1 the principal recipient ("PR"), an entity nominated by, *inter alia*, the relevant Country Coordinating Mechanism to implement programmes pursuant to the Global Fund's Framework Agreement and the Grant Confirmation in which the PR generally is the grantee;

38.2 the Country Coordinating Mechanism, which is defined as a country-level public-private partnership in the host country, whose role is, *inter alia*, to prepare a proposal for programmes, nominate PRs and oversee the implementation of programmes pursuant to the Global Fund's Grant;

38.3 Local Fund Agent ("LFA"), which is defined as an entity engaged by the Global Fund to provide oversight, verification and/or reporting services to the Global Fund concerning

implementation of programmes utilising the Global Fund's grant funds in a particular host country.

[39] These Global Fund Grant Regulations are annexed as annexure "FA5".

[40] In this instance, under the Grant Confirmation, pursuant to the grant, the nominated PR and grantee was Indus and the LFA was the United Nations Office for Project Services. The grant was to be supervised by the Country Coordinating Mechanism for Pakistan, which was chaired at the time of the grant confirmation by Mr Mohamed Ayub Sheikh, the Federal Secretary of Health of Pakistan. According to the CCM's website, "*the [CCM] in Pakistan … is established in response to requirements and recommendations of the [Global Fund]. The mandate of the CCM is to discuss, approve and submit quality and appropriate proposals to the Global Fund, to monitor, evaluate and support the implementation of projects that are initiated by the CCM and financed by the Global Fund*".

[41] It is IRD's contention that, at all times prior to and at the time of the grant confirmation, IRD and Indus were seen by the Global Fund as a consortium.

[42] In the chronology of events, it is clear that historically there was an MoU between the so-called consortium members. The contents thereof have not been disclosed to the court. During 2016, Indus and

IRD established the GHD as an internal structure within Indus. This undermines the notion of IRD being a separate consortium partner inasmuch as it would appear that Indus has now, within itself, a body named the GHD and that, IRD consolidated the longstanding collaborative relationship between IRD and Indus within this body. It is also through this body which IRD and Indus cooperate on the implementation of public health projects in Pakistan.

[43] It is specifically alleged that the MDR-TB programme launched by IRD and Indus in 2007 was subsequently absorbed by and consolidated into GHD.[2]

[44] At a crucial time, and very shortly after Indus was awarded the grant, IRD and Indus concluded the LTTA through which IRD was appointed as Indus' technical adviser for the implementation of its TB projects.[3] The terms of the LTTA are also not disclosed to the court and it is not clear how this would function given the earlier allegations, in paragraph 18 of the Founding Affidavit inasmuch as it is there alleged that, as far as the MDR-TB programme, same was absorbed within the GHD, which is a subdivision of Indus. It is alleged that it was successful because Indus was appointed as a grantee. The grant was preceded by a bidding process and, in terms of paragraph 21 of the founding affidavit, IRD and Indus were invited and encouraged by the

[2] See para 18 of the founding affidavit.
[3] See para 19 of the founding affidavit.

Global Fund's Senior Controlling Manager ("the SCM") for Pakistan to bid as a consortium for the Global Fund's TB grant in Pakistan.

[45] The bid itself is not disclosed to the court so, once again, there is no indication of what their functions would be *vis-à-vis* the Global Fund as between IRD and the Global Fund, if any.

[46] On 11 February 2016, when Indus was conferred PR status there was no LTTA and, as pointed out, that was entered into in April 2016. IRD sees its appointment as technical adviser to Indus as arising out of the LTTA. As stated, the contents thereof have not been disclosed to the court. As will transpire later IRD is not even the technical adviser.

[47] The grant confirmation, annexure "FA3", as well as the email from the CEO of Indus confirming the readiness of the grant confirmation in annexures "FA3" and "FA4", makes no disclosure of any role by IRD and also no mention of GHD. IRD's appointment under the LTTA allegedly took place shortly after the grant was awarded to Indus.

[48] It is further clear from the founding affidavit that the functions of Indus would be performed in Pakistan and IRD's involvement therein, whether it is as a member of a consortium, whether recognised or not by the Global fund, or whether it is simply a technical adviser under the LTTA, also plays out in Pakistan.

[49] It is alleged in paragraph 27.9 that, in the lead up to the grant, the Global Fund knew of the collaborative relationship between Indus and IRD, openly endorsed it and sought ways to ensure, including through IRD's insistence, that Indus be appointed as the PR on the project.

[50] In or around January 2017, Indus, as the grant PR, began the roll out of the project by advertising a tender for the implementation of four healthcare related operational research and service delivery projects. A copy of the tender advertisement is annexed marked "FA13". Thereafter, in or around March 2017, Indus awarded the tender to IRD, following IRD's successful bid for the projects

[51] This seems to be a separate bid in response to the tender advertisement annexed as "FA13". The tender advertised was for the implementation of four healthcare-related operational research and service delivery projects. There is no disclosure as to whether there were other bids and it would appear from the founding affidavit that it was a foregone conclusion, given the LTTA that was already in place in 2016. IRD specifically alleges that the separateness of the projects, as well as IRD's role contemplated above, was discussed and declared during the grant-making process, to avoid the possibility of claims that there was a conflict of interest. In this regard it relies on an email sent to the FPM on 8 November 2016 declaring potential conflicts of interest, a copy of which is annexed as "FA14".

[52] Without delving any further into the rollout of the MDR-TB programme or the PSSI project or the agreement between IRD and Indus for the implementation of the prevalent survey or the so-called Kiran Sitara project and its associated agreement between IRD and Indus, annexure "FA17", as well as any analysis of the antenatal control screening and providing care to pregnant women and new born children project, in respect of which there is an agreement styled "FA18" between IRD and Indus, it is virtually impossible to comprehend these agreements properly without an understanding of the original MoU and the LTTA. The failure to disclose the aforesaid documentation, so that it could be scrutinised in conjunction with the other agreements, demonstrates a lack of transparency and a proper understanding of IRD's role, other than the details of such role as it appear from the affidavits as opposed to certain other documents annexed.

[53] On the one hand it contends that it tendered for the services required in terms of "FA13".[4] This tender it says was awarded to it. Although the tender advertisement does not refer to the Global Fund or IRD. In the disclosure of conflict documentation, "FA15", the real agreement seems to be between Indus and IRD Pakistan (Private) Limited. On this basis IRD the party before the Court did not tender and has no standing. The latter agreement already refers to the LTTA agreement

[4] See 001-157

as between IRD Pakistan (Private) Ltd and Indus and although "FA15" is itself not dated it purports to be backdated to 1 March 2017[5]. The LTTA as stated earlier is not disclosed to the court but on at least one reading of the founding affidavit with "FA15" it is supposed to be an agreement between Indus and IRD as defined in this matter. An applicant should come clean with the court. It is unclear whether IRD has the *locus* to launch these proceedings or whether it is IRD Pakistan (Private) Ltd. As will transpire below this is resolved in the Published Report.

[54] It has already been pointed out that the rollout of the project was audited by the OIG. The OIG's mandate in terms of the Charter of the Office of the Inspector is set out as follows in paragraph 34 of the founding affidavit:

> "*The mission of the Office of the Inspector General is to provide the Global Fund with independent and objective assurance over the design and effectiveness of controls or processes in place to manage the key risk impacting the Global Fund's programs and operations, including the quality of such controls and processes.*"

[55] The same charter sets out, in 10.7, the OIG's investigatory mandate, authorising the OIG "*to undertake investigations of alleged fraud, abuse, misappropriation, corruption, mismanagement and violations of applicable human rights standards (collectively, "fraud and abuse") within Global Fund financed Programmes and by Principal Recipients*

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[5] See 001-159.

('PRs'), sub-recipients, Country Coordinating Mechanisms ('CCMs'), Local Fund Agents ('LFAs'), as well as suppliers and service providers and those with whom suppliers and service providers engage in connection with their activities to implement Global Fund projects, programs or operations, or that receive, have received or have sought to receive Global Fund funds, either directly or indirectly, but not limited to, their agents, intermediaries, subcontractors and assignees."

This is wide enough to include tenderers for the use of such funds

[56] The Published Report containing the alleged defamatory material also describes the OIG as follows:

> "*The OIG is mandated to investigate any use of Global Fund funds, whether by the Global Fund secretariat, grant recipients, or their suppliers. OIG investigations identify instances of wrongdoing, such as fraud, corruption and other types of non-compliance with grant agreements.*"
>
> ...
>
> "*The OIG bases its investigations on the contractual commitments undertaken by recipients and suppliers. Principal Recipients are contractually liable to the Global Fund for the use of all grant funds, including those disbursed to Sub-recipients and paid to suppliers.*"

[57] There is no need to analyse the OIG investigation procedures as set out in the stakeholder engagement document. It is clear that, on 18 June 2020, the OIG furnished IRD with a letter of findings ("LoF"). It is

alleged that this is based on the stakeholder engagement document stage 4 of the OIG investigation.

[58] The LOF detailed various preliminary findings ostensibly based on its investigation into the GF TB Grant, including, *inter alia*, allegations of breaches of conflicts of interest, and allegations of instances of overcharging, data fraud and non-delivery in the implementation of projects All or most of the allegations posited by the OIG in the LoF were underscored by gratuitous allegations of fraud on the part of IRD and Indus. (my emphasis)

[59] According to the LoF, the OIG's investigation commenced when it received information from an undisclosed source of conflicts of interest and procurement interest pertaining to Indus' suppliers under the grant. The OIG thereafter, as stated in the LoF, undertook two missions to Karachi in Pakistan in August 2019 and February 2020. The purported purpose of these missions was for the OIG to obtain financial transaction, procurement and service delivery records and documents and to conduct interviews with Indus and its suppliers, including IRD. The scope of the investigation is said to have covered the period 1 January 2016 to 31 January 2018. The LoF is annexed marked "FA21" and posited the following preliminary findings against Indus and IRD:

59.1 finding 1 – the appointment of IRD breached the Global Fund's policies and involved multiple unmitigated conflicts of interest;

59.2 finding 2 – Indus fraudulently steered the Projects to IRD;

59.3 finding 3 – multiple irregularities in the implementation of the Projects by IRD, including data fraud;

59.4 finding 4 – conflicts of interest and irregularities in the awarding of an IT contract to Interactive Health Solutions.

[60] It is contended, in paragraph 40 of the founding affidavit, that IRD responded to the LoF with detailed submissions, dealing comprehensively with each and every allegation set forth by the OIG to the extent that such allegations implicated IRD in any alleged wrongdoing. On an objective and proper assessment of the IRD's response to the LoF, it is evident that the OIG's findings as per the LoF were baseless and unfounded, or so it is contended. A copy of the IRD's response to the LoF is annexed marked "FA22".

[61] It is further contended that, on 1 December 2020, the OIG delivered, via an email to CCM (copying the deponent to the Founding Affidavit by email), a draft report titled "*Global Fund Grant in Pakistan – Procurement fraud in tuberculosis grant ('the Initial Draft Report')*". The OIG noted that the Initial Draft Report was confidential, not

published and subject to change, and requested comments and observations on the report from stakeholders. A copy of the OIG's email attaching the Initial Draft Report is annexed as annexure "FA23".

[62] Despite informing the CCM and other stakeholders, including IRD, that the Initial Draft Report was confidential and not public knowledge, the report was leaked to the Arab News media outlet around 15 January 2021, who published an article embedding the Report. A copy of this article, dated 15 January 2021, is annexed marked "FA24" and a copy of the leaked Initial Draft Report is annexed marked "FA25".

[63] It is alleged, in the Founding Affidavit, that, notwithstanding IRD's detailed responses to the LoF, the Initial Draft Report merely rehashed and condensed the OIG's findings as per the LoF with minimum modification and without having substantially engaged with IRD's detailed responses to the LoF. As a consequence of the leak to the Arab News and given that the Report fails substantially to take into account the comprehensive responses and refutations set forth by IRD, IRD feared that the report would be made final in its material inaccurate and substantially deficient state. IRD thus wrote to the Global Fund Board on 22 January 2021, through its attorneys (Webber Wentzel) and by way of letter dated 22 January, informing it that the:

63.1 Initial Draft Report makes sweeping and unfounded allegations against IRD, fails to take into account and engage with the vast majority of material set forth by the IRD in its response to the LoF and has been leaked to the media;

63.2 that should the Initial Draft Report be made final and subsequently publicised and published, IRD would sustain substantial impairment of its reputation, professional standing and work that it undertakes in the developing world;

63.3 the OIG's allegations and findings set forth in the Initial Draft Report demonstrates a lack of understanding of the implementation of the Projects and, given the material factual inaccuracies and lack of substantial engagement with IRD's responses to the LoF, leads to an almost inescapable inference that the OIG conducted its investigation negligently; and

63.4 as of 31 December 2020, Indus is no longer a PR of the Global Fund and thus no longer a recipient of the GF TB Grant. This letter is attached to the founding affidavit marked "FA26".

[64] In response hereto, the Global Fund's general counsel, Mr Fady Zeidan responded to the 22 January letter via email, stating that:

> *"[The 2022 January letter] has been shared with the office of the Inspector General and any facts you may have provided and which can be substantiated by available evidence will be taken into account in the finalization of the report."*

[65] This is annexed as annexure "FA27".

[66] It is further alleged that, on 16 February 2021, IRD, through its attorneys, Webber Wentzel, again wrote to the Global Fund board:

> *("The 16 February 2021 letter") informing the Board that, inter alia IRD has come to know that the Communications Department of the Global Fund have been confirming the content and findings contained in the Initial Draft Report as fact to the public, and IRD continues to face substantial harm as a result of the OIG's flawed investigation and inaccurate Initial Draft Report, leaked to the media. In addition, IRD requested the Global Fund Board to undertake certain urgent interventions, including to take all necessary steps to retract the Initial Draft Report from Arab News and to release a statement distancing the Global Fund from the report."*

[67] A copy of this letter is also annexed marked "FA28".

[68] Thereafter, on 26 February 2021, Covington and Burling LLP ("Covington"), representing the Global Fund, delivered a letter to IRD's attorneys, Webber Wentzel, on 26 February 2021, stating:

68.1 that the Global Fund is aware that the Initial Draft Report was leaked to the Arab News in breach of confidentiality obligations;

68.2 the Global Fund's Communication Department had made statements to the Arab News, confirming the authenticity of the Initial Draft Report and certain interim measures in respect of the TB Grant taken by the Global Fund pursuant to the OIG's investigation;

68.3 although Indus is no longer a Global Fund PR of the TB Grant, IRD would, nevertheless, be entitled to participate in the Global Fund's process to reallocate the grant, by engaging with the relevant proposed PRs and/or the CCM; and

68.4 the Global Fund would soon circulate an updated version of the Initial Draft Report and IRD would have an opportunity to comment on the substance of this report, which comments will be taken into account in the finalisation of the OIG investigation report.

[69] This is annexed and marked "FA29".

[70] On 2 March 2021, IRD received an email from the Inspector General of the OIG, Ms Tracy Staines, which email attached a revised version of the Revised Draft Report. In Ms Staines covering email, annexure "FA20", IRD was informed that the OIG had considered all comments provided to date in preparation of the Revised Draft Report and,

therefore, OIG would not be soliciting any further comments. A copy of the Revised Draft Report is annexed and marked as "FA31".

[71] IRD alleges that this contradicted the earlier letter from Covington, which indicated that IRD would have an opportunity to comment on any further iteration of the OIG's draft report. IRD's attorneys brought this fact to Covington's attention by way of another letter, dated 4 March 2021, annexed marked. Thereafter, IRD was afforded until 13 March 2021 to provide comments on the Revised Draft Report in terms of the subsequent letter from Covington, dated 7 March 2021, annexed as "FA33".

[72] On 15 March 2021, IRD sent a letter to the Global Fund Board setting out its responses and comments in relation to the Revised Draft Report, supported by relevant evidence where necessary ("the 15 March IRD letter"). In this letter, IRD provided detailed responses to the factually deficient and baseless allegations posited against it in the Revised Draft Report by the OIG. As the published report does not differ materially from the Revised Draft Report, IRD addressed the substantive portions of the 15 March IRD letter with regard to the defamatory content in the published report. This letter is annexed as annexure "FA34".

[73] IRD informed the Global Fund in the 15 March letter that it stands by its previous submissions made to the OIG and Global Fund Board

over the course of the OIG's investigation into the grant, including IRD's detailed responses to the LoF.

[74] On 19 March 2921, Covington, on behalf of the Global Fund, wrote to IRD's attorneys, Webber Wentzel, stating, in reference to the 15 March letter, that "*all comments received on the updated draft of the OIG Draft Investigation Report from interested parties (including IRD, whose comments were promptly passed onto the OIG) are being taken into account and the final OIG Investigation Report will be issued promptly, without additional circulation of the report (or notice) to IRD, or other interested parties*". It is further alleged that the 19 March letter referred to in the Stakeholder Engagement document and indicated that OIG's investigation report would be finalised after it had been reviewed by Global Fund's Management Executive Committee and the Audit Committee. Thereafter, as per the 19 March letter, the final report would be shared with the Global Fund Board before its publication. The aforesaid letter is annexed as annexure "FA35" to the papers.

[75] Based on the aforesaid letter, IRD was assured that the Global Fund's OIG would update the Revised Draft Report to consider the actual facts as represented in IRD's various submissions to the OIG and Global Fund Board, including in the 15 March letter. Moreover, IRD assumed that the Global Fund Board, given that it has final sight of the investigation report before publication, would ensure that the

Revised Draft Report is either materially amended in light of the IRD submissions or shelved given the material inaccuracies and deficiencies in the purported findings contained in the report.

[76] IRD also points out, in its founding affidavit, that the 19 March letter did not indicate by when the Global Fund intended to complete the procedures detailed in the Stakeholder Engagement document. Thus, IRD was left in the dark, expecting that, in accordance with corporate governance standards postulated by the Global Fund, the internal oversight mechanisms and the Board of the Global Fund would act to correct all inaccuracies.

[77] On 22 March 2021, IRD wrote directly to the Global Fund Board on behalf of IRD entreating the Board to take cognisance of the immense ramifications that it expected to arise from the OIG's flawed investigation and the inherently deficient iterations of the investigation report produced since then. This plea was addressed to the collective conscience of the Board, as the Global Fund constituted with the requisite authority had to exercise final say on the OIG's investigation and publication of a report pursuant thereto. A copy of IRD's letter to the Global Fund Board, dated 22 March 2021, is annexed to the founding affidavit marked "FA36".

[78] A further letter, dated 25 March 2021, was again addressed to the Global Fund Board on behalf of IRD, and this was prompted by a WhatsApp conversation the deponent to the founding affidavit had on

22 March 2021 with the FPM, an excerpt of which is attached to the 25 March letter from the deponent's mobile interaction with the FPM. The deponent to the founding affidavit brought it to the Board's attention that it was clear that concerns raised in IRD's 22 March letter and other correspondence were legitimate and shared by the most senior Global Fund official in Pakistan and in relation to the grant.

[79] The FPM, in the correspondence, confirmed that:

79.1 14000 TB patients in Indus' care stood to be adversely impacted by the end of April 2021;

79.2 IRD's work was of an exemplary standard;

79.3 the OIG had not carried out a proper investigation and was biased; and

79.4 the OIG's investigation report was fundamentally flawed.

[80] This is annexed to the founding affidavit marked "FA37".

[81] Finally, on 1 April 2021, the Global Fund released and made available the Published Report on its website and, as already set out before, it contains defamatory material pertaining to IRD. This report was accompanied by the published letter, which seems to reinforce the report.

[82] The Published Report and the Published Letter remains accessible on the Global Fund's website.

[83] It was accessed in Johannesburg by IRD's legal representatives, Webber Wentzel, on or about 2 April 2021 by its Mr Ahmed Imraan Rajan.

[84] Despite IRD's submissions to the OIG in respect of the LoF, the Initial Draft Report, and the Revised Draft Report, the Published Report substantially retains alleged findings against IRD that are demonstrably inaccurate, misleading and false. Given IRD's detailed submissions and responses, the Global Fund had before it all the relevant and true facts. Its smearing of IRD and maintaining false assertions against IRD is without, any question, intentional.

[85] The founding affidavit sets out in paragraph 66 and further the defamatory material. From these paragraphs, it is clear that the Published Report allegedly contains a multitude of false and demonstrably inaccurate allegations and findings against IRD, defaming IRD and causing grave harm to IRD's reputation, goodwill and beneficent public image, including its reputable standing within the global healthcare project implementation industry.

[86] The Published Report clarifies the confusion alluded to in paragraph 53 as to who IRD really is. It states as follows:

"Interactive Research and Development (IRD): In April 2016, the Indus Hospital and IRD signed the LTIA agreement for the "Global Fund Tuberculosis Project" for an amount of US$1,918,801 for the period May 2016 to December 2017. Under the agreement, IRD would provide technical advice, oversight and personnel, with reporting lines as per the organogram shown in Fig 1. This agreement was later extended to December 2018.

Three entities sharing the name IRD are relevant to this report: IRD Pakistan (PVT) Limited, a Pakistan registered entity, IRD-FZC owned, a U.A.E. registered entity, and IRD Global Limited, a Singapore-registered entity. Ownership structure is summarized in Annex A. As the distinction between the three legal entities is not material to the findings, the report uses IRD to refer to all three entities" [6]

[87] The organogram Annex "A" does not assist in separating the corporate identities for present purposes.

[88] The founding affidavit enjoins this court to consider the context of the defamatory material against the backdrop set out above and, as mentioned, it is stated that it contains shortcomings, inaccuracies and is demonstrably untrue, despite IRD and Indus having made detailed submissions to the relevant iterations of the OIG's investigation report demonstrating the true state of affair. It is specifically alleged that the Published Report, including the defamatory statements therein, was publicised in circumstances where the Global Fund had the correct and true facts before it yet decided nevertheless to include and publish demonstrably false statements and alleged findings against IRD.

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[6] See page 001-79 of the Published Report.

[89] It is not necessary to traverse the detail of the defamatory material against IRD as contained in the Published Report as well as the substantiated reasons and explanations demonstrating why the allegations and statements are false and defamatory in nature and effect. To a large extent these facts mirror the 15 March IRD letter and, given that the Published Report does not at all materially differ from the Revised Draft Report.

[90] I do not intend to quote fully from all the alleged defamatory statements and will now turn to the relevant law applicable to the issue of jurisdiction, which is the point *in limine* taken by the Global Fund. From the outset, the Global Fund took the point that this Court has no jurisdiction and, inasmuch as any other evidence is provided, it is simply a pleading over in order to demonstrate that they intend to defend the matter on the basis of truth and public interest.

[91] I now turn to the issue of jurisdiction.

JURISDICTION

[92] It is convenient to start the enquiry into jurisdiction with the decision in *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, third party)* 2008 (3) SA 355 (SCA). In this matter, the applicant, an *incola* of the court, brought the traditional application to found jurisdiction against two *peregrini*, one John and Andrew Strang, citizens of Australia, being resident and

domiciled there. They are also directors of two of the eponymous Australian companies involved.

[93] The appellant intended to sue the respondents in the Johannesburg High Court for delictual damages and, to establish or confirm jurisdiction for the purposes of the suit, the appellant applied for an order for the respondents' arrest. The respondents opposed the applications, firstly, on the basis that no *prima facie* case was made on the merits of the proposed claim and, secondly, that foreign nationals while in South Africa enjoyed the protection of the Constitution and their arrest to found or confirm jurisdiction would be contrary to various provisions of the Bill of Rights. Hence, it was argued that any legislation or even the common law rule, to the effect that such an arrest should take place, would be unconstitutional. And, to that extent, the common law would have to be developed in order to abolish the rule. The court held that the basis for the proposed delictual claim is actually based on wrongful interference of contractual relations and that, although the particulars of claim did not quite make out that case, minor amendments to same would establish such case.

[94] The court did not find it necessary to enter into whether a *prima facie* case was made out or not on the basis that it would not require much amendment to the proposed claim to bring it in line with the notion that the claim was based on wrongful interference of contractual relations.

[95] In paragraph 18, the court dealt with the constitutionality of jurisdictional arrest and mentions that, although an asset belonging to one of the respondents was at one time capable of being attached to found or confirm jurisdiction, the appellant failed to take the opportunity to effect such attachments. In addition, although the applicant has persisted and requested the respondents to submit to the Johannesburg High Court jurisdiction, they had refused to do so.

[96] It is trite that the legislative provision that was said to be unconstitutional in this matter was section 19(1)(c) of the Supreme Court Act 59 of 1959, to the extent that section 19(1)(c)(i) provided for attachment of property or arrest of a person to confirm jurisdiction, also where the property or person concerned is outside its area of jurisdiction but within the Republic, provided that the cause of action arose within the area of its jurisdiction.

[97] In the present matter, the record did not reveal where the applicant's delictual cause of action arose and counsel could also not tell the court. Nevertheless, it was accepted that there was a factual connection with South Africa and that the Johannesburg High Court's area of jurisdiction was in particular such point of connection. The court only had to deal with the constitutionality of section 19(1)(c) inasmuch as the same could be said to be contrary to the Constitution.

[98] Paragraphs 24 to 26 of the judgment state as follows:

"*[24]* *Essentially a court has jurisdiction over a matter if it has the power not only if taking cognisance of the suit but also of giving effect to its judgment. However it is necessary at the start of the discussion to recognise that the issue here is whether jurisdictional arrest is constitutional. We are not concerned with the question of jurisdictional effectiveness as such. Were the focus on attachment, not arrest, we would be concerned squarely with effectiveness. Dealing as we are with arrest, effectiveness – and taking cognisance of the suit – enter the picture only in so far as we are concerned to assess whether jurisdictional arrest serves, or can possibly serve, any constitutionally permissible purpose in either respect.*

[25] *A court has the power to take cognisance of the suit if the relevant cause arises in its area of jurisdiction. The cause arises there if it would have done so at common law. At common law even if a jurisdictional cause (for example, contract or delict within the jurisdiction) was present, if the defendant was a foreigner there had to be arrest or attachment.*

[26] *Contrary to the rule which prevailed in the Roman Empire that foreign defendants had to be sued in the courts of their own domicile, the practice in Holland and several other Dutch provinces allowed resident plaintiffs to arrest foreign nationals and to bring them before a local court in order to compel them to give security for their appearance in court or to pay whatever the judgment debt might be. This saved the plaintiffs the expense of proceeding in a foreign country; they could obtain judgment and levy execution in their own domicile.*"

[99] Paragraphs 30 to 32 state that:

"*[30]* *The common law came to deal with attachment of property and arrest of the person in the same breath. As applied in South Africa it requires that one or the other has to take place to found or confirm jurisdiction where the defendant is a foreign national. Neither can take place without the plaintiff first obtaining an order for attachment or arrest and to secure such an order the plaintiff must, as I have said, make out a prima facie case. (One should perhaps emphasise for present purposes that arrest can follow upon <u>no more</u> than a prima facie case, in other words taking only the plaintiff's allegations into account.)*

[31] The provision in section 19(1)(c), enabling an attachment or arrest order to be given in respect of property or persons wherever in the country they are (not just in the issuing court's area of territorial jurisdiction), eschews any implication that attachment or arrest is essential; it says the court 'may', not 'must', issue the relevant order. I shall revert to the meaning and function of the provision later.

[32] The first question to be answered now is whether arrest infringes the entrenched right to freedom and security of the person."

[100] Without any further ado, it suffices to state that the conclusion of the SCA was that:

"*There is a crucial difference between attaching property and arresting a person. Attachment ordinarily involves no infringement of constitutional rights (absent, for example, seizure of the means by which the defendant's livelihood is earned). But, more importantly, the property attached will, unless essentially worthless, obviously provide some measure of security or some prospect of successful execution. Arrest, purely by itself, achieves neither. Security or payment will only be forthcoming if the defendant chooses to offer one or other in order to avoid arrest and ensure liberty. It is therefore not the arrest which might render any subsequent judgment effective but the defendant's coerced response.*"

[101] In paras 41 to 43 the court concluded that:

"*[41] Apart from the fact that arrest does not serve to attain jurisdictional effectiveness it cannot be 'just cause' to coerce security or, more especially payment, from a defendant who does not owe what is claimed or who, at least, is entitled to the opportunity to raise non-liability in the proposed trial. If there is no legal justification for incarcerating a defendant who has been found civilly liable there cannot be any for putting a defendant in prison whose liability has not yet been proved. And as to the function of arrest to enable the court to take cognisance of the suit, that could be appropriately achieved if the defendant were in this country when served with the summons and there were, in addition, significant factual links between the suit and South Africa.*

I shall return to that aspect in due course. Accordingly, there is no 'just cause' for the arrests sought.

[42] Although it may be said that establishing jurisdiction is a constitutionally permissible objective, to reach it by means of deprivation of a foreign defendant's liberty is to breach the latter's s 12 entrenched right.

[43] The most obvious concomitant would be breach of the defendant's respective rights to equality, human dignity and freedom of movement. There is also much to be said for the contention that arrest would also compromise the right under s34 of the Constitution to a fair civil trial. Although it is arguable that, subject to the constraints imposed by all the mentioned rights infringements, a detained defendant could still be permitted all required opportunities to consult, give instructions and attend court, it would seem unfair to have to litigate, unlike the plaintiff, under such handicaps. Suffice it, at all events, to say that jurisdictional arrest would cause extensive infringement of various of the defendant's fundamental constitutional rights. That bears heavily on the next question."

[102] Hence, the court held, in paragraph 44, that the common law rule cannot survive the limitation section and that human rights, quality and freedom is infringed by the common law rule. It concluded that the infringement was not only profound and, although the governmental purpose of the limitation is to favour resident plaintiffs, in line with the common law, by seeking to enable them to establish jurisdiction which would not otherwise exist and so avoid the trouble and expense of suing abroad. The court further held that, assuming for the moment that purpose to be constitutionally permissible, that it fails to see how it is reasonable and justifiable, in our constitutional society, to achieve such purpose by subjecting foreign defendants to arrest and detention.

[103] The court further held, in paragraphs 47 and 48, that:

> "*[47] There are less restrictive means to establish jurisdiction (whether founding or confirming) than by way of the defendant's arrest. First and foremost there can be attachment. Its legal competence is beyond question. However, if attachment is not possible because the defendant has no property here, there are alternative possibilities. Before considering their legal competence it is important to note that the respondents did not argue that if arrest were unconstitutional and attachment not possible, no jurisdiction could be established. Why that is important is because if arrest were held unconstitutional and it were further to be held that in this case, and cases like it, jurisdiction can competently be established without arrest, the necessary corollary would be that it can also be established without attachment despite the need for attachment not having been in issue and despite attachment, generally, not being unconstitutional.*
>
> *[48] I do not mean to say that where attachment is possible it is no longer a jurisdictional requirement. It is naturally not open to the court in this case, on the issues and arguments involved, to override or ignore precedent or principle. We are confined to the issue of arrest's constitutionality and the inevitable consequence if it is indeed unconstitutional and the alternative of attachment is not possible. In other words if the common law is to be developed by abolishing jurisdictional arrest, that development must necessarily involve providing practical expedients for cases where jurisdiction is sought to be established and there can be neither arrest nor attachment. One could, of course, hold that if arrest and attachment were, for separate reasons, no longer possible, then a resident plaintiff would simply have no basis for establishing jurisdiction in a case such as the present. On the other hand it is important, in my view, to remember that the practice of arrest and attachment came about in order to aid resident plaintiffs who would otherwise have to sue abroad. There is no reason why that rationale should not still apply. It represents, in my view, a rational and legitimate governmental purpose.*"

[104] Of importance, in particular, are paragraphs 52 to 55:

"*[52] Consideration of a substitute practice can usefully start with the observation that this court has accepted, for purposes of reciprocal enforcement of a foreign judgment, that the defendant's mere physical presence within the foreign jurisdiction when the action was instituted is sufficient, according to South African conflict of law rules, for a finding that the foreign court had jurisdiction. It may also be noted that in England, for example, service on a foreign defendant while physically present – albeit temporarily – within its borders is sufficient for jurisdiction provided the case has a connection with that country. These are pointers to the acceptability – subject to the presence of sufficient evidential links – of mere physical presence as being an acceptably workable substitute for a detained presence. One might add – a self-evidently more acceptable substitute.*

[53] In the course of argument passing reference was made to the words 'persons residing or being in' in s 19 (1)(a) of the Supreme Court Act when referring to those over whom a High Court has jurisdiction. [25] *At first blush the phrase 'being in' seems to afford a basis on which it could be said that such persons include those who are merely physically present as opposed to those domiciled or resident within the court's area of jurisdiction. I do not think the words 'being in' assist. A line of authority culminating in Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd holds that nothing turns on 'being in'; for purposes of s 19(1)(a) a court's jurisdiction depends on nothing short of residence and the defendant's residence within the jurisdiction is one situation in which a 'cause arises', the defendant then being amenable to that court.*

[54] I nevertheless consider that jurisdiction in the present case will fall within the terms of s 19(1)(a) if the matter can be said to involve a 'cause arising' or be a matter of which the court 'may according to law take cognisance'. A 'cause arising' is not to be confused with a cause of action, and to determine what a 'cause arising' is, as also to determine of what matter a court may take cognisance, one is driven back to the common law jurisdictional principles. If those principles can be developed to accommodate a situation like the present there will be conformity with s 19(1)(a). Which is not to say that the common law must conform to the legislation. It is rather the converse. The legislation in question has all along merely been concerned to reflect or implement the common law. All one is therefore looking to ensure is that

between the Act and the development sought to be achieved there is harmony.

[55] Obviously the jurisdictional principles we are concerned with here have originated because courts have always sought to avoid having to try cases when their judgments will, or at least could, prove hollow because of the absence of any possibility of meaningful execution in the plaintiff's jurisdiction. It seems to me that, firstly, one has to apply reasonable and practical expedients in moving away, where necessary, from historical practices that cannot achieve what they were intended to. Secondly, the responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff. Economic considerations will dictate whether a South African judgment has prospects of successful enforcement abroad and thus influence a plaintiff in deciding whether to attach and sue here or to sue there (leaving aside, of course, other costs considerations). And if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the forum conveniens and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile."

[105] I, in particular, emphasise the fact that the SCA judgment leaves it open for the defendant to contest whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and the country to render litigation appropriate here rather than in the court of the defendant's domicile.

[106] Paras 56 and 57:

"*[56] In my view it would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts*

which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.

[57] As to the principle of effectiveness, despite its having been described as 'the basic principle of jurisdiction in our law' it is clear that the importance and significance of attachment has been so eroded that the value of attached property has sometimes been 'trifling'. However, as I have said, effectiveness is largely for the plaintiff to assess and to act accordingly." (my underlining)

[107] It is thus clear that it is open for IRD to choose to institute proceedings in South Africa but with that the Global Fund acquired the right to challenge IRD as to whether it is the forum of convenience.

[108] In the result, the court found, in paragraph 59, as follows:

"*[59] For all these reasons the common-law rule that arrest is mandatory to found or confirm jurisdiction cannot pass the limitations test set by s36(1). It is contrary to the spirit, purport and objects of the Bill of Rights. The common law must be, and is hereby, developed by abolition of the rule and the adoption in its stead, where attachment is not possible, of the practice according to which a South African High Court will have jurisdiction if the summons is served on the defendant while in South Africa and there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient. It goes without saying that the new practice could itself be subject to development with time.*"

[109] I emphasise the issue of service on the defendant while in South Africa as well as the notion that there has to be sufficient connection between the suit and the area of jurisdiction and that the disposal of the case should be appropriate and convenient.

[110] The next question that does arise is whether or not there is a sufficient connection between the suit and the area of jurisdiction concerned so that the disposal of the case is appropriate and convenient.

[111] In the matter of *Akani Retirement Fund Administrators v NBC Holdings (Pty) Ltd and Others* Case No 10182/2020, decided on 28 May 2020 in the Gauteng Local Division, the court had to deal with the publication of remarks with regard to certain litigation imputing a corrupt character to Akani. The court held on the facts that it was not cogently disputed that the remarks were defamatory and that they were unlawful.

[112] It is not necessary to deal with the details of the wrongful publication of the defamatory material save to state that, on 27 March 2020, a periodical publication called the "*Public Eye*", domiciled in Lesotho, was published online to the world. In that issue, an article appeared which included an interview with one Godfrey Vatsha and his status was the subject of debate. This was published by NBC and Akani sought a final review. What is of relevance is the following:

> "*[27] The intolerability of inaccurate reports of a court ' s utterances, which are also defamatory, is all the more acute in an age of fake news and hyperbolic public discourse. In my view, although a reasonable reporter of a court judgment need not exercise a lawyer's insight and felicity with language to transmit what that person understands a judgment says, more than just ordinary care is required when doing so, precisely because it is a judgment of a court. There ought to an appreciation that the dissemination of wrong information about decisions of the courts has serious adverse consequences for the public interest, no less than*

deleterious consequences for the litigants or other persons referred to in the report of the judgment. A person reporting on what a judgment says, as distinct from comment on the judgment however critical and adverse, must accept a responsibility to ensure that the report is not misleading. Where a misleading report is also defamatory there can be no defence to excuse it. Such conduct is wrongful and unlawful.

[28] NBC contended that its letter fell within the bounds of qualified privilege. Indeed, in so far as it might choose to express its own opinions about Akani being corrupt, that might have been a complete defence if the disclosures had been made to a confidential circle to whom it could claim a duty to report. However, NBC was not communicating with its own confidential circle, comprising, say, its own directors. The recipients all were persons with whom Akani had actual or potential relationships no less than NBC: the recipients were all (bar the co-applicants in the review) clients or potential clients of both NBC and Akani.

[29] NBC seeks to rely on the prior adverse propaganda put out about it by Akani, but this is a false premise; in defending its own reputation or in reporting to its client base about the developments in the dispute over incumbency, it could never be entitled to misrepresent what a court said.[8] No public interest is served by a principle that would allow, under cover of qualified privilege, falsehoods about a judgment of the court to be peddled. In misrepresenting the import of the judgment, it must be inferred that it endeavoured to bolster its own adverse opinion about Akani, which it may, for the purposes of the judgment, be assumed to be bona fide and even reasonably held. However, it is this very conjunction of circumstances from which the animus injuriandi can be inferred. Accordingly, the defence of qualified privilege must fail.

[30] The defence of truth and the public interest is raised by NBC. It fails on the simple basis that what it states is untrue."

[113] To a limited extent, there is some parallel between this matter and the matter presently before the court. Needless to say, NBC was, of course, not a peregrine and there was effective service on L, a company, which, although it is domiciled in Lesotho and has no office

or presence in South Africa, it was notified of the litigation by way of email. This was transmitted to Vatsha at a .co.za domain address and Vatsha responded to a demand from that address and the notice of motion and founding papers were also transmitted to that email address.

[114] From the outset, L took the point that service of process was not proper and hence the court was called upon to consider the grant of relief that materially affects that person. The court held that service and procedures prescribed for this purpose are not an end in themselves. Ultimately, even when service takes place in terms of the rules, the court has to be satisfied that service has been effective. In addition, any manner otherwise than in terms of the Rules of Court, to give notice of litigation, may be authorised by a court.

> "*[43] When a litigant participates fully in proceedings, can it still be heard to raise inadequacies about service, or indeed to raise a complaint about no service in terms of the rules at all? In my view that would be plainly silly. It would make a mockery of the judicial process to engage in this sort of pretence: i.e., a party appears to deny that it can be seen. In the past this type of petty technicality might have found favour with a certain kind of mind-set, but the modern judiciary regards it as something up with which we will not put; substance must trump form.*
>
> *[44] The absence of seeking, in advance, the court's leave for an unorthodox type of service is a point that bears mention. In an urgent application, to insist on such a preliminary step, seems self-evidently inappropriate.*
>
> *[45] In my view, service has been effective as proven by the full participation of the litigant, L.*"

[115] The Court thereafter considered whether the Gauteng Johannesburg Division had jurisdiction over L. The Court stated as follows:

> *[46] Self-evidently, L, being a foreign entity with no assets or presence in South Africa, is beyond the jurisdiction of this court on any territorial premise. The contention advanced on behalf of Akani, is that notwithstanding that circumstance there is nevertheless a sound foundation to exercise jurisdiction by this court over L.*
>
> *[47] The argument in favour of jurisdiction is premised on an approach that eschews mechanistic thinking and ritualistic gestures, which were once thought to be dispositive of the issue of jurisdiction, in favour of a frank acknowledgement of global interconnectedness and the appreciation that effective dispute resolution demands a rational and expansive perspective of the role of the courts. Foreigners are perpetually among us and even when not rubbing shoulders with us, their actions abroad have material effects on us within our own country."*

[116] The Court, thereafter, referred to the decision in *Bid Industrial Holdings (Pty) Ltd v Strang* above. Hence, the Court concluded, in paragraph 48:

> *"[48] The necessity of attachment, when it is mere a ritual is criticised: ... The insistence on the establishment of effectiveness of the order under all circumstances is repudiated: ... Matters of status, for example, probably stand in a class of their own. At the other end of the spectrum, where a delict is committed in the territory of the Court by a foreigner in another country, the policy considerations are wholly different. The efficacy of the order is a matter for the party who seeks enforcement to address."*

[117] Thereafter, the Court embarked on what facts would establish the appropriate connectedness. In paragraphs 49 and 50, it further found as follows:

"[49] The source of the court's jurisdiction in this matter is derived from Section 21(1) Superior Courts Act 10 of 2013 which provides:

'(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power -

(a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

(Emphasis supplied)

[50] On the papers this evidence of interconnectedness is shown in the following respects:

50.1 To publish online is in effect to publish to the world. It is undisputed that the article was accessed online and read in Gauteng. This means that L's unlawful remarks were published in Gauteng.

50.2 The victim of the delict is a South African company.

50.3 Some of the remarks published were about a South African court's judgment.

50.4 L's holding company, NBC is a South African company over which the Court has jurisdiction.

50.5 L and NBC have common directors.

50.6 L uses resources from NBC based in Gauteng.

50.7 L and NBC acted in solidarity and in concert to injure a South African company in South Africa.

Why is it convenient for the matter against L to be heard with the matter against NBC in Gauteng?

[51] The core facts pertinent to both L and NBC are part of wider dispute being litigated in Gauteng.

[52] Jurisdiction over NBC unquestioned: to run two cases would result in a considerable overlap, albeit not in respect of every issue.

[53] The relief needed is in South Africa not in Lesotho."

[118] The court ultimately found that there was jurisdiction and it granted certain remedies. The matter was subsequently taken on appeal and certain of the remedies granted in the court a quo criticised and given that it was an opposed motion for final relief and truth and public interest was raised as a defence no relief should have been granted.

[119] Despite the attraction of this matter and the notion that the Court should expand its jurisdiction over *peregrini* and, in that sense, recognise the interconnectedness of South Africa with the rest of the world, the matter is not on all fours with the case in front of me. The Global Fund has at all times objected to the jurisdiction and made it clear that it wishes to raise the defence of truth and public interest. I am bound to consider the issue carefully.

[120] Firstly, unlike *Akani*, the applicant in the present matter is a peregrine. Secondly, the respondent, like the respondent in *Akani*, is a peregrine.

In *Akani* there was full participation. In the matter before me service and jurisdiction are contested.

[121] There was no physical service on the Global Fund in this jurisdiction. *Akani* seems to be authority that where there is full participation it is not necessary. The Global Fund participated without conceding jurisdiction.

[122] As to the issue of service on the Global Fund whilst in the South African jurisdiction I should point out that *Akani* was not overruled for lack of service by the SCA (I bear in mind that it dealt with final relief). Is email service on the Global Fund's attorneys enough in proceedings for interim relief? I cannot see why, given its participation (although limited) in the proceedings, I should not uphold that service was sufficient. Its attorneys were involved from an early stage and served per email and the Global Fund was served per email on its address in Switzerland.

[123] On the issue of publication a necessary element of any proceedings for defamation the matter was published online, downloaded by the Applicant's attorney (subject to the terms of use) and presumably read to assess its impact and to advise as to whether it still remains defamatory.

[124] There was thus no actual publication to a third party. In *Le Roux and Others v Dey* 2011 (3) SA 274 (CC), the majority of the Constitutional

Court described the requirement of "*publication*" for purposes of a defamation claim, as follows:

"Publication" means the communication or making known to at least one person other than the plaintiff. It may take many forms. Apart from the obvious forms of speech or print, the injurious information can also be published through photographs, sketches, cartoons or caricatures."

[125] The defence that the publication in South Africa was self-serving is rejected by IRD in the replying affidavit.[7] This defence is not without merit. In substance IRD argues that the cause of action arose in South Africa. This is only because the report was downloaded in South Africa by its own attorney. There is no other indication of publication in South Africa. The delict is alleged to have been committed here because of this act of downloading the report in South Africa (subject to the terms of use).[8] IRD effectively "published" same through its own agent i.e., its attorneys. The Global Fund did not publish anything.in South Africa.

[126] Even if on the basis of *Akani*, publication online, is publication to the world, the terms of use limit the users rights. This can never be denied by IRD or for that matter any other notional reader. In this sense it differs from *Akani*.

[127] The additional motivation relating to jurisdiction in paragraph 20 of the replying affidavit is merely a response to the allegation of a lack of

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[7] See paragraph 19 of the replying affidavit.
[8] See paras16-18 of the replying affidavit.

jurisdiction. The Global Fund's attorney merely summarises that which is already stated in the founding affidavit when he says:

> "*The connectedness and appropriateness of this Court as the suit for litigation is thus underpinned by each of these South African-based considerations: the demands made out of South Africa on IRD's behalf in respect of its harmed reputation, the convenience for IRD of litigating through its South African attorneys in South Africa, and the undoubted reputational harm that it has incurred globally, and hence also within South Africa where it continues to interact with the South African government and public in the public health space*"[9]

[128] There is no evidence that any of the above arose by the Global Fund publishing the Published Report in South Africa. In *Akani* the cause of action arose in Gauteng and no terms of use were at stake. The fact that the cause of action arose in South Africa was clearly regarded as a strong connecting factor assisting with the establishment of jurisdiction in *Akani*.

[129] The reliance on *Tsichlas & Another v Touchline Media (Pty) Ltd* 2004 (2) SA 112 (W) is of no assistance. There the attorney of the applicant stumbled on the defamatory content online and informed his unwitting client of same. In addition, his client had a place of business within the jurisdiction of the Court although it was not its principal place of business.

[130] The reasoning of Fabricius J in *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 GP is also persuasive. In holding that the appropriate or natural forum (being the

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[9] See para 20 of the replying affidavit.

one most suitable to hear the matter) is that with which the action has the most real and substantial connection. The various factors which might establish the requisite connection, it was held, include:

"all background facts, convenience, experts, the law governing the relevant transaction or action, the place where the parties reside or carry-on business, etc."[10]

[131] The fact that IRD has a related company here doing the same kind of work and it has at least one director in common is neither here nor there.. This in hardly establishes a jurisdictional link.

[132] The original leak in the Arab News undoubtedly caused its own harm.

[133] In addition the real cause of action i.e. the conduct allegedly exposed by the OIG and giving rise to the report in its present form occurred in Pakistan.

[134] All the aforesaid points to a lack of jurisdiction. It also suggests that South Africa is not the forum of convenience.

[135] Given the aforesaid I do not have to deal with the balance of the defences raised by the Global Fund.

[136] This does not leave IRD without a dispute resolution mechanism. It can hardly deny the allegations that it is subject to the Grant

[10] See par 11 and 13.

Regulations, or the Uncitral Arbitration envisaged in the Terms of Use it allegedly agreed to when its attorney downloaded the report. I nevertheless make no finding in this regard.

[137] In the circumstances I make the following order:

"The application is dismissed with costs such costs to include the use of Senior Counsel".

S VAN NIEUWENHUIZEN AJ 24/08/2023

Representation for applicant

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Representation for respondent

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