CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 38/07

[2008] ZACC 6

INDEPENDENT NEWSPAPERS (PTY) LTD	Applicant
versus	
MINISTER FOR INTELLIGENCE SERVICES	Respondent
and	
FREEDOM OF EXPRESSION INSTITUTE	Amicus Curiae
In re:	
BILLY LESEDI MASETLHA	Applicant
versus	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MANALA ELIAS MANZINI	Second Respondent

Heard on : 22 November 2007

Decided on : 22 May 2008

JUDGMENT

MOSENEKE DCJ:

Introduction

[1] In a claim premised on the right to open justice, a newspaper group, Independent Newspapers (Pty) Ltd (Independent Newspapers), seeks an order to compel public disclosure of discrete portions of a record of proceedings in this Court. The state, represented by the Minister of Intelligence (the Minister), objects to the disclosure sought on grounds of national security.

[2] The record of which disclosure is sought relates to the case of *Masetlha v President of the Republic of South Africa*[1] (the underlying matter), which was heard and has since been decided by this Court.[2] A brief account of the circumstances in the *Masetlha* case may be helpful. Until his suspension and ultimate dismissal by the President in 2006, Mr Masetlha was the head and Director-General of the National Intelligence Agency (the NIA). The NIA was established in terms of section 209(1) of the Constitution read together with the provisions of the Intelligence Services Act 65 of 2002 and the Intelligence Services Oversight Act 40 of 1994. Mr Masetlha brought two applications before the Pretoria High Court (the High Court). In the first application he impugned his suspension as irregular and unlawful and in the later application he sought to review and set aside the decision of the President to terminate his appointment. The suspension application and the termination application were consolidated and heard together by Du Plessis J during November 2006. Both applications were dismissed.

[1] The case is now reported as *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) BCLR 1 (CC); 2008 (1) SA 566 (CC).

[2] The matter was heard on 10 May 2007 and judgment was handed down on 3 October 2007.

[3] In the suspension application, Mr Masetlha filed two sworn statements. The one he styled an "open court founding affidavit" and the other carried the heading "in camera founding affidavit". In the in camera affidavit, Mr Masetlha explained that he delivered two affidavits because "in this in camera affidavit there are many matters which I cannot disclose for fear [that] national security will be compromised." The contents of the in camera affidavit differed markedly from that of the open court affidavit. The former described certain activities of the NIA and had attached several annexures some of which displayed on their face the state security classification "secret" or "confidential".

[4] In turn, the Minister delivered a single affidavit in the suspension application in answer to both the open court and in camera affidavits of Mr Masetlha. Although his answer was not in an in camera affidavit, in it he confirmed that "the nature of the subject matter in these proceedings does not permit full disclosure which if done would undermine national security beyond the relevance of these proceedings." Even so, neither Mr Masetlha nor the Minister moved the High Court for an order restricting disclosure of any part of the record. Consequently, the High Court held its hearing in an open court and made no order proscribing public access to the record.

[5] It will be recalled that the High Court dismissed Mr Masetlha's claim for reinstatement to his post. As a sequel, he approached this Court for leave to appeal

the unfavourable decision and to that end, he filed the record of proceedings that served before the High Court.

[6] The application for leave to appeal was set down for hearing on 10 May 2007. Of its own motion and a few days before the hearing, this Court directed that the underlying record be removed from the Court website.[3] The Registrar was directed not to make the hard copy of the record available to the public, pending further direction by this Court. This Court issued that direction because certain documents in the underlying record were marked "in camera" or "confidential" or "secret" and related to the activities of the NIA. The direction was informal and mero motu, in the sense that it was not made at the request of or after hearing any of the parties concerned. Since all the parties to the case had full access to the underlying record, this Court considered the sealing of the record as an interim precaution which would be reviewed after inviting submissions by the parties at the hearing of 10 May 2007.

[7] However, before the hearing, a journalist working for Independent Newspapers could not gain access to the record on this Court's website and was denied a hard copy by the Registrar's office. A day before the hearing, Independent Newspapers delivered an urgent application for an order to join the proceedings as first intervening party in the underlying matter and to gain access to written argument of the parties

[3] Rule 20(2)(h) of the Rules of this Court requires parties to file the record of proceedings by delivering hard copies as well as an electronic version of the record. The ordinary practice of this Court at that time was for the Registrar to place the electronic record on the website for easy access by members of the public. However, since that time this Court has introduced the practice of making the record available only after judgment has been handed down in the matter. The practice is not an inflexible one. Sometimes it is not feasible to follow the practice because of the size of the record or the memory capacity available or some other operational reason. In addition, the Registrar may decide not to publish documents on the website at all in circumstances where it is considered inappropriate to do so.

and other unspecified documents in the record. On the day of the hearing, Independent Newspapers appeared and moved for the order sought. The President and the Minister did not oppose the disclosure of the record save in relation to documents they wanted to specify in an objection notice. Having heard Independent Newspapers and all other parties, this Court ruled that the entire record be made available from noon on 14 May 2007 and that any party who wished to object to the disclosure of any part of the record must, in writing, identify the document to which the objection related and the grounds for the objection not later than noon on 11 May 2007. The balance of the disclosure application by Independent Newspapers was postponed sine die subject to further directions of this Court, if necessary.

[8] The Minister entered the fray as second intervening party by filing an objection to the release of two specified documents (the restricted materials) to the public. The first document was the whole of the in camera affidavit by Mr Masetlha including annexures and the second consisted of the whole of the report compiled by the Inspector-General of Intelligence (the IGI Report) on the legality of a certain surveillance operation conducted by NIA agents.[4] The second document was an annexure to the in camera affidavit. The objection was mounted on various grounds of national security. In light of the objection, this Court ordered on 14 May 2007 that the record be made available to the public, but that the restricted materials be kept from public exposure until a decision on the validity of the objection had been made. On

[4] The office of the Inspector-General of Intelligence (IGI) is established by section 7 of the Intelligence Services Oversight Act. The primary duties and powers of the IGI are to monitor the activities of the NIA and to ensure that its operatives and agents act in a manner consistent with the law.

the same day, this Court issued directions to regulate the further exchange of affidavits in order to ripen the application for hearing.

[9] However, on 16 May 2007 and prior to the hearing of the application, Independent Newspapers directed a written request to the Registrar and later to the Minister to let it have copies of the restricted documents for the limited purpose of preparing its case on whether the restricted materials should continue to be withheld from the public. The request was accompanied by an assurance that access to the documents would be limited to its counsel, attorneys and senior editors. The Minister declined the request stating that it raised questions of constitutional significance and that he preferred a court to determine whether the restricted information should be disclosed to the legal team of Independent Newspapers and its editors before any court decision on the main application.

[10] Following the further directions of 22 May 2007, Independent Newspapers brought an interlocutory application for an order to gain access to the restricted documents pending the adjudication of the main claim of disclosure. It claimed that it needed an early and conditional disclosure of the restricted materials in order that it might prepare its case to assert its right to open justice. The Minister filed an opposing affidavit, as second intervening party, in which he resisted the granting of the order on several grounds of national security.

[11] What is significant is that in the opposing affidavit, the Minister abandoned his earlier objection to the disclosure of the whole of the in camera affidavit and confined his objection to specified paragraphs of that affidavit and to specified annexures to it. He persisted with his opposition to the release of the IGI Report. I deal with the details of the restricted materials later in this judgment. Let it suffice to record that, after the exchange of depositions by the intervening parties, only certain paragraphs of the in camera affidavit and parts or all of four of its annexures remained restricted and in contention.

[12] The interlocutory application was heard on 22 August 2007 and, by majority decision, this Court dismissed the application and undertook to furnish reasons later.[5] I do so later in this judgment.

[13] Shortly after dismissing the interlocutory application, this Court directed that the main application of Independent Newspapers which was postponed sine die on 10 May 2007 be set down for hearing on 22 November 2007. At that hearing the parties to the underlying matter chose not to participate. Only the two intervening parties

[5] The order issued on 29 August 2007, reads as follows:

> "1. The interlocutory application of the first intervening party heard on 22 August 2007 is, by majority decision, dismissed. Reasons for the decision will be furnished together with the reasons for judgment in the main application.
> 2. The costs of the interlocutory application shall be costs in the main application.
> 3. The main application of the first intervening party, which was postponed sine die on 10 May 2007, is set down for hearing on Thursday 22 November 2007 at 10am.
> 4. The first intervening party may supplement its papers by filing an affidavit not later than 18 September 2007 and the second intervening party may file an affidavit in reply not later than 2 October 2007.
> 5. The record shall consist of all papers filed in the interlocutory and main applications, duly indexed and paginated as required by the Rules of this Court.
> 6. Written argument shall be lodged—
> a. on behalf of the first intervening party, on or before 9 October 2007;
> b. on behalf of the second intervening party, on or before 23 October 2007."

appeared and presented argument. That was hardly surprising because the litigants in the underlying matter had full access to the disputed record, their proceedings were held in open court in the High Court and in this Court and, at any rate, by then a final judgment had been delivered.

[14] I must add that the Freedom of Expression Institute (FXI) was admitted as amicus curiae. FXI is a not-for-profit, non-governmental organisation which has as its principal objects the promotion of freedom of expression in South Africa and the opposing of censorship. It submitted helpful and comprehensive written argument in order to assist this Court in addressing the question of the procedural approach to be adopted when documents which form part of court records are sought to be withheld from the public.

Issues

[15] There are one core and five collateral issues. The core issue is whether the restricted documents should be disclosed to the public by order of this Court. The collateral issues are: (a) should the application for leave to intervene be granted? (b) does the right to open justice entitle Independent Newspapers to access to the restricted materials in the court record? (c) does the Minister's objection premised on national security constitute adequate justification? (d) what is the proper approach to harmonising these competing constitutional claims? and (e) is it desirable to set guidelines on a procedure to be adopted when a court record is sought to be withheld from the public? It will be convenient first to consider the application for leave to

intervene, and then to furnish brief reasons for the order dismissing the interlocutory application.

Application for leave to intervene

[16] This matter came before us by way of an urgent application for intervention in the underlying matter. As indicated above, the parties in the underlying matter did not resist the intervention. Neither Independent Newspapers nor the Minister made submissions on why they were entitled to be admitted as intervening parties. Even in oral argument, they appeared to assume without more that they were entitled to be joined as parties to the underlying matter.

[17] Intervention of parties in proceedings is regulated by Rule 8(1) of the Rules of this Court. It provides:

> "Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party."

As is plain, the Rule does not prescribe the criteria that entitle a person to join or be liable to be joined as a party. Under Rule 12 of the Uniform Rules of Court,[6] it is well-settled that when a court is called upon to exercise its discretion on whether to grant leave to intervene, the primary consideration is whether the applicant for

[6] Rule 12 provides:

> "Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet."

intervention has a direct and substantial interest in the subject matter of the litigation. Chaskalson P resorted to the same joinder standard in the decision of this Court in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*.[7] In that case, the government applied directly to this Court for leave to appeal an order made by the High Court setting aside the decision of the government to establish a transit camp for flood victims. Mr Mukhwevho, one of the flood victims, in turn applied to this Court for leave to intervene in the application and argued that he too had a direct and substantial interest in the outcome of the application. Chaskalson P admitted Mr Mukhwevho as a party to the underlying dispute because he had a direct and substantial interest in the outcome of the proceedings as it would affect his right of access to housing and temporary accommodation in the transit camp.[8]

[18] In *Gory v Kolver NO and Others (Starke and Others Intervening)*[9] this Court held that in a case involving the validity of a statute an application to intervene would succeed only if the applicant had a direct and substantial interest in the subject matter of the litigation, which in that case was the validity or otherwise of the statute and if, in addition, it was in the interests of justice for the application to be granted.[10] On that occasion we explained that, whilst a direct and substantial interest is a necessary condition for intervention as a party, it is not always sufficient ground for granting

[7] [2001] ZACC 19; 2001 (7) BCLR 652 (CC); 2001 (3) SA 1151 (CC).

[8] Id at para 30.

[9] [2006] ZACC 20; 2007 (3) BCLR 249 (CC); 2007 (4) SA 97 (CC).

[10] Id at paras 12-3.

leave to intervene. The ultimate test is whether, in a particular case, it is in the interests of justice to join or be joined as a party to pending litigation.

[19] In the present matter the applicant who applied for intervention does not have a direct and substantial interest in the subject matter of the underlying litigation. As I said earlier, in that litigation a final judgment has already been delivered and Independent Newspapers did not claim to have an interest in the final outcome of that case. Its real and substantial interest rests elsewhere. It is to gain access to a relatively small but restricted part of the underlying record for public dissemination on the ground of the right to open justice. Strictly speaking, this claim it could assert without intervening in the underlying matter. It could have brought a self-standing application before the High Court or in an appropriate case, an application for direct access before this Court for the same relief it now seeks, if the Minister had refused its request to lift the veil of secrecy over the classified or restricted materials. A ready example is the matter of *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* (*SABC v NDPP*),[11] in which the public broadcaster did not seek to intervene in the underlying appeal, but rather applied for permission to be present at, and to broadcast live, the proceedings before the Supreme Court of Appeal. It follows from what I have said that the application for intervention cannot succeed. That, however, is not the end of the matter.

[11] [2006] ZACC 15; 2007 (2) BCLR 167 (CC); 2007 (1) SA 523 (CC).

[20] When it is in the interests of justice, this Court may permit a party to bring an application directly to it.[12] For the reasons that follow, I am convinced that it is in the interests of justice to dispose of this application as one of direct access. Independent Newspapers and the Minister have acted under the mistaken belief that they were entitled to intervene. Even so, both want the dispute between them decided to finality by us. Both raise important constitutional questions which in all probability would have eventually ended up in this Court. Also, much proverbial water has run under the bridge. The intervening parties have spent much effort and money to place the issues before this Court in no less than three oral hearings and in certain instances they were spurred on by directions of this Court. In any event, this Court is already seized with the record of proceedings in issue. Whilst it would have been preferable to have the benefit of a judgment of another court, sending the parties to another forum at this hour may well work an injustice. Another important consideration is that none of the parties is opposed to us adjudicating the matter and I cannot detect any prejudice or unfairness against any of the parties concerned if we were to do so. In my judgement, dictates of justice urge us on the path of finality. I will accordingly dispose of this matter as an application for direct access.

Reasons for refusing the interlocutory application

[21] On 14 May 2007, this Court ordered that the entire record be made available to the public provided that within a stipulated time any party may object to the disclosure

[12] See section 167(6) of the Constitution, 1996 which provides that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
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> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

of any part of the record. The Minister objected to the disclosure of the restricted materials principally on the ground that their exposure would threaten national security. In an interlocutory application before the validity of the objection had been determined, Independent Newspapers moved for an order that the restricted documents must be released to its attorneys, counsel and senior editors subject to conditions that would protect the confidentiality of the documents. It contended that without access to the documents it would be hindered in the preparation of its legal case concerning the legitimacy of the Minister's objection to the disclosure.. It said it could not assert its constitutional right to open justice without sight of the target.

[22] The enquiry whether Independent Newspapers should be afforded access to the contested materials in a court record in order to decide whether to impugn their confidential status raised novel questions. Independent Newspapers did not challenge the authority of the Minister to classify or protect the documents as confidential for purposes of national security. It did not attack the manner in which the authority was exercised. Its claim was singularly premised on the right to gain access to and publish legal proceedings inclusive of the record before this Court.

[23] At a general level, the right of access to information is entrenched, in the first instance, by the Constitution itself. Section 32 of the Constitution confers on everyone the right of access to any information held by the state or by another person that is required for the exercise or the protection of any rights.[13] That right of access

[13] For a discussion on the interaction between the discovery of documents within the context of litigation and pre-action discovery under section 32(1) of the Constitution, see *Ingledew v The Financial Services Board and*

to information is given effect to and regulated through legislation in the form of the Promotion of Access to Information Act (PAIA). However, its provisions do not apply to a record relating to judicial functions of a court or of its judicial officers.[14] It is clear that at the very least section 32 of the Constitution creates, subject to certain procedural conditions, a right of discovery of information held by the state or another person. There has been considerable judicial debate on whether that right co-exists with or supersedes the right a litigant has to access information under the discovery procedures regulated by various rules of courts.[15] Happily, I need not confront that prickly problem because Independent Newspapers expressly disavowed any reliance on the right of access to information under section 32 of the Constitution or PAIA.

[24] The constitutional guarantee on which the applicant chose to peg its claim was the right to open judicial deliberations. To it, the applicant tagged the right of a claimant to be afforded a reasonable opportunity to present its case. The kernel of this complaint was that unless it gained access to the restricted documents it would be severely handicapped in the pursuit of its cause.

Others (*Ingledew*) [2003] ZACC 8; 2003 (8) BCLR 825 (CC); 2003 (4) SA 584 (CC) at para 15. Although *Ingledew* was decided before the commencement of the Promotion of Access to Information Act 2 of 2000 (PAIA), Rule 35(14) of the Uniform Rules, which was under consideration in *Ingledew*, substantially reflects what is required under section 50 of PAIA. In that case the complex relationship between pre-action discovery under section 32(1) of the Constitution and discovery during litigation was canvassed but not decided.

[14] See subsections 12(b)(i) and (iii) that provide that the provisions of PAIA do not apply to a record relating to the judicial functions of—

> "(i) a court referred to in section 166 of the Constitution;
> . . . .
> (iii) a judicial officer of such court or Special Tribunal."

[15] Rule 35 of the Uniform Rules of Court; Magistrates' Courts Rule 23; and Labour Court Rule 9.

[25] Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial.

[26] In the context of civil litigation the right of access to information which is under the control of another litigating party is regulated by discovery procedures applicable in various courts.[16] For instance, Rule 29 of the Rules of this Court specifically incorporates Rule 35(13)[17] of the Uniform Rules for purposes of discovery, inspection and production of documents in application proceedings in this Court. It has long been recognised that adequate but equitable discovery procedures form an indispensable and integral part of a fair civil trial.

[16] Id.

[17] Rules 35(1) and 35(13) of the Uniform Rules of the High Court state that:

> "(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.
>
> . . . .
>
> (13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications."

[27] Even before the advent of the Constitution, courts often, and correctly in my view, recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. These are well recognised by Schutz AJ in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* (*Crown Cork*):[18]

> "[A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part."[19]

[28] Independent Newspapers placed much reliance on this passage in urging us to give it access to the confidential documents for purposes of preparing its case. However, without detracting from the value of his reasoning, it is important to recognise that in that case Schutz AJ was concerned with measures to facilitate fairness and to avoid abuse of the discovery procedures within a civil suit connected to unlawful competition. We must keep in mind that the claim of Independent Newspapers is novel because it does not rely on any of the rights to discovery of documents or other information under the control of a party to litigation. It relies on

[18] 1980 (3) SA 1093 (W).

[19] Id at 1100A-C.

the right to know or receive what is contained in a sealed part of a court record in order to decide whether to impugn its alleged confidential status. In effect, as non-parties to the underlying matter, the order it sought was to vindicate the right to know and to let the public know and nothing more.

[29] At this interlocutory stage of the proceedings, the interim relief sought by Independent Newspapers posed several difficulties which in my view were insurmountable. The first was that Independent Newspapers did not attack as constitutionally invalid the legislative authority of the Minister to classify or protect from disclosure the confidential material in issue. Nor did it contend that the Minister had abused his authority in classifying the material as confidential. Also, it did not accuse him of some impropriety or ulterior motive in the way he went about claiming confidentiality over the materials in the record. The relief it sought went no further than that it wanted to have sight of the documents concerned in order to prepare its case. In my judgement, at the interlocutory phase and in the context of documents protected on a claim that their disclosure may breach national security, a party demanding disclosure in order to prepare its case must, at the very least, say what its case is. The party must display more than inquisitiveness or a desire to embark upon a fishing expedition. It must point to a lack or abuse of authority or other unlawfulness or impropriety on the part of the official who asserts confidentiality over the sealed documents or other information.

[30] Second, the release of the restricted materials at the interlocutory stage would have created the untenable rule that when a member of the public questions the confidentiality of information kept by the state, she or he would in effect gain the right to receive the information in order to decide whether to prepare a court challenge. If that were to be so, the very purpose of classifying and protecting information for purposes of national security would be rendered nugatory, even were no challenge to be made to the authority to classify and withhold the documents or its exercise.

[31] Third, whilst it may be so that Independent Newspapers did not have access to the restricted materials at the interlocutory stage, the Minister filed an opposing affidavit in which he lifted his objection to the disclosure of several documents but retained his opposition in relation to certain of the material.[20] In regard to each of the items of restricted materials, the Minister gave a brief description of its contents, set out the legislative authority for his conduct and furnished reasons why it was appropriate to protect the item of restricted materials from public exposure. Added to this, the entire record of proceedings, save for the restricted materials, was at the disposal of Independent Newspapers. In my view, at the interlocutory phase of the proceedings, the deposition of the Minister, read with the rest of the record, contained detailed grounds and material to enable Independent Newspapers to decide whether or not to pose a challenge to the confidentiality claim the Minister makes. I was unpersuaded that it could not adequately prepare its case.

[20] It might be useful here to describe the five items to which the Minister persists with his objection. They are (a) paragraphs 3.2, 4.11-4.13 and 18-18.6 of the in camera affidavit; (b) para 3 of annexure IC(i) to that affidavit; (c) annexure IC(iii) to that affidavit; (d) annexure IC 1 to that affidavit; and (e) annexure IC 17 to that affidavit. I shall refer to all these items generally as "the restricted materials".

[32] I do not mean to lay down an inflexible rule. There will be instances where a party will point to what appears to be a lack of authority or to an improper exercise of authority or to some other unjustifiable conduct on the part of a public official claiming confidentiality of information. In that event, it may well be in the interests of justice to permit the party concerned and her or his legal representatives, subject to appropriate conditions, to gain access to the sealed part of the record or information for purposes of posing an informed challenge to the confidentiality claim of the public official concerned. At the very least, the claimant will have to demonstrate that it cannot adequately prepare its case without the early disclosure of the protected materials. As I have found, the present is not such a case.

[33] Fourth, there was much to be said for the Minister's contention that an early release of the restricted materials, ahead of the main hearing, would dissipate its confidentiality. In other words, the disclosure would anticipate and render moot the pending court decision at the likely expense of public interest to keep properly classified documents confidential. My clear view is that where there is a court dispute over the disclosure of information or documents which are claimed to be classified on grounds of national security, a right to preview the confidential material ahead of the resolution of the dispute might frustrate the confidentiality claim and render moot the very decision on the dispute. The order of disclosure would in effect anticipate the outcome of the dispute and at the same time dissipate the claim for confidentiality.

[34] Another considerable obstacle in the path of Independent Newspapers was that it was not party to the underlying case. It did not have a direct and substantial interest or an identity of interest with any of the litigating parties. It wanted to vindicate a right which none of the parties in the underlying case had asserted. After all, the parties in the underlying proceedings enjoyed unlimited access to the full record inclusive of the in camera affidavit. All proceedings were held in open court and the public and the media, including Independent Newspapers, were allowed to attend sessions in this Court, the High Court and the Hatfield Magistrate's Court.[21] The unrestricted record before us shows that the media attended the proceedings and reported extensively on them barring perhaps certain parts of the in camera affidavit and in particular its annexures which include the IGI Report.

[35] Independent Newspapers sought to persuade us that, whilst it was not a party to the underlying proceedings, it is a party to the proceedings on whether the restricted materials should form part of the public record in accordance with the requirements of open justice. That is true. It is a party to the dispute over access to the restricted materials. In its next step it argued, with reference to pre-constitutional cases[22] and

[21] Aside from the hearings in the High Court and in this Court, Mr Masetlha was charged criminally for contravening certain provisions under security legislation. In that trial, reference was made to the in camera affidavit and to the IGI Report.

[22] In the South African context reliance is placed on several cases. In *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* (*Moulded Components*) 1979 (2) SA 457 (W) at 466D-F, the court had to contemplate the scope and effect of Rule 35(12) of the Uniform Rules, and held that—

> "the concern for protecting the respondents and their interests is a very valid consideration, it is something that must be weighed up against the interests of the applicant to be placed in a position to present its case fully in the Court."

Botha J further determined that—

> "the Court should endeavour to impose suitable conditions relative to the inspection of documents . . . in the possession of the respondents, so as to protect the respondents as far as

foreign cases[23] which were said to be analogous authority, that a party who requires relief from a court must be placed in a position to address submissions regarding its interest to that court.

[36] Again, as may be gathered from my earlier remarks, that is a proposition I support. However I was not convinced that the applicant could not formulate its case without full sight of the classified documents. It had a detailed deposition of the Minister on the grounds for withholding each of the remaining items. It was open to it to impugn these grounds. A further consideration was that the contested documents constituted a mere three percent or 24 pages of an appeal record running to 708 pages. From this it may be fairly inferred that the applicant had a vast context within which to formulate its constitutional disquiet. I might add that the restricted pages were before all members of this Court and have been assessed in the light of the

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> may be practicable, whilst at the same time affording the applicant a reasonable opportunity of achieving its purpose."

Friedman J (dissenting) held in the case of *Omar and Others v Minister of Law and Order and Others* (*Omar*) 1986 (3) SA 306 (C) at 329I-J that the reasons for an individual's continued detention, and other relevant information, must be provided to the detainee. He stated that "it is implicit in the *audi alteram partem* rule that in order to enable a person to make representations, he must be informed of the case against him".

Finally, in *Kadalie v Hemsworth NO* 1928 TPD 495 at 506 it was put by the court that:

> "A man cannot meet charges of which he has no knowledge; a man who has to give evidence that he is of a respectable and deserving character is merely beating the air if the tribunal before which he goes declines to give any indication of the points against him which have to be met."

[23] In regard to comparative foreign jurisprudence, numerous cases were cited. For example, in *Tinnelly & Sons Ltd & Others and McElduff & Others v United Kingdom* (1999) 27 EHRR 249, the European Court of Human Rights found that the refusal of access to relevant documents in respect of which confidentiality was claimed on the basis of national security amounted to a denial of the right of access to courts in terms of Article 6(1) of the European Convention on Human Rights.

The United States Supreme Court in *New York Times Co v United States* 403 US 713 (1971) at 719 noted that:

> "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."

submissions of the parties and the balance we must find between these competing constitutional claims.[24]

[37] Another hurdle confronting Independent Newspapers was that the pre-constitutional authorities and foreign cases it referred us to were distinguishable from the facts of the present matter and are accordingly of limited value. First, the authorities deal with direct litigants whereas Independent Newspapers may well be described as a litigant "once removed". Moreover, the authorities relied upon by and large deal with commercial or property interests and not with matters pertaining to state security or national interest. Further, Independent Newspapers was not in jeopardy of criminal prosecution or required to confront a civil suit. It wanted to secure the restricted materials, not for the purpose of ensuring that a fair trial took place, but rather, and understandably so, that it might report to its customers, the readers of its newspapers, on the contents of the restricted documents.[25]

[38] It is for these reasons that the interlocutory application to gain interim access to the restricted documents was dismissed. At that time, this Court reserved the question of costs – a matter to which I return towards the end of this judgment.

[24] See in this regard below paras [59]-[73] wherein the balancing exercise between the competing constitutional claims is carried out.

[25] The applicant places much reliance on *Moulded Components*, above n 22 above. That, however, is a case in which the applicant and the respondent were direct parties to the matter and the issue was whether customer lists between competitors should be discovered through the procedure provided by Rule 35(12) of the Uniform Rules. Similarly, in *Crown Cork*, above n 18, the court was concerned with placing limitations on the litigant's ordinary right of inspection and copying of documents discovered by the opposing party, where the party claimed that the documents contained trade secrets of which advantage may be taken. I also could not find support in the minority judgment in *Omar*, above n 22, as argued for by Independent Newspapers.

Open justice

[39] The bedrock of the disclosure claim of Independent Newspapers is that the media and the public have a constitutional right of access to court proceedings. There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice. The constitutional imperative of dispensing justice in the open is captured in several provisions of the Bill of Rights. First, section 16(1)(a) and (b)[26] provides in relevant part that everyone has the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas. Section 34[27] does not only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in section 35(3)(c)[28] which entitles every accused person to a public trial before an ordinary court.

[40] This systemic requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order,

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[26] Section 16(1)(a) and (b) provides:

> "Everyone has the right to freedom of expression, which includes—
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas".

[27] Section 34 reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[28] Section 35(3)(c) reads:

> "Every accused person has a right to a fair trial, which includes the right—
> (c) to a public trial before an ordinary court".

amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of state function.[29]

[41] From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis in order to ensure a fair trial. This proposition was affirmed by this Court in *SABC v NDPP*,[30] where Langa CJ stated the following:

> "Open justice is observed in the ordinary course in that the public are able to attend all hearings. The press are also entitled to be there, and are able to report as extensively as they wish and they do so. Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (ie the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness."[31]

[29] See section 1(d) of the Constitution which provides that the founding values of our Constitution include:

> "Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[30] Above n 11.

[31] Id at paras 31-2.

[42] More recently in *Shinga v The State*,[32] Yacoob J explained the constitutional interest in open court rooms in the following terms:

> "Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy."[33]

There is much to be said for the contention of Independent Newspapers and the amicus that open justice is a crucial factor in any consideration of a request to limit public disclosure of a court record. That is particularly so when one deals with an appeal record the disclosure of which to the public was not restricted by an order of the court from which the appeal emanates.

[43] I am, however, unable to agree with the submission that a restriction placed on public access to proceedings is only permissible as an exceptional occurrence and that the party seeking to restrict the court record bears a true onus of demonstrating that the restriction is justifiable. The logical consequence of this stance is that all court records may not be restricted except in exceptional circumstances, by a court order after a formal application, on notice to interested parties and after a hearing in an open court. In other words, I accept that the default position is one of openness. My

[32] *Shinga v The State and Another (Society of Advocates, Pietermaritzburg Bar as* Amicus Curiae*); O'Connell and Others v The State* [2007] ZACC 3; 2007 (5) BCLR 474 (CC); 2007 (4) SA 611 (CC).

[33] Id at para 26.

difficulty arises in defining the circumstances in which that default position does not apply. As will become apparent later, I cannot accept the argument that the default position may only be disturbed in exceptional circumstances.

[44] The 'exceptional circumstances' standard advanced is inconsistent with the design of our Constitution and the jurisprudence of this Court on several counts. The better approach, I think, is to recognise that the cluster of rights that enjoins open justice derives from the Bill of Rights and that important as these rights are individually and collectively, like all entrenched rights, they are not absolute.[34] They may be limited by a law of general application provided the limitation is reasonable

[34] See *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC) at paras 7-8, which deals with freedom of expression, in which O'Regan J held that "freedom of expression lies at the heart of a democracy . . . [and] is one of a 'web of mutually supporting rights' in the Constitution."

O'Regan J held at para 9 that while the provisions in question did in fact infringe on the rights of members of the National Defence Force to freedom of expression, the question which had to be answered was whether the provisions were justifiable limitations of the right, as contemplated by section 36 of the Constitution.

In *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* [2001] ZACC 17; 2001 (5) BCLR 449 (CC); 2001 (3) SA 409 (CC) at paras 40-1 it was held that our Constitution, unlike the American one, does not rank freedom of expression above all other rights, or declaim it as an unqualified right.

Similarly, this Court held in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International (Freedom of Expression Institute as* Amicus Curiae) [2005] ZACC 7; 2005 (8) BCLR 743 (CC); 2006 (1) SA 144 (CC) at para 47 that "the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless."

In *NM and Others v Smith and Others (Freedom of Expression Institute as* Amicus Curiae*)* [2007] ZACC 6; 2007 (7) BCLR 751 (CC); 2007 (5) SA 250 (CC) at para 66 this Court recognised that—

> "[i]t cannot be gainsaid that freedom of expression lies at the heart of democracy. This Court has recognised in other cases that freedom of expression is one of a 'web of mutually supporting rights'."

It was held further at para 94 that:

> "This Court and the Supreme Court of Appeal have held that the media, as a consequence of their power, bear a particular constitutional responsibility to ensure that the vital right of freedom of expression is not used in a manner that improperly infringes on other constitutional rights." (Footnotes omitted.)

The Cape High Court also held in *Director of Public Prosecutions (WC) v Midi Television (Pty) Ltd t/a E TV* 2006 (6) BCLR 751 (C); 2006 (3) SA 92 (C) at para 33 that—

> "[f]reedom of expression however, does not enjoy superior status in our law . . . and needs to be construed in the context of the values of human dignity, freedom and equality enshrined in our Constitution".

and justifiable. It is not uncommon that legislation and the common law in this country, and elsewhere in open and democratic societies, limit open court hearings when fair trial rights or dignity or rights of a child or rights of other vulnerable groups are implicated.[35]

[45] Another encroachment on these rights may occur in a manner this Court pointed out in *SABC v NDPP*.[36] The right of the media or public to attend, receive and impart workings of a courtroom may be attenuated by a court where it exercises its inherent power to regulate its own process under section 173 of the Constitution.[37] If in so doing "it impinges upon rights entrenched in chapter 2 of the Constitution, [it must ensure that] the extent of the impairment of rights is proportional to the purpose the court seeks to achieve."[38] It may be added that the right to an open court hearing and the right to report on it does not automatically mean that court proceedings must necessarily be open in all circumstances. There may be instances where the interests

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[35] Section 153(1) of the Criminal Procedure Act 51 of 1977 provides that:

> "If it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof."

Similarly, section 5(2) of the Magistrates' Courts Act 32 of 1944 states that:

> "The court may in any case, in the interests of good order or public morals, direct that a civil trial shall be held with closed doors, or that (with such exceptions as the court may direct) minors or the public generally shall not be permitted to be present thereat."

In terms of section 56 of the Children's Act 38 of 2005, proceedings of a children's court are closed and may be attended only by certain persons specifically mentioned in the section.

[36] Above n 11.

[37] Section 173 states:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[38] See the majority judgment in *SABC v NDPP* above n 11 at para 42.

of justice in a court hearing dictate that oral evidence of a minor or of certain classes of rape survivors or confidential material related to police crime investigation methods or to national security be heard in camera.[39] In each case, the court will have to weigh the competing rights or interests carefully with the view to ensuring that the limitation it places on open justice is properly tailored and proportionate to the end it seeks to attain. In the end, the contours of our constitutional rights are shaped by the justifiable limitation that the context presents and the law permits.

[46] Lastly, it was argued that a party that seeks to restrict open justice must bear an onus. It is so that a party that contends for a restriction of a right protected in the Bill of Rights must place before the court material which justifies the limitation sought. This does not, however, mean that that party carries an evidentiary burden or an onus in the strict sense of the word.[40] At the end of the day, a court is obliged to have regard to all factual matter and factors before it in order to decide whether the limitation on the right to open courtrooms passes constitutional muster. I revert to this

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[39] Id at para 51.

[40] For a similar approach in relation to the nature of the onus in a proportionality evaluation compare *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* Amicus Curiae*)* [2001] ZACC 21; 2001 (8) BCLR 765 (CC); 2001 (4) SA 491 (CC) where this Court was asked to confirm an order of invalidity made by the High Court of section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, on the ground that the section infringed a litigant's section 34 constitutional right of access to courts. Somyalo AJ stated at para 18 that—

> "[i]t is by now settled law what a limitation exercise under section 36 of the Constitution requires. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) at paras [33]-[35] the nature, purpose and process of the exercise were explained thus:
>
> > '[33] Although s 36(1) of the 1996 Constitution differs in various respects from s 33 of the interim Constitution its application still involves a process, described in *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) as the ". . . weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests".'"

matter below when I deal with the proper approach to evaluating the competing constitutional claims premised on open justice, on the one hand, and on national security, on the other.[41]

[47] What remains is to evaluate, in the light of the proper approach I advance below, the confidentiality claims premised on national security in relation to each document's disclosure which is demanded by Independent Newspapers.

The proper approach

[48] It will be recalled that Independent Newspapers contended that the starting point in resolving its disclosure claim is the right to open justice. The Minister approached the matter from the opposite end. He first put up the constitutional and statutory power of the executive to classify and protect sensitive information for reasons of national security. He argued that, once a document is properly classified under the operative legislation, courts have no discretion to rule on whether the document may be disclosed to the public. The argument goes that the power is constitutionally derived and is regulated by legislation and national policy, the constitutional validity of which Independent Newspapers does not impugn.

[49] I describe briefly the regulatory framework which governs the protection and classification of sensitive information. The authority of the Cabinet to make and

[41] See in this regard below paras [48]-[56] in which the proper approach is advanced.

implement national policy derives from the Constitution.[42] The Constitution imposes upon the government the duties, amongst others, to preserve the peace and secure the well-being of the people of the Republic;[43] to maintain national security;[44] to defend and protect the Republic;[45] to establish and maintain intelligence services;[46] and to prevent, combat and investigate crime.[47] Effect is given to these constitutional

[42] Section 85(2)(b) which reads:

> "The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> (b) developing and implementing national policy".

[43] Section 41(1)(a) and (b) provides:

> "All spheres of government and all organs of state within each sphere must—
>
> (a) preserve the peace, national unity and the indivisibility of the Republic;
>
> (b) secure the well-being of the people of the Republic".

[44] Section 44(2)(a) reads as follows:

> "Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
>
> (a) to maintain national security".

Section 146(2)(c)(i) reads:

> "National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
>
> (c) The national legislation is necessary for:
>
> (i) the maintenance of national security".

And section 198 reads:

> "The following principles govern national security in the Republic:
>
> (a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
>
> (b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.
>
> (c) National security must be pursued in compliance with the law, including international law.
>
> (d) National security is subject to the authority of Parliament and the national executive."

[45] Section 200(2) states:

> "The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force."

[46] Section 209(1) provides:

> "Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation."

[47] Section 205(3) states:

obligations through legislation, the establishment of institutions as permitted by law and by the exercise of executive authority vested in the President and the Cabinet. The Minister draws attention to the national information security policy, known as Minimum Information Security Standards (MISS), which was adopted by the Cabinet on 4 December 1998.[48] It applies to all departments of state that handle classified information in the national interest. It provides for measures to protect classified information and empowers the Minister to protect information by classifying it as "restricted" or "confidential" or "secret" or "top secret".[49] In addition national legislation and regulations prohibit the disclosure of certain classified information.[50]

[50] In a second layer of argument, the Minister says that no valid criticism has been levelled at the manner in which the restricted materials have been classified or protected as confidential. There is no suggestion that in classifying the documents he acted beyond his powers or improperly in any sense. In relying on the separation of powers, the Minister argues that his power derives from section 85(2)(b) of the Constitution,[51] which permits the executive to formulate national policy. Judicial

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> "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[48] MISS can be accessed by visiting http://www.kzneducation.gov.za/policies/MISS96.pdf, accessed on 20 May 2008.

[49] This classification is provided for in Chapter 2 of MISS.

[50] See in this regard: section 4 of the Protection of Information Act 84 of 1982, which prohibits the disclosure of protected documents or information in relation to, amongst other things, security matters; sections 26(1)(a)(iii), (f)(i) and (g) of the Intelligence Services Act, which makes it an offence for any person, members or former members of any intelligence service to disclose classified information without permission of the relevant government official; and regulation E of Part II of Chapter 1 of the Public Service Regulations, 2001 GN R1 GG 21951, 5 January 2001, which prohibits an employee from releasing official information to the public without the necessary authority.

[51] Above n 42.

authority over executive power, derived from section 172(1) of the Constitution,[52] is to be exercised only by declaring invalid any law or conduct inconsistent with the Constitution. On this argument, judicial review is the only mechanism through which courts check executive power. However, courts may not arrogate to themselves the power to subvert a legitimate intelligence classification by making an order which grants the public access to protected materials. If a court were to do so, the argument goes, it would be undoing classification without hearing argument on why the classification was wrong. In short, courts cannot order the disclosure of classified documents without setting aside the classification of those documents. For this reason alone, the Minister contends that this Court has no power to make the order sought and thus the application must fail.

[51] This contention of the Minister has no merit. For one thing, it mischaracterises the issues we are called upon to decide. The issue before us is not whether this Court should undo the security classification of documents sought from the Minister by the media or the public. If that were so, different considerations may very well apply. The issue before us is whether an appellate court record, under the authority and direction of this Court, should be made available to the media and the public. The restricted portions of the record were placed before this Court by the parties

[52] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

themselves and none of the parties before the courts below sought an order to hold as classified any part of the record. So the narrow question we are called upon to decide is whether the belated claim of the Minister that certain parts of the record should be kept classified has any merit.

[52] In the alternative, the Minister submits that, should this Court take the view that it has the power to decide whether to release classified documents which form part of the record to the media and the public, it should give due and proper weight to the classified status of the documents sought to be released and the concomitant obligation of government to maintain national security.

[53] In my view, the mere fact that documents in a court record carry a classification does not oust the jurisdiction of a court to decide whether they should be protected from disclosure to the media and public. We were not referred to, and I could not find, any legislative provision on the classification and protection of information on grounds of national security or any other authority which purports to oust the jurisdiction of a court over any document which forms part of a court record. As I have said above, different considerations may very well apply where the request to disclose classified intelligence documents occurs in any context other than where the documents have been placed before a court by a party to the proceedings and thus form part of the court record. In that event, a court will always have the power to regulate the proceedings before it because it is clothed by section 173 of the

Constitution with an inherent power to regulate its own process, taking into account what is in the interests of justice.[53]

[54] I agree with the submission made by Independent Newspapers that ordinarily, the starting point is that court proceedings and so too court records must be open to the public. A mere classification of a document within a court record as "confidential" or "secret" or even "top secret" under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.

[55] It follows that where a government official objects to disclosure of a part of the record before a court on grounds of national security, the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public. This forms part of a court's inherent power to regulate its own process that flows from section 173 of the Constitution. In my view, a court in that position should give due weight both to the right to open justice and to the obligation of the state to pursue national security within the context of all relevant factors. As in the present matter, it would not be concerned with a statute or other law of general application as the basis for restricting the disclosure of the material. In

[53] Above n 37.

deciding whether documents ought to be disclosed or not, a court will have regard to all germane factors which include the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court. These factors are neither comprehensive nor dispositive of the enquiry.

[56] However, in the final analysis, a court should be alive to the fact that it is confronted by competing constitutional claims. The one claim is for open justice and the other relates to the government's obligation to pursue national security. Because the contested documents form part of the court record, a court is obliged, in its own right, to examine the documents concerned in order to ensure that it impairs as little as possible the other constitutional interests at stake whilst striking a harmonious balance between the two or more competing claims.

Is it desirable to set procedure to be adopted when a court record is sought to be withheld?

[57] As I have intimated earlier, FXI sought to persuade us with reference to Canadian[54] and United States'[55] jurisprudence to catalogue a procedural approach to

[54] In relation to the Canadian cases the amicus refers us to: *Named Person v Vancouver Sun* 2007 SCC 43; 285 DLR (4th) 193 (SCC); *Vancouver Sun (Re)* 2004 SCC 43; [2004] 2 SCR 332; *Canadian Broadcasting Corp v*

be adopted when documents that form part of a record of proceedings are to be withheld from the public. Like Independent Newspapers, FXI articulates the importance of the right of the public to receive information and ideas and the role which the media plays in being the conduit through which the public receives information. The mainstay of their submission is to urge upon us a procedural approach which has the following features: (a) not compromising the legitimacy of the judicial proceedings, which is reflected in their adversarial nature; (b) facilitating the public's interest in opposing an order to restrict access; (c) requiring that any order granted which restricts access should state the conclusions reached and be accompanied by specific findings and reasons for rejecting less drastic measures; (d) providing the prerequisites for meaningful appellate review; and (e) informing the public of an order granted which restricts access to court records.

[58] I have little difficulty with the broad principles advanced by FXI. I am however most reluctant to seek to impose a fixed and prior set of principles which are to apply in every case in which disclosure of a court record is an issue. Even the most cursory observation of the way our trial courts or courts of first instance operate, will reveal that the contexts within which they are called upon to decide whether to conduct any part of the proceedings to the exclusion of the public, differ widely. FXI

New Brunswick (Attorney General) [1996] 3 SCR 480; and *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326.

[55] In relation to the United States' approach we are referred to: *Stone v University of Maryland Medical System Corporation* 855 F 2d 178, 180 (4th Cir 1988); *In re Washington Post Co*. 807 F 2d 383, 390 (4th Cir 1986); *Press-Enterprise Co. v Superior Court* 464 US 501, 510 (1984); *In re The Knoxville News-Sentinel Co. Inc* 723 F 2d 473, 474 (6th Cir 1983); *Globe Newspaper Co. v Superior Court* 457 US 596, 606-7 (1982); *Nixon v Warner Communications Inc*. 435 US 589, 598-9 (1978); and *Ex Parte Drawbaugh* 2 App DC 404 (DC Cir 1894).

made us understand that the proposed principles are flexible and need not apply in every case. If that is so, I cannot understand the need for certain principles in the course of a judgment, already so lengthy, when they are not intended to be binding. I am quite confident that judicial officers of our land, on whom the discretion rests, will determine where the interests of justice lie from case to case consistently with our evolving, context-sensitive jurisprudence that is driven by justice rather than rules.

The restricted materials[56]

[59] Independent Newspapers contends that the restricted documents should be released as they are or in a redacted form for three principal reasons. The first is that the Minister has furnished inconsistent and contradictory grounds objecting to their release. Second, the contents of the restricted materials are already in the public domain. Third, the claim for confidentiality over the entire document is too broad and not sufficiently tailored. Keeping in mind these reasons for claiming disclosure put up by Independent Newspapers and the grounds of objection advanced by the Minister, I examine whether each of the documents should be protected from disclosure.

[60] The in camera affidavit was deposed to by Mr Masetlha, the applicant in the underlying proceedings. As head of the NIA, he took the view that the matters in the affidavit were of a confidential nature and should appear not in his regular founding affidavit but in an in camera affidavit. It is so that the court below never made an order that the affidavit may not be disclosed to the public. Also, the affidavit is not a

[56] Above n 20.

document classified under intelligence legislation or MISS. However, certain annexures to the affidavit and in particular annexures IC 1, IC(iii) and IC 17 are boldly marked "secret", "confidential" and "top secret" respectively. An additional factor is that the record shows that the *Mail & Guardian*, a weekly newspaper, has widely published quotations of several parts of the in camera affidavit. The record shows that the Minister has called upon the *Mail & Guardian* to desist from publishing classified documents forming part of the in camera affidavit and the newspaper has furnished certain undertakings in this regard. It is also true that Independent Newspapers has been furnished with the entire in camera affidavit except for the redacted paragraphs and certain annexures in respect of which it now claims disclosure.

Paragraphs 18 to 18.6 of the in camera affidavit

[61] The Minister explains that these paragraphs contain specific protected details of Operation Avani and details from a counter-intelligence report which is in turn classified and protected from unauthorised disclosure. The reasons advanced by the Minister are unconvincing. First, the counter-intelligence report and the details of Operation Avani are not attached to the in camera affidavit and their details are not revealed in paragraphs 18.1 to 18.6 of the affidavit. What is contained in these paragraphs is a brief description of six key conclusions of the counter-intelligence report. In a nutshell, the conclusions are that (a) there was a need for the President to intervene; (b) the issue of the succession to the President was complicating issues; (c) some groupings that were instigating unrest have been identified; (d) a unit within the

Scorpions was an instrument of a group instigating unrest; (e) the group wanted to retain the Scorpions in its original form; and (f) the Minister has associated himself with the group.

[62] In my judgement, the conclusions are innocuous or, at best for the Minister, neutral in relation to national security. I am unable to identify the threat the disclosure of the conclusions would pose to our collective safety and security. In any event, it is evident from the voluminous press clippings placed before us that the issue covered by the conclusions are all well within the public domain and media discourse and are not worthy of any confidentiality protection.

Paragraphs 3.2 and 4.11 to 4.13 of the in camera affidavit

[63] The Minister says that these contain allegations in respect of Cabinet proceedings and that information from Cabinet proceedings is protected from disclosure under section 12 of PAIA, which states that the Act does not apply to Cabinet records.[57] It is so that, under PAIA, Cabinet records are exempted from disclosure under the provisions of that Act. The present claim for disclosure is not made under PAIA. But even if the claim for access fell within the purview of PAIA, paragraph 3.2 and paragraphs 4.11 to 4.13 do not contain a record of Cabinet

[57] Section 12 of PAIA provides:

> "This Act does not apply to a record—
> (a) of the Cabinet and its committees;
> (b) relating to the judicial functions of—
> (i) a court referred to in section 166 of the Constitution;
> (ii) a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996); or
> (iii) a judicial officer of such court or Special Tribunal".

meetings. In these paragraphs, Mr Masetlha alleges that the Minister inaccurately accused him, in his absence, before two Cabinet meetings, and in that way gained the support of the Cabinet to condemn his actions publicly, through a Cabinet spokesperson. The accusation the Minister allegedly made is that Mr Masetlha made submissions to the Khampepe Commission in conflict with the Minister's instructions.

[64] I have just described the contents of the relevant paragraphs. They contain no more than Mr Masetlha's disquiet as to how, in his view, he was treated unfairly by the Minister. I have carefully weighed the national security objection raised against the disclosure claims. I am satisfied that the disclosure of the remaining paragraphs (that is, paragraph 3.2 and paragraphs 4.11 to 4.13 of the in camera affidavit), which have never been classified as confidential and which are now in the public domain to a very great extent, will not imperil national security. I conclude that these paragraphs may be disclosed to the public despite the Minister's objection.

Paragraph 3 of annexure IC(i)

[65] This is a letter dated 19 June 2005 from the Minister to Mr Masetlha. It was never classified as confidential until after the commencement of these proceedings. The Minister has agreed to release it to Independent Newspapers in a redacted form by excising only paragraph 3 of the letter. Therefore, Independent Newspapers has been furnished with the contents of the entire letter, but for paragraph 3.

[66] The Minister asserts that paragraph 3 makes reference to the relationship enjoyed by the South African Secret Service with foreign intelligence agencies. Independent Newspapers now insists that paragraph 3 should be redacted and released to them. I cannot support this claim because, in my view, it is not possible to redact the paragraph without frustrating the confidentiality that the Minister wants to preserve. The paragraph does indeed discuss the relationship enjoyed by the South African Secret Service, our external intelligence agency, with other foreign intelligence agencies. Moreover, the confidentiality claim is tailored to a single paragraph and thus its invasiveness has been sharply curtailed. I conclude that the objection that the Minister raises is valid and must be upheld.

Annexure IC(iii)

[67] This document is an annexure to the in camera affidavit. It is a report prepared for the head of the NIA by the Deputy Director-General of the NIA, Mr Njenje, regarding the abortive surveillance of a businessman, Mr Sakumzi Macozoma. The Minister objects to the disclosure of this annexure on the grounds that it exposes the name of an NIA operative, a chain of command within the NIA and information which could be used to identify the operative in question and to endanger her or him. In my view, the objection of the Minister is accurate and well taken. During oral argument, Independent Newspapers was hard pressed to advance a cogent reason why it would be in the public interest for the media to report on and for the public to know about the identity of secret agents and operatives of the NIA. It properly conceded that a disclosure of that kind could endanger the life of the operative concerned and

also undermine the role of the NIA in gathering intelligence directed at enhancing national security. I conclude that the annexure concerned must not be released to the public.

Annexure IC 1

[68] This document is an annexure to the in camera affidavit and is dated 29 September 2005. It is a three-page report drawn by Mr Masetlha for the Minister. The document carries the classification "secret". It concerns the Macozoma surveillance. Its contents are littered with actual names of NIA operatives and makes reference to operating methods and a chain of command. The Minister says that the document has been classified "secret" in order to prevent hostile elements from using its contents. He says they may disrupt operational planning and co-operation between institutions and may harm individuals employed by the NIA. He also adds that the contents may be used to damage diplomatic relations between certain states.

[69] During oral argument, Independent Newspapers assured us that it does not demand the release of names of NIA operatives. It understood well that the disclosure of the names would carry significant risk to the agents inasmuch as the exposure of operating methods would undermine the future activity of the NIA. I understood Independent Newspapers to concede that the Minister's claim of non-disclosure in relation to this document is justified. Be that as it may, I have no hesitation in upholding the Minister's objection. I conclude that the document must remain protected.

Annexure IC 17

[70] This too is annexed to the in camera affidavit. It is a 12 page report prepared by the IGI and is dated 17 October 2005. The report carries the title *Summary of the Findings and Recommendations of the Investigation into the Legality of the Surveillance Operations carried out by the NIA on Mr S Macozoma* (IGI report)[58]. The report carries a "secret" classification. It is common cause that at a media briefing on 23 March 2006, the Inspector-General released to the public a version of the IGI report which does not contain all the material which the Minister now wants to protect from public access.[59] However, the public version contains many of the details in the original report without disclosing the names of the operatives and sources. The Minister argues that the protected IGI report contains names of NIA operatives, names of sources of intelligence, the name of a foreign person who is a target of an intelligence operation and certain intelligence methods.

[71] Independent Newspapers demands the release of the balance of the report albeit in a redacted form. It points out that there was frequent reference made to the IGI report in the criminal trial of Mr Masetlha in the Magistrate's Court and in the civil proceedings in the High Court. On the other hand, the Minister points out that although reference was made to the IGI report in these proceedings, the actual classified document has never been released publicly.

[58] Above para 8.

[59] The public version of the report carried the title *Executive Summary of the Final Report on the Findings of an Investigation into the Legality of the Surveillance Operations carried out by the NIA on Mr S Macozoma*.

[72] Whether or not a document classified "confidential" has been disclosed to some degree in the public domain is a relevant but not decisive factor in determining whether the document deserves continued protection. This is so because a leaked confidential document does not lose its classification. If it were so, people may be encouraged to reap the benefit of their own misconduct by leaking classified or protected documents and thereby rendering the documents beyond the protection they may deserve. However, the fact that the contents of the document has been referred to in public is not alone sufficient reason to order that the entire document should be accessible to the public.

[73] I do think that there is a valid basis for further restriction of the protected IGI report. It does indeed contain the material the Minister has alluded to and I can find no compelling reasons why the material should be disclosed to the public at large. This is particularly so because a sanitised version of the IGI report is accessible to the public. The Minister's objection is slenderly tailored to conceal only the particularised and sensitive material. Independent Newspapers has not advanced any public or private good that will be served by public disclosure as against the personal danger in which the NIA operatives concerned and their activities will be placed.

Outcome

[74] It follows from what I have said that I would (a) grant the order sought by Independent Newspapers only in relation to paragraphs 18 to 18.6, 3.2 and 4.11 to

4.13 of the in camera affidavit of Mr Masetlha in the underlying proceedings; and (b) dismiss Independent Newspapers' claim for the disclosure of paragraph 3 of annexure IC(i), annexure IC(iii), annexure IC 1 and annexure IC 17 to the in camera affidavit.

Costs

[75] Each of the parties has urged us to grant costs against the other in the event of its substantial success. Additionally, Independent Newspapers advanced the contention that even if it fails on the main application it should be awarded the costs of the first two applications – being the urgent application of 10 May 2007 and the interlocutory application of 22 August 2007 – for the reason that, but for its intervention, the record would have remained undisclosed.

[76] The issues raised in this case are of considerable constitutional importance. However, I am not inclined to grant costs to any of the parties on the main application. Each party has gained substantial success to some degree. A just order would be to direct that each party pay its own costs on the main application which was heard on 22 November 2007.

[77] Turning to the urgent application heard on 10 May 2007 and the subsequent interlocutory application heard on 22 August 2007, I think that Independent Newspapers overstates the role it played in having the record made available to the public. The mero motu non-disclosure direction of this Court was no more than a holding position until the date of hearing on 10 May 2007. A simple letter of enquiry

to the Registrar of this Court on 9 May 2007, rather than an urgent application, would have elicited a response that at the hearing of 10 May 2007, this Court would, on its own motion, invite parties to make submissions on whether the record should be kept confidential. So, the application by Independent Newspapers on the first day of the hearing was not the only reason that the record was made available to the public. I also keep in mind that the Minister readily conceded to the entire record being disclosed except for the documents specified in the notice of objection. The fact that the Minister later narrowed down his objection from 12 documents to five items, should not on its own attract an adverse order of costs. If anything, the Minister's willingness to abandon his objection to the disclosure of certain documents is indicative of the attitude that he may keep away from the public only such information as is necessary to achieve specified national security objectives. I would order no costs in relation to the urgent application.

[78] Lastly, Independent Newspapers' interlocutory application has failed. We must now determine the costs of the application. The application was merely interim and must be disposed of as part of the main application. Another relevant consideration is that the arguments which were advanced in relation to the interlocutory application were in great part repeated in relation to the main application. I would follow the course I have taken in relation to the main application and that is to make no order as to costs in the interlocutory application as well.

Order

[79] In the event the following order is made:

(a) Direct access is granted.

(b) Paragraphs 18 to 18.6, 3.2 and 4.11 to 4.13 of the in camera affidavit of Mr Masetlha in the underlying proceedings shall be made available to the public.

(c) Annexures IC(iii), IC 1, IC 17 and paragraph 3 of IC(i) to the in camera affidavit may not be disclosed to members of the public.

(d) The Registrar is instructed to act in accordance with paras (b) and (c) of this order.

(e) No order as to costs is made.

(f) No costs order is made in respect of the interlocutory application dismissed by this Court on 29 August 2007.

Madala J, Mpati AJ, Ngcobo J, Nkabinde J and Skweyiya J concur in the judgment of Moseneke DCJ.

YACOOB J:

[80] I have had the benefit of reading the judgment of my colleague Moseneke DCJ (the main judgment). I agree with the approach taken by Sachs J. The main judgment is strikingly clear, decidedly forceful and engaging in its flow. However, after careful and anxious consideration, I find it quite impossible to agree with its reasoning and

conclusion in several aspects of substance. It is therefore now regrettably necessary for me to write this judgment.

[81] I delineate first those areas of the main judgment that I must traverse. There are three. One is concerned with whether an order should have been granted in favour of Independent Newspapers in the interlocutory application.[1] In my view the application for access to the disputed material should have been granted so as to enable Independent Newspapers to investigate issues and argue the matter properly before us. The second aspect is the test to be ultimately employed in determining whether documents that constitute evidence before a court should be kept secret.[2] I may have preferred the test to have been more akin to that required by the limitations analysis commanded by our Constitution.[3] Nevertheless, it makes no difference in this case whether the test propounded in the main judgment is adopted and I apply it subject to qualifications that I mention. However the issue of the appropriate test should, I think, remain open to be decided on another day. Finally, while I agree with the main judgment that the veil over the remaining portions of Mr Masetlha's in camera affidavit[4] should be lifted, I cannot consent to the continued secrecy of any of the other disputed material which are the annexures to the in camera affidavit of Mr Masetlha.[5]

[1] Above [21] – [38].

[2] Above [55] – [57].

[3] Section 36.

[4] Paragraphs 18.1 to 18.6 and paragraphs 3.2 and 4.11 to 4.13.

[5] Paragraph 3 of IC(i), and the whole of IC(iii), IC 1 and IC 17.

[82] I have set out the issues to be considered in the order in which they are investigated in the main judgment. However, it is convenient to discuss them here in a different order. This judgment will concern itself firstly, with the appropriate test to decide if material used as evidence in a court should be secreted. I then apply the test and conclude that the documents in this case must, in the interests of justice, be made public. It is only after this conclusion that I lastly consider whether the material should have been made available to Independent Newspapers consequent upon their interlocutory application.

The test

[83] In determining whether to keep the material secret, we exercise a discretion in terms of section 173 of the Constitution.[6] It is arguable that it will be in the interests of justice for a court to limit a right conferred by the Constitution only if it has been shown that the limitation is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom.[7] In other words, courts should not limit rights unless the limitations test in the Constitution is met. The main judgment concludes that the appropriate test must simply be whether disclosure or secrecy of the material is in the interests of justice. The other side of the coin is that Parliament can limit a right only if the limitation satisfies the requirements of the limitations analysis. What is more, there is a burden on the lawmaker to justify the limitation.[8] It is

[6] Section 173 provides: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[7] Section 36.

[8] This is clearly not an ordinary onus.

difficult to justify a regime in which a court can limit rights more easily than a legislature can. We must acknowledge some difference between two situations.

[84] The one is where the court needs to balance competing individual rights against each other.[9] Because there is no hierarchy of rights, the appropriate test when one is concerned with balancing rights must be the interests of justice test. A section 36 analysis may not be entirely inappropriate. This is because courts would be in the impossible position of determining the right to which section 36 were to apply. In the context of the *SABC* case[10] it is apparent that if the fair trial right could be compromised only to the extent allowed by section 36, the right to freedom of expression would be unduly trammelled. If, on the other hand, the freedom of speech right could be limited only to the extent that a limitations analysis would allow, the fair trial right would undoubtedly suffer.

[85] The other situation is that we are faced with in this case. There is a right on the one side and a state interest aimed at the benefit of the people on the other. The interests of justice test might not adequately protect a fundamental right in relation to a state interest. Indeed the whole of section 36 is concerned with legislation in the interests of the state and the general citizenry as well as the circumstances in which that legislation can limit the right. I say no more about this issue because, as indicated earlier, the question can and should be left open. This is because even on the test

[9] See *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); 2007 (1) SACR 408 (CC) at para 10.

[10] Id at para 37.

postulated in the main judgment, all the material must be released. Otherwise, as I show later, justice would become a laughing stock.

[86] There are nonetheless two important qualifications that I wish to make in relation to the approach elaborated in the main judgment.[11] I take issue with the statement in the main judgment that the aim of the exercise is to strike an "harmonious balance between the two or more competing claims." My understanding of the balancing exercise is different. It is impossible to achieve an harmonious balance between two competing claims in the constitutional context. The balancing exercise as I understand it places different considerations into different parts of what may be called the balancing instrument and strives to arrive at a conclusion as to where the balance lies. If the balance tilts in favour of the state, in all the circumstances, the state must win. If, on the other hand, the balance swings the other way, the other party must succeed. Balancing is the process or exercise by which the result is reached. The result, though a consequence of the balancing exercise, is not necessarily an even balance. Moreover, harmony has nothing to do with it in my view. The one side or the other side will succeed depending on what the balancing of interests yields in the interests of justice analysis.

[87] The second qualification is perhaps a matter of detail and emphasis. It is apparent that the right to freedom of expression is not that of the media alone. In

[11] Above [55] – [57].

reality the press performs an important service to our democracy because it ensures that the people's right to know is satisfied. As was said in *SABC*:

> "This Court has also highlighted the particular role in the protection of freedom of expression in our society that the print and electronic media play. Thus everyone has the right to freedom of expression and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression."[12] (Footnote omitted.)

[88] But added to the considerations mentioned in the preceding paragraph is the important area of public interest. There is a greater public interest in knowing certain things than in knowing others. I do not refer merely to the curiosity of the public. The public might be very curious about some domestic discord between a Cabinet Minister and her spouse. Disclosure of detail in this regard can hardly be said to be in the public interest. On the other hand, the circumstances in which an intelligence agency came to improperly and unlawfully infringe upon the privacy of an innocent citizen are not merely matters of public curiosity. They would be issues of immense public interest. The degree of public interest is an important factor to be put into the balance and would, in my view, not be of insignificant weight if the interest is one that must be fulfilled.

[12] Above n 9 at para 24.

[89] Before I consider the disputed material I must agree completely with the main judgment that—

> "the mere fact that documents in a court record carry a classification does not oust the jurisdiction of a court to decide whether they should be protected from disclosure to the media and public."[13]

In other words the classification of the material can never be decisive. It may or may not carry some weight depending on the reason for its classification. I return to this later.

The disputed material

[90] It is now time to examine the disputed material and its contents. A number of people feature in the material and the related publicity and it is necessary to identify them and to say that their names have already received considerable publicity.

(a) The Minister for Intelligence, Mr Ronnie Kasrils (the Minister);

(b) the erstwhile Director-General for Intelligence, Mr Billy Masetlha (Mr Masetlha);

(c) a former Deputy Director-General for Intelligence, Mr Gibson Njenje (Mr Njenje); and

(d) a Counter-Intelligence Manager who then held office Mr Bob Mhlanga (Mr Mhlanga).

IC(i): Paragraph 3 – The Minister's letter

[13] Above [53].

[91] IC(i) is a letter from the Minister to Mr Masetlha (the Minister's letter). The Minister says that the disputed paragraph 3 refers to the relationship between the South African Secret Service and foreign intelligence agencies. It should not be disclosed on that account. It is necessary to see whether the paragraph does in fact refer to this relationship. If it does, we must ask whether the relationship referred to in the paragraph is already in the public domain. If the information is already lawfully in the public domain there can, in my view, be no reason for its non-disclosure. It will be convenient to determine the information in relation to this paragraph before returning to the document itself. Suffice it to say, at this stage, that the paragraph has nothing whatever to do with the Macozoma affair[14] but a different one concerned with the relationships enjoyed by the Directorate of Special Operations (DSO) referred to in common parlance as the Scorpions. It is common knowledge that the government appointed the Khampepe Commission[15] to determine the future of the DSO and in particular whether the DSO should continue to exist within the National Prosecuting Authority and separately from the police.

[92] Two articles in the *City Press* focused on this debate as it emerged in those parts of the proceedings of that Commission that were open to the public. The first of these,[16] made certain allegations in a report relying on "confidential correspondence" submitted to the Khampepe Commission before the public hearing into whether the DSO "should remain in the NPA or be incorporated into the South African Police

[14] The botched surveillance of a businessman Mr Sakumzi Macozoma discussed below [100] onwards.

[15] Presided over by Judge Sisi Khampepe who is currently a judge of the Labour Appeal Court.

[16] *CIA runs Scorpions* (8 October 2005), http://www.news24.com/City_Press/0,,186-187_1813726,00.html, accessed on 13 May 2008.

Service".[17] The article says, relying on papers before the Commission, that the National Intelligence Agency (the NIA) had accused some members of the DSO of spying on foreign governments. It goes on—

> "[the NIA] claims that the elite investigative body is breaking the law by running its own intelligence unit.
>
> The NIA is unhappy about the Scorpions' alleged working relationship with US-owned Kroll, a risk-management company with perceived strong ties to former Central Intelligence Agency (CIA) operatives."

The article goes on to say that other NIA claims against the DSO and the National Prosecuting Authority are—

(a) The DSO has formal relations with intelligence structures.

(b) Certain members of the National Prosecuting Authority have undeclared links with foreign intelligence services.

(c) Foreign intelligence services have infiltrated the DSO.

[93] The next article in the *City Press* appeared a week later.[18] It reported—

> "President Thabo Mbeki is said to have been so infuriated by the NIA's claim that the Scorpions were 'threatening national security' by working closely with foreign intelligence agencies that he stopped short of giving Masetlha his marching orders this week."

It was also reported that the Cabinet had distanced itself from the NIA's stance.

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[17] The newspaper article alleges that attempts to hold certain parts of the hearing in camera were rejected by Judge Khampepe.

[18] Msomi, *NIA boss in firing line* (15 October 2005), http://www.news24.com/City_Press/News/0,,186-187_1817704,00.html, accessed on 13 May 2008.

[94] These two articles demonstrated a strong difference of opinion between the government on the one hand and the NIA on the other in relation to the Scorpions and their relationship with foreign intelligence agencies.

[95] About two years later this debate was once again brought into the spotlight in a different context by the *City Press*.[19] According to the article a—

> "report commissioned by the government claims that renegade intelligence operatives are colluding with people disgruntled with ANC rule to plant divisive documents meant to sow confusion and weaken the ANC and thus the state."

This was revealed at a press conference at which senior government officials were present. It was also reported that the intelligence and security director–general had said in a statement "[o]ther affected departments shall cease to use external security services or individuals without the prescribed vetting requirement." The article then reminds the reader that the DSO was criticised before the Khampepe Commission for using external security services before vetting them. Frank Chikane, the Presidency Director-General, is alleged to have said "[t]here are also indications that there is an interface with foreign intelligence services in a manner that could threaten the security of the State." The newspaper article then revisits the allegations made at the Khampepe Commission about the relationship between the DSO and Kroll described above.[20]

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[19] Sefara, *Spies bent on chaos* (28 July 2007), http://www.news24.com/City_Press/News/0,,186-187_2155203,00.html, accessed on 13 May 2008.

[20] Above [92].

[96] The issues before the Khampepe Commission were of immense public importance and reporting as much of them as possible would have been in the public interest. The debate between the NIA and the government about the propriety or otherwise of the DSO liaising with foreign intelligence agencies was well within the public domain.

[97] The Minister's letter contains comments on the draft that had been prepared for the Khampepe Commission. Much of paragraph 3 of the document has nothing whatever to do with the South African Secret Service. The Minister says in this paragraph that his "most serious concerns" (arising out of the draft report prepared by Mr Masetlha for submission to the Khampepe Commission) related to the counter-intelligence issue. The Minister then goes on to suggest that "operational intelligence" such as the naming of individuals whom the NIA might suspect as being foreign intelligence agents should "certainly" be omitted. There can be nothing objectionable about these two sentences from a national security point of view.

[98] The Minister then asks Mr Masetlha to bear in mind that the DSO's relationship with foreign embassies and services such as the FBI and Scotland Yard has come about through government directives for training and assistance. This also relates to the British SIS and to Kroll. The Minister says that the DSO can hardly be blamed in these circumstances. The only sentence about the South African Secret Service is one

in which Mr Masetlha is asked to "bear in mind that SASS" (presumably the South African Secret Service) has a relationship with Kroll.

[99] The existence of Kroll is well known. So is the complaint about the relationship of the DSO with Kroll. The objection of the NIA is that the DSO should not be having these relationships. The implication is that the intelligence sector should be enjoying these relationships. The website of the South African Secret Service makes it plain that it gathers intelligence and fosters relationships in the foreign intelligence sphere subject to ministerial approval.[21] Nothing is said in paragraph 3 about the nature of the relationships. The fact of the existence of a relationship cannot in itself endanger any intelligence-gathering or information. I would, bearing in mind the nature of the information, the context in which it appears, the lack of any potential to damage national security and the public interest, conclude that it is in the interests of justice that this paragraph be released as a whole.

The Macozoma surveillance

[100] The other three documents concern the Macozoma surveillance which, as everyone knows, was botched. The first is a "statement" made by Mr Njenje in relation to the incident (the Njenje statement).[22] The second is a letter written by Mr Masetlha pursuant to an "investigation into the legality of surveillance activities

[21] http://www.sass.gov.za, accessed on 13 May 2008. An interested reader must follow the following links to obtain the information relied on: "Systems" and "National and International Co-operation".

[22] IC(iii).

carried out by the NIA on Mr Sakumzi Macozoma" (the Masetlha letter).[23] The third is a report by the Inspector-General on the legality and propriety of the whole affair (the IGI report).[24] It is necessary to set out that information in this debacle already in the public domain before considering whether the disputed material should be kept secret.

[101] I might start by setting out a government statement communicating the result of the investigation in question and certain limited information about it as they emerge from the IGI report (the IGI public version):

> "1.1. Receipt of a complaint
>
> On Monday the 5th of September 2005, the Minister, who was abroad at the time, received a telephonic complaint from Mr S Macozoma. Mr Macozoma informed the Minister that he had been harassed by the NIA from Monday the 29th to Wednesday the 31st of August 2005 and that he and his family had been subjected to surveillance over that period. At that stage, it is understood that the Director-General of the NIA, Mr B Masetlha had not informed the Minister that Mr Macozoma was under surveillance by the NIA or that the surveillance operation had been compromised.
>
> On Wednesday the 7th of September 2005, the Minister received correspondence from private attorneys informing him they had been instructed by Mr Macozoma to interdict the NIA from harassing their client and any member of his family. As a result the Minister instructed the Director-General of the NIA to formally report on the alleged surveillance operation conducted on Mr Macozoma. This report was forwarded to the Minister on Friday the 16th of September 2005.
>
> 1.2. Request for an investigation in terms of the Intelligence Services Oversight Act

[23] IC 1.

[24] IC 17.

On the 20th of September 2005 the Minister formally requested the Inspector-General to investigate the allegations made by Mr Macozoma. The request was formally directed in terms of the provisions of section 7(7)(c) of the Intelligence Services Oversight Act, 1994 (Act 40 of 1994) which obliges the Inspector-General to perform all functions designated to him by a Minister of the designated Intelligence Services, of which the Minister for Intelligence Services is one.

1.3. Nature of surveillance operations and misleading of the Inspector-General

In a Phase One report addressed to the Minister on the 14th of October 2005 the Investigation Team reported that the NIA had in fact carried out a surveillance operation directed at Mr Macozoma between the 29th and the 31st of August 2005. This operation was not authorised in terms of existing NIA operational policy and was therefore un-procedural.

The reasons advanced by the Director-General, Mr B Masetlha and members of the senior management of the NIA as to why Mr Macozoma was placed under surveillance at all had been found by the Investigation Team to be without substance and merit. The Investigation Team noted with concern attempts to conceal the fact that Mr Macozoma was specifically targeted for surveillance by the NIA and to mislead the Minister and the Investigation Team as to the true nature of events surrounding this particular operation. The Investigation Team as a result concluded that the surveillance operation was both un-procedural and – as an intrusive measure had been deployed without proper justification – lacked legitimacy and based on the facts before us, was therefore unlawful.

1.4. Recommendations of the Inspector-General

Based on our findings, the Investigation Team recommended that the Minister consider taking disciplinary steps against the management team of the NIA and that the NIA continue with an internal investigation into the circumstances which resulted in the surveillance operation against Mr Macozoma being compromised. The Investigation Team also identified the need for a policy review in specified areas of concern that included operational policy on the authorisation of surveillance targets, in particular the identification of and authorisation required for secondary targets identified during the course of a surveillance operation and a policy framework in support of target identification for Counter-Intelligence Investigations.

> Although the purpose of the first phase of the investigation had been to determine the circumstances and facts that led to Mr Sakumzi Macozoma being placed under surveillance by the NIA, during the course of the investigation the need was identified for a further investigation into the possible link between the surveillance of Mr Macozoma and the so-called Project Avani – which the NIA had carried out at about that time."

[102] Material aspects of the statement released by government are:

(a) The Minister, while overseas, received a telephonic complaint from Mr Macozoma that he had been harassed by the NIA from Monday 29 to Wednesday 31 August 2005.

(b) Mr Masetlha had not informed the Minister of the surveillance or that the operation had been compromised.

(c) Mr Macozoma's attorney had threatened an interdict.

(d) The IGI had concluded that—

i) the NIA had in fact carried out a surveillance operation directed at Mr Macozoma on the above dates;

ii) the operation had not been authorised and was unprocedural;

iii) the reasons advanced for the surveillance were without merit;

iv) there had been attempts to conceal the fact that Mr Macozoma was specifically targeted;

v) there had also been attempts to mislead the Minister and the investigating team as to the true nature of the events surrounding this particular operation; and

vi) the operation was both unprocedural and, as an intrusive measure had been employed without proper justification, lacked legitimacy and was therefore unlawful.

[103] The public importance of and interest in these events can neither be gainsaid nor over-emphasised. A member of the public was unlawfully and improperly harassed and he and his family suffered an egregious and inexcusable invasion of privacy. All this consequent upon secret government action. The public is entitled to know all except that which cannot be revealed on account of important national security considerations. I would put the strong public interest to know as well as the extent to which the material is already in the public domain on the one side of the scale and the appropriate weight to be attached to the government objection on the other side of the scale in order to determine where the balance falls in the interests of justice enquiry. Of course, all the other factors mentioned in the main judgment must also be considered.

[104] I now investigate the further extent to which the matter came to be in the public domain and matters other than those in the government communiqué that were subjected to public exposure. Two major items of publicity in relation to these events occurred almost a year apart from each other. The first was a *Sunday Times* article[25] that appeared some five months after the botched surveillance and about three months after the report by the Inspector-General on the surveillance. It is based on documents

[25] Wa ka Ngobeni et al, *Secret report exposes spy bungle* (15 January 2006).

before the High Court in relation to Mr Masetlha's dismissal. The publication cannot be said to have been unlawful because there was no court order prohibiting publication of material before the court. The second was in the *Mail & Guardian*.[26] This was around the time when the application for leave to appeal had served before this Court and a decision to grant leave to appeal had been taken. No order existed preventing publication of this article either.

[105] I set out the salient revelations about the IGI report contained in the first of the two articles mentioned in the previous paragraph[27] that were not in the government release:[28]

(a) The NIA justified its decision to spy on Mr Macozoma saying he had links with a foreign intelligence agent.

(b) That agent was code named Mr F.

(c) Messrs Masetlha, Njenje and Mhlanga had told the investigating team that they had monitored Mr Macozoma because they had confirmed that a meeting between the businessman and a foreign agent was to take place on 28 August, a day before the surveillance began and that Mr Masetlha had claimed that he had information that the foreign agent and Mr Macozoma "knew each other and had met".

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[26] Brümmer and Sole, *Saki, the spooks and the French* (16 February 2007), http://www.mg.co.za/articlePage.aspx?articleid=299160&area=/insight/insight__national/, accessed on 13 May 2008. The Court papers wrongly allege that the publication took place on 22 February 2007 but nothing turns on this.

[27] Above n 25.

[28] Above [101].

(d) The IGI report criticises the NIA for bungling the surveillance of Mr Macozoma and again reproduces a sentence from it—

> "[t]he surveillance team did not discover that they themselves were being monitored by a private security company and the SAPS, who were alerted to the presence of strangers in the area".

(e) The spies also used their personal vehicles rather than untraceable NIA vehicles.

(f) The intelligence on which Messrs Masetlha, Njenje and Mhlanga had relied for their decision to focus on Mr Macozoma did not correspond with the intelligence report received from the investigating team.

(g) Mr Masetlha and his two deputies had attempted to "conceal the true nature of the surveillance operation" against Mr Macozoma.

[106] As I have already said, the second article appeared early in 2007, about a year after the first. It is headed rather sensationally: "Saki, the spooks and the French". It reveals information about all three documents. I now set it out.

[107] The article says of the Njenje statement:

> "Njenje states that he was called by an acquaintance on August 31, who said that Macozoma wanted confirmation that people watching his home were from the NIA, as this was what they had claimed when confronted by police.
>
> Betraying that he knew of the operation, Njenje states that he then phoned the NIA's surveillance coordinator 'and enquired from him if it was true that the team has

already deployed around Saki's residence. He answered affirmatively whereupon I instructed him to immediately withdraw them.'

Njenje then briefed Masetlha on 'the flop'. Masetlha 'advised that I phone Macozoma and indicate to him the intention of our operation'.

Njenje spoke to Macozoma the next day. 'I told him . . . indications were that we had a counter espionage operation on the roll. I mentioned that there was a French intelligence officer who was attempting to make contact with influential South Africans for the purposes of winning them over, [and] that Saki's name was among those the French intelligence officer was interested in: therefore the aim of the NIA operation was to positively identify the French intelligence officer.'"

[108] The article reveals and comments on the Masetlha letter in the following terms:

"Masetlha himself repeated the 'French intelligence' explanation to Kasrils three weeks later in a report also contained in the court file.

Masetlha's report states that on August 24 the NIA's then general manager for counter-intelligence, Lloyd Mhlanga, was briefed by one of his managers about 'the envisaged activity by the French intelligence service (DGSE) that had as an intention efforts meant to make contact with South African business officials associated to the African National Congress'.

Njenje subsequently authorised surveillance of Olivier Fichot, the first secretary at the French embassy in Pretoria. A diplomatic source confirmed this week that Fichot is an 'official representative' of the DGSE, meaning the South African authorities were informed of his function.

Masetlha's report continues: 'On . . . August 27, a surveillance operation commenced on Fichot's residence number 205 Melk Street Nieuw Muckleneuk . . .'. This is not Fichot's residence. The French embassy, however, is at 250 Melk Street. It appears that either Masetlha got his facts badly wrong or the bungling NIA had put surveillance on the French embassy itself.

> Masetlha's report says that no movement was seen at Fichot's 'residence' on August 27 and 28 and that as a result, Mhlanga asked the surveillance coordinator to 'cover' Macozoma's home too.
>
> The operation was compromised on its second day. 'The surveillance team encountered problems with members of the South African Police Service accompanied by members of a private security company . . . Macozoma later drove out of the residence and the surveillance team lost him.'"

[109] It is as well to note at this stage that the French agency concerned, the DGSE, as well as the name of the agent, Mr Fichot, are now put into the public domain. Secondly more possible bungling is exposed. If the newspaper is correct, the NIA went to the wrong house.

[110] The *Mail & Guardian* makes additional disclosures on the IGI report:

(a) It was expected that Mr Macozoma would be approached by the French foreign intelligence service, the DGSE.

(b) The official NIA operation that included the surveillance of Mr Fichot was called Operation Fairwood.

(c) There was no link between the surveillance of Mr Fichot and the surveillance of Mr Macozoma. The implication is that Messrs Masetlha, Njenje and Mhlanga lied when they said that the surveillance on Mr Macozoma was the result of the fact that the team had lost Mr Fichot. Indeed it appeared from the documents that the Macozoma surveillance had been ordered one day before the surveillance of Mr Fichot had started.

[111] In addition the *Mail & Guardian* repeats some of the material contained in the 2006 *Sunday Times* article referred to earlier:

(a) The report criticises the amateurish handling of the operation in that amongst other things the operatives concerned used their own rather than NIA cars which could not be traced.

(b) The report also points out that the NIA surveillance team failed to notice that they were being watched by private security guards and policemen. They remained in place even after their cover had been blown!

[112] Operation Fairwood was subsequently[29] referred to in two newspaper articles about Mr Masetlha's criminal trial.[30] The first is that published by SAPA[31] during the course of the trial while the second appeared in the *Mail & Guardian* of the same date.[32] In addition a further article published in the *Mail & Guardian* in the context of the trial of Mr Masetlha[33] repeated information already in the public domain. The article said that it was on record that Mr Macozoma and Mr Fichot, a French intelligence operative, knew each other and had met as Mr Masetlha had said during an interview.

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[29] After this application was made but before it was argued.

[30] Mr Masetlha was charged for not conveying full information to the Inspector-General of Intelligence (the IGI).

[31] *Ex spy-chief quizzed on report* (31 October 2007), http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=84006&s, accessed on 14 May 2008.

[32] *Masetlha accused of being inconsistent in testifying* (31 October 2007), http://www.mg.co.za/articlePage.aspx?articleid=323649&area=/breaking_news/breaking_news__national/, accessed on 14 May 2008.

[33] *Masetlha 'had no political ambitions'* (10 November 2007), http://www.mg.co.za/articlePage.aspx?articleid=324540&area=/breaking_news/breaking_news__national/, accessed on 14 May 2008.

The last three documents considered

[113] It is in this context that the Minister's objections to the remaining three documents must be evaluated to see whether the balance falls in favour of their release to the public and against their being kept secret. I repeat that the boundaries of the investigation are concerned with the public interest in the information together with the extent to which the information is in the public domain, on the one hand, and the Minister's reasons concerning the nature of the security interest on the other.

IC(iii): Mr Njenje's report

[114] This is the document produced by Mr Njenje talking about the information he had received from someone enquiring about the surveillance on behalf of Mr Macozoma. As correctly reported in the newspaper publicity concerning this document,[34] the report says that Mr Njenje received a telephone call enquiring about whether the surveillance on Mr Macozoma was NIA-inspired because that is what the operatives concerned had said to the police. It also says that Mr Njenje telephoned the NIA surveillance co-ordinator and asked him if it was true that the surveillance had already been deployed around Mr Macozoma's residence. The co-ordinator said it was, whereupon Mr Njenje instructed him immediately to withdraw the team. Mr Masetlha was then advised and there was finally a communication with Mr Macozoma on the issue.

[34] Set out in [107] above.

[115] The Minister wants this Court to keep the Njenje report secret because, so he says, the document reveals the name of an operative and, what is more, contains information that might disclose the identity of the operative and place his life in danger. The Minister also objects to the disclosure of this document on the ground that it discloses a chain of command.

[116] The only person identified in the Njenje report is the surveillance co-ordinator referred to in the article. He was simply asked whether the surveillance had already commenced and he replied in the affirmative. The only other reference to this co-ordinator in the report is that he was asked to obtain statements from those involved. There is no other information in the Njenje report about him except that the report names him. I find it impossible to understand how his life would be in danger if his name were to be released in view of his limited role. I cannot see why the document should not be disclosed on that ground.

[117] The objection concerning the chain of command must be dealt with next. The Njenje report deals broadly with the following areas—

(a) the fact of the receipt of the complaint;

(b) that certain information was sent through to Mr Njenje by the person who had received the complaint;

(c) that the surveillance co-ordinator was asked to stop the surveillance after he had confirmed that it had already begun;

(d) a conversation between Mr Njenje and the person who had originally telephoned in which Mr Njenje thanked him for the information;

(e) the fact that Mr Masetlha was later briefed; and

(f) a phone call by Mr Njenje to Mr Macozoma providing some explanation for the fiasco.

[118] Only three NIA employees are mentioned in the report: the surveillance co-ordinator who said that the surveillance had begun and who was asked to stop the surveillance and to obtain statements from those involved, the Deputy Director-General and the Director-General. To my mind, no chain of command is revealed. In the light of the contents of the document it is difficult to see any reason for its non-disclosure other than to limit the embarrassment of the NIA. This is not an appropriate basis.

[119] Although the Minister did not take the point, I have noticed that the Njenje report contains the information that Mr Njenje had said in a telephone call to Mr Macozoma that a French intelligence officer was interested in him. If the Minister had objected on this basis, I would have dismissed it. This is because it is already in the public domain that Mr Fichot, an intelligence agent for the French agency, the DGSE, was interested in Mr Macozoma.

[120] I have already said that the public interest in the matter is enormous. The Minister's reasons examined in the light of the document as a whole are nothing short of fanciful. The Njenje report must therefore, in my view, be released.

IC 1: The Masetlha letter

[121] After the Minister received a complaint from Mr Macozoma about the surveillance and after Mr Macozoma had threatened an interdict, the Minister asked the Director-General to account for what had occurred. Mr Masetlha investigated this undoubtedly intrusive surveillance and reported to the Minister. The document, the possible secrecy of which we are now considering, is that report. The starting point of the enquiry into whether the document should be released is that it was of great public importance and justified considerable public interest. The report was concerned with and provided particulars of unlawful action taken by the NIA that had the impact of infringing upon the privacy of Mr Macozoma and his family. Unless there was good reason for concealment, the public as a whole had the right to know what Mr Masetlha said to the Minister about this unjustifiable action. The objections of the Minister must be evaluated in this context.

[122] The Minister objects on the basis that release of the information would allow "hostile elements" to use its contents. These elements might, the Minister says, disrupt operational planning and harm the operatives concerned. The Minister was also concerned that the information might be used to damage diplomatic relations

between certain states. More specifically, the Minister objects to the disclosure of the names of operatives and the activities in South Africa of a foreign intelligence service.

[123] It is the disclosure of the foreign intelligence service and the name of the operative that could, as far as the Minister is concerned, have implications for co-operation between institutions and diplomatic relations. The only foreign agency mentioned in the letter is the French DGSE. The only foreign agent mentioned is Mr Fichot of the French DGSE. These matters are already very much in the public domain and this objection by the Minister holds nothing. If regard is had to the extent to which the report is already in the public domain,[35] the Minister's case is weakened. As pointed out earlier, it is already known that the Masetlha letter said that the then NIA Manager for Counter-Intelligence, Mr Lloyd Mhlanga, was briefed by his managers on the intention of the French DGSE to make contact with prominent South African business people. It was also reported that the Masetlha letter is to the effect that Mr Njenje authorised the operation against Mr Fichot. The article, if correct, seeks to show that the NIA surveillance team had the wrong address and went to the wrong house. I do not see how, once all this is known, foreign relations could at all be endangered.

[124] The objection cannot be upheld even where it concerns the disclosure of names of operatives. It may be said at first blush that the Masetlha letter is replete with the names of operatives. On closer examination however the following appears. There

[35] Above [108].

are nine NIA names in the document. Three of these names, Mr Masetlha, Mr Njenje and Mr Lloyd Mhlanga are already in the public domain. This leaves six names:

(a) One is that of the Manager Counter Intelligence Investigations whose name is mentioned twice.

(b) The second is the Coordinator Surveillance whose name appears ten times.

(c) The person who was the leader of the surveillance team appears five times.

(d) The name of a person whose designation might reveal too much is mentioned twice.

(e) An operative in charge of the operation whose name is mentioned once.

(f) Lastly, the name of the operative who watched Mr Fichot's house is mentioned three times.

[125] In the light of the nature of public interest involved I see no reason why the security interest could not be more than adequately protected by making 23 deletions that concern six names and that would involve deletion of a little more than 40 words.[36] This to ensure that the public could know and evaluate the account given by Mr Masetlha to the Minister on a matter of public importance.

[126] Annexure IC 1, the Masetlha letter must therefore be released.

IC 17: The IGI report

[36] After all, the document has 873 words.

[127] I have already set out the relevant parts of the redacted and amended version of the IGI report that the Minister released for public consumption.[37] Part of the argument by the Minister is that this limited release of information to the public somehow excuses the Minister from telling the public more. The document that was released to the public must be compared with the IGI report as a pre-cursor to an evaluation of the Minister's objection.

[128] The public version is no more than a recapitulation of the summary of the relevant portion of the report redacted, changed and expanded in certain respects. It is important to point out these differences to start with:

(a) The name of Mr Macozoma's attorney who had threatened the interdict on his behalf was removed from the summary of the report and replaced with the phrase "private attorneys".

(b) The document says that the Minister "tasked" the Inspector-General to investigate the allegations made by Mr Macozoma. The word "tasked" contained in the IGI report summary is replaced by the word "requested".

(c) The IGI summary says that the relevant legislation "allows" the IGI to investigate. The IGI public version changes the word "allows" to "obliges".

(d) The IGI report makes it quite clear that the relevant legislation allows the investigation of complaints by members of the public as well as by governmental agencies. In the public version the words "investigate complaints from members of the public" are deleted.

[37] It has been called the IGI public version and is set out in full above [101].

(e) The IGI summary expressly states that "the operation was not authorised in terms of existing NIA operational policy and was therefore unlawful". The public version is amended and it is said to the public that the report found the operation to be merely "un-procedural".

(f) The public version consistently holds back the names of the two Deputy Director-General of Intelligence and the General Manager of Counter Intelligence, Messrs Njenje and Bob Mhlanga, wherever they appear, and replaces them with the words "and members of the senior management of NIA". I have already shown these names are very much in the public domain.

(g) The IGI summary makes it clear and the *Sunday Times* has published[38] that Messrs Masetlha, Njenje and Bob Mhlanga tried to "conceal the true nature of the surveillance operation against Mr Macozoma". This is excluded from the IGI public version altogether. The public version says that these senior officials tried to conceal "the fact that Mr Macozoma was specifically targeted for surveillance by the NIA".

(h) Finally I must point to an interesting sleight of hand. I have already said that the conclusion that the operation was unlawful was changed in the public version and reflected as being unprocedural. In addition the public version has in it a sentence which I do not find in the IGI report at all. The sentence reads:

> "The Investigation Team as a result concluded that the surveillance operation was both un-procedural and – as an intrusive measure had been employed without proper justification – lacked legitimacy and based on the facts before us, was therefore unlawful."

[38] Above [105(g)].

> The IGI report never said that the operation was unprocedural, nor did it qualify the unlawfulness finding in the way conveyed by the public version.

[129] It is this publicly released document upon which the Minister relies. Regardless of what the motives may have been for all the changes it is clear to me that the public was deceived at least by some of them. The public deceit has, to an extent, been cured by what has been said in the preceding paragraph. The conduct of the agency in producing the public version is as an exercise of public power inconsistent with the values mandated by our Constitution and is therefore, at the very least, regrettable. The public version is the summary of the IGI report amended in material respects. It would have been different however, if the public version of the report did in fact contain the detail of the original report without disclosing the names and sources. As I have pointed out earlier this is a far cry from what the public version in fact does.

[130] It is against this background that it is necessary to consider whether it is in the interests of justice to keep the IGI report secret. The Minister urges secrecy on the basis that the document contains the name of a foreign target of an intelligence operation, sources of intelligence as well as the names of NIA operatives. This contention must be examined against the documents.

[131] The only foreign agent who was the target of surveillance mentioned in the IGI report is Mr Fichot of the French DGSE. This information is quite public. The only source of intelligence referred to is the file concerning the Fairwood Operation. This

is also public knowledge as I have already pointed out. The argument concerning the disclosure of NIA operatives must now be dealt with.

[132] One more operative is mentioned in the IGI report compared to the names that have been mentioned in the Masetlha letter.[39] As I show immediately, it is in the public interest to release the entire report – so much so that the deletion of all the names of NIA operatives is fully justified.

[133] The public version of the report communicates that there was a surveillance operation against Mr Macozoma, that it was not authorised and that it was unlawful. Far from providing details of the IGI report and findings the only material aspects that are set out in the public version are—

(a) particulars as to the circumstances that led to the investigation;

(b) that the surveillance was carried out;

(c) that it was unprocedural and in some limited way unlawful;

(d) that the reasons given by the NIA for the surveillance were without merit; and

(e) that there was an attempt to conceal and mislead.

[134] There is no detail at all about any of the following—

(a) the circumstances in which the surveillance took place;

(b) the basis on which it was found that the surveillance was unauthorised and unlawful;

[39] See above [124].

(c) the reasons that were advanced by the NIA for venturing upon the unlawful surveillance of a private citizen;

(d) why these reasons were unacceptable; and

(e) on what basis the NIA concluded that the true nature of the surveillance of Mr Macozoma had been concealed by the NIA senior management.

[135] Above all the summary says not a word about all the bungling by NIA operatives which received publication before and after the release of the public version.[40]

[136] Those who bungled and those who perpetrated a deceit upon the Inspector-General were all civil servants paid by the taxpayer. Those who deceived the Inspector-General were indeed very senior members of the NIA receiving high salaries. A court should not be used as an instrument to conceal bungling and deceit under the guise of protecting the names of operatives and other details that are already in the public domain. To suggest that this course is in the interests of justice is, to my mind, to define the concept of justice in a manner inconsistent with the understanding of the notion throughout the world and, perhaps more importantly, in a manner utterly inconsistent with our Constitution.

The interlocutory application

[40] 23 March 2006.

[137] The interlocutory application was dismissed by a majority. I concluded that it should have been granted. It is now necessary to provide the reasons for the conclusion that I had reached. The only material in dispute at the time the interlocutory application was heard was the material that has been considered in the main judgment and in this judgment. In summary, it consisted of two portions of an affidavit that had been filed by Mr Masetlha in the High Court proceedings, a single paragraph of one annexure to it and the whole of three other annexures. The material was therefore limited. It will be recalled that Independent Newspapers asked for the documents to be given to them so that they would be able to advance argument in favour of the release of the documents. They contended that they would otherwise have been hamstrung in arguing their case. They agreed that the material should be made available only to some of their legal representatives as well as to two senior editors. They were prepared to undertake not to publish the information pending the final determination of their interlocutory application.

[138] In my view the test to be employed in regard to whether or not the documents should have been released to the legal representatives and editors for a limited purpose upon the stated condition would be the same as that employed in determining whether the documents ought to have been released to the public. In other words, we would need to decide whether the limited disclosure contended for in the interlocutory application would have been in the interests of justice. The interests of justice would

need to be determined by a court looking at the document concerned and applying the test set out in the main judgment.[41]

[139] The fundamental problem with the reasons for not making this material available for the limited purpose contended for in the interlocutory application is that the judgment has no regard to the content of the documents concerned. On the other hand it does quite properly have regard to the contents of the document concerned in applying the interests of justice test in this application. This underlines the wholly different and to some extent contradictory approach in the main judgment in the reasons for the dismissal of the interlocutory application on the one hand[42] and the way in which the main application is determined on the other.[43] The concept of the interests of justice is merely mentioned in the reasons for the dismissal of the interlocutory application but no test of any kind is applied in relation to those reasons. In fact, the reasons for the refusal of the interlocutory application put together an array of sometimes unrelated factors in coming to the conclusion.

[140] Five matters must be canvassed before I explore the interests of justice in keeping each document secret even from the legal representatives and senior editors. The first is a matter of approach. One must be careful in this analysis not to provide the reasons, in hindsight as it were, for the limited release of the material. This is because more argument has been heard since the interlocutory application and the

[41] Above [54] – [56].

[42] Above [21] – [38].

[43] Above [48] – [74].

material concerned has by now been subjected to in-depth analysis. I must try to ensure that the reasoning and the analysis which compel me to release the disputed material to the public now, do not creep into the reasons which impelled me to authorise the limited release consequent upon the interlocutory application. Nor, on the other hand, is it appropriate to argue that the fact that the main judgment releases some material now means that that material ought to have been released before. The interlocutory application must be determined on its own merits.

[141] The second is that it would in principle be more difficult to justify, in the interests of justice, a refusal to permit a limited conditional disclosure of material sought to be secreted than to justify a refusal to disclose the material to the whole public. Secrecy is in a sense a matter of degree. Nothing is ever completely secret. Information is always known to somebody. Information impinging on national security is no exception. Conditional limited disclosure of classified information for official purposes is well known. The decision to be made in the interlocutory application is whether there ought to have been limited conditional disclosure for the purpose of legal proceedings.

[142] Thirdly, it must be understood that Independent Newspapers brought this case in the fulfilment of its constitutional obligation to inform the people of this country. I can do no better than to repeat what was said in the *SABC* case:

> "The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression."[44]

Independent Newspapers is not a busybody attempting to interfere in a case which does not concern it. Accordingly the fact that the parties to what was referred to in the main judgment as the underlying case had all the information is irrelevant to whether Independent Newspapers should have it on a limited and conditional basis. The underlying case is different from the case of Independent Newspapers. Independent Newspapers must be assisted in the performance of its constitutional mandate unless it is not in the interests of justice to do so.

[143] Fourthly, I must point out that there had been considerable access to the material for professional purposes already. Free access to the material would have been given to the Minister's attorneys and counsel, Mr Masetlha's attorneys and counsel in the High Court, the prosecuting team in the Hatfield Community Court, Mr Masetlha's legal team in the criminal proceedings before the Hatfield Community Court, certain staff members in the Magistrate's Court, certain staff members in the High Court, as well as 24 South African clerks and four foreign clerks employed in this Court at the time the matter was heard.

[144] Lastly, it is vital that parties to legal proceedings are able to argue their case effectively and properly. The more so if the party seeking the material does so in the

[44] Above n 9 at para 24.

valiant effort to comply with a constitutional obligation. It was my view that it would be unduly difficult for parties to argue the matter without referring to the documents. The main judgment shows this. It would have been quite impossible to write the judgment without referring to the documents concerned. I fear that the argument presented to us has not been as useful as it would have been if the documents had been released.

[145] I now provide reasons in respect of the specific material in issue in the interlocutory application.

The material in Mr Masetlha's in camera affidavit

[146] I read the disputed material in Mr Masetlha's affidavit[45] and, at the time, could see no risk or potential harm to national security in releasing it. At that stage, I would already have been inclined to release it to the general public. The material has now been released and I set it out in this judgment to show that there could have been no reason to prevent its conditional limited release for the purpose of conducting legal proceedings effectively.

[147] I set out the disputed material in justification of my position:

> "3.2 [T]he Minister inaccurately accused me before Cabinet of taking a public position on the issue in conflict with the Minister's instructions to me, succeeded in my absence in obtaining the support of the Cabinet in

[45] Above n 4.

condemning my actions and then made such condemnation public, through the Cabinet's spokesperson.

. . . .

4.11 At the very next Cabinet meeting, the Minister reported to Cabinet, inaccurately, that NIA's confidential submission to the Khampepe Commission (in the form of the revised draft) had been submitted to the Khampepe Commission in conflict with an instruction given to me by the Minister.

4.12 On the strength of the Minster's inaccurate accusation, my alleged conduct in making a submission to the Khampepe Commission in conflict with the Minister's instruction was disapproved by the Cabinet. The Cabinet however decided that the matter should remain confidential.

4.13 The Cabinet spokesman however included in his public statement of the deliberations of Cabinet, at the Minister's insistence, a reference to Cabinet's disapproval of my alleged conduct.

. . . .

18 . . . The conclusions in the counter-intelligence report included the following in no special order:

18.1 There was a need for the President to intervene;

18.2 The struggle for position around the issue of the succession to the President was complicating the issue;

18.3 The groupings instigating the unrest (which included the group) were identified;

18.4 A unit within the Scorpions was an instrument of the group;

18.5 The group wanted to retain the Scorpions in its original form, ie located without any additional accountability;

18.6 The Minster had associated himself with the group."

All the other material

[148] I had read the other disputed material and had subjected it to mild scrutiny. I had not analysed it closely in relation to the context or in relation to the other publicity. In the light of four of the five considerations mentioned earlier,[1] I came to the conclusion that there were no interests of justice considerations which ought to have precluded the release of the material concerned. My view was that the material was embarrassing to the government.

[149] I was convinced that the responsible legal representatives and senior newspaper editors would handle the matter with sensitivity and care. I was also persuaded that all were bona fide and would comply with their undertaking not to publish the material. I accordingly concluded that the material should be made available to them. The NIA and the government would have been embarrassed by the information. I saw no possibility that the newspapers would have revealed the bungling, the identity of Mr Fichot, the foreign French intelligence service known as the DGSE, the names of the junior operatives or any information which might endanger them. The legal representatives and the newspaper editors are responsible citizens as much interested in the security of the South African state as anyone else might be, including the NIA, the Minister's attorneys and counsel, Mr Masetlha's attorneys and counsel in the High Court, the prosecuting team in the Hatfield Community Court, Mr Masetlha's legal team in the criminal proceedings before the Hatfield Community Court, certain staff

[46] Above [141] – [144].

members in the Magistrate's Court, certain staff members in the High Court, as well as 24 South African clerks and four foreign clerks employed in this Court at the time.

Costs

[150] I would have ordered the Minister to pay the costs of Independent Newspapers, both of the interlocutory application and this application. It is pointless to elaborate on this in a minority judgment.

Sachs J concurs in the judgment of Yacoob J.

SACHS J:

[151] The concept of open justice is not self-contained. It is an integral part of living in the open and democratic society that lies at the heart of our constitutional order.[1] It is also conditioned by the fact that the Constitution envisages a new kind of intelligence service, one that functions at all times within the letter and spirit of the

[1] The Preamble states (in part):

> "We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
>
> . . . .
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law".

Constitution and subject to civilian oversight.[2] This is the context in which I believe the balancing in the present matter between the principles of open justice, on the one hand, and protecting important state interests in preserving secrecy, on the other, has to be conducted.

[152] With these considerations in mind I find myself in agreement with the broad sweep of Moseneke DCJ's judgment. In my view, he has outlined the legal issues and the principles that govern them in an elegant and persuasive manner. Furthermore, in relation both to the interlocutory application to enable the legal representatives of the newspapers to view the embargoed material, and to the final determination of what should remain secret, he has set out the competing factors in a most helpful and comprehensive manner. These are borderline cases. Acting with due regard to the need to be open where possible, the Minister agreed to the disclosure of the great bulk of the material initially withdrawn from the public record, and offered carefully-reasoned justifications for keeping the rest out of the public domain. Yet, and not without hesitation, I have come to the conclusion that, at the end of the day, after all the competing interests have been carefully placed in the scales, the analysis by the Deputy Chief Justice fails to give enough weight to the impact that the non-disclosure of even relatively small parts of the record would have on the principle of openness. I

[2] Section 199(5) stipulates that:

> "The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."

Section 199(8) requires that:

> "To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament."

accordingly align myself with the outcome proposed in the minority judgment of Yacoob J.

[153] To my mind, this case requires special attention to be paid to the importance of openness, a theme that until now has not been given much attention in our jurisprudence. The principle of openness is an integral part of the constitutional vision of an open and democratic society. Section 1 of the Constitution declares that the democratic government of South Africa is founded on the principles of accountability, responsiveness and openness.[3] The theme of openness is underlined right through the Constitution: in the Preamble,[4] the limitation clause in the Bill of Rights,[5] in the provision dealing with the interpretation of the Bill of Rights,[6] and in sections regarding the manner in which Parliament and other legislative bodies should function.[7]

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[3] Section 1 states:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . . .
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[4] Above n 1.

[5] Section 36(1) requires that:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

[6] Section 39(1) states that:

> "When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

[7] Section 59, outlining the functions of the National Assembly, requires that:

> "(1) The National Assembly must—
>
> . . . .

[154] Indeed, the most notable feature of these provisions is the inseparability of the concepts of democracy and openness. The rationale for constitutionalising this symbiosis can be found in our history. By its nature, minority rule was not only racist; it was hegemonic and autocratic. The security police received greater and greater powers, and ended up virtually a law unto themselves. In the paranoid world-view of those in authority who spoke of a total onslaught on South Africa, everyone was a potential enemy, and secrecy became the order of the day. The impact on the lives of the majority of citizens was devastating. Although security policy was advanced as being in the 'national interest', its primary goal was to safeguard the racially exclusive state and the privileged status of the white community. Security strategy was formulated by a select group of cabinet ministers and security officials, excluding parliament and the public from effective participation. The consequences have been summed up in the following terms—

> "the death of thousands of people; the impoverishment of millions of lives; massive economic waste and damage; a regional arms race; and a greater resolve by the liberation movements and international community to end apartheid. In short, the outcome was perpetual insecurity for the states and inhabitants of South and Southern Africa."[8]

(b) conduct its business in an open manner".

and that

"(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."

Similar provisions apply to the National Council of Provinces and the provincial legislatures. See sections 72(1)(b) and (2) and 118(1)(b) and (2).

[8] Nathan *The Changing of the Guard: Armed Forces and Defence Policy in a Democratic South Africa* (Human Science Research Council, Pretoria 1994) 11.

And in the striking words of Mahomed DP: "Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history."[9]

[155] An open and democratic society does not view its citizens as enemies. Nor does it see its basic security as being derived from the power of the state to repress those it regards as opponents. Its fundamental philosophy is quite opposed to the authoritarianism of the past. Its starting-point is not repression, but the promotion of positive elements of social stability, such as food security and job security. Above all, the society is bound together not by ties of arrogance combined with fear, but by a shared sense of security that comes to all citizens from the feeling that their dignity is respected and that each and every one of them has the same basic rights under the Constitution.

[156] One of these basic rights gives a special and rare texture to our Constitution. It is the right in section 32 of everyone to have access to information. The Promotion of Access to Information Act (PAIA),[10] adopted on 3 February 2000, gives effect to this right, and although the applicants cannot rely on the provisions of PAIA to found their claim,[11] it remains highly relevant because of the illumination it throws on the totally

[9] *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 17.

[10] Act 2 of 2000.

[11] This is due to the limitation of the application of PAIA in section 12, which states:

> "This Act does not apply to a record of—
> (a) the Cabinet and its committees;
> (b) the judicial functions of—
> (i) a court referred to in section 166 of the Constitution;

changed character of our society envisaged by the Constitution. This rupture with the past was emphasised by the Deputy Minister for Justice and Constitutional Development, Cheryl Gillwald, in the following terms:

> "Considering our not so distant past, one would understand the lack of complete faith in the self-regulating accountability of the state. The Act therefore constitutes a clean break with practices of the successive apartheid governments that were so often secretive. In most cases this secrecy had a profound impact on the lives of the majority of citizens in this country. As the new government we had no choice therefore but to ensure that we create conditions that would allow citizens full and democratic participation in the governance process. We have an obligation to make rights enshrined in the Constitution real!"[12]

The sea-change in philosophy and practice is highlighted in PAIA's Preamble, which recognises:

> "[T]he system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations".[13]

[157] And consistent with this new approach, the point of departure for the statute is that people have a general right of access to information possessed by the state, coupled with a more limited right of access to information in private hands. Exemptions, including those set out in favour of national security, are presented as

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(ii) a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996); or

(iii) a judicial officer of such court or Special Tribunal; or

(c) an individual member of Parliament or of a provincial legislature in that capacity."

[12] Delivered at a seminar on the Promotion of Access to Information Act, Cape Town, 3 May 2002. The full text is to be found at http://www.info.gov.za/speeches/2002/02051409461001.htm, accessed 13 March 2008.

[13] Above n 10.

exceptions, and not as the norm. Thus the relevant provision dealing with national security does not provide a blanket ban on disclosure of such information, but rather furnishes carefully delineated and objectively reviewable grounds for non-disclosure.[14]

[158] Finally, in keeping with the transformed outlook, the intelligence services are given a distinct place in the Constitution. They share with all the other security services the duty to act, to teach and to require their members to act in accordance with the Constitution and the law, including customary law and international agreements binding the Republic.[15] The Constitution specifically places any intelligence service established by the President in terms of national legislation under the civilian oversight of an inspector, who is appointed to monitor its work by a

[14] Section 41(1) of PAIA reads:

> "The information officer of a public body may refuse a request for access to a record of the body if its disclosure—
>
> (a) could reasonably be expected to cause prejudice to—
> (i) the defence of the Republic;
> (ii) the security of the Republic; or
> (iii) subject to subsection (3), the international relations of the Republic; or
> (b) would reveal information—
> (i) supplied in confidence by or on behalf of another state or an international organisation;
> (ii) supplied by or on behalf of the Republic to another state or an international organisation in terms of an arrangement or international agreement, contemplated in section 231 of the Constitution, with that state or organisation which requires the information to be held in confidence; or
> (iii) required to be held in confidence by an international agreement or customary international law contemplated in section 231 or 232, respectively, of the Constitution."

It is unfortunate in the present matter that, since the provisions of PAIA are not applicable to cases involving judicial records (see above n 11), there is no clear guidance governing the principles to be applied. To overcome such problems, the outdated Protection of Information Act 84 of 1982 needs to be replaced by a statute that takes account of present day constitutional and social realities.

[15] Above n 2.

resolution supported by two thirds of the members of the National Assembly.[16] In general terms, the objects, powers and functions of intelligence services must be regulated by an Act of Parliament.[17] These constitutional provisions both safeguard the specific status of the intelligence services in the government hierarchy and ensure that they function within the parameters of an open and a democratic society.

[159] All these various constitutional provisions need to be viewed in conjunction. No longer is it possible to view the intelligence services as shadowy and all-powerful supports for a beleaguered society. Their function is to keep government well-informed, so that it can confidently fulfil its responsibilities towards ensuring a better life for all in a country undergoing major transformation. While many of the processes of information-gathering might remain confidential, and sensitive information gathered might be for restricted eyes only, their work is not essentially of the cloak-and-dagger kind popularised in Cold War fiction, with operatives putting their lives at risk with every venture they undertake. There will, of course, be intelligence-gathering activities of a highly sensitive nature involving matters such as serious cross-border crime, money-laundering, and international terrorist actions, where secrecy will be of the essence. But in my view, there is nothing that suggests

[16] Section 210 states:

> "National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for—
>
> (a) the co-ordination of all intelligence services; and
> (b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members."

[17] Section 199(4) states:

> "The security services must be structured and regulated by national legislation."

that the work of the intelligence services should automatically be regarded as secret. Everything will depend on the specific context.

[160] In the present matter the context consists of a dubious and botched surveillance project which gave rise to tensions inside the intelligence community, ultimately leading to litigation that came to this Court. It includes reference to the proceedings and representations of the Khampepe Commission which was also of great public interest. In these circumstances I believe that the constitutional provisions to which I have referred, taken together, place a rather robust thumb on the scales in favour of disclosure of all court documents.

[161] I agree with the Deputy Chief Justice that acceptance of this point of departure does not mean that technical concepts such as onus of proof should be allowed to loom large in the balancing enquiry. On the contrary, in fact-specific matters such as these, undue technicism, whether on questions of procedure or evidence, would be more likely to distort the achievement of constitutional justice than to enhance it. Similarly, it seems clear that, whereas in most cases involving proportionality, the courts will act as an outside eye in assessing the constitutionality of the way in which power has been exercised, in cases such as the present the courts have to do the balancing themselves.[18] Check-lists will not be helpful. As in all proportionality

[18] For similar examples of circumstances where judicial officers themselves have to exercise an on-the-spot judicial discretion, see *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC); 1999 (2) SACR 51 (CC) (the right to bail) at para 50; *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC); 1998 (1) SACR 227 (CC) (the right to a speedy trial) at para 30; *Shabalala and Others v Attorney-General of the Transvaal and Another* [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC); 1995 (2) SACR 761 (CC), (*Shabalala)* (access to prosecution dockets) at para 55.

exercises, the factual matrix will be all-important, and the court concerned will itself have to make an order based on its enquiry into the specific way in which constitutionally-protected interests interact with each other, and particularly with the intensity of their engagement.

[162] This would appear to be one of those areas where judicial experience and common sense could be of special importance. Thus, this Court accepted in *Shabalala* that the names of informers in criminal matters should not be revealed at any stage, even if such non-disclosure were to some extent to limit the capacity of the accused to make his or her defence.[19] The rationale for this common law rule was not only to protect the individual source from reprisals – the whole system of passing on information to the police would be jeopardised if informants feared their identity would be revealed.[20]

[163] The equivalent in the present matter would be redaction, to which neither party has objected in principle. The question is whether something more than appropriate redaction is required. In answering this question, it is important not to deal with hypothetical damage that could be caused to national security if certain types of information were to be revealed, but rather to verify whether on the facts a real risk exists that non-trivial harm could result. More particularly, it has to be asked whether more harm could well result from disclosure than from non-disclosure.

[19] *Shabalala*, id at para 172.

[20] Id at para 56.

[164] There are two idiosyncratic features that give this case a surreal character. The first is that the initiative to suppress access to certain internal intelligence documents came from the Court itself and not from the intelligence agency. The belated response from the Ministry does not smack of any real perceived need to protect hot state secrets from the public eye. Rather, it suggests that the Ministry wishes to make points of principle for the future. The second is that all the documentation had already been placed on the Court website, so that any interested party, whether friendly or unfriendly or just curious, could quite lawfully have downloaded and printed it out.

[165] I would add that a perusal of the actual contents of the documents supports the notion that their disclosure risks causing embarrassment rather than harm. In these circumstances, I feel that walls of national security would hardly have come tumbling down if the legal advisers had had access to the full record before deciding whether to encourage or discourage litigation. Far from being incandescent, the material was so banal, and so much of it had already been placed in the public domain, that their advice could well have been to desist from litigation because at best there was nothing to gain but dross.

[166] And, as a matter of principle, it would be unfortunate if officers of the court were to be regarded presumptively, or possibly, as dangerous enemies of the state, or even as irrepressible gossips who do not know how to keep a secret. Hopefully the day will never arrive where in cases involving extremely serious security matters some sort of vetting of legal advisers could be required as the price for making highly

sensitive material available to the defence. Yet if such an eventuality could even be hypothetically contemplated, not in the most notional of senses could the present matter be considered as potentially coming anywhere near that category.

[167] Similar considerations apply to the final determination of whether anything more than appropriate redaction is required. I agree with Yacoob J that more damage would be done to the national interest in general, and to the vitality of the intelligence service in particular, by withholding stale and routine information about the workings of the agency, than by allowing the normal rules governing public access to all court documents to apply. In my view, subject only to appropriate redaction, we should restore all the embargoed material to the website and give proper respect to the principle of open justice in an open society.

VAN DER WESTHUIZEN J:

[168] I have read the judgments of my colleagues Moseneke DCJ, Sachs J and Yacoob J. I agree with Moseneke DCJ that the interlocutory application should have been dismissed and thus with this Court's order of 29 August 2007, for the reasons given by the Deputy Chief Justice.

[169] As to the main application, I agree with much in the judgment of Moseneke DCJ. However, I am respectfully unable to support the conclusion. I agree largely

with the conclusion in Yacoob J's dissenting judgment. In this judgment, I provide a few brief reasons and also indicate where I am not entirely in agreement with Yacoob J.

[170] In my view, the test put forward in the majority judgment lacks specificity and provides insufficient guidance to courts on how to balance the competing interests of open justice and national security. I would have preferred a different test, on which I briefly express some thoughts below. However, I am of the view that disclosure of much of the disputed material is warranted, even applying the test put forth in the majority judgment. Therefore, I agree with Yacoob J that full disclosure of the material is required, subject to the qualification mentioned below. I associate myself with some of the views expressed in the judgment of Sachs J on the importance of openness.

[171] It might be that the exact formulation of an appropriate test could be left for another day, as the judgment of Yacoob J does. That being said, it may be useful to suggest the type of analysis that I would hold to be appropriate, although the discussion below is not intended to be comprehensive or definitive.

[172] In my view, the factors set out in section 36 of the Constitution could be of considerable use in the weighing of the interests that are at stake here.[1] Of course

[1] Section 36 of the Constitution states:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open

section 36 deals with the limitation of rights in the Bill of Rights in terms of law of general application. Here we are not dealing with a limitation imposed on a right by legislation or the common law, but with the weighing of competing interests by a court. Therefore, section 36 is not directly applicable. However, the balancing of competing interests that has to be done is not unrelated to a consideration of the reasonableness and justifiability of the limitation of a right, as required by section 36.

[173] In the weighing and balancing process required in this case we have, on the one side of the scale, the constitutionally recognised need for open justice. The judgments of Moseneke DCJ and Yacoob J – in my respectful view – correctly characterise it as a constitutional right, derived from a cluster of related rights, including the rights to freedom of expression[2] and to a public trial.[3]

[174] On the other side is national security, which the government is constitutionally obliged to protect. This constitutional obligation is recognised by Moseneke DCJ. This obligation is characterised in the judgment by Yacoob J as "a state interest aimed at the benefit of the people". I do not disagree. However, in my view the obligation to safeguard national security is related to the rights protected in the Bill of Rights and

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and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[2] Section 16 of the Constitution protects freedom of expression.

[3] The right to a fair public hearing is protected in section 34 of the Constitution.

the values embodied in the Constitution. The right to freedom and security of the person, protected in section 12,[4] comes to mind. Threats to national security may furthermore endanger several other rights in the Bill of Rights, from the rights to human dignity[5] and life,[6] and the right not to be subjected to slavery, servitude, or forced labour,[7] to political rights[8] and property rights.[9] Of course, freedom of expression itself might be threatened if national security is compromised. National security is essential for the preservation of the sovereignty and the democratic nature of the state, so prominently recognised in section 1 of the Constitution.[10]

[175] It is arguable that almost every limitation of a right by law of general application would somehow be based on the state's obligation to protect one or more other rights directly or indirectly; an important purpose of the state is after all to protect the rights of the people. Obvious examples include the law of defamation, which limits free expression in order to protect dignity and anti-pornography legislation which may limit free expression in the interests of dignity, gender equality

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[4] Section 12(1) provides for the protection of "the right to freedom and security of the person."

[5] Section 10 states: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[6] Section 11 provides that "[e]veryone has the right to life."

[7] Section 13 of the Constitution.

[8] Section 19 protects political rights.

[9] Section 25 protects property rights.

[10] Section 1 of the Constitution states:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

and the rights of children. Free movement is limited by the legal regulation of traffic for the sake of safety and the right to property is limited in the interests of the environment or other rights in the Bill of Rights. Even when the limitation of a right by the legislature is considered by a court, in terms of section 36, the balancing of competing rights may well be at the heart of the exercise, although the inquiry would of course focus directly on the words of a statute.

[176] The question in this matter is whether and to what extent the limitation of the right to open justice in the interest of national security, as the Minister contends, can be justified. In the terminology of section 36, the question would be whether it is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. It appears logically sound to me that factors such as the nature of the right that is limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and especially the question whether the purpose could be achieved by less restrictive means, should play a significant role.

[177] We have to determine the importance of the purpose of the limitation of the right to open justice. The executive, through the Minimum Information Security Standards (MISS), created a convenient tool for analysing the necessity for secrecy in a particular document to national security. Courts should presume that documents classified according to the MISS indicate the document's importance to national security, unless the person seeking disclosure can demonstrate why the MISS

classification is improper. However, the classification of a document following the MISS guidelines cannot be the end of the inquiry, as the Deputy Chief Justice holds in his judgment.

[178] The nature and extent of the limitation are highly relevant. The inquiry into the nature of the limitation includes an analysis of the type of proceedings in which disclosure is sought. When the government is a party to litigation, the adversarial nature of the proceedings creates the potential that the government will be tempted to restrict disclosure to avoid liability or embarrassment. Naturally, the government has the right to object to any potentially harmful disclosures, but it must show that the limitation it seeks is reasonable and justifiable.

[179] The inquiry into the extent of the limitation requires an examination of the degree of necessity to the individual of obtaining or disclosing the documents. Upon a prima facie demonstration that the failure to disclose would implicate the right to a fair trial or any other right in the Bill of Rights, the government has to show that those individual rights are not implicated, or only minimally interfered with, or that non-disclosure is necessary for the preservation of national security. The number of documents withheld, the type of information withheld (such as individual names, locations of military installations, etc), and the percentage of the document withheld have to be evaluated.

[180] A relationship between the limitation and its purpose must be demonstrated. This includes whether the means being used – non-disclosure – is a rational way to accomplish the protection of national security. A court should take into account the availability of the information in the public domain, how the documents came to be in the public domain (illegal public disclosure will probably not bind the government in later litigation), and whether further disclosure would increase the risks to national security. This is a fitness test, one that should be very fact-specific and would require a discretion to be exercised by the court.

[181] Even if it is shown that national security requires non-disclosure, it must be shown that the non-disclosure that is specifically being sought is the least restrictive method to achieve the purpose. A court will look favourably upon alternatives to full disclosure, or absolute non-disclosure, for example redaction of highly sensitive materials, or summaries of documents that allow the public to understand the substance if not the specifics of the material.

[182] Redaction is an especially attractive option when the material sought to be withheld relates to individual names. Yacoob J may underestimate the dangers potentially faced by operatives in the field when he finds it impossible to understand how a surveillance coordinator's life would be in danger if his name were to be released in view of his limited role. Surveillance coordinators are privy to highly sensitive information like names, faces and other methods of identification of undercover agents, knowledge of tactics of surveillance by the government, and

knowledge of particular undercover or surveillance operations. This information could be useful to those seeking to threaten national security. Disclosing the identity of a person with access to that information *and* identifying him or her as someone who on at least one occasion had access to information may place them at risk. For this reason, I am of the view that redaction of the operative's name in question would have been an appropriate means of achieving the government's need to protect its operatives.

However, I agree with the judgment of Yacoob J that, in the circumstances of this case, disclosure of the disputed material was required in all instances, save that I would permit the redaction of the names of any operatives not already identified in the media.

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