



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 64148/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

05 OCTOBER 2022

SIGNATURE

DATE

In the matter between:

THE MINISTER OF STATE SECURITY

APPLICANT

and

THABO MAKWAKWA

FIRST RESPONDENT

INDEPENDENT MEDIA (PTY) LTD

SECOND RESPONDENT

INDEPENDENT ONLINE SA (PTY) LTD

THIRD RESPONDENT

JUDGMENT

MOLEFE J

[1] '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'.¹

[2] In this application, the Minister of State Security ('the Minister') pursues confirmation of a *rule nisi* granted by this court on 22 December 2021 and a final interdict (an ancillary relief) that *inter alia*:

2.1 Prohibits the respondents or any other person from publishing the intelligence report dated 2020 or any portion thereof in any medium or any platform; and

2.2 Directs the first respondent to return to the Minister all copies of the report.

[3] The respondents opposed the application and seek that the *rule nisi* be discharged and the application be dismissed with costs.

Background

[4] The applicant is the Minister of State Security acting in his or her official capacity and the member of Cabinet responsible for the control and direction of Civilian Intelligence Services, as well as the administration of the Ministry of State Security. The State Security Agency of South Africa ('the SSA') is the department of the South African Government with overall responsibility for civilian intelligence, operations and is referred to in Schedule 1 of the Public Service Act 1994. It was created in October 2009 to incorporate the formerly separate National Intelligence Agency, the South African Secret Services, the South African National Academy of Intelligence, National Communication Centre and COMSEC (South Africa).

[5] The first respondent is Thabo Makwaka (Makwaka) an adult male employed as a chief reporter at among others, the Daily News (South Africa) newspaper.

[6] The second respondent is Independent Media (Pty) Ltd ('IM'), a private company with limited liability duly registered and incorporated in terms of the Company

¹ *Independent News Paper (Pty) Ltd v Minister of Intelligence Services* (Freedom of Expression Institute as Amicus Curiae) in re: *Masetla v President of the Republic of South Africa and Another* (Independent) (CCT) 38/07 [2008] ZACC:62008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (22 May 2008), para 41.

Laws of the Republic of South Africa, and owns and publishes several newspapers across the Republic of South Africa among others, Daily News (South Africa), The Star, Pretoria News, Cape News, Cape Argus, The Mercury, Post, Diamond Fields Advertiser, Isolezwe, Daily Tribune, The Independent on Saturday and Sunday Independent.

[7] The third respondent is Independent Online (Pty) Ltd ('IOL'), a private company with limited liability, duly registered and incorporated in terms of the Company Laws of the Republic of South Africa, and owns the website 'Independent Online' (IOL), and publishes IM's said newspapers and other news reports in electronic form on this website.

[8] On or about 17 and 18 December 2021 (although Makwakwa records the date as being 20 December 2021), Mr Mava Scott, the head of the State Security Agency of South Africa ('the SSA') received a text message from Makwakwa to which a copy of a report classified as 'secret' was appended and posed questions about the report. On 18 December 2021, Scott responded to Makwakwa's text message and informed him that the SSA will not respond to his questions, and also asked him how he obtained the report and requested him to return it. Makwakwa responded that he had sources from within the SSA.

[9] On 20 December 2021, Makwakwa sent WhatsApp messages to Mr Brian Dube, spokesperson for the Minister Mr Zizi Kodwa, Deputy Minister of State Security, Mr Skhumbuzo Majola of the United States of America Consulate, Mr Pule Mabe of the ANC and Mr Tyrone Seale, spokesperson of the Presidency of the Republic of South Africa, addressing questions to these persons in relation to the report.

[10] On 22 December 2021, the SSA's acting head of legal (department) Maetsane Mothibe flagged a tweet from Makwakwa that was sensitising readers about a big leak that was to be published in the Daily News the following day. On 22 December 2021 at 22h23, the Minister approached this court on an urgent *ex parte* basis seeking an interim interdict prohibiting the respondents from publishing and/or disseminating the report. Due to the urgency nature of the application, Scott presented oral evidence and the court granted a *rule nisi* with return date 24 February 2022, interdicting the

respondents and any other person from publishing and/or disseminating to any person and on any medium, the intelligence report in the possession of Makwakwa. Makwakwa was informed of the court order on 22 December 2021 at 23h30.

The Minister's version

[11] The basis upon which the Minister relies for the relief sought may be encapsulated as follows:

11.1 The Constitution of the Republic of South Africa imposes upon the Government numerous duties, among others, to preserve the peace and secure the well-being of the people of South Africa,² maintain national security,³ defend and protect the Republic of South Africa,⁴ establish and maintain intelligence services,⁵ and prevent, combat and investigate crime.⁶

11.2 Effect is given to the said constitutional duties through legislation, the establishment of institutions, and the President and Cabinet's exercise of executive authority which includes the authority to make and implement national policy.⁷

[12] The SSA is responsible for civilian intelligence operations and is mandated to provide the Government with intelligence on domestic and foreign threats to national stability, the constitutional order and safety of the well-being of Republic of South Africa. On 4 December 1998, the Cabinet adopted the Minimum Information Security Standards ('MISS'), which replaced the former Guidelines for the Protection of Classified Information. It is common cause that pursuant to the 1988 constitutional obligations imposed on the Cabinet regarding national security and safety and in accordance with the MISS provisions, a document must be classified as secret when the comprise thereof can:

12.1 Disrupt the effective execution of information or operational planning and/or plans;

12.2 Disrupt the effective functioning of an institution;

² Section 41(1)(a) & (b) of the Constitution.

³ Ss 44 (2)(a), 146(2)(c)(i) and 198 of the Constitution.

⁴ S 200(2) of the Constitution.

⁵ S 209(1) of the Constitution.

⁶ S 205(3) of the Constitution.

⁷ S 85(2)(b) of the Constitution.

12.3 Damage operational relations between institutions and diplomatic relations between states; and

12.4 Endanger a person's life.

[13] During 2020, the SSA compiled an intelligence report ('the report') under the heading "US INTEREST IN ANC PARTY DYNAMICS" that required protection as contemplated by the Protection Information Act 84 of 1982 and was classified 'secret' for the following reasons:

13.1 It contains allegations regarding the interaction and the nature of the working relationship between the United State of America ('the USA') and the SSA, the disclosure of which can disrupt the effective execution of information or operational planning and/or plans;

13.2 It implicates certain high profile South African politicians in cooperating with the USA, and specifically deals with the USA's involvement in causing conflicts and instabilities in the African National Congress ('the ANC') as a ruling party, the functioning thereof, the different factions therein, who belongs to which faction, and which members of the ANC pose a threat to the USA interest in South Africa, the disclosure of which may seriously compromise the peace and well-being of the people of South Africa as it may cause civil unrests, damage the diplomatic relationship between South Africa and the USA and endanger the lives of the persons mentioned in the report. Consequently, any unauthorised possession of the report is unlawful.

[14] Makwakwa, who is not a person authorised or entitled to have access to the report or to have it in his possession, is in unlawful possession of the report and intends to publish the report or an article on the report. Makwakwa's continued possession constitutes an injury to SSA and Makwakwa, IM and IOL (who have already published an article related to the report despite being aware of the *rule nisi*) intends to publish the contents of the report and this creates a reasonable apprehension of injury to SSA and there is no other remedy available to the SSA.

The respondent's version

[15] The respondents raised the following defences to the Minister's application:

15.1 The report is incorrectly classified as 'secret';

15.2 The urgency relied upon by the Minister in procuring the *rule nisi* was the SSA's own making;

15.3 The contents of the report do not justify any classification and must be disclosed to give content to open justice imperative among others because;

15.3.1 The report does not contain any information which is not already in the public domain;

15.3.2 The report is evidence of an involvement of the SSA in internal ANC politics;

15.3.3 The USA's information gathering and the use of informers within a political party is not worthy of a secret classification;

15.3.4 The language used in the report is disturbing as it appears that the SSA is issuing orders to the government not only to take steps regarding the factional dispute within the ANC but to promulgate legislation, and that such conduct is unlawful and needs to be reported upon and interrogated within the public domain;

15.4 The court has jurisdiction to determine whether classified documents should be made accessible to the public and the report's classification cannot oust this jurisdiction.

Legal principles

[16] The Protection of Information Act 84 of 1984 ('the PAIA') has its objects as the protection from disclosure of certain information and to provide for matters connected therewith. Section 4 of the PAIA provides that:

'Prohibition of disclosure of certain information

- (1) any person who has in his or under his control or at his disposal –
 - (a) any secret official code or password; or
 - (b) any document, model, article or information –
 - (i) which he knows or reasonably should know is kept, used, made or obtained in a prohibited place, or relates to a prohibited place, anything in a prohibited place armaments, the defence of the Republic, a military matter, a security matter or the prevention of combating of terrorism;
 - (ii) which he has made, obtained or received in contravention of this Act;
 - (iii) which has been entrusted in confidence to him by any person holding office under the Government;
 - (iv) which he has obtained or to which he has had access by virtue of his position as a person who holds office or has held office under the Government, or as a person who holds or has held a contract made on

behalf of the Government, or contract the performance of which takes place entirely or partly in a prohibited place, or as a person who is or has been employed under a person who holds or has held such office or contract, and the secrecy of which document, model, article or information he knows or reasonably should know to be required by the security or other interest of the Republic; or

(v) of which he obtained possession in any manner and which document, model, article, or information he knows or reasonably should know has been obtained by any other person in any of the ways referred to in paragraph (iii) or (iv) and the unauthorized disclosure of such document, model, article or information by such other person he knows or reasonably should know will be an offence under this Act, and who –

(aa) discloses such code, password, document, model, article or information to any person other than a person to whom he is authorized to disclose it or to whom it may lawfully be disclosed or to whom, in the interest of the Republic, it is duty to disclose it;

(bb) publishes or uses such code, password, document, model, article or information in any manner or for any purposes which is prejudicial to the security or interests of the Republic;

(cc) retain such code, password, document, model, article or information when he has no right to retain it or when it is contrary to his duty to retain it, or neglects or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or

(dd) neglects or fail to take proper care of such code, password, document, model, article or information, or so to conduct himself as not to endanger the safety thereof;

shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000.00 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment, or if it is proved that the publication or disclosure of such secret official code or password or such document, model, article or information took place for the purpose of its being disclosed to a foreign State or to a hostile organization, to the penalty prescribed in section 2.

(2) Any person who receives any secret official code or password or any document, model, article or information, knowing or having reasonable grounds

to believe, at the time when he receives it, that such code, password, document, model, article or information is being disclosed to him in contravention of this Act, shall unless he proves that the disclosure thereof to him was against his wish, be guilty of an offence and liable on conviction to a fine not exceeding R10 000.00 or to imprisonment for a period of not exceeding 10 years or both such fine and such imprisonment.'

[17] All official matters requiring the application of security measures (i.e. exempted from disclosure) must be classified 'Restricted'; Confidential'; 'Secret' or 'Top Secret'. 'Secret' is the classification given to information that can be used by malicious/opposing/hostile elements to disrupt the objectives and functions of an institution and/or state, and intelligence/ information must be classified 'Secret' when the comprise thereof can:

17.1 Disrupt the effective execution of information or operational planning and/or plans;

17.2 Disrupt the effective functioning of an institution;

17.3 Damage operational relations between institutions and diplomatic relations between states; and

17.4 Endanger a person's life.

[18] After SSA's classification of the report as 'Secret' only the following persons may have access thereto and inspect same:

18.1 A person who has an appropriate security clearance or who is by way of exception authorised thereto by the head of the institution or his/her delegate, with due regard being paid to the need-to-know principle.

18.2 Persons who must necessarily have access to that classified information in the execution of their duties (need-to-know principle) on condition that that a suitable clearance has been issued or authorisation has been granted; and

18.3 Persons such as stand-in typist/secretaries and personnel at smaller centres who in general do not have access to classified material, and who do not have a relevant security clearance but are expected to have to this information on an ad hoc basis owing to the circumstances, on condition that the prescribed oath/declaration of secrecy was taken.

It therefore follows that until the report is declassified, the unauthorised possession is unlawful in terms of section 4 of PAIA.

[19] When Mr Scott received on his mobile phone a text message from Makwakwa on or about 17 and 18 December 2021 with questions posed to him about the report, Makwakwa was in unlawful possession of the report because the report was classified as 'Secret' by the SSA and had not been declassified. The report had not been released to the public pursuant to a request to do so and never was nor is it in the public domain. Makwakwa was not a person who is authorised or entitled to have access to the report in terms of PAIA Act. He had also failed to return the report (the copy thereof) to the SSA despite Mr Scott's request to do so.

[20] It is therefore common cause that Makwakwa is in unlawful possession of the report and that he is not a person authorised to be in possession thereof, and his continued possession of the report constitutes a crime in terms of section 4 of PAIA.

The rule *nisi*

[21] On 22 December 2021, Mr Mothibe flagged a tweet from Makwakwa that was sensitising readers about a big leak that was to be published in the Daily News the following day on 23 December 2021. Mr Mothibe suspected that the leak was connected with the report, and instructed the State Attorney to obtain an urgent interim interdict prohibiting the respondents from publishing the contents of the report. It was submitted by the Minister that due to the urgent nature of the application, it was impossible to prepare papers and the application was brought on an *ex parte* basis. After Mr Scott had presented oral evidence the court granted a *rule nisi* return date on 24 February 2022.

[22] It was submitted by the Minister's counsel that in Scott's evidence, he erroneously stated that the report was classified as 'Top Secret' however the correct classification of the report is 'Secret'. It was contended that the erroneous reference is a reasonable mistake having regard to the extreme urgency under which the interim interdict was brought, and that the error does not detract in any way from the merits of the application or urgency.

[23] The respondents made much of the fact that the Minister proceeded with an *ex parte* application without notice and that the *viva voce* evidence by Scott in the urgent interim hearing was incomplete and inaccurate and that facts were suppressed and important aspects omitted. It was argued that more problematic was the failure by the Minister to provide the court with a copy of the report for the court to have a 'judicial peek'. The respondents contended that the *ex parte* application amounts to an abuse of court process as it imperils the principles of *audi alteram partem* rule.

[24] In my view, the question of urgency is irrelevant for the purposes of this application because the court which heard the *ex parte* urgent application has already dispose of it. In so far as Scott's *viva voce* evidence may contain discrepancies, they are non-material and would not have affected the outcome of the urgent application. His reference to the report's classification as 'Top Secret' instead of 'Secret' is not material; the document is exempted from disclosure and warranted security. The respondents' submission that the Minister's counsel informed the court that the respondents were about to publish the report but that this statement was false in that 'Makwakwa had no such intention albeit that he did inform the SSA on 20 December 2021 that he intended to publish a story' is very confusing. In his answering affidavit Makwakwa stated that 'on 22 December 2021 at 12h17 I sent a follow up to Mabe indicating that I intended to publish the story the next day.'

The final interdict

A clear right

[25] Counsel for the Minister submitted that the report, is classified as 'secret' and is also a security measure and as such, only the SSA and authorised persons should have access to it. The SSA is obliged to protect the secrecy and integrity of the report and has accordingly a clear right that the report or its contents may not be in possession of any unauthorised person (such as Makwakwa) or be published or disseminated to any person or on any medium.

An injury committed or reasonably comprehended

[26] The Minister contented that there was no doubt that Makwakwa, IM and IOL intended publishing the contents of the report and this was apparent from the following facts:

26.1 On 23 December 2021, despite being alerted of the *rule nisi* order, Makwakwa published in The Star and Daily Newspaper, an article related to the report with heading 'US political office guiding ANC policy'. Makwakwa made it clear in the article that what had been published was only part one of the report and that part two was still on its way.

26.2 The publication of this article has already caused an injury to the SSA and more injury is comprehended with the intended publication of part two of the report, which is what the applicant seeks to interdict.

[27] It was further argued that if the report was to be divulged it would constitute a serious breach of trust. This in turn would not only impact on the SSA's relationship with the specific USA Intelligence Service but could also impact on its relations with other intelligence services which will perceive the SSA as untrustworthy. Makwakwa's continued possession and publication of the report would therefore constitute an injury to the SSA.

No other remedy available

[28] Counsel for the Minister submitted that the SSA has no other legal remedy available other than to procure a final interdictory relief against the respondents.

[29] Section 47 of Promotion of Access to Information Act (PAIA) reads as follows:
'46 Mandatory disclosure in public interest – *Despite any other provision of this chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in s 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 42(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or (45) if –*
(a) the disclosure of the record would reveal evidence of –
(i) a substantial contravention of, or failure to comply with the law; or
(ii) an imminent and serious public safety or environmental risk; and
(b) The public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.' (own emphasis)

[30] Counsel for the respondents submitted that s 46 of PAIA is applicable in this matter in that:

30.1 Disclosure of the record reveals evidence of the SSA failing to comply with the law in that it is utilising the state resources to not only busy itself with the internal ANC factional battle but has taken it upon itself to instruct the Government to pass legislation.

30.2 If it is so that there is an imminent and serious public safety risk consequent upon the internal ANC factional battle, it is in any event in the public interest to disclose the report and that public interest clearly outweighs any harm to the applicant.

[31] It was also submitted on behalf of the respondents that the onus rests on the applicant to make out a case why access to the record should be withheld. It is not for the respondent to make out a case why the disclosure is necessary but for the applicant to make out a case why the report should be kept secret.

[32] The respondent submitted that the pre-eminent case relevant to this dispute is *Independent Newspaper (Pty) Ltd v Minister for Intelligence services (Freedom of Expression Institute as Amicus Curiae in re: Masetla v President of the Republic of South Africa and Another*⁸, where the applicant sought access to the record in a case involving the fairness of the dismissal of the head of the National Intelligence Agency ('NIA'). When Independent Newspaper requested access, it was refused whereupon it launched an application for access to the Constitutional Court. Similarly, the documents in the record were classified 'secret' and the question of national security was raised.

[33] The respondent also relied on *The President of the Republic of South Africa and others v Mail and Guardian Ltd*⁹ where two judges were sent to assess the constitutional and legal issues relating to the presidential election in Zimbabwe. Upon their return, the judges prepared a report and submitted it to the President. The report was never released to the public. M & G Limited, the publishers of a weekly newspaper Mail and Guardian requested access to the report pursuant to s 11 of PAIA.

⁸ *Independent Newspaper (Pty) Ltd v Minister for Intelligence services (Freedom of Expression Institute as Amicus Curiae in re: Masetla v President of the Republic of South Africa and Another* (CC) 38/07 [2007] ZACC 6: 2008 (5) SA 31 (CC).

⁹ *The President of the Republic of South Africa and others v Mail and Guardian Ltd* [2011] ZACC 32.

The constitutional right of access to information held by the state

[34] The constitutional right of access to information is governed by section 32 of the Constitution, which provides, in relevant part:

- “(1) Everyone has the right of access to—
- (a) any information held by the state”.

[35] Section 11 of PAIA gives effect to this constitutional right, and provides:

- “(1) A requester must be given access to a record of a public body if—
 - (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
 - (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
- (2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.”

[36] I agree with the respondents’ submission that the mere classification of a document as confidential secret or top secret, does not place such document beyond the reach of the court. Once the document has been placed before the court, it is for the latter to scrutinise it and make a determination as to whether the public should be granted or denied access. Disclosure serves the open justice imperative. The report in this matter was placed before me before the hearing and I had the privilege of examining the content of the disputed material to determine whether the report can be described as national security information or not.

[37] Although Makwakwa is not a specialist or an expert to interrogate the report, in the answering affidavit he provided ‘a detailed analysis’ of the report and concluded that the report has nothing to do with the state security and everything to do with the factional in-fighting within the ANC. His view is also that the SSA has no business getting involved in party political contest and that in the public interest the report should be interrogated in the public domain in furtherance of transparency, accountability and responsiveness.

[38] On the strength of Makwakwa’s analysis (who is not an expert) counsel for the respondents submitted that:

- (i) The report has nothing to do with national security,
- (ii) There will be no harm caused by its disclosure;
- (iii) The contents of the report should be in the public domain and be subjected to scrutiny and interrogation;
- (iv) The public should know that SSA is spending public funds on internal party-political matters.

[39] In my view, the respondents' reliance on the *Independent Newspaper* and the *Mail and Guardian* cases is misplaced. In both cases, there was a request made for access to the record in terms of PAIA, which was not the case in this matter. Paradoxically, Makwaka pertinently stated that he understood that what was required was a balance between the interests of the Minister and the SSA on the one hand, and access to information as envisaged by s 32 of the Constitution read with s 9 of PAIA, but then failed to follow or invoke the process of PAIA and rather elected to obtain and retain a copy of the report unlawfully. Absent a request for access to information in terms of PAIA or an application if such access is refused, or an application for a declarator, the report will remain classified.

[40] The fact that a classified document had been disclosed to some degree in the public domain is not relevant in determining whether or not the document deserves continued protection. It is also not a decisive factor that simply because a document had been leaked it therefore loses its classification.

[41] I have had the opportunity to have a 'judicial peek' of the 'secret' report and have examined the report concerned in order to ensure that it impairs as little as possible the constitutional imperative for open justice and the government's obligation to pursue national security. I have also taken into account the availability of the information in the public domain, how the report came to be in the public domain by illegal public disclosure and whether further disclosure would increase the risk to national security. I am satisfied that the Minister has made out a case for the final interdict and the application should succeed.

Costs

[42] I must now determine the costs of this application. The respondents' counsel submitted that the Minister should pay punitive costs on an attorney-own client scale because of the use of intemperate language towards the respondents. There is no merit in this submission. I do not agree that the Minister used unfounded and derogatory language. Costs should therefore follow the result.

[43] In the result, the following order is made:

1. The *rule nisi* granted on 22 December 2021 is confirmed.
2. The respondents are interdicted from publishing the intelligent report dated 2020 or any portion thereof on any medium and/or platform.
3. The first respondent is ordered to immediately return to the applicant all the copies of the report.
4. The respondents are ordered to pay the costs of this application, the one paying the others to be absolved.



D S MOLEFE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email. The date for hand-down is deemed to be 05 October 2022.

