THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO. 477/2000

In the matter between

The Investigating Director of the Investigating Directorate: Serious Economic Offences	**FIRST APPELLANT**
The Minister of Justice	**SECOND APPELLANT**
v	
Bernard Gutman NO	**RESPONDENT**

Before: Smalberger ADP, Harms, Zulman, Navsa JJA, Heher AJA

Heard: 1 March 2002

Delivered: 25 March 2002

Summary – access to information under s 32 of Constitution – preservation of secrecy under s 30 of National Prosecuting Authority Act 32 of 1998 – whether Investigating Director entitled to rely on s 30 for refusal to allow access.

JUDGMENT

HEHER AJA

[1] This appeal concerns the power of the first appellant to limit or deny a right of access to information in possession of the State for which s 32 of the Constitution of the Republic of South Africa Act 108 of 1996 provides.

[2] In June 1994, 3D ID Systems (Pty) Ltd ("the company") was a disappointed tenderer in respect of a contract for the supply of computerized equipment and the provision of services in relation to social pensions and welfare grants for the Cape Provincial Administration. The tender was awarded to Nisec CC. In April 1995 the company was wound up. The present respondent is its liquidator. The contract with Nisec CC was cancelled amid allegations of fraud and impropriety.

[3] An investigation into the award of the tender was conducted by the Director of the Office for Serious Economic Offences acting pursuant to powers conferred by the Investigation of Serious Economic Offences Act 117 of 1991.

[4] During 1997, and while the Director was examining the evidence gathered, the respondent launched an application requiring the Director and the Minister of Finance to make available to him information collected and compiled in the course of the investigation and to allow him access to tape recordings of certain meetings of the Regional Office of the State Tender Board. The application was brought in terms of s 32(1) of the Constitution read with item 23(2)(a) of schedule 6 thereto, the respondent averring that the information was required by him in order to determine whether to institute action for damages against various parties arising out of the award of the tender. The

parties arrived at a settlement and 1 February 1999 the application was withdrawn, each party paying its own costs.

[5] The state attorney had attempted to impose a condition that the settlement would "constitute a full and final settlement of the issues between the parties". The respondent would not agree to that. His attorney addressed the state attorney on 25 January 1999 as follows:

"Whereas we are in agreement with points 1 and 2 of your letter under reply [i.e. withdrawal and costs], we are somewhat concerned about the meaning and ambit of your paragraph numbered 3. Whereas the effect of withdrawing the application under Case No. 21861/97 is to bring the same to a final end, it may be that there are issues that arise between the parties in the future and in the context independent of the aforesaid application (more particularly, the action recently instituted under Case No. 1119/99).

Our client is on no account prepared to waive any such right which he may have in the context of the aforesaid action or in any other context for that matter."

The state attorney yielded. He replied on 27 January 1999:

"We note your concern that there may be issues which may arise between the parties in the future in a context independent of the pending application. Your client is obviously at liberty to enforce its constitutional rights in respect of those issues. However, we must state unequivocally that the disruption caused by your client in OSEO'S office as a result of his unreasonable demand for indiscriminate access to all documentation will not be tolerated. Therefore, as regards the claims made under case number 21861/97, we trust that these will not be pressed and to that extent our client is anxious to put this matter to rest.

It goes without saying that your client is at liberty to exercise his rights under s 32 of the Constitution in respect of information reasonably required for purposes of the action instituted under case number 1119/99."

The contention in these proceedings that the respondent was vexatious in making a second application for access (which is referred to below) because

everything required had been made available during the earlier dispute was, unsurprisingly, not pursued with enthusiasm.

[6] Events had, meanwhile, overtaken the application. During January 1999 the respondent issued summons out of the Transvaal High Court citing as defendants the Minister of Finance, the National Government, the Minister of Welfare and Population Development and the Premier of the Western Cape. He claimed, *inter alia*, payment of R102 572 000,00 as damages suffered by the company. He alleged corruption on the part of certain employees of the Welfare Department of the Cape Provincial Administration acting in the course and scope of their duties, together with one Huisamen, the majority member of Nisec CC, negligence in the evaluation and investigation of the tenders, unfair comparison of the tenders and unreasonableness in awarding the tender to Nisec CC and not to the company. In formulating his claim the respondent made use of documents furnished to him by the Director and inspected at his offices.

[7] The official investigation culminated in criminal charges against Huisamen, the employees and two others for fraud and contraventions of s 1 of the Corruption Act 94 of 1992.

[8] The respondent prepared for the civil action. He found that the information which had assisted him to formulate his claims was by no means sufficient for the purposes of presenting the case in court. Further requests were made for access to documents in possession of the Investigating Director, who is presently the first appellant. (On 16 October 1998 Act 117 of 1991 had been

superseded by the National Prosecuting Authority Act 32 of 1998 - hereinafter referred to as "the Act". An Investigating Director appointed under s 7 of the Act had taken over the conduct of the Nisec CC investigation.) Some inspection was permitted.

[9] The date set for trial approached. No resolution satisfactory to the respondent had been achieved. He launched an urgent application in which he sought an order compelling the Investigating Director to allow inspection and to furnish copies of documents described in the Notice of Motion as

"2.1 All documents obtained by the Investigating Directorate: Serious Economic Offences (IDSEO) or the Office of Serious Economic Offences (OSEO) in connection with its investigation into the circumstances surrounding Tender KT30986MD and the award thereof to Nisec CC, from all persons or entities listed in annexure "NM1" hereto.

2.2 Transcripts of interviews conducted by OSEO/IDSEO with witnesses in the course of the said investigation whether in terms of Section 5 of the Investigation of Serious Economic Offences Act or Section 30 of the National Prosecuting Authority Act or otherwise.

2.3 Copies of witness affidavits and/or statements obtained by OSEO/IDSEO whether in terms of the said Section 5 or Section 30 or otherwise.

2.4 The forensic report or similar document in respect of and in support of the criminal charges preferred against M M Huisamen and Four Others setting out the basis on which the State intends to prove its case which document is normally furnished to the Accused in respect of serious economic offences.

2.5 The Report of OSEO/IDSEO to the Minister of Justice in terms of Section 5(12) of Act 117 of 1991 or, alternatively, the Report by the Investigating Director to the National Director in terms of Section 28(12) of Act 32 of 1998."

[10] The application was opposed by the Investigating Director and the Minister of Justice. It was heard by De Klerk J in the Transvaal High Court. He made the following order

"1. That the first respondent is ordered within a reasonable time to allow applicant to inspect those documents, listed in prayers 2.1 as amended, 2.2, 2.3, 2.4 and 2.5 in applicant's Notice of Motion, as regards which the first respondent does not contend that access should be limited in terms of Section 36 of the Constitution of the Republic of South Africa Act, 108 of 1996.

2. As regards those documents that the first respondent submits unrestricted access to applicant should not be allowed, the first respondent is ordered, within a reasonable time, to inform applicant why and how access to those documents should be limited.

3. [That] the applicant is entitled at his own expense to make copies of the documents made available to him.

4. [That] respondents are ordered to pay applicant's costs of the application including the costs of two counsel."

[11] The learned Judge found that although s 32(1)(a) of the Constitution conferred an unqualified right of access to information held by the State, the respondents in the application were entitled to restrict the right to access if they were able to justify the limitation in terms of s 36 of the Constitution. They had attempted to do so by relying on s 30 of the Act.

[12] The learned Judge decided that s 30

"prescribes an internal control mechanism in the office of the first respondent. It does not give the first respondent the discretion to decide whether a limitation of the right of access granted by section 32(1)(a) of the Constitution is warranted."

Accordingly, he found, the appellants' attempt to rely on s 30, of itself, whether as a defence to the request for information or as a limitation in terms of s 36 of the Constitution could not be sustained.

[13] In terms of the transitional arrangements set out in item 23 of schedule 6 of the Constitution the legislature was required to enact the national legislation

envisaged in s 32(2) of the Constitution to give effect to the right contained therein within three years of the date upon which the Constitution came into effect, i.e. 4 February 1997. Until such enactment, item 23(2) laid down, s 32(1) was to be read as providing every person with a right of access to all information

"held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights".

Item 23(3) provided that s 32(2) would lapse if the legislation envisaged in that section was not enacted within the said period: Ex parte *Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744 (CC) para 83.

[14] Legislation to give effect to the right viz, the Promotion of Access to Information Act 2 of 2000 was eventually passed by Parliament and assented to on 2 February 2000, to take effect on a date to be determined by the President. That Act, with the exclusion of ss 10, 14, 16 and 51, was, however, only brought into operation on 9 March 2001. It was common cause between the parties that the deemed interpretation placed on s 32(1) in item 23(2)(a) lapsed with the enactment. What remained was s 32(1) in an unqualified form, namely

"Everyone has the right of access to –

(a) any information held by the State; ……"

[15] The application was launched in the Court *a quo* in June 2000. The rights and duties of the parties were therefore governed by s 32(1) unencumbered by the transitional interpretation, as the Court *a quo* correctly found,

notwithstanding that the appellants had throughout their affidavits relied upon the terms of the transitional provision.

[16] It is in this context then that the appellants' continued reliance upon s 30 of the Act as an answer to the application must be considered. The construction of s 30 depends, of course, on the precise terms of that section understood within its place in the scheme of the Act and having regard to the declared intention of the Act and the evils which it is designed to remedy: see *Commissioner, South African Revenue Service v Dunblane (Transkei)(Pty) Ltd* 2002 (1) SA 38 (SCA) 46 C - H and the authorities there cited, and *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) 810D – 811A.

[17] The Act has been amended by the National Prosecuting Amendment Act 61 of 2000 with effect from 12 January 2001. For present purposes the changes brought about are not significant.

[18] Section 7(1) of the Act authorized the President to establish not more than three Investigating Directorates in the Office of the National Director of Public Prosecutions "in respect of specific offences or specified categories of offences".

[19] The head of each Investigating Directorate was an Investigating Director who performed the powers, duties and functions of the Directorate subject to the control and directions of the National Director (s 7(3)).

[20] It is clear from s 7(4) that an Investigating Director might potentially be assisted by a staff of public servants, "persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the Directorate" and "any other person whose services are obtained by the Investigating Director for the purposes of a particular inquiry". It is therefore apparent that such assistance might be afforded by persons not employed by the state or under the day to day control and authority of an Investigating Director.

[21] It is also clear that the primary target of the Investigating Directorate was serious crime and not (for want of a better term) run-of-the-mill criminal activity.

[22] Section 22 of the Act provided that the National Director of Public Prosecutions, as head of the prosecuting authority,

"shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law".

[23] An Investigating Director could, in addition to the powers, duties and functions conferred or imposed on or assigned to him by the Act, institute actions and prosecute appeals emanating from criminal proceedings instituted by him or on his authority (s 24(2)).

[24] Chapter 5 of the Act dealt with "Powers, duties and functions relating to Investigating Directorates". In terms of s 27

"If any person has reasonable grounds to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may lay the matter in question before the Investigating Director by means of an affidavit or affirmed declaration specifying –

(a) the nature of the suspicion;

(b) the grounds on which the suspicion is based; and

(c) all other relevant information known to the declarant."

[25] In terms of s 28 the Investigating Director was empowered to hold an inquiry if he suspected that a specified offence had been or was being committed and might designate any person referred to in s 7(4) to conduct it and report to the Investigating Director. Such an inquiry would be held *in camera*. For its purposes persons could be summoned to produce books, documents or other objects and to be questioned. Such books, documents or objects could be examined or retained for further examination or safe custody.

[26] In terms of s 29 the Investigating Director or his delegate was permitted to enter premises and, *inter alia*, make copies of books or documents found thereon and seize anything which might have a bearing on the investigation in question and retain it for examination or safe custody.

[27] Then follows s 30, the section which has given rise to this appeal:

"Preservation of secrecy and admissibility of evidence: -

(1) Notwithstanding any other law, but subject to subsection (3), no person shall without the permission of the Investigating Director disclose to any other person –

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act and relating to the business or affairs of any other person;

(b) the contents of any book or document or any other item in the possession of the Investigating Director; or

(c) the record of any evidence given at an inquiry,

except –

(i) for the purpose of performing his or her functions in terms of this Act; or

(ii) when required to do so by order of a court of law.

(2) Any person who contravenes subsection (1) shall be guilty of an offence.

(3) A person from whom a book or document has been taken under section 28(6)(b) or 29(1)(d) shall, as long as it is in the possession of the Investigating Director, at his or her request be allowed, at his or her own expense and under the supervision of the Investigating Director, to make copies thereof or to take extracts therefrom at any reasonable time."

[28] In the amending Act these provisions are housed in s 41(6), a section which bears the rubric "Offences and penalties". Their new location probably represents a belated appreciation of their true substance, as will be discussed below. The authority previously conferred on an Investigating Director has been transferred to the National Director where, to some extent, it has always resided by reason of the terms of s 22, referred to earlier.

[29] Looking at the broad scheme of the legislation which has been outlined, the following indications are relevant to the role of the Investigating Director under s 30:

(1) The legislature directed specific resources to combat serious crime.

(2) In placing the Investigating Directors at the head of the drive, the legislature provided them with specific powers to obtain and protect information sensitive to the investigation and prosecution of such crime.

(3) The legislature recognized that the information obtained was, considering the substance, sources and potential misuse of the information and the nature of the criminal activities and what was at stake, vulnerable.

(4) The legislature considered it necessary to provide for the preservation of secrecy and the safe custody of information pertinent to an investigation and prosecution. It expressed its concern by creating a criminal offence. (One of the reasons may well have been not merely the interest of the Investigating Director in the investigation or prosecution, but also a recognition of the harm which could be caused to innocent persons if free disclosure were permitted.)

(5) In the context of s 30 the relevant Investigating Director was invested with the sole duty and responsibility of deciding whether disclosure might be made. The section recognized two circumstances when no authority was required from the Investigating Director, viz. disclosure in the course of the performance of a functionary's duties and disclosure made pursuant to an order of court requiring the functionary to do so. The last-mentioned

instance shows the primacy accorded to the courts even within the scope of s 30.

(6) The powers of an Investigating Director under s 30 were not so much directed to access to information, which could always be sought through the National Director or the Investigating Director himself, in

which case s 30 had no role to play, but rather against uncontrolled disclosure of information by persons who might either have no or insufficient insight into the competing interests at stake or no compulsion to recognize such interests.

[30] The plain wording of s 30 drives one ineluctably to conclude that although the Investigating Director might authorize or bar disclosure by other persons in possession of information, he himself and his National Director were not persons who required permission. The section was not directed to imposing or setting limits on the National Director or the Investigating Director. The persons who were struck by the prohibition were (1) functionaries under the Act; (2) persons who possessed copies of books, documents or items of which the Investigating Director had come into possession in the course of his duties or who had information about the contents of any such book, document or item; (3) persons who had access to the record of an inquiry held under the Act.

[31] It is clear that all three categories included persons who were not, in their work, subject to the authority of the Investigating Director. Persons in the second and third categories might be outside the public service, unknown to the Investigating Director and ignorant of his existence. The description by the Court *a quo* of the powers of the Investigating Director under s 30 as "internal control" narrowed the scope of the section inappropriately. For the same reason I disagree with the submission of the appellants' counsel that, properly

construed, s 30 related only to the disclosure of documents by officers and agents of the Directorates.

[32] Whatever the nature of the function performed by the Investigating Director when asked to consider the disclosure of information in possession of one of the specified categories of persons, the position was different when access to information in his possession was claimed directly from the Investigating Director himself. He was then in no different position from any other functionary upon whom no specific discretion has been conferred by statute. He was required to come to a *bona fide* informed decision as to whether access should be granted or refused. Should he refuse it or grant access conditionally or partially the person seeking access had the right to apply to court in order to enforce his constitutional or other rights. The court would then consider the validity of the objection by the Investigating Director on its merits and particularly, but not only (as the order of the Court *a quo* implies), within the scope of any justification proffered under s 36 of the Constitution. It is conceivable that valid grounds of objection may be raised outside of the constitutional framework. To the extent that paragraph 1 of the order appealed against limits that right it requires to be varied. Although the scheme of the Act, in so far as it brought the Investigating Director into possession of the information in question and informed his use thereof, might well be relevant, s 30 of itself provided no justification for a refusal by the Investigating Director to

disclose information. This interpretation does not in the least run counter to the objects which the Act sought to further.

[33] It is, in the circumstances, unnecessary to decide whether s 30 conferred a discretion on the Investigating Director, although it can be remarked that the indications for the presence of a discretion, such as the criteria which govern its exercise (and without which its constitutionality might be in doubt, cf *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001(1) SA 29 (CC) para. 25) and the use of language appropriate to a discretion, are absent. It does not make much sense to countenance only a review of the exercise of the powers of the Investigating Director while the section recognized the right of a court to order disclosure by any of the persons subject to the sanction without the restrictions inherent in review procedures.

[34] The interpretation which I have placed on s 30 gives full weight to the constitutional rights of an applicant both in relation to access to information and access to the courts, while leaving open for recognition the competing interests of the State. By contrast the interpretation urged by appellants' counsel is not easily reconciled with the values of the Constitution. While a statutory provision may be adjudged by a court to operate as a constitutional limitation on a fundamental right, it is entirely contrary to the spirit of the Constitution that the diktat or discretion of a functionary in the employ of the State should have that effect. Such a person is not equipped or empowered to make the necessary determination. The rights of the subject can only properly be protected if the

court undertakes that task fully informed by the evidence and submissions which s 36 contemplates shall be weighed in the balance.

[35] Counsel for the appellants invited us to embark upon the justification exercise contemplated by s 36 on the strength of certain material in the appellants' answering affidavit. Even if one begins with an acceptance that the protection of the right of access of a civil litigant to information compiled by the State for the purposes of a criminal prosecution cannot ever justify disclosure to which the accused in the criminal case would not himself be entitled, as to which see *Shabalala and Others v Attorney General, Transvaal and Another* 1996 (1) SA 725 (CC) 757 E – I, I think we would be wrong to do so. It is clear from the affidavits that the only justification which the appellants intended to provide was in the context of the perceived exercise of a discretion under s 30 of the Act. The respondent was not called on to meet a justification under s 36 of the Constitution. In addition, much of the justification provided was non-specific, dealing with broad categories rather than the items in issue. The affidavits also concede that the Investigating Director did not consider the request on its merits. On the papers before us there is no assurance that any of the documents fall within any category of justification.

[36] The order of the Court *a quo* provides a practical step in the resolution of the dispute between the parties, which, one may hope, will be applied by all parties with less intransigence than seems to have characterized their relations thus far.

[37] Lastly, lest there be any doubt, I should make it clear that in upholding the order of the Court *a quo* I do not tacitly conclude that all or any of the documents to which the respondent seeks access amount to or contain "information" within the meaning of s 32 of the Constitution, or should necessarily be made available before the conclusion of the criminal trial or are in any way beyond the pale of justification. Nor do I express any opinion on the applicability of the Promotion of Access to Information Act 2 of 2000 to such subsequent steps as the respondent may take to obtain access to the documents in question.

[38] The order is accordingly:

(a) The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

(b) Paragraph 1 of the order of the Court *a quo* (see paragraph 10 above) is amended by the addition at the end thereof of the words "or can otherwise lawfully be limited or denied".

(c) Paragraph 2 of the order is amended by the addition of the words "or denied".

J A HEHER

ACTING JUDGE OF APPEAL

SMALBERGER ADP) CONCUR
HARMS JA)
ZULMAN JA)

NAVSA JA)