



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 1316/2022

**In the matter between:**

**THABO MAKWAKWA  
INDEPENDENT MEDIA (PTY) LTD  
INDEPENDENT ONLINE SA (PTY) LTD**

**FIRST APPELLANT  
SECOND APPELLANT  
THIRD APPELLANT**

and

**MINISTER OF STATE SECURITY**

**RESPONDENT**

**Neutral citation:** *Makwakwa and Others v Minister of State Security* (1316/2022)  
[2024] ZASCA 41 (5 April 2024)

**Coram:** MAKGOKA, WEINER and GOOSEN JJA and CHETTY and MASIPA  
AJJA

**Heard:** 21 November 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website; and release to SAFLII. The time and date for hand-down is deemed to be 11h00 on the 5<sup>th</sup> day of April 2024.

**Summary:** Interdict – Ex parte proceedings – need for good faith – intelligence report – foreign State said to be monitoring internal politics of ruling party – whether this implicates the role of the State Security Agency – whether publication of such report would negatively affect national security.



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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Molefe J sitting on the return date of an interim interdict):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the High Court is set aside and replaced with the following:  
'The interim interdict granted by this Court on 22 December 2021 is discharged with costs.'

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## JUDGMENT

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**Makgoka JA (Weiner and Goosen JJA and Chetty and Masipa concurring):**

[1] The first to third appellants appeal against an order of the Gauteng Division of the High Court, Pretoria (the High Court) per Molefe J. That court confirmed an interim interdict granted earlier by Mundzelele J, against the appellants at the instance of the respondent. The appellants were, among others, interdicted from publishing an intelligence report (the report) compiled by the State Security Agency of South Africa (the SSA). The appeal is with the leave of the High Court.

### **The parties**

[2] The first appellant, Mr Thabo Makwakwa, is a journalist who writes for *The Daily News* and *Independent Online*, news publications respectively owned by the second appellant, Independent Media (Pty) Ltd (Independent Media), and the third appellant, Independent Online SA (Pty) Ltd (Independent Online). Independent Media owns and publishes several newspapers across the country.<sup>1</sup> Independent Online owns the website 'Independent Online' and publishes the Independent Media's newspapers and other reports in electronic form on its website.

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<sup>1</sup> In its stable, Independent Media has, among others, *The Star*, *Pretoria News*, *Cape News*, *Cape Argus*, *The Mercury*, *Post*, *Isolezwe*, *Daily News*, *Sunday Independent*.

[3] The respondent is the Minister of State Security (the Minister),<sup>2</sup> the National Executive responsible for the administration of the Ministry of State Security, including the SSA. The mandate of the SSA is, among other things, to provide government with intelligence on domestic and foreign threats to national stability, the constitutional order and the safety of the people of South Africa.

### **Background facts**

[4] During December 2021, Mr Makwakwa came to be in possession of the report. On 20 December 2021, he sent text messages about the report to the following people: the Deputy Minister of State Security; the head of communications and media relations at SSA (Mr Mava Scott); the spokesperson for the President of the Republic; the spokesperson for the African National Congress (ANC); as well as the Press and Media Coordinator of the USA Embassy. Mr Makwakwa listed several questions about the contents of the report and requested a response from each of them. None of them gave him any meaningful response. Mr Scott spoke to Mr Makwakwa telephonically on 21 and 22 December 2021. On both occasions, Mr Scott demanded to know how Mr Makwakwa obtained the report and demanded of him to return the report as he was not authorised to possess it. Mr Makwakwa refused to comply with that demand.

### **The ex parte proceedings**

[5] On the evening of 22 December 2021, the Minister launched an urgent application in the High Court. The appellants were not given notice. The matter came before Mundzelele J, without any papers. Counsel for the Minister addressed the court as to the urgency of the matter and was granted leave to lead the oral evidence of Mr Scott. After his evidence, counsel closed the Minister's case and addressed the court without handing up a copy of the report to the court. Having heard Mr Scott and counsel's submissions, the court gave a short judgment. It recorded its satisfaction that the requisites for urgency as well as those for an interim interdict, had been met. As regards the merits of the application, the court reasoned that the

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<sup>2</sup> A Minister originally oversaw South Africa's civilian intelligence agencies and national security matters. In 2021 the ministry was abolished and the function of the Minister was taken over by the Presidency, with a Deputy Minister reporting to the President. There was therefore an erroneous citation of a non-existing Minister. But nothing turns on this, and I will keep the citation as originally done in the High Court.

Minister is the custodian of the report and Mr Makwakwa had not been authorised to possess it. He was therefore in unlawful possession of the report and that its publication will harm state security. Accordingly, the court interdicted the appellants from publishing the report. A rule nisi was issued, returnable on 24 February 2022, for the appellants to show cause why the interim interdict should not be made final.<sup>3</sup>

### **Confirmation proceedings before the High Court**

[6] On 24 January 2022, the Minister applied to the high court seeking confirmation of the interim interdict. The founding affidavit was deposed to by the Deputy Director-General of State Security (the Deputy Director). By and large, he repeated the evidence of Mr Scott during the ex parte proceedings. The only difference was the classification of the report. Whereas Mr Scott had testified that the report was classified 'Top Secret', the Deputy Director said that it was simply classified as 'Secret'.<sup>4</sup>

[7] The appellants opposed the application. In their answering affidavit, deposed to by Mr Makwakwa, the appellants contended that the report had nothing to do with national security, but revealed an impermissible involvement of the SSA in factional battles within the ANC. This, they argued, the public was entitled to know. They denied that there would be any harm to State security if the report was to be published. On these bases, the appellants sought the discharge of the interim interdict.

[8] The application for the confirmation of the interim interdict came before Molefe J on the return date. Unlike Mundzelele J, she was given a copy of the report.

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<sup>3</sup> Shortly after the order was granted, counsel for the Minister contacted Mr Makwakwa and informed him of the fact that the appellants had been interdicted from publishing an article about the report. Despite this, the appellants went on to publish the article in *The Star* under the headline 'US, ANC leaders "spying on the party"', and in the *Daily News* under the headline 'US Political Office "guiding ANC policy"'. This, on the face of it, constituted contempt of court. However, that is not before us, and I make no further comment on it.

<sup>4</sup> The classification is done in terms of the national security policy known as the Minimum Information Security Standards (MISS). All official matters requiring the application of security measures must be classified as 'Restricted', 'Confidential', 'Secret', or 'Top Secret'. According to this policy, '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 compromise thereof can: (a) disrupt the effective execution of information or operational planning and/or plans; (b) disrupt the effective functioning of an institution; and (c) damage operational relations between institutions and diplomatic relations between states.

Upon hearing the matter, she concluded that '[a]bsent 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'. She accordingly confirmed the interim interdict with costs. The appellants were interdicted from publishing the report or any portion thereof on any medium and/or platform. Mr Makwakwa was ordered to immediately return all copies of the report to the Minister. When granting leave to appeal, the High Court made an order in terms of s 18 of the Superior Courts Act<sup>5</sup> that pending the determination of the appeal in this Court, its order 'shall operate and be executed'. The effect thereof was that despite the appeal, the appellants remained interdicted from publishing the report.

### **In this Court**

[9] The appellants submitted that: (a) the classification of a document is not decisive; (b) the Minister failed to discharge the onus resting on her; and (c) the Minister did not observe the requisite of good faith in the ex parte proceedings. For her part, the Minister supported the judgment of the High Court and the reasoning underpinning it.

#### *The contents of the report*

[10] A copy of the report was given to each member of the Court. Before I consider the issues, it is necessary to set out the salient features of the report. The report is a seven and quarter-page document, marked 'SECRET' at the foot of each page. The purpose of the report is set out in clause 1 as being to inform the Minister of the extent of the United States' (USA) interest in the political dynamics of the ANC. This was 'specifically in relation to developments regarding [former] ANC Secretary-General . . . and his perceived anti-President Cyril Ramaphosa's positioning'. The report further states in clause 2 that the USA had collected its information mainly from its embassy in Pretoria, which coordinates the US Mission in South Africa, and includes the USA consulates in Johannesburg, Durban and Cape Town.

[11] Clause 3 is titled '*Introduction and background*'. In clause 3.1 the report notes that foreign intelligence actors continue to monitor policy conceptualisation in the

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<sup>5</sup> Superior Courts' Act 10 of 2013.

ANC. The USA, through its National Security Strategy, has mandated its intelligence agencies to monitor the activities of State and non-state entities to warn of future developments on issues. In South Africa, the Political Office of its embassy in Pretoria (the Political Office) continues to gather information related to the ANC, which is then sent to the USA State Department.

[12] In clause 3.2 the report alludes to reported factional battles within the ANC, and that the Political Office has drawn its conclusions about them through a network of ANC party officials, 'who wittingly or unwittingly, share privileged information'. No names are mentioned in this regard. It is further stated that the conclusions were that the former ANC Secretary-General was galvanising support in anticipation of his arrest for corruption.

[13] Clause 4 is titled '*Intelligence collected by the US Embassy on the political dynamics within the ANC*'. In summary, the conclusions said to have been drawn by the USA embassy were that:

(a) The ANC Youth League (ANCYL) in the Free State supported the former ANC Secretary-General, and its efforts to have Mr Ramaphosa removed as ANC President in a then-pending National General Council (NGC) and to lobby other provinces to support them.

(b) Unidentified business people from the Free State were co-ordinating support for both the former ANC Secretary-General and former President Zuma,

(c) Former President Zuma's refusal to testify at the Zondo Commission was part of his strategy with former ANC Secretary-General to weaken the Zondo Commission and President Ramaphosa and that they met regularly in Durban for that purpose.

(d) The campaign to weaken President Ramaphosa was led and coordinated by 'key Zuma allies'.

[14] Clause 5 is headed '*Analysis and Projection*'. Clause 5.1 states that the USA mission views the ANC's party dynamics, especially the manifestation of factionalism, as a barometer of the political climate within the ruling party and 'tries to gauge future political-economic scenarios'. The report further notes that there is 'a very close cooperation taking place between the USA diplomatic community and the USA intelligence community in South Africa'.

[15] Clause 5.2 notes that over the years, the US Mission had created a comprehensive network of contacts and that these efforts have been successful considering the kind of intelligence it had acquired. In this regard, it is mentioned that the USA Consulate in Durban had, for example, managed to establish various regular contacts amongst political parties including the ANC, the Inkatha Freedom Party (IFP), the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA).

[16] Finally, in clause 6, under '*Recommendation*', it is noted that the USA had cultivated good access in the ruling party with the purpose of either influencing policy direction in South Africa or determining how it can be subverted. It is recommended to the Minister that the government should take note of the vulnerabilities in the ruling party and take steps in this regard. Under clause 7, the conclusion is that legislation aimed at the protection of State information should be promulgated to 'neutralise' 'unrestrained access to covert information' by foreign agents.

[17] On the face of it, what is discussed in the report implicates the mandate of the SSA. The suggestion that foreign intelligence agencies have infiltrated the ruling party with a view to influence its policy, and implicitly that of the country, is sufficient to trigger the SSA's attention. I therefore do not agree with the contention of the appellants that the report has nothing to do with the mandate of the SSA but internal ANC politics.

### **The issues**

[18] The overarching issue before us is whether the High Court properly exercised its discretion when it confirmed the interim interdict. That issue has the following subsets: (a) whether the Minister observed the requisite good faith in the ex parte proceedings; (b) the effect of classification of the report; and (c) whether the report deserves protection from publication. I consider each, in turn.

### **Good faith**



[19] Since *Schlesinger v Schlesinger*,<sup>6</sup> (*Schlesinger*) it is settled that in ex parte applications all material facts which might influence a court in coming to a decision must be disclosed. The non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission. The Court, apprised of the true facts, has the discretion to set aside the interim order or to preserve it.<sup>7</sup> The discretion that the court must exercise in this regard, is one in the true sense. Thus, an appeal court will only interfere if the court of first instance exercised its discretion on a wrong principle or made a decision that was not reasonably open to it.<sup>8</sup>

[20] In *Phillips v National Director of Public Prosecutions*<sup>9</sup> this Court set out the factors which a court should consider in exercising its discretion where there is non-disclosure as including: (a) the extent of the non-disclosure; (b) whether the first court might have been influenced by proper disclosure; (c) the reasons for the non-disclosure and (d) the consequences of setting the provisional order aside.

[21] With these precepts in mind, I must determine whether in the ex parte proceedings, the Minister made full disclosure of the material facts, or whether there was any misleading information or misstatements. In this regard, I consider: (a) that the report was not made available to the court; (b) that the court was informed that the report was classified as 'Top secret'; (c) whether accurate information was conveyed to the court about the nature and contents of the report.

#### *The report not available to the court*

[22] It is common cause that the report was not made available to the court in the ex parte proceedings. There is no explanation for this, neither in the evidence of Mr Scott, the submissions by the Minister's counsel, nor the founding or replying affidavits on behalf of the Minister. The silence in this regard is deafening. The High Court said nothing about this.

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<sup>6</sup> *Schlesinger v Schlesinger* 1979 (4) SA 342 (W).

<sup>7</sup> *Ibid* at 348E-349B. The *Schlesinger* test has since been applied in subsequent cases by this Court. See for example, *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 288E-F; *Powell NO v Van der Merwe NO* 2005 (5) SA 62 (SCA) paras 74-75; *National Director of Public Prosecutions v Basson* [2001] ZASCA 111; 2002 (1) SA 419 (SCA); [2002] 2 All SA 255 (SCA) para 21; *Recycling and Economic Development Initiative of South Africa MPC v Minister of Environmental Affairs* 2019 (3) SA 521 (SCA) (*Redisa*) paras 45-52.

<sup>8</sup> *Redisa* para 87.

<sup>9</sup> *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 29.

*'Top secret' v 'Secret'*

[23] As mentioned, Mr Scott incorrectly testified that the report was classified as 'Top Secret', instead of 'Secret'. In his founding affidavit, the Director General attributed this to 'a reasonable mistake', given the extreme urgency under which the application was brought. There was no confirmatory affidavit by Mr Scott about his alleged mistake. In their answering affidavit, the appellants challenged the Minister to provide a better explanation for this. In the reply on behalf of the Minister, the Director-General brushed this aside, and stated that this 'has been fully explained in the founding affidavit and is reasonable'. The High Court agreed, and held that this was not material, as 'the document is exempted from disclosure and warranted security'.

[24] I disagree. The materiality of the failure lies in what Mr Scott testified to be the implications of a 'Top secret' classification. This, he testified, 'is a type of report that should not be accessed by ordinary members of the public or anyone who is not authorised by a top-secret clearance. Without such clearance, he said, 'the possession of the report was illegal'. This is highly material because the category of people who are prohibited from possessing or seeing the report, as per Mr Scott's testimony, would include the court itself, as it: (a) is '[an] ordinary member of the public', and (b) presumably did not have a 'top-secret clearance'. Mr Scott's chilling warning might explain why the court did not bother to request that the report be made available to it. It could not risk being in 'illegal possession' of the report.

[25] In my view, the Deputy Director's laconic statement constitutes no explanation for the misstatement of fact by Mr Scott. It was the latter who allegedly made an error in his testimony, and not the Deputy Director. It follows that Mr Scott was the only person who could shed light on the circumstances under which the error allegedly occurred. When the appellants challenged the Minister for a better explanation, this presented an opportunity for a full explanation, confirmed by Mr Scott in a confirmatory affidavit. She elected not to do so. In the absence of this explanation, the statement by the Deputy Director is speculative and carries no weight.

[26] Another consequence of the absence of a proper explanation is that an irresistible inference arises that Mr Scott would have found it difficult to explain the alleged error. I say this because it would be difficult for anyone who has read the report, to miss its classification 'SECRET' (in uppercase) as it stands conspicuously alone at the bottom centre of each page. One would assume that Mr Scott had read the report to enable him to testify about it and did in fact, have it in front of him when he testified. It would indeed be surprising if he did not.

[27] Counsel for the Minister must also have had sight of the report to enable him to make the submissions he made to the court. Therefore, for Mr Scott and the Minister's counsel to have conveyed to the court in the *ex parte* proceedings as they did, they must either: (a) not have read the report; or (b) deliberately misled the court about its classification. Either way, this does not redound to the Minister's case. Viewed in this light, the High Court erred in summarily dismissing the materiality of this non-disclosure. In the absence of any satisfactory explanation for this, I consider it to be a misrepresentation of a material fact to the court in the *ex parte* proceedings.

*Were the nature and contents of the report accurately conveyed to the court?*

[28] Core to this, are counsel's submissions and the testimony of Mr Scott. In his opening address, counsel informed the court that the report contained 'sensitive intelligence information compiled by the USA *together* with the SSA'. The publication of the report 'would likely expose these two governments [South Africa and USA] to serious diplomatic relations'. Later, in his closing address, counsel reiterated the partnership between the USA and South Africa in the compilation of the report. He said that the USA and South Africa are partners in the intelligence community, where 'trust was of the utmost importance', and once that is lost with a partner, 'then you have problems'. He further testified that the report was '*produced by [the USA]* that is making certain allegations, *working with [the SSA]*'. (Emphasis added.)

[29] As to the likely impact of the publication of the report, Mr Scott testified: 'The first one is the one that I alluded to with regard to diplomatic relations because as you would imagine *agencies all over the world share information and they work together*. If that information ends up in the wrong hands, then there is a level of distrust that develops

between the agencies. *It has the potential to [adversely] affect the image of the country. To break the trust of our country with international partners.*' (Emphasis added.)

[30] Having outlined the salient features of the report, the statement by counsel and the testimony of Mr Scott that the report was compiled by the USA in collaboration with the SSA is simply not correct. Far from being a co-author of the report, the USA Embassy appears to be the subject of counter-surveillance by the SSA. What was emphasised to Mundzelele J was that having worked with the SSA to produce a secret report in confidence, the USA would feel betrayed by the breach of confidentiality were it to be published. This, in turn, would lead to a diplomatic fallout and loss of trust between the intelligence agencies of the two countries. Were this to be true, any court would understandably be concerned about the implications of the publication of the report. This is where the evidence that the report was classified as 'Top secret' assumes significance. It would have been uppermost in the court's mind when considering whether to grant the interim interdict. This was a material misstatement.

[31] Mr Scott also testified that '[t]he report also talks about how [the USA] political office is working within the ruling party *to divide it and to exacerbate what they call the factions within*'. (Emphasis added.) There is no such claim in the report. This was a further material misstatement.

[32] Lastly, Mr Scott testified that the report makes 'certain allegations . . . implicating certain high political people, some of whom involve the former President'. He said:

'The second [point of concern] relates to the implicated people in that report who happen to be high office bearers of political office. The type of information that is being disseminated with regards to the factions of the ruling party and who [are] still in those. Those [have], in our view, . . . the potential to return us to what I would call the July events because some of the insinuations made, especially in the questions are leading us to that direction. It also has the potential on our own national security given the sensitivity of the issues that are in those questions.'

[33] There are several incorrect statements in the above testimony of Mr Scott. First, the report does not 'implicate' anyone. It simply states what the Political Office would have analysed regarding reported factions in the ANC. I have already stated the context in which individuals named in the report were mentioned, namely, their alleged loyalty to former President Zuma in reported factions of the ruling party. This has been widely reported in the media. If this is what Mr Scott sought to convey to the court when he testified that there were 'allegations' against certain individuals who were 'implicated' in the report, he was mistaken. This was another material misstatement.

[34] The report does not say that the USA intelligence was making any allegations. It says that it is taking note of the allegations which had been widely reported about factions in the ruling party, to influence the ruling party's policy. Mr Scott's evidence conveyed to the court an impression that the report contained 'sensitive' allegations against individuals, who are 'implicated' in something sinister or some wrongdoing. As seen from the outline of the contents of the report, there is nothing in the report to that effect. This is another material misstatement. Secondly, Mr Scott's testimony that the publication of the report might lead to 'the July events,'<sup>10</sup> is a bald statement not supported by any facts. It is not clear what link Mr Scott drew between the two. This is a further material misstatement. Thirdly, the claim that the publication of the report would harm our national security is also a bald statement without any factual basis. Mr Scott did not explain the link. This was a further material misstatement.

[35] I have identified a misrepresentation (the classification issue) and five material misstatements made to the court during the ex parte proceedings. It is immaterial whether they were made deliberately to mislead or were simply misstated. As pointed out in *Powell NO v Van der Merwe*<sup>11</sup> the *Schlesinger* test applies equally to the relief obtained 'on facts which are incorrect because they have been misstated or inaccurately set out in the application for an order . . . or, because they have not been sufficiently investigated . . .'<sup>12</sup> These influenced the court's decision to grant the interim interdict. Had Mundzelele J been placed in possession of the report during

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<sup>10</sup> This refers to a wave of civil unrest that occurred in South Africa in KwaZulu-Natal and parts of Gauteng from 9-18 July 2021 in protest against the imprisonment of former President Zuma for defying an order of the Constitutional Court to testify at a Commission of Inquiry.

<sup>11</sup> *Powell NO and Others v Van der Merwe and Others* [2004] ZASCA 25; [2005] 1 All SA 149 (SCA); 2005 (5) SA 62 (SCA); 2005 (1) SACR 317 (SCA); 2005 (7) BCLR 675 (SCA).

<sup>12</sup> *Ibid* para 75.

the hearing, some of the issues identified above would have become apparent to the Judge as not being factually correct. The outcome might have been different.

[36] The position is that courts will always frown on an order obtained ex parte on incomplete information,<sup>13</sup> unless there is a very cogent practical reason why an order should not be rescinded. In my view, the materiality and multiplicity of the misstatements, and the misrepresentation, identified above, required a cogent reason to deviate from the default position. The Minister has proffered none. This leads to an inescapable conclusion that the Minister did not observe the duty of utmost good faith in the ex parte proceedings.

[37] The High Court, having had sight of the report, failed to have any regard to these misstatements and the misrepresentation. It follows that it did not exercise any discretion at all. If it did, it was on the wrong principle. On this basis alone, the appeal must succeed. This Court is therefore at large to replace the High Court's order with one it should have made. For the sake of completeness, I consider the other two issues.

### **The effect of classification**

[38] How a court should approach the question as to whether a classified document, should be made available to the public, was enunciated by the Constitutional Court in *Independent Newspapers v Minister for Intelligence Services: in re Masetlha*<sup>14</sup> (*Masetlha*). It was held that the mere fact that documents in a court record have been classified does not oust the jurisdiction of a court to decide whether they should be protected from disclosure to the media and the public. The mere say-so of the Minister concerned does not place such documents beyond the reach of the courts. The court went on to explain that 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.<sup>15</sup>

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<sup>13</sup> *Schlesinger* at 350B.

<sup>14</sup> *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa (Freedom of Expression Institute as Amicus Curiae)* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC); (*Masetlha*); *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) paras 54-55.

<sup>15</sup> *Masetlha* para 53.

[39] The appellants relied on this dictum and urged the High Court to look beyond the classification and read the report to determine whether it should be disclosed to the public. The court agreed with the appellants' contention and noted that it 'had the privilege of examining the content of [the report] to determine whether the report can be described as national security information or not'. However, it sought to distinguish the present case from *Masetlha* and *President of RSA v M & G Media Ltd*<sup>16</sup> (*Mail and Guardian*) on the basis that in those cases, there was a request made for access to the record in terms of the Promotion to Access of Information Act<sup>17</sup> (PAIA), which was not the case in this matter. The court said that Mr Makwakwa had failed to request the report under PAIA 'and rather elected to obtain and retain a copy of the report unlawfully'. The court did not elaborate on the effect of the last statement.

[40] I understand it to mean that the *Masetlha* dictum applies only where access to a document is sought through a court application, but not where a document is already in the hands of a party without authorisation, as is the case here. In other words, according to the High Court, for as long as the report remains classified, the court's jurisdiction to consider its contents is ousted. This is fortified by its remark that 'the [report] is exempted from disclosure and warranted security'.

[41] I cannot agree with this reasoning. In these matters, the question is always whether, irrespective of classification, a court is entitled to have regard to the contents of the classified document to determine whether it should be made available to the public. This is an objective test, to be decided discretely from whether the application before the court is one for access, or as here, about the right to publish a document already in the possession of a party, albeit obtained in an unauthorised manner. Although *Masetlha* concerned the principle of open justice to compel public disclosure of discrete portions of a record of court proceedings, the dictum applies with equal force to cases such as the present.

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<sup>16</sup> *President of Republic of South Africa v M & G Media Ltd* [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC).

<sup>17</sup> Promotion to Access of Information Act 3 of 2000.

[42] Were the distinction drawn by the High Court correct, it would lead to an absurd result in that once the Minister asserts that a document had been classified, the court would be obliged to accept her word, and not go beyond the classification. This is directly at odds with the express holding in *Masetlha*. The absurdity is also demonstrated by the fact that in this case the report was made available to the court. This begs the question. For what purpose if not for the court to scrutinise its contents to determine whether it should be published?

[43] Despite its apparent conclusion that it was precluded from scrutinising the report because it was classified and Mr Makwakwa had not applied to access it, the High Court said that it did consider the report in confirming the interim interdict. But there is no evidence of this in its judgment, as there is no analysis or overview of the report. This suggests that, despite it having read the report, the court considered the report to be beyond its scrutiny merely because of the classification. In this, the High Court erred and on this basis too, the appeal should succeed.

#### **Should the report be published?**

[44] The onus to establish that the report should not be in the public domain because of national security, rested on the Minister. This seems to have eluded the High Court, it approached the matter on the footing that the 'classification [of the report as "secret"] stands until set aside'. This unwittingly shifted the onus to the appellants to establish why they should be allowed to publish a report that they have not been authorised to possess.

[45] The High Court identified the issue before it as being whether, after reading its contents, 'the report can be described as national security information or not'. The court stated that having had the so-called 'judicial peek' of the report, it considered: (a) the availability of the information in the public domain; (b) how the report came to be in the public domain by illegal public disclosure; (c) whether further disclosure would increase the risk to national security.

[46] However, nowhere in its judgment did the High Court discuss or elaborate on any of these issues or explain what, in the report, implicates national security. This is despite the appellants pertinently placing this in dispute, and the court itself



acknowledging that Mr Makwakwa had provided 'a detailed analysis' of the report for his contention that the report did not implicate national security. Having made that observation, the court surprisingly did not consider whether Mr Makwakwa's 'detailed analysis' had merit. Instead, it remarked that Mr Makwakwa was 'not an expert'. It is not clear what this had to do with the analysis of the report. To be clear, the analysis of the report required no expert witness.

[47] I have earlier set out the salient features of the report. In sum, the report is about the USA Embassy and its intelligence community which are said to be observing the widely reported factions in the ruling party to influence domestic policy and shape the USA's own decisions. The information considered in the report is in the public domain already. For example, the mention of certain leaders of the ANC as being supporters of former President Zuma is nothing new. Thus, there is nothing 'sensitive' about the contents of the report. They are so banal that one could even doubt whether the conclusions said to be drawn by the USA intelligence community resulted from any intelligence-gathering exercise, as opposed to ordinary research. Indeed, a browse through the local media on the reported factions in the ruling party would easily enable one to make the same conclusions.

[48] The Minister accepted that the information contained in the report is already in the public domain. She also accepted the fact that embassies gather intelligence information. But she contended that what is not in the public domain and has not been reported on, was the fact that the USA Embassy, as part of the USA intelligence community, has a network of ANC party officials with whom they share intelligence information. According to the Minister, should this information be 'misconstrued or published, the security of South Africa and the individuals may be compromised'. However, the Minister does not explain how this implicates national security, or how the individuals will be compromised since their names are not disclosed in the report.

## **Conclusion**

[49] In all the circumstances, I conclude that the Minister had failed to discharge the onus to establish that national security would be implicated by the release of the

report. On this basis, too, the appeal should succeed. Costs should follow the result. Both parties employed two counsel. Given the issues involved, this was warranted.

[50] The following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the High Court is set aside and replaced with the following:  
'The interim interdict granted by this Court on 22 December 2021 is discharged with costs.'

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**TM MAKGOKA**  
**JUDGE OF APPEAL**

## APPEARANCES:

For appellants: PA Myburgh (with him V Bruinders)  
(Heads of argument having been drawn by HJ De  
Waal SC and PA Myburgh)

Instructed by: Abraham Kiewitz Inc., Cape Town  
Webbers Attorneys, Bloemfontein

For respondent: DB du Preez SC (with him NP Mashabela)

Instructed by: State Attorney, Pretoria  
State Attorney, Bloemfontein.