IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 37510/2012

Date: 12/5/2016.

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

12/05/2016 .....
DATE SIGNATURE

In the matter between:

M AND G CENTRE FOR INVESTIGATIVE JOURNALISM NPC

FIRST APPLICANT

M AND G MEDIA LIMITED

SECOND APPLICANT

STEPHEN PATRICK "SAM" SOLE

THIRD APPLICANT

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FIRST RESPONDENT

MAHARAJ, SATHYAMDRANATH RAGUNANAN

SECOND RESPONDENT

MAHARAJ, ZARINA

THIRD RESPONDENT

JUDGMENT

PRETORIUS J,

(1) This is an application where the following relief is sought:

> *"1. Reviewing and setting aside the decision of the first respondent communicated to the applicants on 4 January 2012 to refuse permission to the applicants to disclose the record of an interview conducted by the former Directorate of Special Operations, popularly known as "the Scorpions", with the second and third respondents in terms of section 28 of the National Prosecuting Authority Act 32 of 1998 ("the decision").*
>
> *2. Directing the first respondent to permit disclosure of the record of the interview referred to in paragraph 1 above.*
>
> *3. Directing that such respondents who oppose this application pay the costs thereof, jointly and severally, the one paying the others to be absolved;"*

(2) A further application was launched by the second and third respondents against the three applicants. The application was launched in terms of Rule 6(15) of the Uniform Rules of Court in which the two respondents seek an order that certain paragraphs and statements must be struck from the applicants' founding papers in the main application.

THE PARTIES:

(3) The applicants in the main application are firstly the M and G Centre for Investigative Journalism, a non-profit company. The second applicant is M and G Media Ltd, a company incorporated in terms of the Companies Act, which publishes the Mail and Guardian newspaper. The third applicant is Mr SP Sole, who deposed to the founding affidavit.

(4) The first respondent is the National Director of Public Prosecutions, who at the time the decision that forms the basis of this review was taken, was Adv Nomgcobo Jiba. The second respondent is Mr Maharaj, who was employed as Minister of Transport and thereafter as the spokesperson of the State President of the Republic of South Africa. He is only cited as an interested party. The third respondent is Mrs Zarina Maharaj, the second respondent's wife who is cited as an interested party and no relief is sought against her and the second respondent.

(5) As the two applications were dealt with simultaneously, this judgment deals with both applications. The first, second and third applicants will be referred to as the applicants, and the first, second and third respondents will be referred to as the respondents throughout.

BACKGROUND:

(6) In June 2003 the Directorate of Special Operations ("DSO") conducted an investigation in terms of section 28(1) of the **National Prosecuting**

Authority Act[1] ("the NPA Act") into the affairs of the second and third respondents. This investigation included recorded and transcribed interviews with Mr and Mrs Maharaj, the second and third respondents, respectively.

(7) Although the inquiry was supposed to be confidential, the applicants obtained copies of extracts of the section 28 record of investigation. The applicants on 21 November 2011 requested the National Director of Public Prosecutions ("NDPP") permission in terms of section 41(6) of the **NPA Act** to publish extracts from the interviews held in terms of section 28(1).

(8) The reasons for the request was set out as follows:

> *"That the publication of the information is in the public interest; much of the information sought to be published was already in the public domain, as the second and third respondents had attached the transcripts of the section 28 enquiry to court papers; that it would enable the applicants to inform the public of an issue of public importance in accordance with media freedom."*

(9) The NDPP decided not to grant this request as she contended that granting permission would amount to condoning a criminal activity and that the NPA operated according to a general policy of non-disclosure. This policy was, according to the NDPP, reflected in paragraph 13 of the

[1] Act no. 32 of 1998

United Nations Guidelines on the Role of Prosecutors. Furthermore, she contended that section 41(6) of the **NPA Act** requires a general policy of non-disclosure.

(10) Her further reason for non-disclosure was that the disclosure of the section 28 record would have an impact on the Commission of Inquiry into the arms deal. She was of the opinion that it was irrelevant that the contents of the section 28 inquiry were already in the public domain. She contended that so-called "other persons" mentioned in the section 28 record required protection. This decision, not to grant permission, lead to the current application for the review of the NDPP's decision.

GROUNDS OF REVIEW:

(11) The applicants rely on sections 6(2)(d), 6(2)(e)(iii), 6(2)(f)(ii), 6(2)(i) of **Promotion Of Administrative Justice Act**[2] ("PAJA"), alternatively the principle of legality. The reasons advanced by the NDPP are being attacked by the applicants on the following grounds; (i) she did not take into account the section 28 record; (ii) she failed to consider the public interest; (iii) she considered the pending criminal charges against the applicants; (iv) she safeguarded the interests of *"others"* mentioned in the record; (v) she took into account the arms deal commission of inquiry; and (vi) she failed to consider that all the information was already in the public domain.

[2] Act 3 of 2000

(12) The second and third respondents had laid a criminal complaint against the applicants alleging that the applicants had breached the provisions of section 41(6) of the **NPA Act** as they had been unlawfully in possession of the section 28 inquiry record.

(13) The second and third respondents rely on the provisions of section 28(8) and section 41(6) of the **NPA Act** which guarantee that any evidence obtained during a section 28 interview will not be used in a subsequent criminal trial and that such evidence cannot be leaked or disclosed lawfully to any person, without the permission of the NDPP.

THE NPA ACT:

(14) The NDPP is empowered by section 28(1) of the **NPA Act** to conduct an investigation into the commission of any offence.

(15) Section 28(1)(a) and (b) provides:

> *"(1) (a) If the Investigating Director has reason 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 conduct an investigation on the matter in question, whether or not it has been reported to him or her in terms of section 27.*
>
> *(b) If the National Director refers a matter in relation to the alleged commission or attempted commission of a specified offence to the Investigating Director, the Investigating Director*

shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter."

(16) An individual is obliged to attend such an investigation and to answer all questions put to him or her. Section 28(8) provides that such information cannot be used in criminal proceedings against the person concerned.

(17) In view of the fact that the NDPP relies on section 41(6) of the **NPA Act** for refusal of the transcripts the provisions of section 41(6) are important. Section 41(6) provides:

"(6) Notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person-

(c) the record of any evidence given at an investigation as contemplated in section 28 (1),

except-

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

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

(18) The criminal sanction for contravention of the provision of section 41(6) is, according to the provision in section 41(7), that of a fine or imprisonment for a period not exceeding fifteen years or both.

(19) It is common cause between the parties that the purpose of section 41 is to preserve confidentiality, but that it is not a blanket prohibition of disclosure of information given in terms of section 28(1)(c) but that the NDPP has a discretion to give permission to disclose.

STRIKING OUT APPLICATION:

(20) I must firstly deal with the striking out application. If I find against the applicants in the striking out application, most of the review application will be struck out and this will have an impact on the review application.

(21) The second and third respondents request the court to strike out certain paragraphs and statements of the founding affidavit by SP Sole on behalf of the applicants; any reference made to section 28 of the **NPA Act** and certain words and phrases in certain paragraphs. This application is brought in terms of rule 6(15) of the Uniform Rules of Court. Rule 6(15) provides:

> *"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client.* ***The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.***" (Court emphasis)

(22) The reasons for this application is that, according to the second and third respondents the information of the section 28 record was unlawfully

obtained and are therefore inadmissible as evidence and secondly, the statements and paragraphs in the founding affidavit constitute hearsay evidence, which is equally inadmissible. The applicants oppose this application.

(23) According to the respondents the applicants are in unlawful possession of the information. The main argument by the respondents are that should the court grant the relief, it will have the result that any party summonsed to appear in a section 28 investigation will not be able to rely on the guarantees of confidentiality set out in section 28 of the **NPA Act**, as it can illegally be disclosed and permission to publish be requested at a later stage.

(24) The applicants argue that they had not obtained the evidence unlawfully. The respondents allege that: *"there **appears** to be a real **possibility** that these documents **may have** been disclosed to the applicants in contravention of the provisions of section 41(6)(a) of the NPA Act and in which instance it was unlawfully obtained".* (Court emphasis)

(25) There is thus no positive allegation in this passage, as the second and third respondents used the words *"appears", "possibility", "may have been disclosed".* The allegation is that the section 28 record may have been disclosed by a third party to the applicants and due to the fact that the third party was acting in contravention of section 41(6), that the

applicants had received the section 28 record unlawfully. It is abundantly clear from these phrases that the second and third respondents base these assertions on speculation and not on clear knowledge. No facts are laid before the court on which the court can find that it had in fact taken place.

(26) Up to date there has been no comparison by any party of the section 28 record with the applicants' documents. Nowhere does the NDPP confirm that the applicants' documents form part of the section 28 record. The NDPP sets out[3]:

"I have no knowledge of the contents of these paragraphs."

(27) It is clear from the second and third respondents' affidavits that they had not compared the applicants' documents with the record of the section 28 inquiry.

(28) Neither the first respondent, nor the second and third respondents provided this court with any evidence that a third party had disclosed the contents of the section 28 inquiry to the applicants. There is no indication as to who the third party is, and where and when the section 28 record was provided to the applicants.

(29) In **City of Cape Town v SANRAL**[4] at paragraph 19 Ponnan JA held:

"Accordingly, court proceedings should be open unless a court

[3] Volume 3, page 253, paragraph 28
[4] 2015(5) BCLR 560 SCA

orders otherwise. The logical corollary must therefore be that departures should be permissible when the dangers of openness outweigh the benefits. And by extension, the right of open justice must include the right to have access to papers and written arguments which are an integral part of court proceedings (Independent Newspapers at paragraph 41). ***That must follow axiomatically, it seems to me, because the public would hardly be in a position to properly assess the legitimacy or fairness of the proceedings if they could observe the proceedings in open court but were denied access to the documents that provide the basis for the court's decision****."* (Court emphasis)

(30) In the **Tshabalala-Msimang case**[5] Jajbhay J held in paragraph 56:

"This decision has not been concluded easily. The difficulty is compounded when two competing constitutional rights come into conflict, one right must suffer. Thus, the first applicant must suffer the limitation of her right to privacy. However within all the euphoria and outcry against the conduct of the first applicant, she does enjoy support. Just because we possess rights, does not mean that we must exercise them to the hilt at every opportunity. Though we enjoy the freedom of expression, we would be ill advised to celebrate them by vilifying each other on the slightest pretext."

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[5] *Supra*

(31) In **SAA v BDFM Publishers**[6] Sutherland J referred to the judgment of Sir Nicolas Browne-Wilkins as follows in paragraph 32:

> *"The spectacular cases often, like this case, involve publications, because, it may be supposed, in the nature of disseminated information, once it is released it cannot be retrieved, and no court, limited by territorial jurisdiction can enforce its judgments abroad. In the controversy about the publication in Great Britain, and elsewhere, of the book 'The Spycatcher', which supposedly revealed British state secrets, in refusing an injunction against the publishers, the remarks of Sir Nicolas Browne-Wilkinson echo still:*
>
> *" ....I have borne in mind, rightly or wrongly, one further factor of the public interest. I think that the public interest requires that we have a legal system and courts which command public respect. It is frequently said that the law is an ass. I, of course, do not agree. But there is a limit to what can be achieved by orders of the court.* ***If the courts were to make orders manifestly incapable of achieving their avowed purpose, such as to prevent the dissemination of information which is already disseminated, the law would to my mind indeed be an ass.***" (Court emphasis)

[6] 2016(2) SA 561 GJ

(32) The second and third respondents had not been questioned or prosecuted in terms of section 41(6) for placing the record in the public domain without the NDPP's permission. The NDPP had instead stated[7]:

> *"I do not dispute the contents of these paragraphs save to note that the fact that the information concerned was already in the public domain is not decisive of the issue of whether or not I should permit the disclosure of such information. If this was so, it would constitute an open invitation to those who wished to disclose a section 28 record, to first make such information public and only then seek permission to disclose the information concerned. This permission could then be based on the fact that the information is, in any event, "in the public domain". The very purpose of the prohibition would have been undermined. This contention is simply not sustainable."*

(33) Thus all the parties involved in the section 28 inquiry, namely the first, second and third respondents jointly placed the section 28 record in the public domain. In the **City of Cape Town case**[8] at paragraph 47 the Supreme Court of Appeal set out the constitutional imperative of open justice:

> *"**The animating principle therefore has to be that all court records are, by default, public documents that are open to public scrutiny at all times**."* (Court emphasis)

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[7] Volume 3, page 255, paragraph 33
[8] *Supra*

(34) The second and third respondents concede in the answering affidavit that the mere possession of the section 28 record is not an offence. Once again no positive assertion based on facts are made as they submit that the record may have been disclosed by a third party to the applicants and such a third party was thus in contravention of section 41(6) and the applicants, by receiving the record, acted unlawfully.

(35) The applicants, after having received some documents pertaining to the section 28 inquiry, put certain questions to Mr Maharaj and after being alerted of the contents of section 41(6) of the **NPA Act** did not publish the report they had prepared. Instead they requested permission from the NDPP, to publish, which resulted in the decision by the NDPP which is currently under review in this matter.

(36) The applicants argue that they had made every attempt to abide by the law. In this instance, the second respondent had laid a complaint against the applicants more than four years ago, but the NDPP failed to prosecute the applicants, nobody has been arrested and there has been no investigation of the applicants. This leaves a question as to whether the NDPP has a serious intention to prosecute the applicants.

(37) The approach by our courts is that the public interest must be weighed against keeping the information confidential. This balancing act must be done in line with constitutional values, the fact that the information is already in the public domain will, in many instances, be an overriding

factor when a court makes a decision about the publication of unlawfully obtained evidence.

(38) The applicants contend that they had not obtained this evidence unlawfully and this court cannot find any evidence that the record had been obtained unlawfully by the applicants. The decisions in the **Tshabalala-Msimang case**[9] and the **SAA case**[10] are applicable in this instance. The **SAA case** had almost identical facts where the applicants applied to the court to prevent publication of the contents of a document. I cannot find any evidence that the applicants had obtained the section 28 transcripts unlawfully as no factual basis can be found in the answering affidavit which is not based on speculation and conjecture. Due to the fact that the second and third respondents had themselves placed the section 28 record in the public domain, there can be no allegation that the applicants are guilty of contravening section 41(6) of the **NPA Act**. Therefore the relevant paragraphs will not be struck out on the ground of unlawfully obtaining evidence.

(39) The second and third respondents allege that certain allegations in the founding affidavit of the applicants should be struck out as the facts referred to are irrelevant and based on hearsay.

(40) It is so that, should this application succeed, there will be no evidence

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[9] *Supra*
[10] *Supra*

that the section 28 inquiry took place and that the second and third respondents were the subject of such an investigation as all mention of the section 28 inquiry will be struck out.

(41) The law of hearsay is governed by section 3 of the **Law of Evidence Amendment Act**[11] ("the hearsay Act"). The respondents submit that the application to review the NDPP's decision in itself is indicative of the applicants' unlawful possession. I was referred to **Fedics Group (Pty) Ltd and Another v Murphy and Others**[12] where Brand J held at page 640:

> *"On the other hand, the Court will, in the exercise of its discretion, have regard to the type of evidence which was in fact obtained. It is the type of evidence* ***which would never be lawfully obtained and/or introduced without the opponent's co-operation, such as privileged communications, or the recording of a tapped telephone conversation****, or is it the type of evidence involved in this case, namely documents and information which the litigant would or should eventually have obtained through lawful means? In the latter case, the Court should, I think, be more inclined to exercise its discretion in favour of the litigant who seeks to introduce the evidence than it would be in the case of the former.* ***It goes without saying that the Court will, in any event, have regard to all the other circumstances of the particular case****."* (Court emphasis)

[11] Act 45 of 1988
[12] 1998(2) SA 617 (C)

(42) In **Lenco Holdings Ltd and Others v Eekstein and Others**[13] it was confirmed that the court has a discretion to exclude evidence obtained by a criminal act or otherwise improperly obtained and that each case must be decided on its own facts. The court found at page 704:

> *"I do feel that one of the important aspects which a Court must consider when it exercises a discretion as vital as one which is aimed at excluding otherwise relevant evidence, is the nature of the litigation over which it is presiding."*

(43) In **Public Protector v Mail and Guardian Ltd and Others**[14] Nugent JA dealt with reported statements in paragraphs 14 and 15 as follows:

> *"[14] Following upon that is the approach that is to be taken to the evidence. Courts will generally not rely upon reported statements by persons who do not give evidence (hearsay) for the truth of their contents. Because that is not acceptable evidence upon which the court will rely for factual findings such statements are not admissible in trial proceedings and are liable to be struck out from affidavits in application proceedings.* ***But there are cases in which the relevance of the statement lies in the fact that it was made, irrespective of the truth of the statement. In those cases the statement is not hearsay and is admissible to prove the fact that it was made. In this case many such reported statements, mainly in***

[13] 1996(2) SA 693 NPD
[14] 2011(4) SA 420 (SCA)

***documents, have been placed before us**. What is relevant to this case is that the document exists or that the statement was made and for that purpose those documents and statements are admissible evidence.*

*[15] I need to deal specifically with one form of such evidence. In his founding affidavit Mr Brümmer has at times conveyed information that he says was imparted to him by an undisclosed source. The appellant applied to strike out those portions of his evidence but for the reasons I have given that application is misconceived. **What is relevant for present purposes is that the reported statements were made, and not that the reported statements are true, and the allegations in the affidavit are admissible proof of that fact**."* (Court emphasis)

(44) The applicants submitted that the various newspaper clippings attached to the founding affidavit were not submitted to demonstrate the truth of their content, but to demonstrate that the information relating to the section 28 inquiry is already in the public domain.

(45) The applicants rely on section 3(1)(c) of the **Law of Evidence Amendment Act**[15] which provides:

"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

[15] *Supra*

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

(46) I have to decide whether the impugned paragraphs or statements constitute hearsay, and if so, whether it should be struck out. In **McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC**[16] the court held that the decision of admissibility of evidence is *"one of law, not discretion…"*. Should the court thus decide that the factors mentioned in section 3(1)(c) weigh in favour of admitting the evidence, a court has minimal discretion to refuse to do so. I cannot consider only the factors set out in section 3(1)(c) but must consider it against the background of the facts of this application, as it was set out

[16] 1997 (1) SA 1 AD

by the court in **Makhathini v Road Accident Fund**[17]. The main contention by the applicants is that the second and third respondents did not allege that they will be prejudiced in any way if the offending statements and paragraphs are not struck out and I have to agree that I could not find that the second and third respondents alleged any prejudice.

(47) The evidence sought to be introduced is that a section 28 inquiry had taken place.

(48) Section 3(1)(c)(ii) deals with the nature of the evidence. The nature of the evidence is that there had been a section 28 inquiry where both the second and third respondents appeared. In some way this became known and several newspapers published this fact. Furthermore, the second and third respondents attached the section 28 inquiry record to their court application in 2006 and the second respondent dealt with it in his biography.

(49) Section 3(1)(c)(iii) provides that the court must determine the purpose for which the evidence is tendered. In the present instance it is tendered to obtain the contents of the section 28 inquiry record and to publish this information. The information as such is not before the court to be dealt with by the court.

[17] 2002 (1) SA 511 (SCA) at paragraph 28

(50) Section 3(1)(c)(iv) requires the court to consider the probative value of the evidence. I find in the present instance that the reference to the section 28 record transcripts has relevance and probative value and should be allowed.

(51) Section 3(1)(c)(v) requires me to enquire as to why the evidence is not given by the person responsible. The first, second and third respondents are the persons who could give the information, but due to the nature of the review application it is clear that they will not supply or confirm the evidence.

(52) I have already dealt with the fact that none of the parties alleged prejudice as required in section 3(1)(vi) of the Act. The respondents cannot rely on this subsection to dismiss the hearsay evidence.

(53) I agree with counsel for the applicants that I have to consider all the facts before reaching the conclusion whether the hearsay evidence should be admitted or excluded. This court has to be appraised of the basic facts that the respondents want to strike out.

(54) I will now deal with the paragraphs and statements which the respondents contend should be struck out. I do not intend quoting each paragraph as it forms part of the application.

(55) Paragraph 20 deals with the contravening of the section 28

investigation. The respondents want this to be struck out as hearsay. It is evident that the respondents' participation in the section 28 investigation was widely reported and was and is in the public domain. This is clear from the annexures attached to the founding affidavit in the review application. These annexures are media clippings of articles which had appeared in the press.

(56) As far as the contents of paragraphs 22 to 24 are concerned, I find that the same reasons apply to allow those paragraphs as set out above to paragraph 20. The fact that no corroboration for the contents of paragraph 25 exists is no reason not to admit it. Both paragraphs 25 and 26 do not constitute hearsay as the deponent is personally aware that the documents came into the applicants' possession. I find that paragraphs 27 and 28 should not be struck out due to the fact that the documents were unlawfully obtained. There is no shred of evidence to sustain this submission. The corruption referred to in paragraph 27 is a matter of public record.

(57) Once more the second and third respondents failed to show prejudice. I am allowing these paragraphs to form part of the record in terms of section 3(1)(c) of the **Hearsay Act**. Paragraph 33 will not be struck out for the same reason as set out above as the contents are in the public domain. I cannot find that paragraph 34 is irrelevant as it confirms the applicants' contention that the information was already in the public domain and therefor the deponent has personal knowledge of what is in

the public domain.

(58) Paragraphs 35 to 39 deal with the publication of several newspapers and also with the High Court application in which the second and third respondents were applicants and where the first respondent stated:

> *"The transcript of the Second Applicant's interrogation, as provided to her by the DSO, is attached marked Annexure SRM5."*

(59) The applicants do not rely on the veracity of the statements, but these statements are tendered to prove that the allegations are in the public domain, even by the second and third respondents' own admission. There has been no indication by the respondents that they will be prejudiced if these paragraphs are not struck out. I find that the contents of these paragraphs should be admitted in the interest of justice in terms of section 3(1)(c) of the **Hearsay Act**.

(60) As far as paragraphs 41, 42, 44 and 45 are concerned I find that they should not be struck out as they do not contain hearsay, as the deponent had personal knowledge of the facts.

(61) I find that paragraphs 53, 58.2, 62.3 and 64.1 similarly should not be struck out for all the reasons articulated in respect of the other impugned paragraphs above.

(62) I find that due to all the circumstances of the case it is in the interest of

justice to allow the evidence, as that is the only way that the court can deal with the main application in a meaningful manner and therefor it is allowed in terms of section 3(1)(c) of the **Hearsay Act**. Furthermore I have set out the reasons for allowing the paragraphs and statements in the paragraphs dealing with the complaints.

(63) Therefor the strike out application falls to be dismissed.

THE REVIEW:

(64) The applicants argue that the prohibition in section 41(6) of the **NPA Act** of publishing the record of evidence given at a section 28(1) enquiry is a limitation on the right to freedom of expression as set out in section 16 of the **Constitution of the Republic of South Africa**[18]. Section 16(1) provides:

> *"(1) Everyone has the right to freedom of expression, which includes-*
>
> *(a) freedom of the press and other media;"*

(65) The applicants submit that the NDPP failed to properly consider the right to freedom of expression when relying on section 41(6) of the **NPA Act**. In issue here was the involvement of the second respondent, who was the presidential spokesman and a high ranking official in the cabinet, where there are *prima facie* material discrepancies between what the second

[18] Act 108 of 1996

and third respondents had informed the NPA in the use of public funds during the section 28(1) investigation and what had in fact transpired. According to the applicants the NDPP had failed to give proper consideration to media freedom in these circumstances.

(66) Section 41(6)(c)'s provisions do not constitute a total ban on publication. The NDPP has a discretion to grant permission for publication to take place. The present matter is concerned with an inquiry in terms of section 28(1)(a) and section 28(6) of the **NPA Act**.

(67) The first respondent's argument is that the **NPA Act** does not empower the NDPP to grant permission to disclose information gathered in terms of section 28 after the fact. It is however clear from the wording that it does not expressly deal with permission to disclose after there has already been disclosure of the information. The first respondent relies on section 18(2) of the **Riotous Assemblies Act**[19] which provides:

> *"(2) Any person who-*
>
> *(a) conspires with any other person to aid or procure the commission of or to commit; or*
>
> *(b) incites, instigates, commands, or procures any other person to commit,*
>
> *any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."*

[19] Act 17 of 1956

(68) I cannot agree that in these circumstances a crime is committed under this Act, as there is no proof on the papers at all of a conspiracy or act by the applicants to *"incite, instigate, command or procure"* anybody to commit an offence. In any event, in my view, section 41(6) and (7) of the **NPA Act** makes it unnecessary to rely on the **Riotous Assemblies Act**, as adequate relief exists in the provisions of the **NPA Act**.

(69) The provisions of section 28(1) is a drastic interference with freedom of speech, which requires the NDPP to strike the correct balance between securing the integrity of the criminal justice system and upholding freedom of expression.

(70) The main argument by the second and third respondents' counsel is that where permission is sought to publish in a high profile case the present matter will be used as an example as to why guarantees of non-disclosure are of no value and will result in parties refusing to partake in section 28 inquiries.

(71) The first respondent's argument is based on whether section 41(6) of the **NPA Act** provides that disclosure may be permitted by the NDPP and the argument is that the provision must be interpreted in the context of all the provisions of the Act and the policies of the NDPP.

THE LAW:

(72) The Constitutional Court held in **Print Media South Africa v Minister of Home Affairs**[20] at paragraph 44:

> *"In answering this question, regard must, of course, be had to our current jurisprudence on prior restraint, with a view to achieving an appropriate balancing of the scales in relation to this matter. In the context of court interdicts, the Supreme Court of Appeal has, correctly in my view, endorsed the following statement of Lord Scarman:*
>
> *'(T)he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice.'*
>
> *The case law recognises that an effective ban or restriction on a publication by a court order even before it has 'seen the light of day' is something to be approached with circumspection and should be permitted in narrow circumstances only."*

(73) In **Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)**[21] Nugent JA held at paragraph 19:

> *"In summary, a publication will be unlawful, and thus susceptible to being prohibited,* ***only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that***

[20] 2012(6) SA 443 (CC)
[21] 2007(5) SA 540 (SCA)

> ***the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough***. *Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information."* (Court emphasis)

I have to agree with these findings in relation to the present application.

(74) This court has been reminded by the applicants' counsel that section 39(2) of the **Constitution** makes it imperative for every court to promote the spirit, purport and objects of the **Bill of Rights**[22].

(75) In **Phumelela Gaming and Leisure Limited v Grundlingh and Others**[23] at paragraph 27:

> *"**The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law.**"* (Court's emphasis)

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[22] Chapter 2 of the Constitution, Act 108 of 1996
[23] 2007(6) SA 350 (CC)

(76) According to the Constitutional Court's jurisprudence on the obligations arising from section 39(2) of the **Constitution** there are two independent obligations. The first thereof is the so-called *"Hyundai obligation"* to which both the applicants' and the first respondent's counsel referred. In the **Investigating Directorate: Serious Economic Offences And Others V Hyundai Motor Distributors (Pty) Ltd And Others: In Re Hyundai Motor Distributors (Pty) Ltd And Others V Smit No And Others**[24] at paragraphs 22 and 23 the court held:

> *"The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*
>
> ***...Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.***" (Court's emphasis)

(77) The second obligation is referred to as the *"Wary obligation"* which emanate from **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and**

[24] 2001(1) SA 545 (CC)

Another[25] at paragraphs 46 and 107 where the court held:

> *"[46] A further aspect arises. I deal below with the interpretative principle that a statutory provision should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. This court has not yet been called upon to deal with the situation where two conflicting interpretations of a statutory provision could both be said to promote the spirit, purport and objects of the Bill of Rights and the decision to be made is whether the one interpretation is to be preferred above the other.* ***It seems to me that it cannot be gainsaid that this court is required to adopt the interpretation which better promotes the spirit, purport and objects of the Bill of Rights. That would, after all, be a more effective '[interpretation] through the prism of the Bill of Rights'"*** (Court emphasis)

(78) This court has to apply the principles as set out above in deciding this application.

(79) It is trite that if even one reason exists to set aside the decision, the court is bound to set the decision aside. The principle was reaffirmed by Cameron J in the Supreme Court of Appeal in **Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration**[26] at paragraph 34:

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[25] 2009(1) SA 337 (CC)
[26] 2007(1) SA 576 (SCA)

> *"Nor does PAJA oblige us to pick and choose between the commissioner's reasons to try to find sustenance for the decision despite the bad reasons.* ***Once the bad reasons played an appreciable or significant role in the outcome, it is, in my view, impossible to say that the reasons given provide a rational connection to it****. This dimension of rationality in decision-making predates its constitutional formulation."* (Court emphasis)

(80) The further argument is that a decision maker is bound by the reasons given at the time of its decision and the available information that was before it when making the decision. It was held in **National Lotteries Board and others v SA Education and Environment Project and another**[27] at paragraph 27:

> *"The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England, the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified.* ***For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision. Whether or not our law also demands the same approach***

[27] [2012] 1 All SA 451 (SCA)

as the English courts do is not a matter I need strictly decide. *"* (Court emphasis)

And in **Zondi v MEC for Traditional and Local Government Affairs and Others**[28] at paragraph 101 the Constitutional Court held:

"All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. ***The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.*** *"* (Court emphasis)

(81) It Is clear from the NDPP that she did not consider the section 28(1) record before taking her decision to refuse the applicants permission to publish[29], as it was conveyed to the applicants:

"Kindly be informed that the record of the section 28 interview was not part of the documentation which was considered by our client when she reached the decision under review as the ANDPP was aware of the section 28 interview in general terms."

This assertion cannot be seen to be that she had considered the record – being aware *"in general terms"* cannot be seen to be a consideration of the record and having full knowledge of the contents of the section 28

[28] 2005(3) SA 589
[29] Annexure "RA 2" Page 284

record. She does not explain what is meant by *"in general terms"*.

(82) The submission by the applicants is that the section 28 record is of utmost importance when taking a decision in this matter as it is the central issue on which everything hinges. The submissions are that the NDPP could not on a logical and rational basis have concluded that the section 28 report should not be published. The question posed is how she could have balanced the second and third respondents' interests with that of public interest if she has not known what the section 28 transcripts contained at the time she had made the decision.

(83) In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others**[30] at paragraph 72 the Constitutional Court held:

> *"Given the central and fundamental importance of substantive empowerment under the Constitution and the Procurement and Empowerment Acts, SASSA's failure to ensure that the claimed empowerment credentials were objectively confirmed was fatally defective. It is difficult to think of a more fundamentally mandatory and material condition prescribed by the constitutional and legislative procurement framework than objectively determined empowerment credentials.* ***The failure to make that objective determination fell afoul of s 6(2)(b) of PAJA (non-compliance with a mandatory and material***

[30] 2014(1) SA 604 CC

condition) and s 6(2)(e)(iii) (failure to consider a relevant consideration). " (Court emphasis)

Similarly, in this instance, the section 28 record is of vital importance and should have been considered and dealt with by the NDPP. It is not good enough to submit that she *"was aware of the interview in general terms"*. She had to have studied the section 28 record to objectively decide whether the contents could be published. She did not do so and failed to consider it properly before making a decision. The first respondent referred the court to **Democratic Alliance v President of the Republic of South Africa and Others**[31] Where Yaccoob ADCJ set out at paragraph 37:

> *"We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not,* ***whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.*** " (Court emphasis)

(84) If I apply the three stage enquiry as set out in the **DA case**[32] I come to the conclusion that the first respondent failed to consider a relevant consideration, by her own admission, by not considering the contents of the section 28 inquiry. Therefore this ground of review must succeed.

(85) The three reasons set out by the applicants, as to why the matter is in the

[31] 2013(1) SA 248 (CC)
[32] *Supra*

public interest is that it deals with the allegations of misappropriation of public funds and corruption; Mr Maharaj holds high public office and that both the second and third respondents may have contravened the **NPA Act** by publishing the transcript of the section 28 inquiry without permission from the NDPP, albeit in court papers.

(86) The Constitutional Court emphasized the importance of a free press in **Khumalo and Others V Holomisa**[33] at paragraphs 23:

> *"[23] Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. As Joffe J said in Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another 1995 (2) SA 221 (T) at 227I - 228A:*
>
> *'It is the function of the press* ***to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators.*** *The press must reveal* ***dishonest mal- and inept administration****. . . . It must advance communication between the governed and those who govern.'"* (Court emphasis)

(87) There rests an obligation on the mass media to provide the country's citizens with information in a responsible manner.

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[33] 2002(5) SA 401 (CC)

(88) The issues in the present matter revolve around the allegations against both the second and the third respondents relating to misappropriation of public funds and corruption. Although Mr Maharaj, the second respondent, is no longer the spokesperson for the Presidency, at the time the decision was taken he held a senior post in the Cabinet. There can be no doubt that Mr Maharaj was a public figure at the time of the section 28 inquiry and had a high profile.

(89) The applicants argue that the case of **Glenister V President of the Republic of South Africa and Others**[34] is applicable where the court held at paragraph 118:

> *"**This is so because corruption largely involves the abuse of power. In corruption cases involving the public sector, at least one perpetrator comes from the ranks of persons holding a public office.** Hence the need to shield anti-corruption units from undue influence. This is a theme that recurs in the international and regional instruments cited by the amicus. Independence in this context therefore means the ability to function effectively without any undue influence. It is this autonomy that is an important factor which will affect the performance of the anti-corruption agency."* (Court emphasis)

(90) The *dicta* in **Tshabalala-Msimang and Another V Makhanya and**

[34] 2011(3) SA 347 (CC)

Others[35], to which the court was referred to by both the applicants' and the first respondent, is applicable in the present instance as Mr Maharaj is similarly *"a public figure"* and had been so as Minister of Transport and as Presidential spokesperson.

(91) The argument that he no longer holds public office cannot be a reason for the matter not to be of public interest as Mr Maharaj held public office as a Cabinet Minister and then as the spokesperson for the President of the Republic of South Africa. The fact that he has since retired cannot detract from the fact that at the time of the section 28 inquiry he was holding high public office.

(92) According to the applicants there is a possibility, in the present instance, that the second and third respondents may have contravened the **NPA Act** and due to the second respondent being a public figure it should be in the public interest if these facts were published. If these allegations are true there may have been a criminal offence committed by the second and third respondents for which they could be criminally prosecuted. It is clear that no such prosecution had been instituted and this reflects not only on the second and third respondents, but on the NDPP as well.

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[35] 2008(6) SA 102 (W) at paragraph 44: *"In her capacity as a Minister the first applicant cannot detract from the fact that she is a public figure. In such a case her life and affairs have become public knowledge and the press in its turn may inform the public of them."* And at paragraph 36: "*Public interest, it must be noted, is a mysterious concept, like a battered piece of string charged with elasticity, impossible to measure or weigh. The concept changes with the dawn of each new day, tempered by the facts of each case. Public interest will naturally depend on the nature of the information conveyed and on the situation of the parties involved.*"

(93) It is so that public interest must be weighed against other interests, which may be equally legitimate. The first respondent argues that there is a possibility that other third parties' information might be revealed should the section 28 inquiry's transcript be disclosed. This cannot be a reason for her decision as the first respondent was only aware of the inquiry in general terms according to her evidence. Section 6(2)(e)(iii) of **PAJA** provides:

> *"(2) A court or tribunal has the power to judicially review an administrative action if-*
>
> *(e) the action was taken-*
>
> *(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;"*

(94) It is evident that the NDPP had not properly considered the public interest in such an important matter as this as she had not considered the section 28 transcripts when making her decision. This is a fatal defect in her decision, as the whole issue turns on the section 28(1) transcripts.

(95) Counsel for the first respondent quoted the dicta in the **Tshabalala-Msimang**[36] matter where the court held in paragraph 34:

> *"The freedom of the press is celebrated as one of the great pillars of liberty. It is entrenched in our Constitution but it is often misunderstood.* ***Freedom of the press does not mean that the press is free to ruin a reputation or to break a***

[36] Supra

> ***confidence, or to pollute the cause of justice or to do anything that is unlawful.*** *However, freedom of the press does mean that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish."* (Court emphasis)

(96) The NDPP failed to adhere to these provisions, as in this instance the second and third respondents had already published the section 28 transcripts themselves in their court application and the contents of the transcriptions were in the public domain.

(97) The applicants argue that the NDPP's further reason for not granting permission to publish is that according to her, she would condone criminal behaviour and that a court cannot retrospectively grant permission for publication which had already taken place. The first respondent alleges that the criminal conduct in issue relates to the applicants' conduct at the time by the applicants publishing protected information without the required permission. According to the first respondent the NDPP cannot permit an unlawful possessor to publish. This is based on conjecture and speculation and not on actual facts.

(98) The applicants admit that they now are in possession of the section 28 inquiry transcripts, but have not disclosed the contents of these transcripts at any stage, but sought permission from the NDPP to publish the contents of the transcripts in terms of section 41(6) of the **NPA Act**,

contrary to what other newspapers and the second and third respondents themselves had done.

(99) It is strange that criminal charges were instituted against the applicants for allegedly contravening section 41(6) in 2011, but no prosecution has ensued in the intervening five years. None of the employees of the first applicant, including the third applicant, had at any stage appeared in court on any charges relating to this particular section 28(1) inquiry. It cannot be rational for the NDPP, who has to make the decision to prosecute, not to have done so in the intervening five years if she was serious in her intention to prosecute. The pending criminal charges should not have been a consideration when taking the decision to refuse permission to publish as it could not have impacted on the decision that had to be taken.

(100) I cannot find that permission to disclose will condone criminal behaviour. Each case will have to be considered on its own merits. In the present instance the contents of the section 28 inquiry is already in the public domain. No criminal charges have been pursued against the applicants in the intervening five years. This ground for her decision cannot be sustained. It should therefore be set aside in terms of section 6(2)(e)(iii) and section 6(2)(d) of **PAJA**, which provides:

> *"(2) A court or tribunal has the power to judicially review an administrative action if-*
>
> *(d) the action was materially influenced by an error of law;"*

(101) The reason that the interests of others and third parties would be affected cannot be seriously entertained as she had stated that she did not consider the contents of the section 28 inquiry when making her decision. It follows that she had not known what the contents of the section 28 inquiry were and cannot rely on this reason as she, according to her own evidence, could not have known whether any other party was implicated. She cannot rely on being aware of the contents of the section 28 inquiry in *"general terms"*. It was imperative that she had to ascertain the contents of the transcripts of the inquiry and had to consider and decide whether it would have an impact on others or third parties. This she clearly did not do, by her own admission.

(102) It is common cause, that at the time, the information in question had been in the public domain for some time at the time she had made her decision.

(103) She had not rationally made the decision as she did not have knowledge whether any other party or third party would be affected as she did not consider the *dicta* in **Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board V Sneller Digital (Pty) Ltd and Others**[37] where Plasket AJA held at paragraph 40:

> *"In order to be rational, the decision must be 'based on accurate findings of fact and a correct application of the law'. That being so, no rational basis existed for the STB's conclusions:* ***the administrative action that it took was not rationally***

[37] 2012 (2) SA 16 (SCA)

connected to the information before it, as required by s 6(2)(f)(ii)(cc) of the PAJA." (Court's emphasis)

(104) The first respondent relies on the fact that she had indicated to the applicants that *"further consideration is being given to your request"* to show that she considered the application, although policy militated against disclosure. She did not consider the contents of the section 28 inquiry and her finding cannot rationally be connected to the information she had.

(105) Her decision on this ground has to be set aside in terms of section 6(2)(d) of **PAJA** and section 6(2)(e)(iii) and section 6(2)(f)(ii)(cc).

(106) Section 41(6) of the NPA Act clearly cloaks the NDPP with a discretion to grant permission to publish. Her reason for refusal was that there was a general policy not to disclose thereby compromising her discretion as granted by section 41(6). Her decision falls to be considered against the authority in **Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another**[38] at page 152 C to D where the Appellate Division held:

> *"Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide* ***or as a result of unwarranted adherence to a fixed principle or in***

[38] 1988 (3) SA 132 (A)

order to further an ulterior or improper purpose; or that the president *misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones;* ***or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.***" (Court emphasis)

It is clear that she considered herself to be bound by the general policy and did not use her unfettered discretion as she had to do according to the provisions of section 41(6). She did not keep an open mind and did not consider the contents of the section 28(1) transcripts when making her decision as she was only aware *"in general terms"* of the contents of the transcripts. If the finding in the **Johannesburg matter**[39] is applied to the present circumstances I find that she did not exercise her discretion in the circumstances of this case and therefor her decision should be set aside.

(107) The applicants argue that the decision should be set aside in terms of section 6(2)(e)(iii) of **PAJA**. Her reason for refusing to grant permission to publish was that the disclosure of the section 28 record would compromise an on-going commission of inquiry. She relied on a statement by the applicants which set out:

"The company group from which Mr and Mrs Maharaj are alleged to have received payments...as well as Mr Shaik

[39] *Supra*

personally, have been implicated for engaging in unlawful conduct in respect of the arms deal... Allegations that are linked to the arms deal are of particular pertinence at present given the new commission of inquiry that has been established by President Zuma."

In any event, if she had **not taken** the contents of the section 28 inquiry into consideration, how could she have known whether it would have had any impact on the commission of inquiry? The allegations against the second and third respondents at that stage did not involve the arms deal. I agree that the commission of inquiry was irrelevant to her decision and should not have been considered. Her decision should be set aside on this ground.

(108) At the time the NDPP took the decision some of the information the applicants sought to publish, was already in the public domain, as various media houses had published articles in this regard before the applicants had obtained the section 28 transcripts.

(109) Mr and Mrs Maharaj had disclosed the contents of the transcripts themselves, firstly in the application to the High Court, Transvaal Provincial Division under case number 34526/2006 where the record of the inquiry in terms of section 28 of the **NPA Act** of both the second and third respondents were attached. Some newspapers published the allegations without requesting permission from the NDPP and were never sanctioned in terms of section 41(6) of the **NPA Act**.

(110) The NDPP decided that the fact that the information was already in the public domain, was irrelevant. Furthermore she contended that should permission to publish be granted, a floodgate would be opened whereby information would be published and permission requested *ex post facto*. This cannot be tenable, as the applicants did not publish, but is only in possession of the information. The applicants want to prevent prosecution by publishing the contents of the section 28 transcripts without permission and therefor they applied to publish it.

(111) Paragraph 45 of **Tshabalala-Msimang and Another V Makhanya and Others**[40] is apposite where Jajbhay J stated:

> *"Much of the information that was published was already in the public domain. Here the information, although unlawfully obtained, went beyond being simply interesting to the public; there was in fact a pressing need for the public to be given the information contained in the medical records of the first applicant. Then, the disclosure made by the Sunday Times did not mislead the public about an issue in which the public has a genuine concern.* ***And finally, the publication of the unlawfully obtained, controversial information was capable of contributing to a debate in our democratic society relating to a politician in the exercise of her functions.***" (Court emphasis)

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[40] *Supra*

I fully support this *dicta* as the principles are applicable to the present review.

(112) The important decision by Moseneke DCJ in **Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another**[41] at paragraph 55 must be referred to in this context, where he held:

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

And at paragraph 62:

> *"In any event, it is evident from the voluminous press clippings placed before us that the issues covered by the conclusions are all well within the public domain and media discourse and are not worthy of any confidentiality protection."*

[41] 2008 (5) SA 31 (CC)

(113) The facts in the present application for review are comparable to the **Masetlha matter**[42] if regard is had to all the press clippings and referrals to articles in this regard. The section 28 record has been in the public domain since 2006 when the second and third respondents placed it in the public domain through the court case. There is thus no longer any confidentiality to be preserved as was the case in the **Independent Newspapers case**[43]. The court was further referred to the leading English decision where the House of Lords in **Attorney-General v Guardian Newspapers (No 2)**[44] where Lord Griffiths held:

> *"The law would indeed be an ass, for it would seek to deny to our citizens the right to be informed of matters which are freely available throughout the rest of the world."*

And Lord Goff at page 659:

> *"The principle of confidentiality only applies to information to the extent that it is confidential ...* ***Once it has entered ... the public domain ... then, as a general rule, the principle of confidentiality can have no application to it.***" (Court emphasis)

(114) In the present instance the NDPP failed dismally in this regard as she did not give the fact that there had been extensive prior publication any

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[42] *Supra*
[43] *Supra*
[44] [1990] 1 AC 109, [1988] 3 All ER 545

weight as she had not considered to what extent the facts had already been in the public domain and the *dicta* in the abovementioned cases confirm it.

(115) The applicants did not publish and then request permission to publish. The applicants had sought permission to publish from the outset. The hypothetical case set forward by the NDPP will still result in an offence under the **NPA Act**.

(116) It is quite clear that although all these publications had taken place prior to the applicants requesting permission no steps were taken to prosecute any of the other concerned parties. Even the second and third respondents had breached the provisions as set out in section 41(6) where they published the contents of the section 28 inquiries in court papers and in Mr Maharaj's biography. There is no indication that they will be prosecuted. It is indeed strange that the persons who took part in the section 28 inquiry did not keep the contents of the inquiry confidential, but even went so far as to have it published in a biography. In such an instance it would be unfair to deny a party permission to disclose where the involved parties have already published the required information.

(117) This results in the untenable position that only parties who request permission to publish are denied such permission but parties who publish without permission attract no consequences.

(118) This decision by the NDPP on this ground cannot be sustained and the decision should be set aside in terms of section 6(2)(e)(iii) of **PAJA**. Due to my findings on all the relevant grounds set out by the first respondent, the decision falls to be set aside.

(119) This court is requested to set aside the decision of the NDPP and not to remit it to the NDPP for a fresh decision, but for the court to find exceptional circumstances and to substitute the decision by the NDPP.

(120) Section 8(1)(c) of PAJA provides:

> *"(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) setting aside the administrative action and-*
>
> *(i) remitting the matter for reconsideration by the administrator, with or without directions; or*
>
> *(ii)* ***in exceptional cases-***
>
> ***(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action****; or*
>
> *(bb) directing the administrator or any other party to the proceedings to pay compensation;"* (Court emphasis)

(121) The main fact that the court is requested to consider is whether it is just and equitable to grant permission to publish the section 28(1) transcripts, as they are already in the public domain. The applicants urge this court to follow the approach which was set out in **Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs and Development Planning, Western Cape, and Others**[45] at pages 83 to 84 where the court found that the decision being reviewed was wholly irrational and based on incorrect information.

(122) The first respondent argues that the matter must be remitted to the first respondent for reconsideration as she is best placed and possesses the relevant facts and expertise to deal with the matter and to make the decision. I cannot agree with this submission due to my findings on each and every fact she took into consideration and the decision that her decision should be set aside for all the reasons mentioned above.

(123) I must agree, if I have regard to my findings on each ground, that the NDPP acted in an irrational manner by not considering the section 28 record, the public interest and the fact that all the information was already in the public domain where even the second and third respondents had published it, that it constitutes exceptional circumstances.

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[45] 2007 (6) SA 65 (C)

(124) This matter has been outstanding since 2011. If the court remits it, it would further delay a matter which should have been finalised much earlier and further prejudice the applicants.

(125) In **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another**[46] Khampepe J held at paragraph 47:

> *"To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties.* ***It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."*** (Court emphasis)

(126) I have been urged to consider all the factors cumulatively to come to the decision that exceptional circumstances exist in this application, as I

[46] 2015(5) SA 245 (CC)

have the requisite knowledge which was available to the NDPP at the time she took the decision.

(127) Furthermore, the section 28 inquiry's transcripts can by no stretch of imagination be regarded as confidential under these circumstances where it has been in the public domain for at least 10 (ten) years.

(128) I agree that it will serve no purpose to remit the matter to the NDPP, but it will be just and equitable for this court to substitute the decision of the NDPP.

(129) Therefore I make the following order:

1. The striking out application is dismissed.
2. The second and third respondents to pay the costs of the striking out application in terms of section 6(15) of the Uniform Rules of Court.
3. The first respondent, the NDPP's decision is reviewed and set aside;
4. The applicants are granted permission to publish the section 28 record;
5. The first respondent to pay the costs of this application, such costs to include the costs of two counsel.

Judge C Pretorius

Case number	: 37510/2012
Matter heard on	: 23 March 2016
For the Applicant	: Adv G Marcus SC, Adv F Ismail, Adv M Seape
Instructed by	: Webber Wentzel Attorneys
For the 1st Respondent	: Adv K Pillay SC, Adv M Lekoane
Instructed by	: The State Attorney
For the 2nd and 3rd Respondent	: Adv MR Hellens SC
Instructed by	: BDK Attorneys
Date of Judgment	: 12 May 2016