THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY

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Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

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

Today, the Supreme Court of Appeal, per Makgoka JA (Weiner and Goosen JJA and Chetty and Masipa concurring) handed down a judgment upholding an appeal against the order of the Gauteng Division of the High Court, Pretoria. That court, sitting in confirmation proceedings in respect of an interim interdict, made the interim interdict final. The matter concerned an intelligence report compiled by the State Security Agency of South Africa (the SSA), marked 'Secret.' The report is about the USA Embassy and its intelligence community which were said to be observing the widely reported factions in the ruling party, the African National Congress (ANC) to influence domestic policy and shape the USA's own decisions.

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. During December 2021, Mr Makwakwa came to be in possession of the report. He directed questions to, among others, the Deputy Minister of State Security, among other people. The Ministry indicated to Mr Makwakwa that his possession of the report was unauthorised and therefore, unlawful. He was instructed to return the copy of the report to the Ministry. He did not.

On the evening of 22 December 2021, the Ministry of State Security launched an urgent application in the High Court, without giving notice to the appellants and without any court papers (ex parte proceedings). Oral evidence was led of the Ministry's Deputy Director

General. Among other things, it was conveyed to the court in his testimony, and in the submissions by the legal representative of the Ministry, that the report had been marked 'Top Secret', and had been prepared by the USA intelligence community together with the SSA, and that the publication of the report would: (a) affect diplomatic relation between South Africa and the USA; and (b) endanger national security. The court was not given a copy of the report.

Having heard the oral evidence, and having considered counsel's submissions, the court issued an interim interdict preventing 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.

On the return date, the parties had exchanged full sets of affidavits. A copy of the report was given to the court. After hearing the parties, the High Court (Molefe J) 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 finally 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 Ministry.

The appellants were granted leave to appeal to the Supreme Court of Appeal (the Court). In its judgment, the Court considered the overarching issue to be whether the High Court properly exercised its discretion when it confirmed the interim interdict, with the following owing 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 deserved protection from publication.

With regard to the requisite of good faith, the Court referred to the test settled in *Schlesinger* 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. In this regard, the Court considered that: (a) the report was not made available to the court in ex parte proceedings and there was no explanation for this; (b) that the court was informed that the report was classified as 'Top secret' whereas it was merely classified 'Secret'; (c) inaccurate information was conveyed to the court about the nature and contents of the report. The Court pointed out several material misstatements and a misrepresentation made during the oral evidence of the Deputy Director, and in the submissions by counsel. On these bases, the Court concluded that the Ministry did not observe the duty of utmost good faith in the ex parte proceedings. The High Court was

remiss in failing to have regard to these factors, and in the process, it did not exercise any discretion at all.

The Court also clarified the effect of a classification of a report with reference to the *Independent Newspapers v Minister for Intelligence Services: in re Masetlha.* There, the Constitutional Court 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 Constitutional 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.

The High Court had sought to distinguish the present case from *Masetlha* and *President of RSA v M & G Media Ltd* on the basis that in those cases, a request had been made for access to the record in terms of the Promotion to Access of Information Act (PAIA), which was not the case in this matter. The High Court implied 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.

The Supreme Court of Appeal disagreed with this reasoning. It held that the *Masetlha* dictum applies, irrespective of whether the application before the court is one for access, or about the right to publish a document already in the possession of a party, albeit obtained in an unauthorised manner.

Finally, the Court considered whether, in all the circumstances, the report should be published, regard being had to the alleged risk to national security. It took into account: (a) the fact that the information contained in the report (about reported factions in the ANC) was already in the public domain; (b) the report does not contain names of ANC leaders who are said to be collaborating with the USA intelligence community about factional battles within the organisation. The Court concluded that the Ministry had failed to discharge its onus to establish that the publication of the report would endanger national security. Accordingly, the Supreme Court of Appeal upheld the appellants' appeal with costs.

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