THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 844/2016

In the matter between:

MAHARAJ SATHYANDRANATH RAGUNANAN	**FIRST APPELLANT**
MAHARAJ ZARINA CARRIM	**SECOND APPELLANT**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**THIRD APPELLANT**

and

MANDAG CENTRE OF INVESTIGATIVE JOURNALISM NPC	**FIRST RESPONDENT**
M&G MEDIA LIMITED	**SECOND RESPONDENT**
STEPHAN PATRICK "SAM" SOLE	**THIRD RESPONDENT**

Neutral citation: *Maharaj & others v Mandag Centre of Investigative Journalism NPC & others* (844/2016) [2017] ZASCA 138 (29 September 2017)

Bench: Ponnan and Petse JJA and Tsoka, Mbatha and Schippers AJJA

Heard: 31 August 2017

Delivered: 29 September 2017

Summary: National Prosecuting Authority Act 32 of 1998 – whether discretion in terms of s 41(6) properly exercised by the National Director of Public Prosecutions in refusing to grant permission to publish record of investigation in terms of s 28.

ORDER

On appeal from: Gauteng Division, Pretoria (Pretorius J sitting as court of first instance):

(a) The appeal by the first and second appellants against paragraphs 1 and 2 of the judgment of the court below is dismissed with costs, such costs to include the costs of two counsel.

(b) The appeal by the third appellant against paragraph 3 of the judgment of the court below is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Ponnan JA (Petse JA and Tsoka, Mbatha and Schippers AJJA concurring):

[1] 'Mac's Secrets'[1] is pithy, yet apt. It captures in just two words, who and what this appeal is about. The who, is the first appellant, the then Spokesperson for the President

[1] I borrow from the City Press Newspaper. 'Mac's Secrets' being the caption of an article published in the City Press of 27 November 2011. Similar captions were 'Mac's foreign stash' in the City Press of 24 March 2011 and 'The Mac behind the big cheese' in the Mail and Guardian of 18 November 2011.

of the Republic of South Africa and former Minister of Transport, Mr SR 'Mac' Maharaj. The what, is his evidence, as also, that of, his wife Ms Zarina Carrim Maharaj (the second appellant) under s 28 of National Prosecuting Authority Act 32 of 1998 (the Act).

[2] On 18 November 2011 the Mail & Guardian (the M&G), a national weekly newspaper, ran a photograph of Mr Maharaj on its front page. Alongside the photograph and within a transverse block were the words 'CENSORED. WE CANNOT BRING YOU THIS STORY IN FULL DUE TO A THREAT OF CRIMINAL PROSECUTION'. Readers were informed by the editor-in-chief that the M&G had been forced to suppress a story about the Presidential Spokesperson following a threat of criminal prosecution under the Act, which, so stated the editor, 'makes it an offence to disclose evidence gathered in camera by a s 28 inquiry – providing for a maximum penalty of 15 years'. Accordingly, so went the explanation, the M&G had decided on the strength of legal advice, 'to withhold publication pending an application to the National Director of Public Prosecutions (the NDPP) for permission to disclose the relevant material'.

[3] For ease of narration the relevant statutory provisions are set out at the outset. Section 28(1) of the Act authorises a Director of Public Prosecutions (DPP),[2] if he or she has reason to suspect that a specified offence[3] has been or is being committed, to conduct an investigation on the matter.[4] For the purposes of such an investigation, the

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2 The Act refers to an Investigating Director. According to s 1 of the Act 'Investigating Director': '(*a*) means a Director of Public Prosecutions appointed under s 13(1)(b) as the head of an Investigating Directorate established in terms of s 7(1); and
(b) in Chapter 5, includes any Director referred to in s 13(1), designated by the National Director to conduct an investigation in terms of s 28 in response to a request in terms of s 17D(3) of the South African Police Service Act, 1995 (Act 68 of 1995), by the Head of the Directorate for Priority Crime Investigation.'

3 "Specified offence" means 'any matter which in the opinion of the head of an Investigating Directorate falls within the range of matters as contemplated in s 7(1) . . .'

4 Section 28(1) 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 and 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 s 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.
(*c*) If the *Investigating Director*, at any time during the conducting of an investigation on a matter referred to in paragraph (*a*) or (*b*), considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the *investigation* so as to include any offence, whether or not it

DPP may summon any person, believed to be able to furnish any information on the subject of the investigation, to be questioned or to produce any book, document or object in their possession.[5] The proceedings contemplated in s 28(6) take place in camera[6] and the procedure to be followed is determined by the DPP.[7] Should any person who has been summoned, fail without sufficient cause to appear before the DPP or answer fully or gives false evidence, such person shall be guilty of an offence.[8] In terms of s 28(8),[9] a person summoned is obliged to answer questions and no evidence given by such a person shall be admissible in any criminal proceedings, save to establish a contravention of subsections 10(*b*) or (*c*).

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is a *specified offence*, which he or she suspects to be connected with the subject of the *investigation*.
(*d*) If the *Investigating Director*, at any time during the conducting of an *investigation*, is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the *Investigating Directorate* concerned, he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter. [Sub-s (1) substituted by s 12(*a*) of Act 61 of 2000 (wef 12 January 2001).]'

[5] Section 28(6)(*a*) provides: 'the *Investigating Director* may summon any person who is believed to be able to furnish any information on the subject of the *investigation* or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the *Investigating Director* at a time and place specified in the summons, to be questioned or to produce that book, document or other object.'

[6] Section 28(3) provides: 'All proceedings contemplated in subsections (6), (8) and (9) shall take place in camera. [Sub-s (3) substituted by s 12(*a*) of Act 61 of 2000 (wef 12 January 2001).]'

[7] Section 28(4) provides: 'The procedure to be followed in conducting an *investigation* shall be determined by the *Investigating Director* at his or her discretion, having regard to the circumstances of each case.'

[8] Section 28(10) provides: 'Any person who has been summoned to appear before the *Investigating Director* and who –
(*a*) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the *Investigating Director* from further attendance;
(*b*) at his or her appearance before the *Investigating Director* –
(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;
(ii) refuses to be sworn or to make an affirmation after he or she has been asked by the *Investigating Director* to do so;
(*c*) having been sworn or having made an affirmation –
(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;
(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true, shall be guilty of an offence.'

[9] Section 28(8) provides: '(*a*) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.
(*b*) No evidence regarding any questions and answers contemplated in paragraph (*a*) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsections (10)(*b*) or (*c*), or in s 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).'

[4] Section 41(6) of the Act, upon which the matter turns, provides:

'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 –

(*a*) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;

(*b*) the contents of any book or document or any other item in the possession of the *prosecuting authority*; or

(*c*) the record of any evidence given at an investigation as contemplated in s 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.'

According to s 41(7):

'Any person who contravenes subsections (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.'

[5] On 13 June 2003 Mr and Ms Maharaj were summoned in terms of s 28(6) of the Act by the DPP to furnish information pertaining to an investigation by the then Directorate of Special Operations (the Scorpions). On 19 June 2003 Mr Maharaj testified under oath in terms of s 28(6)(*b*) of the Act before a DPP and other members of the National Prosecuting Authority. The next day Ms Maharaj did the same.

[6] The three respondents – the MANDAG Centre of Investigative Journalism NPC (MANDAG), the M&G Media Limited (the publisher of the M&G) and Mr 'Sam' Sole, the managing partner of MANDAG (collectively referred to as the M&G) – considered the publication of the answers given by the appellants during the s 28 investigation to be in the public interest. With a view to reporting on the matter, on 16 November 2011 the M&G presented Mr Maharaj with a list of questions relating to the evidence adduced by both him and his wife during the course of s 28 investigation. The response from Mr Maharaj's attorney was that possession of the record of the investigation as well as disclosure of the evidence furnished by them during the course of the investigation

would amount to a contravention of s 41(6) of the Act. Only then, so says the M&G, did it realise that the permission of the third appellant, the NDPP, was required to publish the evidence.

[7] On 21 November 2011 the M&G's attorney wrote to the NDPP seeking permission. The letter read:

'11.1 Based *inter alia* on the information contained in the record, our clients have reason to believe that Mr and Mrs Maharaj failed to disclose certain information during the course of the investigation and provided false information. This is an offence in terms of s 41(2) of the NPA Act.

11.2 Mr Maharaj has held the position of a cabinet minister, and is now the Presidential spokesperson. Given the public office that he held and holds, and the public power that he exerted and continues to exert, issues concerning his integrity – and particularly whether he lied under oath – are of public interest.

11.3 The company groups from which Mr and Mrs Maharaj are alleged to have received payments, namely Thomson-CSF and Nkobi, as well as Mr Shaik personally, have been implicated for engaging in unlawful conduct in respect of the arms deal. It is in the public interest that any allegations of unlawful conduct in procuring other government tenders involving these parties be disclosed.

. . . .

12. Furthermore, the substance of the record of the evidence in the s 28 enquiry is already in the public domain, not least because of an interview given by Mr Maharaj to Mr Patrick O'Malley in 2005. Mr O'Malley is Mr Maharaj's biographer. It appears that Mr Maharaj disclosed the record of his s 28 interview to Mr O'Malley for purposes of his biography. In other interviews which Mr Maharaj has given he also addresses certain aspects of the allegations against him.

. . . .

14. There has been extensive media coverage of the requested extracts and the allegations against Mr and Mrs Maharaj which formed the subject matter of the s 28 investigation. A small sample of the relevant material which is already in the public domain includes the following . . . .'

Some 17 sources, being newspaper reports, media statements and websites were cited. Those reveal alleged impropriety on various related fronts.

[8] When that letter failed to elicit a response, a further letter was dispatched on 29 November 2011 to the NDPP. Reference was made in this letter to two further articles that had since been published by the City Press Newspaper on Sunday 27 November 2011, entitled 'Mac's secrets' and 'Just give me peace of mind'. It was pointed out that those articles, which were also available on the City Press website and had been republished on various other websites contained 'the essence of the information which our client wishes to disclose'. When the NDPP did respond on 14 December 2011, it was to inform the M&G's attorney that: '[i]t is not the policy of the National Director to disclose the record of evidence given at an investigation as contemplated in s 28(1) of the [Act].' The NDPP added: '[h]owever, in view of your submission that the relevant information is already in the public domain further consideration is being given to your request.'

[9] That very day the M&G's attorney once again wrote to the NDPP. This time it was pointed out that the appellants had themselves placed the evidence in the public domain. The letter, to the extent here relevant, read:

'2.1 In this regard, in addition to the sources of the public domain referred to in our previous two letters, we enclose a High Court application by Mr and Mrs Maharaj in the Transvaal Provincial Division (as it then was) under case number 34526/06 ("the high court application"). Mr and Mrs Maharaj brought this application in an effort inter alia to have sub-sections 28(2), (6), (8) and (10) of the [Act] declared to be inconsistent with the Constitution, or alternatively to have the manner of the investigations declared to be inconsistent with the Constitution . . . .

2.2 You will note that the record of the s 28 enquiries into Mr and Mrs Maharaj ("the record") – extracts of which our clients seek to publish, as you are aware – are attached by Mr Maharaj to his founding affidavit in the high court application. Mr Maharaj states at paragraph 20 that "The transcript of my interrogation, as provided to me by the DSO, is attached marked *Annexure SRM3*"; and at paragraph 25, in reference to Mrs Maharaj (whose confirmatory affidavit is attached to the founding affidavit), that: *"The transcript of the Second Applicant's interrogation, as provided to her by the DSO, is attached marked Annexure SRM5*". These documents have accordingly been made public in the court documents by Mr and Mrs Maharaj themselves.

2.3 The high court application has also been canvassed by the City Press in its article dated 11 December 2011 entitled "Maharaj wanted to rat on ANC". A copy of this article is attached

hereto marked "B". The article states *inter alia* that: *"The 2007 court file – Media24 Investigations now has a copy – contains the controversial "secret" transcripts of their evidence to Scorpions investigators in 2003."*

It was re-iterated that there could be no rational basis for refusing our permission to publish.

[10] When the refusal eventually came from the NDPP on 3 January 2012 it was in these terms:

'3. It is not the policy of the National Prosecuting Authority to disclose the record of evidence given at an investigation as contemplated in s 28(1) of the NPA Act. This is necessary to encourage and preserve confidence and trust in the NPA.

4. These legislative provisions, as is others restricting disclosure, are very necessary for the combating of crime and corruption, both then and now. To the extent that the relevant provisions may infringe on the right to freedom of expression and of the media, such limitation [is] justifiable.

5. The legislature has further underlined the importance of non-disclosure by prescribing a penalty of a fine and/or period of imprisonment not exceeding 15 years where a person is found guilty of contravening s 41(6) of the NPA Act. Unlawful disclosure is, indeed, a very serious offence.

6. The claim that disclosure could in no way interfere with a current investigation has to be approached with circumspection. We are mindful of the fact that a Commission of Inquiry has been established and a possibility cannot be ruled out that this matter may as well feature therein.

7. Furthermore, as indicated above, there is a criminal investigation currently underway relating to a possible contravention of s 41(6) of the NPA Act in relation to the very information in question. The granting of permission to disclose the information will no doubt affect the investigation of such offence at a time when the investigation is not complete.

8. The claim has also been made that, as the information has been placed in the public domain by Mr and Mrs Maharaj, a rational basis no longer exists for refusing permission to disclose the record of evidence. However, it should be noted that, it is the National Director who must give permission, not the witness in the enquiry. The National Director has not done so.

9. Although it is acknowledged that there is significant public interest in the person of Mr Maharaj the interests of the public also extend to ensuring that legitimate institutions and mechanisms established by Government effectively serve their intended purposes. This is a

particularly acute interest in the current environment where the combating of crime and corruption is considered by the general public to be one of the highest priorities.

10. In considering a request for permission to disclose evidence, attention must be given to more than just the interests of the particular witness. The interests of other persons must also be taken into account. These would include persons who are referred to both by the witness in evidence and in questions that may be put into the witness during the inquiry.

11. Consideration also needs to be given to the entire investigation, all the persons who testified, had documents seized or who were referred to in the investigation. All the facts and circumstances must be considered. Your application does not seem to give consideration to or recognise such competing interests.

12. In conclusion, it is my view that the constructions of the relevant provisions of the NPA Act, compelling considerations of policy, the effective functioning of the administration of justice and the balancing of different interests involved, taking into account constitutional rights and values, support the non-disclosure of the record of evidence given at the investigation.

13. In the circumstances, therefore, we are unable to accede to your request.'

A week later the NDPP clarified that the policy relied on is reflected in paragraph 13 of the United Nations Guidelines on the Role of Prosecutors. She added that s 41(6) of the NPA Act requires a general policy of non-disclosure.

[11] On 29 July 2012 the M&G applied to the North Gauteng High Court, Pretoria for an order in the following terms:

'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 s 28 of the [Act] ("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.'

[12] All three appellants opposed M&G's application. The NDPP, who was cited as the first respondent filed an answering affidavit, in which, she substantially reiterated the reasons given in her letter refusing permission. She added:

‘15. This case turns on the question of whether the exercise of my discretion in refusing permission to disclose the relevant information, was lawful. I am advised and submit that:

15.1 I took all relevant considerations into account in coming to my decision. That this is so, is clear from the detailed reasons contained in my letter refusing permission.

15.2 In exercising my discretion, I was required to take into account competing interests, the provisions of the NPA Act, the Constitution and the NPA policy on non-disclosure of s 28 records. I also took into account the fact that in order to protect the rights and interest of witnesses who give evidence in s 28 investigations as well as the integrity of the process, non-disclosure must be the rule and disclosure the exception.

15.3 I must emphasis though that it is quite plain from the above that the NPA policy referred to is not rigid. It does admit of the possibility of disclosure.’

The appellants, who had been cited as the second and third respondents, approached the matter on a different footing – they restricted themselves to an application to strike out substantial portions of the M&G’s founding affidavit, without pleading over.

[13] The matter was heard by Pretorius J, who on 12 May 2016 issued 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 s 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 s 28 record;

5. The first respondent to pay the costs of this application, such costs to include the costs of two counsel.’

With the leave of the learned judge the appellants appeal against paragraphs 1 and 2 of the order (the strike out appeal) and the NDPP against the remaining paragraphs (the main appeal).

[14] Turning, first to the strike out appeal: Rule 6(15) of the Uniform Rules, upon which the appellants relied in support of the strike out application, provides that:

‘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.'

Two requirements must be satisfied before an application to strike out a matter from an affidavit can succeed: first, the matter sought to be struck out must be scandalous, vexatious or irrelevant; and, second, the court must be satisfied that if such matter was not struck out the party seeking such relief would be prejudiced.

[15] The strike out application is staggering in its breadth. It seeks to preclude virtually every reference to the s 28 record from the founding affidavit. In the main, it is suggested that the passages contain: (a) hearsay or (b) unlawfully obtained evidence, both of which are inadmissible.

[16] As to (a): Pretorius J correctly recognised that the various newspaper articles annexed to the founding affidavit were relied on, not to prove the truth of their content, but to demonstrate that the information was already in the public domain. In *The Public Protector v Mail & Guardian Ltd & others*[10] Nugent JA explained:

'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 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.'

This is an important nuance that appears not to have been appreciated by the appellants.

[17] As to (b): Pretorius J found that there was no evidence on the papers before her that the M&G had indeed obtained any of the evidence unlawfully. She found the appellants' assertions to the contrary to be speculative at best. The appellants contend

[10] *The Public Protector v Mail & guardian Ltd & others* 2011 (4) SA 420 (SCA) para 14.

that the M&G must have obtained the evidence by inciting, instigating, commanding or procuring a person to commit the offence created by s 41(6) read with s 41(7) of the Act. This purportedly constituted an offence in terms of s 18(2) of the Riotous Assemblies Act 17 of 1956. But, those are allegations of a most serious kind and are not easily established in motion proceedings. A clear factual basis must be laid to support an allegation of criminal conduct. It is not sufficient merely to put up speculative propositions or advance arguments on probabilities that might be suggestive of the commission of a criminal offence. As long ago as 1939, Watermeyer JA put the position thus in *Gates v Gates*:[11]

'Now in a civil case the party, on whom the burden of proof (in the sense of what *Wigmore* calls the risk of non-persuasion) lies, is required to satisfy the court that the balance of probabilities is in his favour, but the law does not attempt to lay down a standard by which to measure the degree of certainty of conviction which must exist in the court's mind in order to be satisfied. In criminal cases, doubtless, satisfaction beyond reasonable doubt is required, but attempts to define with precision what is meant by that usually lead to confusion. Nor does the law, save in exceptional cases such as perjury, require a minimum volume of testimony. All that it requires is testimony such as carries conviction to the reasonable mind.

It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the "clearest" evidence or "clear and satisfactory" evidence or "clear and convincing" evidence, or some similar phrase. There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.'

It thus could not have been sensibly concluded on the papers as they stood that the M&G had contravened the law.

[11] *Gates v Gates* 1939 AD 150 at 154-5.

[18] But, even if the offending paragraphs did contain unlawfully obtained evidence that would not, without more, render it inadmissible. In *Janit & another v Motor Industry Fund Administrators (Pty) Ltd & another*[12] Eksteen JA stated:

'Courts in England have for a long time accepted that they have a right in criminal cases to exclude otherwise admissible evidence when justice and fairness to the accused require it, for example where the evidence was obtained by a trick or by fraud . . . In South Africa our courts have exercised a similar discretion . . . Until the *dictum* of Lombard J[13] to which I have referred, there seems to have been considerable doubt as to whether any such discretion existed in civil cases.'

However, Eksteen JA expressly left the question open. Our high courts have since come to accept that they do indeed possess such a discretion.[14] In *Waste Products Utilisation (Pty) Ltd v Wilkes & another*,[15] Lewis J summarised the position as follows: '[t]he general rule is that if evidence is relevant it is admissible, and the court will not concern itself with how the evidence was obtained . . . However, the Court has discretion to exclude evidence improperly obtained'.

[19] I have considerable difficulty in appreciating on what basis the factual narrative sought to be excluded by the appellants can be characterised as irrelevant. It is part of the historical background and appears quite useful for a proper understanding of the matter. The averments are clearly relevant in assessing whether or not the M&G was justified in its decision to launch the proceedings to review and set aside the decision of the NDPP. 'They cannot properly be said to fall within the ordinary meaning of what the Oxford Dictionary describes as irrelevant matter: allegations which do not apply to the matter in hand or which do not contribute one way or another to a decision of such matter'.[16]

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[12] *Janit & another v Motor Industry Fund Administrators (Pty) Ltd & another* 1995 (4) SA 293 (A) at 306.
[13] In *Shell SA (Edms) Bpk en Andere v Voorsitter, Dorperaad van die Oranje-Vrystaat, en Andere*1992 (1) SA 906 (O) at 916E-I, Lombard J took the view that there was no good reason why a court, in a civil case, should not have the same discretion as it had in criminal cases to exclude otherwise admissible evidence because of the improper way in which it had been obtained.
[14] See *inter alia Fedics Group (Pty) Ltd & another v Murphy & others* 1998 (2) SA 617 (C); Lenco Holdings Ltd & others v Eckstein & others 1996 (2) SA 693 (N) at 704C and Protea Technology Ltd & another v Wainer & others 1997 (9) BCLR 1225 (W) at 1234. Several of the other authorities are set out in *Waste Products Utilisation (Pty) Ltd v Wilkes & another* 2003 (2) SA 515 (W) at 545.
[15] *Waste Products Utilisation* Ibid.
[16] Per Mahomed CJ, *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733E.

[20] In any event, even if it could properly be said that some or other part of the founding affidavit was irrelevant, it does not follow that the application to strike out should succeed. I am not persuaded that the appellants suffered any prejudice on account of the impugned portions of the founding affidavit, not having been struck out. For, even if material is indeed scandalous, vexatious or irrelevant, relief will not be granted if an applicant cannot prove that he or she will be prejudiced if the offending matter is not struck out.[17] No such prejudice was relied on in argument before us. The application was heard by a judge, not a layperson. She would have been able to disabuse her mind of any vexatious, scandalous or irrelevant matter contained in the affidavit. I accordingly conclude that the strike out appeal is without merit and it accordingly falls to be dismissed with costs.

[21] I now turn to the main appeal: Section 41(6)(*c*) of the Act does not contain an absolute ban on publication. Instead, publication depends on permission first having been sought and obtained from the NDPP. The purpose of the limitation is obviously to protect the integrity of the criminal justice system. There is no denying that s 41(6) constitutes a limitation on the right to freedom of expression contained in s 16 of the Constitution. In the present matter, it limits freedom of the media as also the correlative right of the public to receive and impart information. Thus, utmost care must be taken to ensure that in exercising that discretion, the NDPP strikes the appropriate balance, in each case, between securing the integrity of the criminal justice system and upholding freedom of expression.[18]

[22] The M&G submitted its request for permission in circumstances where it had not just a right to publish, but indeed a duty to keep the public informed on an issue of high public interest involving a senior and high-ranking government official – a former Cabinet Minister and then Presidential Spokesperson. On the facts of this case, I can

[17] Ibid at 732-734.
[18] *Print Media South Africa & another v Minister of Home Affairs & another* 2012 (6) SA 443 (CC) para 44; *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] 3 All SA 318 (SCA) para 12.

discern no valid countervailing concern regarding the integrity of the administration of the criminal justice system. On the contrary, the administration and integrity of the very criminal justice system would itself appear to require that the M&G be permitted to publish the record to: first, reveal to this country's citizenry what was said by a senior public office bearer in response to allegations of unlawful conduct involving public funds; and, second, whether what was said by him can withstand scrutiny in the light of other information that has since come to light.

[23] The NDPP approaches the matter so as to elevate the policy considerations underlying the relevant provisions of the Act to the level of directives from which no deviation is permitted. The Act confers a discretion on the NDPP. That discretion must be properly exercised. The express conferral of a discretion clearly contemplates that there will be circumstances where disclosure is appropriate.

[24] The Act does not spell out the factors which the NDPP must consider in exercising her discretion in terms of s 41(6) of the Act. One would have thought that a consideration of the s 28 record would be the first and most obvious factor. It was not. Approximately four months after having deposed to her answering affidavit in the matter, the rather startling revelation was made that the NDPP had not considered the record in arriving at her decision. Without a consideration of the s 28 record, the discretion conferred could not have been properly exercised. It was not sufficient for the NDPP to state, as she subsequently did, that she was aware of the s 28 interviews in 'general terms'. What was meant by that rather vague expression remained unexplained. The NDPP is no ordinary litigant.[19] She is an officer of the court, who is duty-bound to take the court into her confidence and fully explain the facts so that an informed decision can be taken.[20]

[19] *DA V President of the RSA* 2012 (1) SA 417; *Zuma v Democratic Alliance & others* [2014] 4 All SA 35 (SCA).
[20] *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA); *Kalik NO & others v Mangaung Metropolitan Municipality & others* 2014 (5) SA 123 (SCA) para 30.

[25] Moreover, a 'general awareness' (whatever that was intended to convey) is difficult to reconcile with the reasons given for refusing permission to publish. For example, it is difficult to understand how the NDPP could have performed the vital balancing exercise of weighing the public interest in publication against the likelihood of harm without carefully considering the contents of the s 28 record; or how the interests of third parties feature as a justification for refusing permission without an appreciation of who those third parties are, what the nature of those interests may be and a determination of whether those interests are indeed worthy of protection. The NDPP cannot underplay the importance of the s 28 record to her decision. Her relegating a factor of such obvious and paramount importance to one of insignificance, amounts to a failure to apply the mind properly to the matter.[21] Plainly therefore, the NDPP ought not to have refused permission without a proper consideration of the record at the time of making her decision. The consequence of this failure is clear. Given the obvious relevance of the s 28 record, the failure to consider it rendered the decision irrational.[22] For that reason alone, the decision is susceptible to being set aside.[23]

[26] That conclusion ought to dispose of the matter. But, it may nonetheless be desirable, particularly when regard is had to the remedy sought by the M&G to examine the reasons advanced by the NDPP for refusing permission in this instance.[24] Those will be considered in turn.

[27] First, the public interest: This case is not concerned with the class of matters that may be said to be merely interesting to the public. It concerns the probity of a senior public office bearer and implicates overarching constitutional values of accountability, openness and responsiveness.[25] Our courts recognise that the media play a key role in

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[21] *Bangtoo Brothers v National Transport Commission* 1973 (4) SA 667 (N) at 685A-D; *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board & others* [2016] 1 All SA 704 (SCA) para 42.
[22] *Democratic Alliance v President of the Republic of South Africa & others* 2013 (1) SA 248 (CC) paras 38-40.
[23] *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others* 2014 (4) SA 179 (CC) para 72.
[24] *S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as Amici Curiae)* 2002 (6) SA 642 (CC) para 21.
[25] *City of Cape Town v South African National Roads Authority Limited & others* 2015 (3) SA 386 (SCA) at paras 16-18; *Economic Freedom Fighters v Speaker of the National Assembly & others*; *Democratic*

a democratic society in ensuring that members of the public are informed about issues that are in the public interest. In *Khumalo v Holomisa* the Constitutional Court stated that:[26]

'The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate.

. . . .

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.'

[28] The matter raises serious allegations of corruption and mismanagement of public funds. In *Glenister v President of the Republic of South Africa & others*[27] the Constitutional Court said of corruption that it had 'a deleterious impact on a number of rights in the Bill of Rights'.[28] It added that '[c]orruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.'[29] Given the scourge of corruption the role of the media in reporting on such activities is indubitably in the public interest. What is more, the appellants are public figures. And, as the court in *Tshabalala-Msimang & another v Makhanya & others* pointed out:[30]

'[i]n her capacity as a Minister [of Health] 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'.

It further said:

Alliance v Speaker of the National Assembly & others 2016 (3) SA 580 (CC) para 1.

[26] *Khumalo & others v Holomisa* 2002 (5) SA 401 (CC) para 22-23.

[27] *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC) para 105.

[28] Ibid para 106.

[29] Ibid para 57.

[30] *Tshabalala-Msimang & another v Makhanya & others* 2008 (6) SA 102 (W) para 45.

'The public has the right to be informed of current news and events concerning the lives of public persons such as politicians and public officials. This right has been given express recognition in s 16(1)(*a*) and (2) of the Constitution which protects the freedom of the press and other media and the freedom to receive and impart information and ideas. The public has the right to be informed not only on matters which have a direct effect on life, such as legislative enactments, and financial policy. This right may in appropriate circumstances extend to information about public figures.'[31]

[29] The NDPP contends that notions of what constitutes 'the public interest' are complex and nuanced. It is suggested that public interest considerations must necessarily be weighed against other equally legitimate, but competing interests such as third party interests. However, the NDPP cannot contend that she considered the obvious public interest and engaged in a delicate balancing exercise while still maintaining that she was only generally aware of the s 28 investigation. Once confronted with the possible implications of the appellants' participation in the investigation, the NDPP was obliged to consider the record carefully to ascertain whether the issues raised were genuinely of public interest and what the extent of that interest might be. Here nuance is the very antithesis of generality. Any consideration of the public interest based on a general awareness of the investigation suggests that it had to have been superficial and was therefore unsatisfactory.

[30] Second, the pending criminal charges: The NDPP's reliance on this factor indicates that her decision was influenced by a material error of law.[32] The NDPP refused permission to publish because granting permission to publish would inter alia amount to condoning criminal activity and jeopardise the investigation into a possible contravention of s 41(6) by the M&G. However, granting permission to publish could not condone any unauthorised disclosures that may have occurred in the past. The two disclosures are therefore unrelated. The one is with the permission of the NDPP, whereas the other is not. The NDPP's decision was based on her incorrect belief that

[31] Ibid para 38.
[32] Sections 6(2)(*e*)(iii) and 6(2)(*d*) of the Promotion of Administrative Justice Act 3 of 2000. See *Security Industry Alliance v Private Security Industry Regulatory Authority & others* 2015 (1) SA 169 (SCA) paras 26-27.

the M&G was guilty of an offence under s 41(6) of the NPA Act. The M&G had not committed any criminal offence. While it is true that the M&G was in possession of portions of the record in the s 28 enquiry, this in itself is not prohibited by s 41(6) of the Act. It is only the disclosure that would constitute a contravention thereof. Instead of disclosing the information, the M&G sought to obtain permission to publish in terms of s 41(6), having obtained legal advice to the effect that while possession was not criminalised, disclosure was. Criminal charges were indeed laid for an alleged contravention of s 41(6) by Mr Maharaj in 2011. To date, no prosecution has been instituted against the M&G or any of its employees. Notably, although warning statements were taken by the police from some of the M&G's employees relatively soon after the charges were laid, nothing further has come of that. Pretorius J was therefore correct in finding that the pending criminal charges were an irrelevant consideration and that the NDPP's decision was materially influenced by an error of law.

[31] Third, the interests of third parties: The NDPP claims to have taken account of the interests of 'other parties' mentioned in the s 28 record. She alleges that she refused permission to publish to protect the interest of the other parties mentioned in or affected by the record. However, third party interests could not have featured as a consideration given the NDPP's failure to consider the s 28 record. It follows that the NDPP could not assess the nature of the interests of 'other parties' and determine whether such interests required any protection. In any event the information in question was already largely a matter of public knowledge at the time that the NDPP made her decision. To the extent, therefore, that the interests of others would be implicated, there was no longer any basis for confidentiality in as much as the information was squarely in the public domain and had been for some time. But, even if the interests of others were to be affected by the disclosure, there is no reason in principle why disclosure could not have been permitted subject to certain conditions – such as protecting the identities of those third parties. It appears that the NDPP did not even consider this option. It has long been recognised that courts have the power to protect confidentiality in appropriate circumstances.[33]

[33] See *Tetra Mobile Radio (Pty) Ltd v Member of the Executive Council of the Department of Works &*

[32] Fourth, the policy of non-disclosure: When asked for the policy on which reliance was placed, the NDPP referred to the UN Guidelines which provide in para 13(C) that prosecutors shall '[k]eep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise.' It goes without saying that the UN Guidelines cannot trump s 46(6) of the NPA Act, which expressly envisages publication with the necessary permission. In any event, the UN Guidelines are not absolute. They specifically refer to exceptions relating to the performance of duty or the needs of justice. The very purpose of s 41(6) is to require the NDPP to exercise an appropriate discretion on a case by case basis. The NDPP's rigid and inflexible adherence to the policy of non-disclosure meant that she had completely lost from sight that the appellants had themselves placed their evidence in the s 28 proceedings in the public domain. That they did when they annexed the relevant transcripts of their evidence to their court application challenging the constitutionality of certain provisions of the Act. As this court observed in *Van Breda v Media 24 Limited & others*,[34] 'a judicial proceeding is a public event and information on the public record may be broadcast despite its highly sensitive nature'. In *Cape Town City v SA National Roads Authority*[35], it was pointed out:

'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. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified.'

[33] Fifth, the commission of inquiry: The NDPP's reliance on the ongoing commission of inquiry into the 'arms deal' was irrelevant to the decision whether to permit publication or not. The commission should never have been considered by the NDPP because: (a) the terms of reference of the commission of inquiry are limited to the so-called 'arms deal'; (b) the existence of the commission of enquiry is entirely

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others 2008 (1) SA 438 (SCA); *Bridon International GMMH v International Trade Administration Commission & others* 2013 (3) SA 197 (SCA).

[34] *Van Breda v Media 24 Limited & others; National Director of Public Prosecutions v Media 24 Limited & others* [2017] 3 All SA 622 (SCA) para 57.

[35] *City of Cape Town v South African National Roads Authority Limited & others* 2015 (3) SA 386 (SCA) para 47.

extraneous to the discretion conferred by the NDPP by s 41(6) of the NPA Act; and (c) there is no evidence, or any indication whatsoever as to why the NDPP was of the view that the disclosure of the record (much of which is already in the public domain) would constitute interference with the work of the commission of inquiry. The allegations against the appellants did not pertain to the arms deal. Nor does the NDPP give any indication as to why the disclosure would have interfered with the work of that commission.

[34] Sixth, information already in the public domain: The founding affidavit is replete with allegations of the widespread presence in the public domain of information relating to the s 28 investigation. This evidence is not disputed. The fact that extensive prior publication of the allegations has taken place in this case is an important consideration. The NDPP dismissed the fact that the allegations are in the public domain as irrelevant on the basis that only the NDPP has the authority to grant permission for the record of a s 28 enquiry to be published. The NDPP was incorrect to dismiss the public domain argument in this manner.[36] The public domain doctrine has been considered by courts both locally and internationally in different contexts. In South Africa, it is well-established that it is basic to the principle of confidentiality that information cannot be protected once it loses its secrecy. This is recognised in s 37(2)(*a*) of the Promotion of Access to Information Act 2 of 2000, which provides that, although an information officer of a public body may in general refuse a request for access to a record if the disclosure of the record would constitute an action for breach of a duty of confidence, he or she may not refuse to disclose if the record consists of information 'already publicly available'. The Constitutional Court has also recognised that the concept of public domain is an important factor in determining whether classified documents before a court should be released to the public.[37]

[36] See *Tshabalala* supra fn 29 para 45.
[37] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa & another (Independent)* 2008 (5) SA 31 (CC) paras 55 and 62.

[35] The public domain doctrine in the context of national security restrictions has been especially prominent in the jurisprudence of the English courts and in the European Court of Human Rights. The leading decision is that of *Attorney-General v Guardian Newspapers (No 2)*[38] (commonly referred to as 'the Spycatcher case'), in which the House of Lords was requested to interdict the distribution of a book by a former MI5 agent. The contents of the book contained names of colleagues, details of operational techniques and specific operations (including a plan by MI6 to assassinate President Nasser of Egypt). The book had already been published in other countries. Lord Griffiths aptly observed that if the injunction had been granted:

'[T]he 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 . . .'[39]

[36] In *Vereniging Weekblad Bluf! V The Netherlands*,[40] the European Court of Human Rights held that the Netherlands had infringed article 10 of the European Convention of Human Rights because its courts ordered the withdrawal of an issue of a magazine containing a report on the internal security service which was dated six years before the magazine was published. The court held that the withdrawal of the magazine could no longer be regarded as necessary to safeguard national security as the information was already in the public domain. The court noted that 2500 copies of the magazine had already been sold in Amsterdam and that the media had commented on the information in the report.

[37] In *Independent Newspapers*,[41] the Constitutional Court dealt with an application for access to classified documents which formed part of an appeal record. National security, so the Minister asserted, required that the documents not be made available to the media and the public. The Constitutional Court confirmed that the default position is one of openness and disavowed an approach that proceeded from a position of

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[38] *Attorney-General v Guardian Newspapers (No 2) (the Spycatcher case)* [1990] 1 AC 109, [1988] 3 All ER 545.
[39] Ibid at 652 (ACR).
[40] *Vereniging Weekblad Bluf! V The Netherlands* (1995) 20 EHRR 189 at 203. See also *Weber v Switzerland* (1990) 12 EHRR 508; *Observer and Guardian v The United Kingdom* (1992) 14 EHRR 153.
[41] *Independent Newspapers* supra fn 37.

secrecy, even in a case where the documents in question had been lawfully classified as confidential in the interest of national security.

[38] The Constitution upon which the nation is founded is a grave and solemn promise to all its citizens.[42] As Nugent JA put it, '[t]ruth and deceit know no status. One expects integrity from high office but experience shows that at times it is not there'.[43] There can be no gainsaying that if what the M&G says is true, they raise matters of profound public importance. That is not to suggest findings have been made here as to their veracity. There might be answers to those allegations or other facts not before us that may impact on inferences that might otherwise be drawn. The objective of policing State officials to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat crime.[44] The NDPP is an important bulwark in that regard. The NDPP is there to inspire confidence that all is well and, if there is corruption and malfeasance in high public office, that it is being effectively dealt with. The public needs to be assured that there is no impropriety in public life and that if there is, then it should be exposed. In that sense, the media plays a vital watchdog role. One of the aspirational goals of the media is to make governmental conduct in all of its many facets transparent.[45] The M&G asserts that Mr Maharaj has contravened s 28(10)(*c*) of the NPA Act, which is a criminal offence in terms of s 41(2). Mr Maharaj's potential culpability in this regard as well as his moral fibre are matters of undoubted national significance. The companies and individuals implicated in the alleged bribery, namely Shaik, Thales and the Nkobi Group, have previously been linked to corruption.[46] Moreover, as stated above, Shaik was convicted of fraud and corruption in 2005. Any

[42] *The Public Protector v Mail & Guardian Ltd* supra fn 10 para 5.
[43] Ibid para 143.
[44] *South African Broadcasting Corporation Soc Ltd & others v Democratic Alliance & others* 2016 (2) SA 522 (SCA) para 44.
[45] *Van Breda* supra fn 34.
[46] Mr Shaik and 10 companies, which he controlled or in which he had a major interest, were indicted on several counts relating to corruption, in relation to payments he had made to the then Deputy President of the Republic of South Africa, Mr Jacob Zuma. It was alleged that Mr Shaik had bribed Mr Zuma to protect a French armaments company from exposure to official investigation. Mr Shaik was convicted and sentenced to 15 years' imprisonment. The companies were also convicted and required to pay fines. (See *S v Shaik & others* 2007 (1) SACR 142 (D).)

allegations that they may have also been involved in corruption in respect of other government tenders are of clear public interest.

[39] It is obviously for the NDPP to exercise a proper discretion having regard to the circumstances of each case. In that regard it remains her duty to examine each application with care and she will be required to exercise a proper discretion in such cases by balancing the competing interests at stake and weighing the relative degree of risk involved. Such an individualised enquiry is more finely attuned to reconciling the competing rights at play than is a rigid, inflexible denial as appears to have characterised the approach encountered here. I do not purport to prescribe to the NDPP how such applications should be approached or whether a particular threshold will have to be overcome by an applicant. Nor do I suggest what considerations should necessarily weigh in the exercise of her discretion. No two applications will be the same and considerations that are likely to weigh in one matter may not necessarily in another. In striking a constitutionally appropriate balance the NDPP must perforce have regard to all the relevant circumstances. It goes without saying that she can hardly be predisposed one way or the other, but will be required to bring an open mind to bear in each case.[47] Consistent with such an approach, mere conjecture or speculation that prejudice might occur ought not to be enough. Of course it will always be open to the NDPP to permit some and not all of the evidence to be published.

[40] It is so that usually when a court reviews and sets aside a decision of an administrative body it almost always refers the matter back to that body to enable it to reconsider the issue and make a new decision.[48] Occasionally, however, as Heher JA added, 'the court does not give the administrative organ a further opportunity. Instead it makes the decision itself.' This is such a case. The factors that appeared to have weighed with the NDPP, neither individually, nor collectively, survive scrutiny. The

[47] As to what constitutes an open mind see *The Public Protector v Mail & Guardian* supra fn 10 paras 21-22.
[48] Per Heher JA, *Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA) para 1.

NDPP ought to have realised that very little could have been achieved by refusing permission to publish.

[41] It follows that the appeal must fail. In the result:

(a) The appeal by the first and second appellants against paragraphs 1 and 2 of the judgment of the court below is dismissed with costs, such costs to include the costs of two counsel.

(b) The appeal by the third appellant against paragraph 3 of the judgment of the court below is dismissed with costs, such costs to include the costs of two counsel.

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V M Ponnan

Judge of Appeal

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For Third Appellant:	K Pillay SC (with him M Lekoane)
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