



REPORTABLE

CASE NO.: SA 33/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DIRECTOR-GENERAL OF THE NAMIBIAN

First Appellant

CENTRAL INTELLIGENCE SERVICE

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

Second Appellant

and

MATHIAS HAUFIKU

First Respondent

EDITOR OF THE PATRIOT NEWSPAPER

Second Respondent

PATRIOT NEWSPAPER

Third Respondent

Coram: DAMASEB DCJ, MAINGA JA and SMUTS JA

Heard: 4 March 2019

Delivered: 12 April 2019

Summary: This is an appeal against the High Court's refusal of a final interdict sought by the Government (appellants) in respect of a threatened publication by a newspaper (The Patriot) of information implicating the national intelligence agency (NCIS) in the improper use of state resources. The appellants relied for the final interdict sought on the Protection of Information Act 84 of 1982 (PIA) read with the provisions of the Namibia Central Intelligence Service Act 10 of 1997 (NCISA). The appellants alleged that they have statutory and constitutional powers and duties to protect sensitive information from being published, and maintained that the information sought to be published by the Patriot will compromise the secrecy of the NCIS's operations and be prejudicial to Namibia's national security. The appellants took the view in the proceedings *a quo* and on appeal that all they needed to establish was the threatened publication and that it will harm national security and the court was bound to grant an interdict.

In defence, the respondents alleged that the interdict sought is against Article 21(1) of the Constitution protecting freedom of speech and the press; that the information was not unlawfully obtained; that it was not sensitive information and therefore did not compromise national security and that, in any event, the media has an obligation to expose corrupt activities.

Although the High Court was satisfied that the appellants have the constitutional competence to protect sensitive information compromising national security, it highlighted the importance of freedom of speech and the press in an open and democratic society. The court *a quo* held that in this case The Patriot acted responsibly and with integrity by seeking to verify the information obtained from source(s) and to

obtain comment thereon from the NCIS before publication. The court *a quo* was, however, not satisfied that sufficient evidence was tendered to justify the conclusion that the information possessed by The Patriot, and its publication, would harm national security.

A quo, Geier J concluded that the decision of the appellants not to place before court the precise nature and ambit of the security concerns and the failure to plead factual matter precisely undermined the case for a final interdict. The learned judge also upheld The Patriot's contention that since the details of the information sought to be interdicted was already in the public domain, the matter had become moot. The court took the view that an interdict would, in the circumstances, deny the public the right to be informed more fully through the intended newspaper article of matters which had already become freely available on e-justice.

On appeal, court stating that the onus is on the appellants to establish the requirements of a final interdict. The appellants had to establish the jurisdictional facts contemplated in the PIA and the NCSIA in order to obtain an interdict to suppress publication of the information which The Patriot possessed. A mere recitation of the sections of the legislation would for that purpose not suffice. Sufficient evidence must be placed before court (if necessary *in camera* as contemplated in Art. 12(1)(a) of the Constitution) to enable the court for itself make an assessment whether the information whose publication is sought to be suppressed came within the scope of the statutory provision(s) relied upon.

The court restated the three requirements for a final interdict and held that an applicant had to satisfy all three by producing sufficient evidence to sustain them. As regards the interference with the clear right, mere assertion of a reasonable apprehension or fear would not suffice. The facts supporting the apprehension must be set out in the application to make it possible for the court to make an assessment itself whether the fears are well grounded.

Held that in addition, the appellants must satisfy the court that the information was unlawfully obtained and or that its publication will harm national security.

Held that the appellants placed not a scintilla of evidence before court to show how the manner of acquisition of the information breached any law. Not only did the Government fail to prove that the respondents obtained the information illegally or in breach of the statutory provisions relied upon, it also failed to show that it related to a secret place or that it concerned a matter of national security.

Held further that the notion that once the Executive invoked secrecy and national security, the court is rendered powerless and must, without more, suppress publication by way of interdict, is not consonant with the values of an open and democratic society based on the rule of law and legality and that if a proper case is made out for protection of secret governmental information, the courts will be duty bound to suppress publication.

Held that it has been recognised that the court retains a discretion to refuse a final interdict if its grant would cause some inequity and would amount to unconscionable conduct on the part of an applicant.

Appeal against the High Court's judgment and order dismissed, with costs.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and SMUTS JA concurring):

Introduction

[1] This appeal relates to a failed attempt by the first and second appellants to obtain a final interdict on an urgent basis in the High Court against an online and print newspaper (The Patriot), a journalist working for the newspaper and its editor. The Patriot's journalist (the first respondent) conveyed information to Namibia Central Intelligence Service's (NCIS's) chief administrator concerning the NCIS and sought comment from him before publication of a story which would place the NCIS in an unfavorable light. Geier J dismissed the application with costs and the present appeal lies against his order.

[2] It bears mention at this early stage that the information which they sought to suppress publication of came into the public domain when the first and second appellants launched urgent proceedings for a final interdict in the High Court through the electronic filing system (e-justice) of that court which is accessible online to the public. I mention that now because that fact was relied on *a quo* and again on appeal by the respondents for the proposition that the relief sought is moot.

The parties and main actors

[3] The applicants *a quo* who are the present first and second appellants respectively, are the Director General (DG) of the NCIS, and the Government of the Republic of Namibia (GRN). I will henceforth refer to them as the 'Government' when the context requires that they be referred to as a collective.

[4] The respondents, both *a quo* and on appeal, are the parties against whom the final interdict was sought. The first respondent (Mr Haufiku) is employed by The Patriot and was investigating the matter which necessitated the Government approaching court. The second respondent is the editor of The Patriot. They will hereafter be referred to collectively as the 'respondents'.

[5] The person in the NCIS with whom Mr Haufiku had the initial contact is the director¹ of the NCIS (Mr Likando). After Mr Haufiku made contact with Mr Likando, the latter instructed Mr Mathias Kashindi (Mr Kashindi) of the Government Attorney's Office, to correspond with Mr Haufiku.

[6] Via a short message service (SMS) on 10 April 2018, Mr Haufiku initiated a conversation with Mr Likando and informed the latter that the respondents intended to publish an article in The Patriot concerning immovable properties purchased by the NCIS and about the NCIS's affiliation with a voluntary association for former NCIS employees (the Association). In the SMS, Mr Haufiku informed Mr Likando that he wanted to send him some questions to elicit a reply on behalf of NCIS and asked for

¹ Who, in terms of s 7 of the Namibia Central Intelligence Service Act 10 of 1997, is the administrative head of the NCIS.

an email address to which to send the questions. This elicited a response from Mr Kashindi stating that the intended publication was a violation of provisions of the Protection of Information Act 84 of 1982 (PIA) and the Namibia Central Intelligence Service Act 10 of 1997 (NCISA).

[7] Mr Kashindi invited Mr Haufiku to forward the questions to him acting on behalf of the NCIS. The questions were duly sent and elicited yet another reply by Mr Kashindi.

Questions and reply

[8] In his questions, Mr Haufiku stated that 'we are currently working on a story linked to NCIS acquisition of farms and houses'. He was aware of the existence of the Association and that its members were allowed to live on the farms. Mr Haufiku sought to establish the link between the NCIS and the Association; in particular, if it was funded by the NCIS and whether its members were occupying the farms.

[9] There were other pointed questions. One went thus: 'Are there any national interests that prompted the acquisition of these properties?' And: 'The Patriot understands one of the purposes is to monitor the volatile security situation (with special reference to farmers owning a lot of guns and other ammunition) in those areas and the other is to serve as a retirement home for former NCIS officers.'

[10] Mr Haufiku also questioned the wisdom of the purchase of the properties given the weak financial position the country finds itself in.

[11] Mr Kashindi replied to the questions on behalf of the DG and GRN. The reply stated:

‘ . . . all information that you seek that relates to the properties and assets of the Namibia Central Intelligence Service falls within the scope of sensitive matters and/ or classified information. In terms of the provisions of the Protection of Information Act 84 of 1982 read with the provisions of the Namibia Central Intelligence Service Act 10 of 1997, possession, disclosure, and or publication of that information is prohibited and it constitutes a criminal offence. In the light of this position be advised that you are prohibited by law from possessing, disclosure and or publishing of that information. As a result of this position, your request to be provided with answers in respect of your questions and or to confirm or deny the veracity of the information you have is denied. With regard to your questions regarding the association, kindly be advised that the Namibia Central Intelligence Service and or Mr Likando cannot comment or answer questions or issues that relate to another entity. On this basis, our clients are not in a position to answer any question that relates to other entities.’

[12] The reply concluded that the NCIS would not provide Mr Haufiku the information he sought as the NCIS was prohibited by law to do so.

The pleadings

[13] The founding affidavit in support of the interdict was deposed to by the DG and the opposing affidavit by Mr Haufiku. I will now set out the salient allegations by both.

The NCIS

[14] The DG recounted that Mr Haufiku in his SMS to Mr Likando made clear that he was working on a story relating to the properties of the NCIS and also about the Association. Mr Haufiku had stated to Mr Likando that he was planning to publish the story in the Friday edition of The Patriot. Mr Haufiku wanted Mr Likando to comment on the information he had gathered concerning the subject matter of the questions and asked for Mr Likando's email address.

[15] The DG maintained that the story which The Patriot wanted to publish related to the properties and or assets of the NCIS and that, by law, the unlawful possession, circulation and publication of any information concerning the properties, means and capabilities of the NCIS is prohibited and punishable by law. He relied on the provisions of the PIA for that proposition and the one under the NCISA that he is compelled by law to take steps to ensure that national security intelligence, intelligence methods, sources of information and the identity of staff members are protected from unauthorised disclosure.

[16] According to the DG, information relating to the properties of the NCIS is a matter that is 'dealt with' by the latter or 'is a matter that relates to 'the functions' of the NCIS or is a matter that relates to the relationship between the NCIS and any person – which would bring it within the frame of s 4(1)(b) of the PIA.

[17] In the view of the DG, The Patriot intended to publish information that will disclose properties which, on the newspaper's own version, belong to the NCIS and that its publication, whether confirmed or denied by the NCIS, contravened s 4(1)(b) of the PIA.

[18] The DG alleged that he did not authorise the possession of the information in the possession of The Patriot and its agents concerning the properties of the NCIS and that, for that reason, it was obtained unlawfully and cannot be published. According to the DG, the operations of the NCIS are, by law and practice, conducted in secret and no unauthorised disclosure of such operations or anything related to

such operations is allowed by law. He asserted that if the information were published, it would threaten or jeopardise the national security of the State.

[19] According to the DG, any disclosure of information which showed either the capability or a lack of resources on the part of the NCIS is unlawful as it undermines the effectiveness of the institution and with that posed a security vulnerability to the State of Namibia. Since the intended publication will compromise the secrecy of the NCIS's operations, means and capabilities, it was essential to protect the secrecy of the purpose for which the properties, assets and means were acquired as not doing so would render their usage by the NCIS meaningless.

[20] The DG stated that for the purpose of obtaining the relief that the NCIS seeks it was unnecessary for him to disclose the 'nature and description of the properties that the respondents wish to publish as that will essentially result in me disclosing' what was sensitive and classified information.

[21] The DG averred that the NCIS and the Government had a constitutional and statutory duty to protect sensitive information and to prevent its unlawful disclosure through publication and that the information involved in the present case, if published, would pose a serious national security risk.

[22] According to the DG it was in the interest of national security to interdict the respondents from publishing the information in their possession and that he reasonably apprehended that the publication of the information would be a contravention of the law and affect the ability and effectiveness of the NCIS. The DG

made the point that the respondents were requested by the NCIS's legal representative not to publish the information they had but failed to make any undertaking - thus necessitating the relief being sought on urgent basis.

The relief sought

[23] Although the NCIS and the Government sought interim relief in the main and a final interdict in the alternative, in the way the litigation evolved, the High Court ultimately only adjudicated on whether or not to grant a final interdict which was sought in the following terms:

'4. An order interdicting and restraining the respondents or any one of them from publishing, circulating and or distributing any article and or any information that relates to the properties and or assets of the Namibia Central Intelligence Service in the edition to be published in The Patriot newspaper on Friday the 13th of April 2018 or any other day.

5. An order interdicting and restraining the respondents or nay one of them from publishing, circulating and or distributing any information that falls within the scope of sensitive matter as defined in section 1 of the [PIA].

6. An order interdicting and restraining the respondents or any one of them from publishing, circulating and distributing any classified information as defined in section 1 of the [NCISA].

7. An order interdicting and restraining the respondents or any one of them from publishing, circulating and or distributing any information that was made, obtained or received by any of the respondents or any person in contravention of the [PIA] and the [NCISA].'

The Patriot

[24] The quintessence of The Patriot's defence is that the intended publication was protected speech, more so to expose corruption and that the information was obtained lawfully and did not threaten national security nor expose the operations of the NCIS. In any event, Mr Haufiku alleged, the orders sought were not competent because they were overbroad, vague and incapable of effective enforcement. If granted, the orders would 'blatantly violate' the right to freedom of speech and expression, including the freedom of the press guaranteed by Art. 21(1)(a) of the Constitution.

[25] According to Mr Haufiku, the information he intended to publish would expose corruption involving the private use by former employees of the NCIS and their families of Government property under the control of the NCIS. He maintained that the exposure of corruption and maladministration could not violate either the PIA or the NCISA and that the media had an obligation to expose such vices as they erode public confidence in public institutions and officials.

[26] In amplification, Mr Haufiku alleged that the information in his possession showed that the NCIS donated millions of tax-payer funds (N\$2M) to the Association, apparently without the approval of the DG or the President of the Republic. The deponent alleged that the donation of public funds to the Association was apparent from written minutes of the governing Board of the Association.

[27] Mr Haufiku further recounted that he sought comment from the NCIS and intended to publish information showing that two farms purchased by the NCIS for tens of millions of dollars, including a house also bought by the NCIS, were being used by members of the Association and their families; and not for the purposes of the NCIS.

[28] As regards the location of the one farm and the house, Mr Haufiku alleged that he was able to verify the information from a search at the Deeds Registries Office which is a public institution from which information can be obtained by payment of a small fee. That search revealed that the farm was bought by the Ministry of Lands and Resettlement under the Government's resettlement program intended for the benefit of deserving landless Namibians.

[29] According to Mr Haufiku, he felt he had the duty to present the full facts as he gathered them to Mr Likando for comment. He had no intention to disclose the names of NCIS staff members or even its former employees nor the physical addresses of any of the properties if it was confirmed that the properties belong to or were related to the NCIS.

[30] As regards the Association, Mr Haufiku averred that it was in the public interest to publish information about a private entity which received public funds in a manner that seemed contrary to law. He did not consider it to be a violation of the PIA or the NCISA, nor a threat to national security to report on the affairs of a private entity such as the Association. In any event, he said, Mr Kashindi's second letter made clear that the Association was a separate entity from the NCIS and not deserving of comment by the NCIS.

[31] Mr Haufiku criticised the DG for failing to take the court into confidence and stating why the information was classified or why the prohibition from disclosure was constitutionally permitted viewed against the backdrop of the premium placed by the Constitution on the right to freedom of speech and the press.

The High Court's approach

[32] In the court below the respondents gave an undertaking not to publish the information, pending the finalisation of the application. Geier J was therefore not required to deal with the issue of urgency nor with the interim relief. In the event, the learned judge dismissed the application with costs.

[33] The High Court was satisfied that the NCIS has the constitutional competence to deal with matters of national security which entitled it to prevent the publication of material if doing so would prejudice the legitimate operations of the intelligence service or pose a genuine threat to national security.

[34] The court *a quo* highlighted the importance of freedom of speech and that of the media in an open and democratic society. The court pointed out that the media is expected to act responsibly and with integrity and to report accurately. Relying on the *Code of Ethics* governing the Namibian media - which requires journalists to ascertain, prior to a publication or broadcast, the reliability of their sources and accuracy of the information to be published – Geier J found that Mr Haufiku acted properly by seeking to verify the information obtained from his source(s) and to obtain comment thereon from the NCIS.

[35] The relief sought being based on statutory provisions, the court *a quo* was satisfied that a clear right had been established. The court held that, in the absence of a constitutional challenge to the validity of the PIA and the NCISA and bearing in mind that freedom of speech may be limited on grounds of national security, those Acts impose reasonable restrictions on the fundamental freedoms guaranteed by Art. 21(1)(a).

[36] As relates to the requirement of injury actually committed or reasonably apprehended, Geier J took the view that the apprehension held by NCIS arose from the questions sent by Mr Haufiku to Mr Likando. Having considered the nature and effect of the responses given on behalf of NCIS by Mr Kashindi, the learned judge held

that the Government did not take the court into its confidence by furnishing evidence to show why disclosure would compromise national security.

[37] The High Court rejected the DG's stance not to divulge more information on the basis that the NCIS is not subject to judicial oversight and held that, as a public institution, the NCIS is subject to the oversight of the courts. Accordingly, the decision of the appellants not to place before court the precise nature and ambit of the security concerns and the failure to plead factual matter precisely undermined the case for a final interdict. Geier J therefore found that the information relating to the properties, being public documents it could not fall within the ambit of the PIA and NCISA prohibitions.

[38] The High Court was satisfied that the information possessed by Mr Haufiku and the manner in which it was obtained did not violate s 4(1)(b) of the PIA and rejected the contrary contention that information The Patriot intended to publish fell within the scope of sensitive and or classified information whose publication was prohibited by law.

[39] The High Court also upheld the respondents' contention that the PIA and the NCSIA could not be relied upon to cover up corruption. Geier J put it as follows at para 110:

'Thus the applicants cannot, in the circumstances, be heard to complain to suffer an injury to their rights through activity possibly not countenanced by the law. By the same token they cannot be heard to complain that there will be a threat of the breach of the statutes relied on or that they can have a reasonable apprehension of such injury should the intended article be published, as this would be tantamount to a criminal approaching the courts for assistance to cover up illegal activity or to prevent the exposure of possible illegal activity'.

[40] The High Court also upheld the respondent's contention that since the details of the information sought to be interdicted was already in the public domain, the matter had become moot. The court took the view that an interdict would, in the circumstances, deny the public the right to be informed more fully through the intended newspaper article of matters which had already become freely available on e-justice.

[41] The fact of the publication on e-justice, the High Court held, removed any reasonable apprehension of an injury or harm as the injury had already occurred. An interdict would in the circumstances be meaningless and moot.

Submissions on appeal

The Government

[42] I will first briefly set out the salient aspects of the written submissions submitted on behalf of the Government. In so doing, I do not find it necessary to set out each and every submission made therein because for the most part it is repetitive.

[43] The written submissions refer altogether to a staggering 50 cases² a significant number of which are pre-independence cases decided under the pre-independence securocratic ethos³ which conjure up images of our painful colonial past. To the Government's credit, most of these submissions were not pressed by Mr Maleka SC who led the appeal on its behalf.

² Rule 17(7)(c) of the Supreme Court Rules requires a party to cite one authority for a legal proposition made and if more than one is cited to 'state the reason for citing additional authorities'.

³Paying lip-service to rule 19(1) (c) which requires counsel relying on foreign authority to certify that 'there is no Namibian law, including the Namibian Constitution, that precludes the acceptance by the court of the proposition of law that the foreign authority is said to establish' and '(d) state that the foreign authority represents the law on the point under consideration and why the foreign authority is relevant'.

[44] Be that as it may, it is submitted in the written heads of argument that the NCIS's powers under the NCISA obliges it to take steps to protect from unauthorised disclosure national security intelligence, intelligence collection methods, sources of information and the identity of the NCIS's staff members. That includes the 'privilege' not to disclose in court proceedings information that can prejudice national security. The Government was therefore not required by law to disclose in the interdict application the factual basis upon which the threat or potential threat to the security of the State was based.

[45] It is argued that s 29(1) of the General Law Amendment Act 101 of 1969⁴ has the effect that (a) the NCIS enjoys immunity from disclosing or producing information in court proceedings if doing so will compromise national security and that (b) courts must respect an honest exercise of the statutory 'discretion' conferred on the Executive to pray in aid in court proceedings 'national security' in order to suppress publication by persons possessing such information.

[46] The argument goes further that publication by unauthorised persons of information concerning properties of the NCIS is a security matter within the meaning of s 4(1)(b) of the PIA. Similarly, the publication threatened by the respondents was a

⁴ Section 29. (1) reads: 'Notwithstanding anything to the contrary in any law or the common law contained, no person shall be compelled and no person shall be permitted or ordered to give evidence or to furnish any information in any proceedings in any court of law or before anybody or institution established by or under any law or before any commission as contemplated by the Commissions Act, 1947, as to any fact, matter or thing or as to any communication made to or by such person, and no book or document shall be produced in any such proceedings, if an affidavit purporting to have been signed by the Minister responsible in respect of such fact, matter, thing, communication, book or document, or, in the case of a provincial administration or the territory of South-West Africa, the Administrator concerned, is produced to the court of law, body, institution or commission concerned, to the effect that the said Minister or Administrator, as the case may be, has personally considered the said fact, matter, thing, communication, book or document; that in his opinion, it affects the security of the State and that disclosure thereof will, in his opinion, prejudicially affect the security of the State.'

security matter because it concerned properties of the NCIS and therefore warranted to be interdicted.

[47] The information possessed by the respondents, both as regards the properties and the Association, placed it within the framework of 'a matter' dealt 'with' by the NCIS, alternatively it 'relates to the functions' of the NCIS or to a relationship between the NCIS and any person. That engaged s 4(1)(b) of the PIA.

[48] It is also submitted that the s 4(1)(b) prohibition extends to publication of information 'for any purpose', including the purported exposure of corrupt activity as long as doing so is prejudicial to the 'security interests' of the State.

[49] As I understand the case made on behalf of the Government in the written heads of argument, in terms of s 5(1)(a) of the NCISA, the NCIS and the DG have the power, duty and function to detect, identify and to protect against any threat (actual or potential) to the security of Namibia. The NCIS therefore must evaluate all information both inside and outside Namibia and to take a view whether or not such information compromises Namibia's national security interests.

[50] Once it has made an assessment that it does, the following consequences follow:

- (a) The NCIS is the sole determiner of whether or not there is a threat to national security from the disclosure of information by a member of the public and not even the courts may inquire into that;

- (b) The NCIS is not obliged (in fact it is prohibited not) to place evidence before court in court proceedings to justify its conclusion that publication will be harmful to national security;
- (c) All the NCIS needs to do in court proceedings aimed at suppressing publication of 'secret' information- be it about its assets or anyone associated with it – is to assign it the label of national security and to assert that publication will compromise national security and the court is bound in law to grant an interdict prohibiting publication;
- (d) The NCIS is under no obligation to reply to any enquiry by the media or to comment on any matter relating to or concerning the NCIS, even if it involves an allegation of a crime such as corruption.

[51] Based on the above, it is submitted that in the present case, when Mr. Haufiku sent the SMS to Mr Likando, the NCIS formed the view that he intended to publish a story disclosing information relating to property of the NCIS and persons linked to it. That made the intended publication a security matter which required suppression by way of an interdict as the publication of the information possessed by the respondents would violate s 4(1)(b) of the PIA.

[52] In oral argument, Mr Maleka SC who led the appeal on behalf of the Government criticised the High Court's judgment in so far as it took the view that the Government's right to suppress publication ought not to override the respondents' right to publish in the public interest. According to counsel, the learned judge engaged in a wrong inquiry: The issue was not whether one right trumped the other but whether the Government made out a case for the grant of an interdict.

[53] Mr. Maleka argued that the Government had established a clear right, basing as it did its case on the PIA and the NCISA. Counsel added that the nature and tenor of Mr. Haufiku's questions gave the Government good enough reason to fear that what was intended to be put in the public domain was information which, by the functions entrusted to the NCIS and the oath taken by the DG, it was incumbent upon the NCIS to protect from publication. Disclosure of assets belonging to the NCIS and activities carried thereon would expose the operations of what is a secretive organisation. Similarly, exposing the NCIS's connection with the Association fell afoul of the law in so far as it laid bare what is supposed to be a secret relationship between the NCIS and the Association.

[54] According to Mr Maleka, the desire to expose corruption through publication is an after-thought by the respondents and was never the reason proffered contemporaneously for making inquiries to Mr Likando.

[55] Mr. Maleka suggested that making inquiries to the NCIS was not the proper way to expose suspected corruption and that the agency is, in any event, subject to audit by the Auditor-General and that anyone with evidence of corruption would be entitled to provide the information to the Anti-Corruption Commission for investigation.

[56] Mr Maleka argued that although, because of the public nature of the court process, the details which the Government wanted sequestered is now public knowledge, that did not render the matter moot as the case raises a matter of grave public importance as regards the limits of what is permissible or not in the light of the PIA and the NCISA. Counsel argued that if the respondents engaged in unlawful

conduct, the court should declare that to be the case and fashion a remedy accordingly.

The Respondents

[57] Mr Tjombe for the respondents supported the reasoning and order of the High Court. He maintained that because of the disclosure of the information in the court papers, initiated, as it happens, by the Government, there was no longer a live dispute between the parties. As regards the argument that other lawful avenues are available to report suspected corruption, counsel argued that doing so does not preclude a journalist's right to publish such information.

[58] Counsel made the point that the information becoming public knowledge was the own doing of the Government; and that it was perfectly open to the DG to approach the High Court *in camera* as envisaged in Art. 12(1)(a) of the Constitution to seek the relief he sought and to ensure that the information was suppressed.

Analysis

[59] The DG's approach in seeking to interdict the publication of whatever information The Patriot was privy to, is three-fold. That:

- (a) The information was obtained or possessed illegally;
- (b) It would be against the law and would compromise national security if the NCIS either confirmed or denied the truth of the information possessed by respondents;
- (c) The mere assertion by Mr Haufiku that he possessed information concerning the NCIS made the disclosure by publication of such

information (whether accurate or not and whether involving the commission of a crime) unauthorised and therefore unlawful and liable to be sequestered.

Was a case made out for the final interdict?

The onus

[60] This case is not about The Patriot compelling the NCIS to disclose information that might fall foul of the law or compromise national security. Had that been the case the onus would have been on The Patriot to justify disclosure. I make this point because the written submissions in the appeal are replete with assertions that the NCIS is under an obligation not to disclose information and therefore cannot be compelled to disclose protected information. The reliance on s 29 of the General Law Amendment Act demonstrates that erroneous approach.

[61] Although the right relied upon is statutory, its enforcement is sought through the medium of the common law which lays down the requirements to be met for a final interdict. In the first place, it is trite that where there are disputes of fact and no referral to oral evidence, final relief may be granted only if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavit, justify the granting of such relief.⁵

[62] Secondly, for the grant of a final interdict, there are three requirements all of which must be satisfied by an applicant: a clear right which is being protected, an act of interference with that right, and the absence of a similar remedy if the interdict is not

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623(A) at 634F.

granted.⁶ The clear right must be established on balance of probability⁷ by producing supporting evidence.⁸ As regards the interference with the clear right, the mere assertion of a reasonable apprehension or fear of interference would not suffice. The facts supporting the apprehension must be set out in the application to make it possible for the court to make an assessment itself whether the fears are well grounded.⁹

Statutory context considered

[63] I will next deal with the statutory provisions relied on by the Government in support of the relief sought *a quo*.

[64] Section 4(1) of the PIA relied upon in part by the Government to support the right for the final interdict are penal in nature. I will cite them in full for completeness:

“Prohibition of disclosure of certain information

(1) Any person who has in his possession or under his control or at his disposal-

- (a) any secret official code or password; or
- (b) any document, model, article or information -
 - (i) which he knows or reasonably should know is kept, used, made or obtained in a prohibited place or relates to a prohibited place, anything in a prohibited place, armaments, the defence of the Republic, a military matter, a security matter or the prevention or combating of terrorism;
 - (ii) which has been made, obtained or received in contravention of this Act;
 - (iii) which has been entrusted in confidence to him by any person holding office under the Government;
 - (iv) which he has obtained or to which he has had access by virtue of his position as a person who holds or has held office under the Government, or as a person who holds or has held a contract made on behalf of the Government, or a contract the performance of which takes place entirely or partly in a prohibited place, or as a person who is or has been employed under a person who holds or has held such office or contract, and the secrecy of which document, model, article or information he knows or reasonably should know to be required by the security or the other interests of the Republic; or
 - (v) of which he obtained possession in any manner and which document, model, article or information he knows or reasonably should know has been obtained by any other person in any of the ways referred to in

⁶ Prest CB.1996. *The law and Practice of Interdicts*. Cape Town: Juta, pp 42-48.

⁷ *Nienaber v Stukey* 1946 AD 1049 at 1053-4; *Beukes v Crous* 1975 (4) SA 215 (NC) at 219.

⁸ Prest, p 43.

⁹ *Ibid* at 45 and see authorities collected at n 31.

paragraph (iii) or (iv) and the unauthorized disclosure of such document, model, article or information by such other person he knows or reasonably should know will be an offence under this Act,

and who -

- (aa) discloses such code, password, document, model, article or information to any person other than a person to whom he is authorized to disclose it or to whom it may lawfully be disclosed or to whom, in the interests of the Republic, it is his duty to disclose it;
- (bb) publishes or uses such code, password, document, model, article or information in any manner or for any purpose which is prejudicial to the security or interests of the Republic;
- (cc) retains such code, password, document, model, article or information when he has no right to retain it or when it is contrary to his duty to retain it, or neglects or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or
- (dd) neglects or fails to take proper care of such code, password, document, model, article or information, or so to conduct himself as not to endanger the safety thereof,

shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment, or, if it is proved that the publication or disclosure of such secret official code or password or of such document, model, article or information took place for the purpose of its being disclosed to a foreign State or to a hostile organization, to the penalty prescribed in section 2.

Any person who receives any secret official code or password or any document, model, article or information, knowing or having reasonable grounds to believe, at the time when he receives it, that such code, password, document, model, article or information is being disclosed to him in contravention of the provisions of this Act, shall, unless he proves that the disclosure thereof to him was against his wish, be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.”

[65] It is beyond dispute that information obtained or disclosed in contravention of s 4(1) of the PIA constitutes a criminal offence.

[66] The PIA outlaws the possession or disclosure of information which has been unlawfully obtained, i.e. in contravention of ‘this Act’ and is used in an unauthorised

manner, i.e. by disclosing it to an unauthorised person, is being published or used in a manner or for any purpose prejudicial to the security interests of the Republic. Those jurisdictional facts had to be established to justify the grant of the final interdict.

[67] The provisions of the NCISA are of a different kind. The NCISA in s 5 defines the powers, duties and functions of the NCIS, the DG and its Director. In s 22 it prohibits the disclosure of the identity of members of the NCIS. In s 23 it deals with the prohibition of access to the premises of the NCIS.

[68] The criminal offences under the CSIA are contained in sections 20¹⁰, 21¹¹, 22¹², 23¹³, 24¹⁴ and s 28.¹⁵

[69] The provisions that come close to the facts of the present case only need considering. The remainder have no relationship to the facts before us.

[70] Section 22 prevents a person who in the performance of their duties and functions under the NCISA, or who by virtue of their position or employment in the NCIS, becomes aware of the identity of NCIS informers or of persons engaged in covert operations, from disclosing such information to unauthorised persons. The section clearly does not apply to the respondents.

¹⁰ Prohibition of false representations as to association with the NCIS.

¹¹ Offences in connection with members of the NCIS.

¹² Prohibition of disclosure of identity.

¹³ Prohibition of access to premises of the NCIS.

¹⁴ Prohibition of interception and monitoring.

¹⁵ The section protects secrecy of information obtained by individuals engaged in authorised interception activities in terms of s 24 of the PIA.

[71] Section 23 empowers the President by notice in the Gazette or in such manner as he may deem sufficient, to prohibit or restrict access to any land or premises under the control of the NCIS. The President may restrict access to such places by causing warning notices to be erected to prohibit access thereto by the public. And any person who then enters such land or premises commits a crime. On the papers, no case is made out that this section was contravened.

[72] Where information has been unlawfully obtained, it constitutes a crime which can result in prosecution and the possessor being prevented to disclose or publish it on pain of contempt of court. Where the State follows the latter course, it must satisfy the court on a balance of probabilities that the information was unlawfully obtained and or that its publication will harm national security.

[73] It is arguable that even information obtained lawfully e. g if found in the street could be barred from publication if doing so would harm national security. But that is the case the State must make. It is not enough simply to say even acknowledging or denying its existence compromises national security.

[74] As I have already intimated, the court can be approached *in camera* until finalisation of proceedings and the State to take the court into its confidence and place sufficient material before court to justify why publication must be prohibited. The notion that the court must simply interdict because the State assigns something the label of national security is not consonant with the values of an open and democratic society.

[75] The respondents placed the following facts before court in the answering affidavit. Acting on a tip-off, Mr. Haufiku visited a public office - the Deeds Registry – and from there established that a certain farm and a house were registered in the name of the Government. The properties were acquired with public funds. He established that individuals who on the face of it were not in the service of the State were occupying those properties. He makes clear under oath that if they were indeed employees of the NCIS he would not have published their identities. In fact, he was advised by his lawyer not to publish such detail.

[76] The Association, some of whose members and family occupied the properties, functioned on the strength of a constitution which clearly identified them to anyone who would lay their hands on that document. The Association's constitution makes no pretence that it is a secret organisation.

[77] Against these facts, one must weigh the version of the Government which, by its own admission, placed not a scintilla of evidence to show how (a) the manner of acquisition of the information breached any law, (b) complete silence about the Association in the founding affidavit, and (c) bald allegations of secrecy and national security which are not apparent on the face of it.

Disposal

Mootness

[78] There are two ways in which mootness arises in the present context. The first is the stage at which the application for the interdict was adjudicated. The second is after the High Court proceedings and when the appeal was ripe for hearing. It was in

the first sense that Geier J found that the interdict sought had become moot since the allegations which were threatened to be made by publication had become public knowledge when detailed in the answering affidavit of the respondents on the High Court's e-justice system.

[79] The issue on appeal is whether Geier J misdirected himself in coming to that conclusion and refusing to grant an interdict on that basis.

[80] As for the first nuance, the Government had placed sufficient information before court to justify adjudication of the matter regardless of whether or not the information had become accessible through e-justice as the issue raised was of immense public importance to guide future conduct.

[81] Although e-justice is accessible to the public, there is no evidence in the record that it was to an audience broader than that which takes interest in court matters. An interdict would in any event have had the effect that the Government would have been entitled to have the electronic record removed from e-justice. The High Court should therefore not have refused the interdict on that ground. But it did also on the basis that the Government had not made out the case for the grant of the final interdict. I deal with that aspect later.

[82] As for the second sense, Mr Tjombe for the respondents argued that after the dismissal of the application by the High Court, the information which was the subject of the proceedings *a quo* and in the appeal, had been widely published and therefore rendered the matter moot. Mr Maleka countered, and it was conceded by Mr Tjombe,

that there is no evidence before this court to support the assertion that such publication indeed took place post the High Court order. In other words, we must accept that except for the information being accessible on e-justice, there had been no publication in the media.

[83] In so far as it remains a live issue in the present appeal, the mootness argument, in both senses, is therefore not a good one.

[84] Although the High Court's judgement is being assailed in the most comprehensive manner and on a very broad front, the real issue in this appeal is whether the Government had made out a case for the grant of an interdict in the terms sought.

Are national security claims beyond curial scrutiny?

[85] It needs to be made clear as a preliminary matter that we do not agree with the Government's refrain, repeatedly pressed with great force in the written heads of argument, that once the Executive invoked secrecy and national security, the court is rendered powerless and must, without more, suppress publication by way of interdict.

[86] The notion that matters of national security are beyond curial scrutiny is not consonant with the values of an open and democratic society based on the rule of law and legality. That is not to suggest that secrecy has no place in the affairs of a democratic State. If a proper case is made out for protection of secret governmental information, the courts will be duty bound to suppress publication.

The legitimate concern for secrecy in court proceedings

[87] The Government had to establish the jurisdictional facts contemplated in the PIA and the NCSIA in order to obtain an interdict to suppress publication of the information which the respondents possessed. A mere recitation of the sections of the legislation would for that purpose not suffice. Sufficient evidence must be placed before court which will enable the court to make an assessment whether the information whose publication is sought to be suppressed came within the scope of the statutory provision(s) relied upon. It is a legitimate concern though that if such information were ventilated through the publicly accessible e-justice process, its secrecy might be compromised.

[88] The Government will therefore be perfectly entitled to intimate to the head of jurisdiction, through the registrar, that for reasons of national security as contemplated in Art 12(1)(a) of the Constitution, such proceedings be conducted *in camera* and to obtain the head of jurisdiction's directions in that regard. It will be stating the obvious that until the proceedings commenced *in camera* are completed, the information it relates to will remain sequestered and anyone who possesses it would be required not to publish it unless authorised by the court to do so. A failure to do so would be contrary to law and make the publisher liable to criminal sanction for contempt.

(a) The Association

[89] Mr Kashindi wrote two letters to the respondents. The first in the immediate aftermath of Mr Haufiku's SMS to Mr Likando and the second after he received the questions sent to him at his request.

[90] In the first letter Mr Kashindi put Mr Haufiku on terms not to publish any information about the properties 'as well as information that relates to the Association of former members of the Namibia Central Intelligence Service'. He added that 'whilst we wait for your questions, be advised that, whether we receive your questions or not, we have instructions to seek from you. . . a written undertaking. . .not to publish any information that relates to the properties. . .as well as . . .the Association. . . '

[91] It was after receiving the questions (and presumably on the instructions of the NCIS) and in the absence of a written undertaking as demanded, that, in relation to the Association, Mr Kashindi in the second letter of demand recorded that:

'With regard to your questions regarding the association, kindly be advised that the [NCIS] and Mr Likando cannot comment or answer questions or issues that relate to another entity. On this basis our clients are not in a position to answer any question that relates to other entities.'

[92] That statement is to be compared to the one made in the same letter regarding the properties. It reads:

'Kindly be advised that all information that you seek that relates to the properties and or assets of the [NCIS] falls within the scope of sensitive matters and/or classified information. In terms of the provisions of the [PIA] read with the provisions of the [NCISA], possession, disclosure, and or publication of that information is prohibited and it constitutes a criminal offence. In the light of this position be advised that you are prohibited by law from possessing, disclosure and or publishing of that information. As a result of this position, your request to be provided with answers in respect of your questions or to confirm and or deny the veracity of the information that you have is denied.'

[93] Mr Kashindi's second letter of demand clearly distinguishes between the properties and the Association. The letter makes plain that the Government considered publication of information relating to the properties objectionable on statutory grounds and that it would not confirm or deny allegations concerning those

properties. As for the Association, the letter makes clear that the NCIS does not comment on an entity unrelated to it.

[94] During oral argument a suggestion was made that what was said about the Association was that the NCIS would not confirm or deny its existence or association with the NCIS. That is clearly an afterthought. First, to say that an entity is not associated with it is to deny a link between the two. Instead of not confirming or denying (as was done in relation to the properties), the choice was made to deny a particular relationship. Second, the DG's affidavit in support of the final interdict is confined to the properties and nowhere in it does he make any reference to the Association. Third, although the properties are specifically mentioned in the relief sought in the notice of motion, there is no reference therein to the Association.¹⁶

[95] The conclusion to which I come, therefore, is that the Government had not made out any case for the final interdict in respect of the Association.

[96] What remains to consider is whether it made out the case for the relief in respect of the properties. It is to that issue I turn next.

(b) The properties

[97] It is important not to confuse two things. On the one hand, the duty or the right of the Government not to disclose information, and the right to prevent publication of information about or relating to matters that fall within the prohibitions of the NCISA or the PIA. In the way the final interdict was sought, that distinction was not borne in mind

¹⁶ The prayer is cited at para [23] above.

resulting in the flawed manner that the Government formulated its case. The reliance on appeal on s 29(1) of the General Law Amendment Act is further proof of that. Although that provision is heavily relied upon on appeal, there is no indication that the jurisdictional facts for its invocation were established in the High Court proceedings by clearly pleading it as part of the Government's case.

[98] The confusion is apparent from the letter of demand sent by Mr Kashindi and it permeates the whole application. Mr Kashindi wrote:

'... all information that you seek that relates to the properties and assets of the Namibia Central Intelligence Service falls within the scope of sensitive matters and/ or classified information. In terms of the provisions of the Protection of Information Act 84 of 1982 read with the provisions of the Namibia Central Intelligence Service Act 10 of 1997, possession, disclosure, and or publication of that information is prohibited and it constitutes a criminal offence.'

[99] In the written submissions, two paragraphs in the founding affidavit of the DG are relied upon as the foundational pillars in support of the interdict. I will quote them verbatim. The first appears at paragraph 22 of the affidavit of the DG and states:

'The respondents intend to publish information that will disclose properties that the Service allegedly has and I assert that the publication of that information whether it is confirmed or denied by the Service contravenes the provisions of s 4(1)(b) of the [PIA].'

The second passage appears at paragraph 37 and states that:

'As a result of the expressions made by [Mr Haufiku] to publish the aforesaid information, the applicant reasonably believes and apprehends that the publication of that information will be a contravention of the [NCISA] and that, that publication poses a serious national security risk to the State of Namibia.'

[100] The onus to justify prohibition from publication rested on the Government. It painted its colours to the mast. It came to court stating that The Patriot had illegally obtained prohibited information and that its publication would constitute a crime and

jeopardise national security. It had the onus to prove those allegations by admissible evidence.

[101] Although a case could conceivably be made out that the respondents had breached the penal provisions of the PIA, the same cannot be said about the NCISA. Neither in the letter of demand nor the founding affidavit is any reference made to a provision of the NCISA that the respondents breached that Act in the manner they obtained or possessed the information in question. In what way the respondents committed criminal acts prohibited by the NCISA was therefore not pleaded. An interdict could therefore not have been granted on the basis that the respondents violated that Act.

[102] Besides, the information about the properties is not inherently secret (such as a military installation, equipment, password etc.), making it obvious to anyone who possessed it, even inadvertently, that it concerned or was a matter of national security. What is in issue are a house and a farm which are readily accessible to the public - without any indication that secret government operations were being carried on there as contemplated in s 23 of the NCISA.

[103] If indeed it was apparent to any reasonable person that it was of such a nature although not manifestly obvious, the Government would be entitled to make that case to the court in the manner that I have described and a court would be under a duty to suppress publication through an interdict.

[104] The need for placing evidence before court is heightened in the present case by the fact the property in question (the farm and the house) by all appearances were not of a secret nature and their use seemed on the face of it suspect. As will be recalled, in his questions to the NCIS, Mr Haufiku suggested that persons who were not so entitled received public funds and occupied public property.

[105] It has been suggested (correctly I may add) that the court retains a discretion to refuse a final interdict if its grant would cause some inequity and would amount to unconscionable conduct on the part of the applicant.¹⁷ In the words of Wessels JA in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 292-293:

“It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law. This inherent equitable jurisdiction of the Roman Courts (and of our Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it would be inequitable, dates back to remote antiquity. . . .

[106] The submission that publication of information relating to the NCIS must, without exception, be suppressed even if doing so would expose a crime cannot be sustained. In an appropriate case relief will be refused if the conduct being exposed is unconscionable.

[107] Not only did the Government fail to prove that the respondents obtained the information about the properties illegally or in breach of the statutory provisions relied upon, it also failed to show that it related to a secret place or that it concerned a matter of national security.

¹⁷ *Prest supra* at 48 citing *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 537.

[108] Therefore, in respect of the properties too, the Government had not made out the case for the grant of a final interdict and the High Court's order must be sustained.

Costs

[109] There is no reason why costs must not follow the result.

Order

[110] The appeal is dismissed and costs awarded to the respondents against the first and second appellants, jointly and severally the one paying the other to be absolved.

DAMASEB DCJ

MAINGA JA

SMUTS JA

APPEARANCES

APPELLANTS: V Maleka SC (with him D Khama and M Kashindi)

Instructed by Government Attorney

RESPONDENTS: N Tjombe

Instructed by Tjombe-Elago Inc.