

CONSTITUTIONAL COURT OF SOUTH AFRICA

Independent Newspapers (Pty) Ltd v Minister for Intelligence Services and Another

CCT 38/07

Medium Neutral Citation ZACC 6

Date of Judgment: 22 May 2008

MEDIA SUMMARY

The following media summary is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an application by Independent Newspapers (Pty) Ltd seeking the disclosure of portions of the record of proceedings in *Masetlha v President of the Republic of South Africa* which was decided by this Court last year. In that case, Mr Masetlha sought leave to appeal in a matter concerning his dismissal by the government. The parties to the *Masetlha* case did not participate in this case.

A day before the hearing in the *Masetlha* matter, Independent Newspapers sought to join the proceedings in order to gain access to the written argument lodged by the parties in the *Masetlha* case as well as to certain documents in the record of proceedings which had been removed from this Court's website by the Registrar on the instruction of the judges. The Minister of Intelligence Services joined the proceedings and opposed the release of the in-camera affidavit deposed to by Mr Masetlha (and in particular specified paragraphs of it) and certain annexures to it including a report compiled by the Inspector General of Intelligence on the legality of a certain surveillance operation conducted by agents of the National Intelligence Agency.

Thereafter Independent Newspapers requested copies of the restricted documents for the limited purpose only of preparing its case. The minister opposed the request. Independent Newspapers brought an interlocutory application for an order to gain access to the same documents but that application was refused by a majority of this Court. Reasons for that refusal are also furnished in today's judgment. This Court then directed that the main application be set down for hearing on 22 November 2007.

In the judgment delivered this morning, Moseneke DCJ writing for the majority furnished brief reasons for the majority decision to dismiss the interlocutory application. He noted that Independent Newspapers did not attack the constitutional validity of the decision to render the documents classified and that Independent Newspapers was not severely prejudiced by not having sight of the documents for the purposes of their argument. He also reasoned that disclosure of the documents to Independent Newspapers might have dissipated the attempts to keep the information confidential.

On the main issue concerning public access to the withheld portions of the record, Moseneke DCJ considered the cluster of rights that establish the right to open justice. He observed that the right to open justice is not absolute, but that a court must decide in all the circumstances of a particular case whether its limitation is in the interests of justice. Moseneke DCJ recognised that what is in the interests of justice has to be considered in the light of two competing constitutional claims: the first being open justice; and the second being the government's obligation to pursue national security. In considering the Minister's argument that the fact that documents are classified renders them immune to disclosure, he held that the mere fact that the documents in a court record carry a security classification does not oust the jurisdiction of a court to decide whether they should be protected from disclosure to the media and public.

Moseneke DCJ then considered each of the documents separately. He ruled that the whole of the in camera affidavit made by Mr Masetlha should be made available to the public but that the three disputed annexures to the affidavit should not.

Yacoob J wrote a dissenting judgment. He held that all the documents should be released to the public mainly because the information in them is in the public interest. The national security interest, he reasoned, may be protected by further redaction of the documents. His judgment emphasises that the public version of the Inspector General's report by the government was both misleading and deceptive and took the view that the Court should not be used as an instrument for concealment in the circumstances.

Yacoob J further held, in relation to the interlocutory application, that it would have been in the interests of justice for the documents to be made available to the legal representatives of Independent Newspapers and some of their senior personnel to help Independent Newspapers prepare their case.

Sachs J in his judgment, which aligns itself with the outcome proposed by Yacoob J, placed reliance on the constitutional principle of openness to justify the disclosure of the

relevant material. In contrast to the hegemonic and secretive agencies of the past, he reasoned, the South African intelligence services are required at all times to act within the limits defined by the Constitution, and in line with the spirit and purport of the Constitution. Sachs J concluded that more damage would be done to the national interest in general, and to the vitality of the intelligence service in particular, by withholding stale and routine information about the workings of the agency, than by allowing the normal rules governing public access to all court documents to apply.

In a dissenting judgment, Van der Westhuizen J agreed with the majority judgment that the interlocutory application should be dismissed. On the main application he expresses the view that the factors mentioned in section 36 of the Constitution when a court tests whether the limitation of a right is reasonable and justifiable in an open and democratic society, could be useful in the balancing of the competing rights in this matter. He reached the same conclusion as Yacoob J, with one qualification regarding the names of operatives.