SACHS J ABRIDGED JUDGMENT

Independent Newspapers (Pty) Ltd v Minister for Intelligence Services

[151] The concept of open justice is not self-contained. It is an integral part of living in the open and democratic society that lies at the heart of our constitutional order. It is also conditioned by the fact that the Constitution envisages a new kind of intelligence service, one that functions at all times within the letter and spirit of the Constitution and subject to civilian oversight. This is the context in which I believe the balancing in the present matter between the principles of open justice, on the one hand, and protecting important state interests in preserving secrecy, on the other, has to be conducted.

[152] With these considerations in mind I find myself in agreement with the broad sweep of Moseneke DCJ's judgment. In my view, he has outlined the legal issues and the principles that govern them in an elegant and persuasive manner. Furthermore, in relation both to the interlocutory application to enable the legal representatives of the newspapers to view the embargoed material, and to the final determination of what should remain secret, he has set out the competing factors in a most helpful and comprehensive manner. These are borderline cases. Acting with due regard to the need to be open where possible, the Minister agreed to the disclosure of the great bulk of the material initially withdrawn from the public record, and offered carefully-reasoned justifications for keeping the rest out of the public domain. Yet, and not without hesitation, I have come to the conclusion that, at the end of the day, after all the competing interests have been carefully placed in the scales, the analysis by the Deputy Chief Justice fails to give enough weight to the impact that the non-disclosure of even relatively small parts of the record would have on the principle of openness. I accordingly align myself with the outcome proposed in the minority judgment of Yacoob J.

[153] To my mind, this case requires special attention to be paid to the importance of openness, a theme that until now has not been given much attention in our jurisprudence. The principle of openness is an integral part of the constitutional vision of an open and democratic society. Section 1 of the Constitution declares that the democratic government of South Africa is founded on the principles of accountability, responsiveness and openness. The theme of openness is underlined right through the Constitution: in the Preamble, the limitation clause in the Bill of Rights, in the provision dealing with the interpretation of the Bill of Rights, and in sections regarding the manner in which Parliament and other legislative bodies should function.

[154] Indeed, the most notable feature of these provisions is the inseparability of the concepts of democracy and openness. The rationale for constitutionalising this symbiosis can be found in our history. By its nature, minority rule was not only racist; it was hegemonic and autocratic. The security police received greater and greater powers, and ended up virtually a law unto themselves. In the paranoid world-view of those in authority who spoke of a total onslaught on South Africa, everyone was a potential enemy, and secrecy became the order of the day. The impact on the lives of the majority of citizens was devastating. Although security policy was advanced as being in the 'national interest', its primary goal was to safeguard the racially exclusive state and the privileged status of the white community. Security strategy was formulated by a select group of cabinet ministers and security officials, excluding parliament and the public from effective participation. The consequences have been summed up in the following terms—

"the death of thousands of people; the impoverishment of millions of lives; massive economic waste and damage; a regional arms race; and a greater resolve by the liberation movements and international community to end apartheid. In short, the outcome was perpetual insecurity for the states and inhabitants of South and Southern Africa."

And in the striking words of Mahomed DP: "Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history."

[155] An open and democratic society does not view its citizens as enemies. Nor does it see its basic security as being derived from the power of the state to repress those it regards as opponents. Its fundamental philosophy is quite opposed to the authoritarianism of the past. Its starting-point is not repression, but the promotion of positive elements of social stability, such as food security and job security. Above all, the society is bound together not by ties of arrogance combined with fear, but by a shared sense of security that comes to all citizens from the feeling that their dignity is respected and that each and every one of them has the same basic rights under the Constitution.

[156] One of these basic rights gives a special and rare texture to our Constitution. It is the right in section 32 of everyone to have access to information. The Promotion of Access to Information Act (PAIA), adopted on 3 February 2000, gives effect to this right, and although the applicants cannot rely on the provisions of PAIA to found their claim, it remains highly relevant because of the illumination it throws on the totally changed character of our society envisaged by the Constitution. This rupture with the past was emphasised by the Deputy Minister for Justice and Constitutional Development, Cheryl Gillwald, in the following terms:

> "Considering our not so distant past, one would understand the lack of complete faith in the self-regulating accountability of the state. The Act therefore constitutes a clean break with practices of the successive apartheid governments that were so often secretive. In most cases this secrecy had a profound impact on the lives of the majority of citizens in this country. As the new government we had no choice therefore but to ensure that we create conditions that would allow citizens full and democratic participation in the governance process. We have an obligation to make rights enshrined in the Constitution real!"

The sea-change in philosophy and practice is highlighted in PAIA's Preamble, which recognises:

> "[T]he system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations".

[157] And consistent with this new approach, the point of departure for the statute is that people have a general right of access to information possessed by the state, coupled with a more limited right of access to information in private hands. Exemptions, including those set out in favour of national security, are presented as exceptions, and not as the norm. Thus the relevant provision dealing with national security does not provide a blanket ban on disclosure of such information, but rather furnishes carefully delineated and objectively reviewable grounds for non-disclosure.

[158] Finally, in keeping with the transformed outlook, the intelligence services are given a distinct place in the Constitution. They share with all the other security services the duty to act, to teach and to require their members to act in accordance with the Constitution and the law, including customary law and international agreements binding the Republic. The Constitution specifically places any intelligence service established by the President in terms of national legislation under the civilian oversight of an inspector, who is appointed to monitor its work by a resolution supported by two thirds of the members of the National Assembly. In general terms, the objects, powers and functions of intelligence services must be regulated by an Act of Parliament. These constitutional provisions both safeguard the specific status of the intelligence services in the government hierarchy and ensure that they function within the parameters of an open and a democratic society.

159] All these various constitutional provisions need to be viewed in conjunction. No longer is it possible to view the intelligence services as shadowy and all-powerful supports for a beleaguered society. Their function is to keep government well-informed, so that it can confidently fulfil its responsibilities towards ensuring a better life for all in a country undergoing major transformation. While many of the processes of information-gathering might remain confidential, and sensitive information gathered might be for restricted eyes only, their work is not essentially of the cloak-and-dagger kind popularised in Cold War fiction, with operatives putting their lives at risk with every venture they undertake. There will, of course, be intelligence-gathering activities of a highly sensitive nature involving matters such as serious cross-border crime, money-laundering, and international terrorist actions, where secrecy will be of

the essence. But in my view, there is nothing that suggests that the work of the intelligence services should automatically be regarded as secret. Everything will depend on the specific context.

[160] In the present matter the context consists of a dubious and botched surveillance project which gave rise to tensions inside the intelligence community, ultimately leading to litigation that came to this Court. It includes reference to the proceedings and representations of the Khampepe Commission which was also of great public interest. In these circumstances I believe that the constitutional provisions to which I have referred, taken together, place a rather robust thumb on the scales in favour of disclosure of all court documents.

[161] I agree with the Deputy Chief Justice that acceptance of this point of departure does not mean that technical concepts such as onus of proof should be allowed to loom large in the balancing enquiry. On the contrary, in fact-specific matters such as these, undue technicism, whether on questions of procedure or evidence, would be more likely to distort the achievement of constitutional justice than to enhance it. Similarly, it seems clear that, whereas in most cases involving proportionality, the courts will act as an outside eye in assessing the constitutionality of the way in which power has been exercised, in cases such as the present the courts have to do the balancing themselves. Check-lists will not be helpful. As in all proportionality exercises, the factual matrix will be all-important, and the court concerned will itself have to make an order based on its enquiry into the specific way in which constitutionally-protected interests interact with each other, and particularly with the intensity of their engagement.

[162] This would appear to be one of those areas where judicial experience and common sense could be of special importance. Thus, this Court accepted in *Shabalala* that the names of informers in criminal matters should not be revealed at any stage, even if such non-disclosure were to some extent to limit the capacity of the accused to make his or her defence. The rationale for this common law rule was not only to protect the

individual source from reprisals – the whole system of passing on information to the police would be jeopardised if informants feared their identity would be revealed.

[163] The equivalent in the present matter would be redaction, to which neither party has objected in principle. The question is whether something more than appropriate redaction is required. In answering this question, it is important not to deal with hypothetical damage that could be caused to national security if certain types of information were to be revealed, but rather to verify whether on the facts a real risk exists that non-trivial harm could result. More particularly, it has to be asked whether more harm could well result from disclosure than from non-disclosure.

[164] There are two idiosyncratic features that give this case a surreal character. The first is that the initiative to suppress access to certain internal intelligence documents came from the Court itself and not from the intelligence agency. The belated response from the Ministry does not smack of any real perceived need to protect hot state secrets from the public eye. Rather, it suggests that the Ministry wishes to make points of principle for the future. The second is that all the documentation had already been placed on the Court website, so that any interested party, whether friendly or unfriendly or just curious, could quite lawfully have downloaded and printed it out.

[165] I would add that a perusal of the actual contents of the documents supports the notion that their disclosure risks causing embarrassment rather than harm. In these circumstances, I feel that walls of national security would hardly have come tumbling down if the legal advisers had had access to the full record before deciding whether to encourage or discourage litigation. Far from being incandescent, the material was so banal, and so much of it had already been placed in the public domain, that their advice could well have been to desist from litigation because at best there was nothing to gain but dross.

[166] And, as a matter of principle, it would be unfortunate if officers of the court were to be regarded presumptively, or possibly, as dangerous enemies of the state, or even as irrepressible gossips who do not know how to keep a secret. Hopefully the day will never arrive where in cases involving extremely serious security matters some sort of vetting of legal advisers could be required as the price for making highly sensitive material available to the defence. Yet if such an eventuality could even be hypothetically contemplated, not in the most notional of senses could the present matter be considered as potentially coming anywhere near that category.

[167] Similar considerations apply to the final determination of whether anything more than appropriate redaction is required. I agree with Yacoob J 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 my view, subject only to appropriate redaction, we should restore all the embargoed material to the website and give proper respect to the principle of open justice in an open society.