



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-CIV-MOT-GEN-2018/00107

THE DIRECTORE GENERAL OF THE NAMIBIA CENTRAL
INTELLIGENCE SERVICE

1ST APPLICANT

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

2ND APPLICANT

and

MATHIAS HAUFIKU

1ST RESPONDENT

THE EDITOR OF THE PATRIOT NEWSPAPER

2ND RESPONDENT

THE PATRIOT NEWSPAPER

3RD RESPONDENT

Neutral citation: *The Director General of the Namibia Central Intelligence Service v Haufiku* (HC-MD-CIV-MOT-GEN-2018/00107) [2018] NAHCMD 174 (18 June 2018)

Coram: GEIER J

Heard: 20 April 2018

Delivered: 18 June 2018

Flynote: Constitutional law — Freedom of speech and expression and the media guaranteed by art 21(1)(a) of Namibian Constitution — Such freedom central to vibrant democracy where and the principle of accountability applicable in democratic states and rule of law jurisdictions and in which members of the public have a right to be informed about the manner and fashion in which the authorities are performing their public duties and mandates, which right includes the right to be informed about how public figures, officials and politicians execute the tasks entrusted to them - members of the public thus have the consequent right to form an opinion about the manner and fashion in which the authorities and public figures are performing their public duties, which opinion is dependent in a very large measure upon the media's ability to provide accurate information on the way in which politicians and functionaries are fulfilling their mandates; in this regard the media plays a key role in that its members are important agents in ensuring that government is open, responsive and accountable to the citizens as the founding values of the Constitution require –

Constitutional law — Freedom of speech and expression and the media guaranteed by art 21(1)(a) of Namibian Constitution – the recognition of the negative effects and the negative impact of corruption on the Namibian Bill of Rights and on Namibia's developing democracy translates itself into the recognition of the important role that the media have in reporting on such activities. *'It is thus one of the functions of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators...'*. The press must reveal dishonest mal- and inept administration. This role of the media is obviously also in the public interest.

Constitutional law - the actions of the NCIS are subject to judicial oversight as the NCIS operates in the context of a democratic state founded on the rule of law which rule subjects all public officials and all those exercising public functions, whether openly or covertly, in the interest of the State, to judicial scrutiny, this would include all operatives and functionaries of the NCIS.

Constitutional law — Freedom of speech and expression and the media guaranteed by art 21(1)(a) of Namibian Constitution — the limitation of such rights and freedoms is however permissible in terms of art 21(2) by any law which imposes reasonable restrictions on the exercise of such rights and freedoms, which rights can also be limited if this should be required in the interests of national security

Interdict — Final interdict — Requisites — an applicant has to establish a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. The Court retains a limited discretion, if at all. There is no general discretion to refuse relief. That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to withhold an interdict, that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts for the resolution of disputes.

Summary: The third respondent, an independent newspaper, intended to publish an exposé on alleged corrupt activities and transgression of the State Finance Act in the Namibia Central Intelligence Service. When informed of the third respondent's intentions, the applicants – the Director-General of the NCIS and the Government launched an urgent application to interdict the publication of the intended article. The interdict was sought on the strength of the Namibia Central Intelligence Service Act, Act No 10 of 1997 and on the provisions of the Protection of Information Act, Act 84 of 1982 which prohibited the possession and publication of classified information and on the basis that the publication would expose and this threaten be harmful to the operations of the security service. The respondents, being the journalist and editor in question, and the publishing entity inter alia relied in their defence on the freedom of speech and expression and the media guaranteed by art 21(1)(a) of Namibian Constitution. In the absence of a constitutional challenge the court had to give recognition to the fact that the applicants had established the clear rights contended for based on the relied on statutes. As on the other hand the respondents had established their constitutional art 21(1)(a) rights, subject to the art 21(2) limitations the court had to embark on a balancing exercise. The court however refused to grant the sought interdict as the court found that the applicants had failed to establish the second requirement for interdictory relief, ie. that the applicants had failed to establish that an injury was actually committed or reasonably apprehended. The application was accordingly dismissed.

Held: That the failure of the applicants' to allege factual matter 'informing the secrecy, sensitivity and classification (as well as the perceived compromise to national security)

on the information and publication they seek to interdict.' materially, detracted from the veracity of the applicants' case.

Held: That the actions of the NCIS are subject to judicial oversight as the NCIS operates in the context of a democratic state founded on the rule of law which rule subjects all public officials and all those exercising public functions, whether openly or covertly, in the interest of the State, to judicial scrutiny, this would include all operatives and functionaries of the NCIS. The agency has been established to serve that state and thus remains accountable to the judiciary.

Held further: that the courts are well equipped to deal with security issues where the court could, for instance, exercise its inherent powers to regulate a preliminary *in camera* procedure, if required, for purposes of establishing whether any information required in judicial proceedings should be kept secret contrary to the open justice principle in the interests of national security or whether or not such information could be placed into the public domain.

Held: as applicant sought to interdict the publication of an article that was intended to expose the alleged misuse of public funds and corruption the question arose whether or not the law – and in this instance the relied upon statutory provisions could be used – to cover up potentially illegal- and in this case alleged corrupt activity? The court answered this question with an emphatic 'no'. On these considerations the court would also exercise its limited discretion against the applicants.

Held: Article 21(2) of the Constitution allows for reasonable limitations of the Article 21(1)(a) rights and freedoms. Any limitation that would lend itself to unlawful purposes could clearly not be considered as reasonable. In such scenario the relied upon art 21(1)(a) of the respondents would have to prevail.

Held in addition: that on the application of the public domain doctrine the law should not deny the Namibian public the right to be informed more fully, through the intended newspaper article, of the matters which had already become freely available through the publicly accessible court record and court documents, the public- and live television broadcast of the hearing and the radio broadcasts and newspaper articles reporting on this case prior and after the hearing, which articles were also published

nationwide in all the main newspapers of this country and even beyond Namibia's borders

Held also: that the import of the public domain doctrine into the law pertaining to interdicts would be that, in such circumstances, it can no longer be said that there can be any reasonable apprehension of an injury or harm, as the injury has already occurred ie. in this case it would be meaningless or moot as it would make no sense to interdict information which is to form the substance of a newspaper article in respect of which that substance is already in the public domain. As the applicants could thus not prove the second requirement pertaining to final interdicts the application had to be dismissed with costs.

ORDER

The application is dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel,

JUDGMENT

GEIER J:

[1] The first applicant, Mr Philemon Malima, in his capacity as the Director General of the Namibia Central Intelligence Service, has brought this urgent application to interdict the publication of a newspaper article in The Patriot newspaper, intended to expose the alleged corrupt private use by former members of the service and their families of two commercial farms allegedly purchased by the Intelligence Agency. The sought interdict is also aimed at preventing the publication in respect of the certain other unauthorized and unlawful expenditure, more particularly the transfer of two amounts by the agency to an association of private individuals in contravention of the State Finance Act. Finally the interdict is intended to gag the exposure of information relating to the payment of a possibly overinflated purchase price paid by the agency in respect of a Windhoek-West property, in circumstances where the Government of the

Republic of Namibia experienced and is experiencing a lack of funds for even the most basic services.

[2] The applicants' case is simple – it rests essentially on certain provisions of its enabling statute the Namibia Central Intelligence Service Act, Act No 10 of 1997 and on the provisions of the Protection of Information Act, Act 84 of 1982.

[3] More particularly and after setting out the purpose for the establishment of the Namibia Central Intelligence Service, (hereinafter referred to as the NCIS), its powers as well as describing the role of the Director General in greater detail which, inter alia, also includes the duty - as far as is reasonably practicable – to take steps to ensure that national security, intelligence, intelligence collection methods, sources of information and the identity of staff are protected from unauthorized disclosure – Section 16 provides further that:

'Notwithstanding anything to the contrary contained in any law, no inspection, investigation, revision or audit which in terms of any law has to be or may be done in connection with any matter or document concerning the Service or the Account, shall be done, unless the person who has to or may do such inspection, investigation, revision or audit has received a security clearance for that purpose.'

[4] The first applicant then contends that the information:

' ... that the 1st respondent had articulated in his SMS text message to the Director and the information that the respondents intend to publish in the Patriot newspaper falls within the scope of sensitive and or classified information and its unlawful possession, circulation and or publication is prohibited by law.

As I pointed out earlier on, the story that the respondents intends to publish relates to the properties and or assets of the Namibia Central Intelligence Service. I assert that by law, the unlawful possession, circulation and publication of any information that relates to the properties, means and capabilities of the Namibia Central Intelligence Service is prohibited and it is punishable by law.¹

[5] The first applicant alleges further that:

¹ In para's [16] to [17] of the founding papers.

'I assert that information that relates to the properties of the Service is a matter that is dealt with by the Service or it is a matter that relates to the functions of the service or it is a matter that relates to the relationship between the Service and any person.

The respondents intend(s) 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 section 4(1)(b) of the Protection of Information Act, Act No. 84 of 1982.²

[6] The Director-General then points out that the possession- or control- or disclosure of a security matter in terms of section 4 of the Protection of Information Act, Act No. 84 of 1982 is prohibited and a criminal offence and that he - as the Director General - did not authorise any possession of the information that the respondents have in their possession, which relates to the properties of the Service.

[7] Importantly - and this tenor permeates through the applicants' entire case - is that the operations of the NCIS are by law and in practice secret and that no unauthorised disclosure of its operations is allowed by law. He explains further that:

'... the art and practice of the intelligence profession is done in accordance with well established tradecraft of the profession and any intelligence organization performs its functions in accordance with established protocols and practices. In this regard, I assert that, secrecy in the operations and or execution of the functions of any intelligence organization is a necessary and indispensable tool that any intelligence organization needs. If the respondents are allowed to publish information that relates to the properties, assets and or any means of the Service, there will no longer be any element of secrecy in respect of those properties, assets and or means, and there shall no longer be any secrecy in respect of the purpose for which those properties, assets and or means were acquired for. This will naturally and effectively render the usage and utilization of those properties, assets and or means by the service useless.

In the light of the aforesaid averments, I cannot disclose the nature and description of the properties that the respondents wish to publish as that will essentially result in me disclosing those properties. I submit that if I disclose the nature and description of those properties that will be contrary to the aforesaid provisions of the law that I have referred to and that may as

² Para's [21] and [22].

well amount to an unlawful disclose of sensitive and or classified information. For these reasons, I submit that for the purpose of the relief that the applicants seeks, I have asserted that the respondents intends to publish information that relates to the properties and or assets of the service. The identification and nature of any information that relates to those properties is classified as secret and if falls within the scope of a sensitive matter and or classified information.

In the light of the above averments, I submit that it will be in the interests of Namibia's national security to interdict the respondents from publishing any information that relates to the properties and or assets of the service.

I assert that the applicants have a constitutional and statutory duty to protect any sensitive information and have a further duty to prevent any unlawful disclosure and or publication of any sensitive information and or any information that when unlawfully published poses a serious national risk.

As a result of the expressions made by the 1st respondent to publish the aforesaid information, the applicant reasonably believes and apprehends that the publication of that information will be a contravention of the Act and that, that publication poses a serious national security risk to the State of Namibia.³

[8] It was against this background that the applicants then sought:

'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 on any other day

An order Interdicting and restraining the respondents or any one of them from publishing, circulating and or distributing any information that falls within the scope of sensitive mater as defined in section 1 of the Protection of Information Act, Act No. 84 of 1982 as amended,

An order Interdicting and restraining the respondents or any one of them from publishing, circulating and or distributing any classified information as defined in section 1 of the Namibia Central Intelligence Service Act, Act. No. 10 of 1997 as amended,

³ See paras [33] to [37] of Mr Malima's founding affidavit.

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 Protection of Information Act, Act No. 84 of 1982 as amended and or the Namibia Central Intelligence Service Act, Act. No. 10 of 1997 as amended.'

[9] Particularly - and given the extremely wide and all- encompassing relief sought in the above quoted prayers 4 to 7 of the notice of motion – it was not surprising that the respondents, as a first line of their defences – took issue with the overbroad nature of the relief claimed, which, according to them, was also so vague that such relief, if granted, would be unenforceable.

[10] It was in the second instance contended that such orders would blatantly violate the respondents' rights to freedom of speech and expression, including the freedom of the press as contemplated in Act 21(1) of the Namibian Constitution.

[11] In this context it was submitted that the intended article related to allegations of corruption pertaining to the private use of a property or properties bought by the second applicant – the Government of the Republic of Namibia – for the first applicant – The publication of an article relating to allegations of corruption within the NCIS or the corrupt use of such properties would not be in violation of the law.

[12] In addition it was emphasised that the exposure of corrupt activity and maladministration - especially in public institutions - was necessary and obligatory for media practitioners.

[13] Greater detail in regard to the envisaged content of the intended article was then given:

' The intended article also concerns the allegations that the Namibia Central Intelligence Service donated a large sum of public money – in the amounts of N\$1,000,000.00 and N\$100,000.00 – to a voluntary association of private individuals being former staff members of the Namibia Central Intelligence Service. I received a tip-off from a member of the public (not currently or formerly employed by the Namibia Central Intelligence Service) that in April 2015 the Namibia Central Intelligence Service deposited an amount of N\$100,000.00 into the bank account of the private voluntary association. The information I was provided with also

indicated that this donation was not approved by the Director-General of the Namibia Central Intelligence Service or the President of Namibia, and was in violation of the State Finance Act and therefore an unauthorised and unlawful expenditure.

After further probing the information I received with the aim of establishing the veracity thereof, I was alerted to a further donation of N\$1,000,000.00 by the Namibia Central Intelligence Service to the private voluntary association, which donation should apparently also have been in 2015.

I was informed that the information was apparent from written minutes of the Board of the private voluntary association, and that the Director of the Namibia Central Intelligence Service, Mr Benedictus Likando was present at that meeting, which apparently took place in May 2015 at Aresbusch Lodge in Windhoek. However, I wanted to a copy of the minutes, but that could not be provided to me as my source was not in possession of same.

In addition, I was alerted to information that the Namibia Central Intelligence Service purchased two agricultural commercial farms – one for N\$40 million and another for N\$17 million – in the Otjozondjupa region, and a house in Windhoek-West, Windhoek for an amount of N\$8.2 million, and that some former staff members of the Namibia Central Intelligence Service were utilising the farms for their and their families' own benefit – and not for the purposes of the Namibia Central Intelligence Service.⁴

[14] After verifying some of the information that had been obtained from an undisclosed source though the obtaining of the Title Deeds of the properties in question, acquired from the public records held in the Deeds office, Mr Haufiku, (cited as the first and second respondent, because of his dual role as journalist and also the editor of the Patriot Newspaper, the third respondent), then sent a sms message to Mr Likando, a director in the NCIS with the following text:

'Good day Mr. Likando

Mathias Haufiku here from The Patriot newspaper.

I tried calling you earlier but your mobile phone went unanswered.

We are working on a story on the properties recently acquired by NCIS, specifically two farms in Otjozondjupa(near Hochfeld and Otjiwarongo) as well as a house in Windhoek. Another issue we are seeking information on is the association for former NCIS officers.

I have questions that I'd like your office to respond on.

⁴ See para's [8] to [11] of the answering affidavit deposed to by Mr Mathias Haufiku.

We plan to publish these stories in our Friday edition and therefore seek your input. Please send me your email address so that I can forward the questions.
Regards,'

[15] This sms elicited a response from the Government Attorney:

'ATTENTION: MR MATHIAS HAUFIKU

Dear Sir,

RE: YOUR INTENDED PUBLICATION OF AN ARTICLE THAT RELATES TO PROPERTIES OF THE NAMIBIA CENTRAL INTELLIGENCE SERVICE AS WELL AS INFORMATION THAT RELATES TO THE ASSOCIATION OF FORMER MEMBERS OF THE SERVICE.

We act for and on behalf of the Namibia Central Intelligence Service and the Government of the Republic of Namibia who are our clients. We furthermore refer to your SMS that you sent to the Director of the Namibia Central Intelligence Service Mr. B. Likando yesterday on the 10th of April 2018 at 16:46.

Our instructions are that, in the aforesaid SMS, you informed the Director of the Namibia Central Intelligence Service Mr. B. Likando that, you intended to publish an article that concerns properties of the Namibia Central Intelligence Service in your edition to be published this coming Friday. Our instructions are further that, in your aforesaid SMS, you indicated that you have questions that you want the aforesaid Director to respond to.

We hold instructions from our aforesaid clients to request you to forward your questions to us as soon as possible as we hold instructions to deal with and respond to your questions. Kindly and immediately fax your questions to this number 061:222428 or 061:400892 or email to mkashindi@ag.gov.na

Our instructions are further that, in your aforesaid SMS, you informed the aforesaid Director that you are working on a story that relates to or involves properties of the Namibia Central Intelligence Service or the NCIS (for short) and you intend to publish this story in your Friday edition. We have instructions to advise you as we hereby do that, you are by law prohibited to publish the aforesaid information or any information that relates to or involves assets of the Namibia Central Intelligence Service. On this basis, we advise you not to publish the aforesaid information as well as information that relates to the Association of former members of the Namibia Central Intelligence Service.

Whilst we wait for your questions, be advised that, whether we receive your questions or not, we have instructions to seek from you as we hereby do, a written undertaking by yourselves in which you confirm that you will not publish any information that relates to the properties of the Namibia Central Intelligence Service as well as any information that relates to the Association of former members of the Namibia Central Intelligence Service.

Kindly and immediately provide us with your written undertaking before 12:00 today the 11th of April 2018 by fax at 061:222428 and 061:400892 or deliver it at the Office of the Government Attorney at 2nd floor, Sanlam Centre, Independence Avenue, Windhoek for the attention of our Advocate Mathias Kashindi and or Advocate Matti Asino. Kindly further be advised that, this matter is very urgent and we urge you to respond to this letter before 12:00 today. In the event that we do not receive your written undertaking in which you confirm that you will not publish your envisaged publication, we hold instructions to launch an urgent application in the High court of Namibia to seek any appropriate relief for our clients and we will seek punitive costs against you

We await your immediate response.

Yours Faithfully'

M S Kashindi

For the Government Attorney'

[16] Upon receiving this letter Mr Haufiku immediately sought legal advice which was rendered to the effect that the names of staff members of the NCIS and the physical addresses of the properties in question should not be disclosed. The first respondent then drafted a set of questions which he sent to the Government Attorney for the attention of Mr Likando.

[17] It is relevant to quote this set of questions in full:

'10 April 2018

Benedict Likando

Director: Directorate of Auxiliary Services

Office of the President

Good day Mr. Likando, I am Mathias Haufiku from the Patriot newspaper. We are currently working on a story linked to NCIS acquisition of several properties in recent years.

We understand the Namibia Central Intelligence Services bought two farms in the Otjozondjupa Region and a house in Windhoek.

We also understand that there exists an association for former NCIS employees, information provided to us indicate that the association makes use of the farms to house retired NCIS workers.

The association

-- What is the purpose of the association and is it strictly funded by NCIS?

-- Who appoints the board of the association and is it a body affiliated to NCIS?

Is it true that the farm is used to house former NCIS officers?

-- We understand former permanent secretary Joseph Lita is board chair of the association. How was this appointment made?

-- Why is GRN money used to fund an association comprised of private individuals?

-- How are those funds justified and how are they accounted for?

-- We understand that NCIS appointed the previous farm owners, Mr Rolf Heiser to work as farm manager. Why was this the case?

-- There are also talks that Heiser has since been relieved of his duties. What led to the discontinuation of his services?

Who is the current farm manager at Farm Hartebeestteich SUD NO.132 and how was that person appointed?

Also, who is the farm manager of the farm near Otjiwarongo?

In conclusion on this topic, can you please tell us what farming activities are carried out on these farms?

The farms:

-- Are there any national interest that prompted the acquisition of these properties?

-- The Patriot understands one of the purpose 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. Please comment

-- We understand one farm in the Otjiwarongo area cost about N\$40 million while the one in the Hochfeld area cost N\$17 million. Is this correct?

-- We also understand NCIS bought a house in ----- for N\$8.2 million in 2016. What is the purpose of this acquisition?

-- The house was bought at a time when government was, and still is, experiencing a difficult economic situation. Why was it so urgent to procure this property?

-- Were all the necessary valuations done to ensure that the house was indeed worth the selling price?

-- Any other comments will be welcomed

Kindly attend to our request and feel free to contact me for any additional information.

Mathias Haufiku

Editor'

[18] The prompt response received to these questions read as follows:

'11 April 2018

THE EDITOR

THE PATRIOT NEWSPAPER

7 Otto Nietzsche Street

Windhoek

ATTENTION: MR. MATHIAS HAUFIKU

Dear Sir,

RE: RESPONSE TO YOUR QUESTIONS RELATING TO YOUR INTENDED PUBLICATION OF AN ARTICLE THAT RELATES TO PROPERTIES OF THE NAMIBIA CENTRAL INTELLIGENCE SERVICE AS WELL AS INFORMATION THAT RELATES TO THE ASSOCIATION OF FORMER MEMBERS OF THE SERVICE.

1. We refer to your letter dated 10 April addressed to our client Mr Benedict Likando.
2. We have instructions to reply to your questions that were addressed to Mr Likando as follows:
 - 2.1 Kindly be advised that all information that you seek that relates to the properties

and or 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, No. 84 of 1982 read with the provisions of the Namibia Intelligence Service Act, No. 10 of 1997, possession, disclosure, and or publication of that information is prohibited and it constitutes a criminal offence.

2.2 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 and or deny the veracity of the information that you have is denied.

2.3 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.

3. In the light of what we have stated herein above the Namibia Central Intelligence Service (our client) cannot provide you with the information that you seek as it is prohibited by law to do so.

Sincerely Yours

M S Kashindi

for the Government Attorney'

[19] The respondents then went on to point out that a change of stance was noted – Whereas in the first answer (to the sms message) the respondents were still advised not to publish the intended information in respect of both the NCIS and the Association of Former Members of the NCIS, the second answer now informed the respondents that both the NCIS and its director Likando could not comment or answer questions which related to the other entity namely the Association of Former Members of the Namibia Central Intelligence Service.

[20] It was thus immediately pointed out that to report on the affairs of a private association could not be regarded as reporting on sensitive information which was likely to pose any threat to the security of the State, particularly if this would involve the receiving of public funds by private individuals in a manner suggesting that this

might be in violation of statutory laws including the State Finance Act – the publication of this part was thus clearly in the public interest.

[21] A further argument was then raised in respect of the Title Deeds obtained in respect of the Farm Hartebeestteich Süd and the Windhoek West property and that such public documents could not be regarded as classified information within the meaning of the NCIS Act, particularly as Farm Hartebeestteich Süd had seemingly- and ex facie the obtained documentation, been purchased by the Ministry of Land Reform for purposes of resettlement in terms of the government resettlement programme. The information regarding its ownership was publicly accessed through the Deeds office and that – in any event – should former staff members of the NCIS utilise these properties for their- and their families; benefit, privately, instead that such property would be utilised for its intended statutory purpose, such information, surely, could not be regarded as classified information.

[22] The respondents then state that Mr Likando is wrong when he suggests throughout that Farm Hartebeestteich Süd is a property that relates to the NCIS, as these averments are contradicted by the declaration made by the Honourable Utoni Nujoma, the Minister of Land and Reform, in terms of Section (1) and (2) of Act 6 of 1995 being the Agricultural (Commercial) Land Reform Act, which provides that the land so acquired for some N\$17 million was for the purpose to make such land available for agricultural purposes and importantly to those citizens who have socially, economically and educationally been disadvantaged by past discriminatory laws and practices.

That it had so become clear that such farm was purchased with public funds for the purpose of resettling landless Namibians and that it was thus a matter of public interest that former staff members of the NCIS were making illegal use of such property which would be also be the crux of the intended publication.

[23] It was also contended that to tar the possession of the Title Deed in respect of the Windhoek-West property with the same brush was simply overbroad and blatantly unconstitutional. If it was intended that the relevant records of the Deeds office were

not to be published, access to such records should have been restricted.

[24] Mr Haufiku explained further that:

'It was never my intention to publish intricate details of the house in Windhoek (such as its physical address) – of which the information in my possession is also publicly available at the Registrar of Deeds – but only on the price paid for the property in the context that the Government was at the time of the purchase and is currently experiencing cash flow and economic difficulties. I also asked the question what the purpose is of the acquisition of the property, and had I been informed that the purpose of the acquisition is classified or sensitive security information, I would not publish that. The response of the Respondents, through their legal practitioner, is a blatant prohibition on the publication of any information, including whether or not a proper valuation of the purchase price was done.'⁵

[25] The respondents thus denied that the publication of such information would- or could constitute a violation of Section 4(1)(b) of the Protection of Information Act.

[26] It was emphasised that all information was lawfully obtained and that importantly also:

'The intended article would not disclose the lawful operations of the Namibia Central Intelligence Services. As stated above, the information that I have in my possession relates to an alleged donation of N\$1 million and a further amount of N\$100,000.00 to an association of private individuals without it being authorised by the Director General of the Namibia Central Intelligence Service and or by the President of Namibia and in violation of the State Finance Act (thus an unlawful expenditure), that the farms, purchased by the Government for purposes of resettlement of landless people, are being used by ex-staff members and their families, and that the Namibia Central Intelligence Service acquired property in Windhoek at the time when the Government experienced and continues to experience lack of funds for the most basic services. I further refer the Honourable Court to what I have already stated hereinabove.'⁶

[27] The respondents thus asked the court to dismiss the application with costs.

[28] In the reply made on behalf of the applicants, Mr Malima then attempted to cast dispersion on the objective of the informer, without stating what that objective was,

⁵ In para [49] of his answer.

⁶ In para [55].

save for alleging further that the information, that had been provided to the respondents, had nothing to do with the exposing of corruption and that it was really a cover up.

[29] The point was now for the first time expressly made that the Article 21(1)a) rights, relied upon by the respondents, were subject to the limitations contained in Act 21(2) of the Constitution.

[30] The Director-General reiterated that the publication would render the use of the disclosed properties useless.

[31] Mr Malima then went on on to make the following further allegations:

‘From an intelligence perspective, we are aware of local and foreign intelligence organizations that recruits or uses journalist to knowingly or unknowingly obtain sensitive information to targeted institutions in order for those intelligence organizations to obtain that information under the guise of freedom of speech and expression. In these circumstances, the service cannot be tricked to fall prey to these types of tricks and disclose sensitive information.’⁷

and

‘ I deny that it is necessary for the respondents or any journalist for that matter to publish any sensitive and or classified information or any security matter in the manner that the respondents wants to do irrespective whether that publication whether separately or conjunctively includes or relates to allegations of corruption as that method is not sanctioned by law. The respondents have no legal authority in law to publish the information that they intend to publish whether that information relates to corruption or not. In their papers, they have relied on the provisions of article 21(1) of the constitution, but that provision is subject to the limitations contained in article 21(2) of the constitution and national security is one of the specific interests that limits the respondents right that they claim to rely on. I submit that, the respondents must conduct their business within the confines and limitations provided for in the said constitution.’⁸

[32] An interesting concession was then made – it reads:

⁷ Para [32] of the replying affidavit.

⁸ Para [36].

' I assert that, if the respondents wanted to expose the alleged corruption in the public service or corruption allegedly taking place in public institutions as they claim, the law allows them to do so as long as they do not publish sensitive or classified information or information that contains a security matter. In fact, I am aware that, the media has been publishing allegations of corruption that is allegedly committed in the public service but as I have pointed out earlier, when it comes to the service, the law specifically prohibits publication of any matter that relates to the functions of the service and the respondents are bound by that law. I shall deal with this aspect more fully in the paragraphs below.'⁹

[33] Contrary to the disassociation made on behalf of the applicant's by the Government Attorney in respect of the veteran's association is was now contended again that:

'I furthermore point out that, in terms of the law, any information that relates to the relationship and the nature of the relationship that the service has with any person constitutes a security matter and that information is prohibited from disclosure and or publication. On this basis, the allegations that the respondents makes that relates to the alleged relationship between the service and the association or with any person falls within this prohibition and the respondents are not entitled to have that information and I am not authorized by law to disclose any information in that regard.'¹⁰

[34] The Director-General then aired his concern about the disclosure that the two farms that had allegedly been bought '*to monitor farmers who own guns and other ammunition*' and that this aspect alone proved the unlawful disclosure of legally sensitive information and the need for interdictory relief.

[35] Finally the point was made that the intended publication purportedly aimed at exposing corruption was rather a smokescreen to hide the real objectives behind the publication and that the application should thus be granted.

ARGUMENT

[36] Shortly before the hearing both parties' counsel submitted heads of argument.

⁹ Para [41] of the replying papers.

¹⁰ Para [52] of the reply.

Argument on behalf of the applicants

[37] On behalf of applicants the following was contended:

'That the applicants were relying on the provisions of the (*statutory*) law to enforce a right to prohibit the publication of sensitive and or classified information and or information that relates to a security matter. For this purpose the scheme Protection of Information Act 1982 was analysed and set out. In this regard it was submitted that:

- a) that the purpose of the Act is to protect certain kind of information from disclosure;
- b) that the Act further regulates different types of prohibitions in respect of certain types of information, access to certain places, and other activities ¹¹;
- c) that the Act does not provide for a defence for unlawfully disclosing or publicating protected information;
- d) that it was contended on this basis that the respondents have no right to possess, circulate, disclose and or publish the protected information;
- e) that the information protected by the Act was information of a particular value and or information of an institution and not that of an individual;
- f) that the Information that the respondents intend to publish is information that falls within the scope of information that is protected from unlawful disclosure;
- g) that, the Information that the Respondents intend to publish is about the properties, assets and means of the service and not individuals. In these circumstances the service was fully entitled to enforce the provisions of the Protection of Information Act in order to protect the unlawful possession, circulation and protection of Information that falls within the scope of protection;
- h) that since the scope of Information that the applicants wish to protect from unlawful disclosure and publication falls within the scope of the protected information as stipulated in the Act, the relief sought by the applicants is not and cannot be vague or overbroad as it is within the scope set out in the law and the respondents have not challenged the validity of the Act;
- i) the respondents have claimed that they intend to publish the protected Information to expose what they term as corruption and that it would be submitted that this is not a defence prescribed in the Act;
- j) in addition, in terms of the law that combats corrupt activities, the service cannot commit any corrupt activity and we will submit that corrupt activities can only be perpetrated by individuals;

¹¹ Section 3,4,5,6,7 etc.

k) that, if the respondents wanted to exercise their alleged right to freedom of speech and expression by exposing the alleged corruption, they can expose corruption in a manner that does not contravene the law. In this case, they cannot contravene the Protection of Information Act by disclosing protected information;

l) that in their answering papers, the respondents averred that the properties were bought by the Government and if they knew that the properties were bought by the Government they could have exposed their story in so far as it related to the Government but not to expose or publish any information that falls within the scope of protection set out in the Act;

m) that it was thus submitted that the Protection of Information Act specifically refers to information that relates to the service and not to the Government.

[38] With reference to the constitutional framework created by Articles 27,32, 36 and 41 it was then argued that if the respondents wanted to expose corruption in public institutions, as they claim, they could have formulated their story within the aforesaid constitutional structures, as all the alleged properties are properties of the Government and that they thus would not have contravened the Protection of Information Act.

[39] Special reference was made to the constitutionally permissible limitation of the right to freedom of speech, as set out in Article 21(2) of the Constitution, in cases relating to national security and that in a democratic state, democracy cannot flourish if there is no peace and stability. In this regard, so the argument ran further, security is one of the building blocks of democracy. The exercise of freedoms in a constitutional democracy carries with it duties and responsibilities and is subject to such formalities, conditions, restrictions or penalties as are prescribed by law and as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety. Thus, and as the scope, value and content of the publication seriously poses a threat to Namibia's national security - and here it should be kept in mind that such determination can only be made by those that have the means and competencies to make this determination ie. the members of the NCIS – which determination has been- and should be made by the service and not the courts - the applicants have satisfied all the requirements for an interdict.

Argument on behalf of the respondents

[40] Mr Tjombe, who appeared with Mr Muhongo, for the respondents, held the view that the applicants had unduly and without sufficient cause – sought the urgent adjudication of this application in respect of relief they were not entitled to.

[41] This submission was firstly made with reference to the argument that the applicants' case was excipiable as applicants had failed to plead factual matter in their founding papers that the publication in respect of which they were seeking final interdictory relief actually contained secretive, sensitive and or classified information as contemplated in terms of the provisions of the Namibia Central Intelligence Service Act¹² ("NCIS Act") which would compromise the Republic's security. This omission alone would render the application liable to be dismissed.

[42] In any event the respondents would seek the dismissal of this application on the merits as the applicants have put up no facts entitling them to the relief that they seek. Reliance was placed in this regard on *Stipp and Another v Shade Centre and Others*¹³ and *Hikumwah and Others v Nelumbu and Others*.¹⁴

[43] In support of this contention counsel pointed out firstly that certain common cause facts could be distilled from the papers exchanged between the parties, namely:

a) that the respondents are in possession of (and have knowledge) of material (pertaining to assets)¹⁵ – readily available at the office of the Registrar of Deeds (second applicant's institution) and lawfully procured in terms of Section 7 of the Deeds Registries Act, 47 of 1937 (as amended)¹⁶ – in respect of which the applicants contend that they are secret, sensitive and or classified as contemplated in terms of the provisions of the NCIS Act;

b) that these asset(s) were procured pursuant to and in terms of the provisions of

¹² Namibia Central Intelligence Service Act, Act 10 of 1997.

¹³ 2007 (2) NR 627 (SC) at [29] and [35] and

¹⁴ 2017 (2) NR 433 (SC) at [41].

¹⁵ Annexure "A" of the respondents' answering affidavit.

¹⁶ Section 7 of the Deeds Registries Act, 47 of 1937: Each registrar shall on conditions prescribed and upon payment of the prescribed fees, permit any member of the public to inspect the registers and other public records in his registry, other than the index to such registers or records, and make copies of those records or extracts from those registers and to obtain such information concerning deeds or other documents registered or filed in the registry as prior to the commencement of this Act could, customarily, be made or obtained: Provided that no such fee shall be payable in respect of any search or inspection made in a deeds registry...".

Sections 14(1) and (2) of the Agricultural (Commercial) Land Reform Act, Act 6 of 1995 – where the second applicant’s name is not even reflected on the title deed¹⁷; and which assets were thus not acquired in terms of the second applicant’s enabling legislation, the NCIS Act;¹⁸

c) that the applicants have not pleaded- and have not sought to lay – not even in camera proceedings - any factual basis lending credence to their bare, nebulous and vague allegations. As a result of this there was no evidence before the Court to enable it to assess the veracity of the aforesaid conclusions.;¹⁹

d) that the applicants also did not seek to engage Article 22 of the Namibian Constitution in an endeavour to demonstrate the propriety of the relief that they were seeking in the face of of the respondents’ constitutional rights of freedom of expression and the press as contemplated by Article 21(1)(a) of the Constitution;

e) that the applicants have acknowledged that the material (and the identification of the assets) forming the basis of the intended publication (in respect of which an interdict is sought) has been divulged by the respondents in their answering affidavit and is now in the public domain;²⁰

[44] It was then submitted that these common cause factors are – *in limine* and on the merits – were already dispositive of the application.

¹⁷ Sections 14(1) of the Agricultural (Commercial) Land Reform Act, 6 of 1995: “Subject to subsection (2), the Minister may, out of moneys appropriated by Parliament for the purpose, acquire, in accordance with the provision of this Act, agricultural land in order to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically disadvantaged by past discriminatory laws or practice...”

¹⁸ Section 6(2)(a)(i) of the Namibia Central Intelligence Services Act, 10 of 1997: “acquire or hire any land or premises, with or without any buildings thereon, which may be necessary for the efficient functioning of the service, and erect and maintain any buildings so required”.

¹⁹ *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 and Another (Independent (CCT38/07) [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (22 May 2008).*

²⁰ Paragraphs 11 to 13 of the applicants’ replying affidavit – submissions will be advanced that that this concession renders this application moot. S Heleba, “*Mootness and the approach to costs awards in constitutional litigation: a review of Christian Roberts v Minister of Social Development Case No 32838/05 (2010) (TPD) [2012] at para 62: “Accordingly, a case is a moot one if it ...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.”.*

[45] The next line of defence was that the applicants had failed to meet the requirements for a final interdict²¹ and even if they had the court should nevertheless not exercise its discretion in favour of the applicants,

[46] Here the argument ran further that the applicants, in their founding papers, had not – in view of the common cause matter and legislation referred to above – firstly, demonstrated a clear right and secondly, an unlawful infringement in respect of any right giving rise to any injury.

[47] In any event the Court should not exercise its discretion in granting the applicants the relief sought as:

- a) the relief sought was not constitutionally intuitive, it was overbroad and vague;
- b) the tenor of the respondents' answering affidavit was of such a nature that the intended publication ought to be permitted as same would be in the public interest;
- c) the applicants concede that the information and material in respect of which they seek interdictory relief is public knowledge.

[48] It was argued further that what the applicants were seeking was in essence the limitation of the respondents' rights to freedom of speech and expression including the right of the press, which are guaranteed in Article 21(1)(a) of the Namibian Constitution. In this regard it was trite that the applicants would bear the onus to justify the limitation of the constitutionally protected right or freedom. This submission was founded on the Supreme Court decision made in *Medical Association of Namibia v The Minister of Health and Social Services*²², referring to *African Personnel Services v Government of Namibia*, it was stated:

²¹These have for instance been restated by the High Court in *Bahlsen v Nederlof and Another 2006 (2) NR 416 (HC)*, at [30] where the court stated '[30] Since applicant is seeking a final interdict he must, first, establish a clear right, secondly that such right has been interfered with (i.e. that he suffered an 'injury') and, thirdly, that he has no other satisfactory remedy to protect himself from the unlawful infringement of his right. The Court retains the discretion, depending on the circumstances of a particular case, whether or not to grant a final interdict (see generally Van Winsen, LDV et al, *The Civil Practice of the Supreme Court of South Africa* 4thed. Juta, 1997 at 1064-1068.)'

²² *Medical Association of Namibia v The Minister of Health and Social Services* (judgment delivered on 9 February 2017).

[62] In *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 (SC) at paras 65 – 68 this court explained the approach to be taken in determining whether an impugned law passes muster under Art 21(2) and Art 22. The government bears the onus to justify the limitation of a constitutionally protected right or freedom. It must also show that the limitation falls 'clearly and unambiguously within the terms of the permissible constitutional limitations, interpreted objectively and as narrowly as the Constitution's exact words will allow'. The limitation must be an exception, and the restriction on the exercise of the freedom or right must be strictly construed so that it is not abused to confine the freedom's exercise to a scope narrower than what the Constitution permits. The limitation can only be justified on the 'criteria' listed in the sub-article (being 'reasonable' also expressed as rationality; 'necessary' and 'required'.)

[49] The applicants had thus not discharged their onus to justify the limitations they were seeking. The sum-total of the applicants' case was that the information intended to be published by the respondents "...falls within the scope of sensitive and or classified information and its unlawful possession, circulation and or publication is prohibited by law"²³ and that "... information that relates to the properties of the Service is a matter that is dealt with by the Service or it is a matter that relates to the functions of the service or it is a matter that relates to the relationship between the Services and any person."²⁴

[50] It was also pointed out that the applicants had specifically alleged²⁵ that the publication of the information regarding the properties that the Intelligence Service is alleged to have amounted to a violation of section 4(1)(b) of the Protection of Information Act²⁶ without further elaborating on it. Here it should be noted that the applicants quote only section 4(1)(b)(i) in the founding affidavit – but then - at paragraph 74 of their replying affidavit - claim that the alleged violation was that of section 4(1)(b)(iii). This was obviously an afterthought: as nowhere in either the founding affidavit or in the replying was it even suggested that the information was entrusted under confidence to the respondents "by a person holding office under the Government" as contemplated in section 4(1)(b)(iii) of the Protection of Information Act.

²³ Paragraph 16 of the founding affidavit. The founding affidavit is replete with such vague and all-encompassing allegations.

²⁴ Paragraph 21 of the founding affidavit.

²⁵ At paragraphs 22 and 23 of the founding affidavit. This was preceded by the written demand in the letter of 11 April 2018, which is annexed to the answering affidavit as annexure "C".

²⁶ Protection of Information Act, Act 84 of 1982.

[51] With reference to Section 4(1)(b) of the Protection of Information Act it was then argued that it was beyond dispute that the respondents have in their possession the title deeds of the properties concerned.²⁷ Such copies were obtained from the Office of the Registrar of Deeds, which is a public office, and which was specifically established for the purpose of maintaining a public register in terms of section 1 of the Deeds Registries Act. The copies of the title deeds were thus not obtained in any unlawful manner²⁸ particularly as Section 7 of the Deeds Registries Act provides that:

'Each registrar shall on conditions prescribed and upon payment of the prescribed fees, permit any member of the public to inspect the public of registers and other public records in his registry, other than the index to such registers or records, and to make copies of those records or extracts from those registers and to obtain such other information concerning deeds or other documents registered or filed in the registry as prior to the commencement of this Act could, customarily, be made or obtained.' ...

and as Regulation 51 of the Regulations made in terms of the Deeds Registry Act provides further that:

"51. Copies of deeds conferring title to land or to any interest therein and copies of mortgage or notarial bonds, required for information only, shall be issued on the application of any person and the words "Issued for information only" shall be written or stamped on the face of every copy so issued."

[52] As the granting of public access to inspect the register or records and to obtain copies of such records, was a statutory obligation on the Registrar of Deeds – such documentation thus being available to the public at large, it was rather strange that the applicants would assert that the possession of such information was unlawful and in violation of section 4(1)(b)(i) of the Protection of Information Act.

[53] In any event the applicants had misconstrued and misunderstood section 4(1)(b)(i) of the Protection of Information Act: The document, model, article or information referred to in sub-section (b) must be *kept, used, made* or *obtained* in a prohibited place. A prohibited place is defined in section 1 of the Protection of Information Act as:

²⁷ Paragraph 12 of the answering affidavit and annexure "D" to the answering affidavit.

²⁸ Paragraphs 12, 38, 42 and 44 of the answering affidavit.

'(a) any work of defence belonging to or occupied or used by or on behalf of the Government, including –

(i) any arsenal, military establishment or station, factory, dockyard, camp, ship, vessel or aircraft;

(ii) any telegraph, telephone, radio or signal station or office; and

(iii) any place used for building, repairing, making, keeping or obtaining armaments or any model or document relating thereto;

(b) any place where armaments or any model or document relating thereto is being built, repaired, made, kept or obtained under contract with or on behalf of the Government or of the government of any foreign State;

(c) any place or area declared under section 14 to be a prohibited place'

[54] Under section 14 of the Protection of Information Act, the President may by proclamation in the *Official Gazette* declare any place or area to be a prohibited place if he is satisfied that information with respect to that place or area could be of use to a foreign State or a hostile organisation. The applicants' papers contained no allegations that the President had so declared by proclamation any place or area relevant to this application to be prohibited place under section 14, nor could counsel find, after a diligent search, any such *Gazette*. It would thus have to be accepted that no such declaration was made – at least not in respect of the Office of the Registrar of Deeds.

[55] It was contended further that it could without any doubt be safely assumed and accepted that the Office of the Registrar of Deeds is not a prohibited place as contemplated in the Protection of Information Act. Accordingly, the information or documents (the title deeds) in possession of the respondents are not to be considered as documents or information *kept, used, made or obtained* in a prohibited place.

[56] Therefore, and as there cannot be a violation of section 4(1)(b) of the Protection of Information Act, the factual and legal position, of the applicants, as set out in paragraph 24 of the founding affidavit, was completely wrong:

[57] As far as the Association of Former Members of the Namibia Central Intelligence Service was concerned it was argued that it appeared from its constitution, in particular the clause dealing with the aims thereof, that the association is not part of the Namibia Intelligence Central Service. It is a voluntary association of private individuals, who organised themselves into an organisation or structure to advocate and lobby for their common interests. There was therefore nothing peculiar about the Association that would make the possession of its constitution or publication of information relating to it, fall within the scope of sensitive information that may threaten the security of the country, if published.

[58] In addition it was pointed out the applicants have expressly disowned the Association in the letter of 14 April 2018, (annexure "C") where respondents were informed:

'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.'

[59] It was the context of the enquiry and the questions through which the first respondent solicited the aforementioned response, that was telling:

'We also understand that there exists an association for former NCIS employees, information provided to us indicate that the association makes use of the farms to house retired NCIS workers.

The association:

--What is the purpose of the association and is it strictly funded by NCIS?

--Who appoints the board of the association and is it a body affiliated to NCIS?

Is it true that the farm is used to house former NCIS officers?

--We understand former permanent secretary Joseph Lita is board chair of the association. How was this appointment made?

--Why is GRN money used to fund an association comprised of private individuals?

--How are those funds justified and how are they accounted for?'

[60] With regard to these questions relating to the Association and the written response of the applicants, it was submitted that it could not be said that possession of the information related to the Association could even remotely be construed as

unlawful within the meaning of section 4(1)(b) of the Protection of Information Act and that therefore, the publication of information emanating therefrom could not be unlawful. It was further apparent from the set of questions that the intended publication concerned the use of public resources: moneys of the Namibia Central Intelligence Service being used to fund an association of private individuals and what the justification thereof could be, and how such funds should be accounted for. The intended publication thus concerned the use of public resources – i.e. the purchase of a farm – for former staff members of the Namibia Central Intelligence Service – private individuals - with public funds.

[61] With reference to what the Supreme Court had said in *Trustco Group International Ltd and Others v Shikongo*,²⁹ in regard to the role of the media and of the right to freedom of speech the point was made that the court should ultimately consider this application in the context of the importance of the constitutional right to freedom of expression and speech and of the media freedoms. As the the applicants had not discharged the onus to justify the limitation of the constitutional rights of the respondents the application fell to be dismissed with costs, such costs to include the costs of one instructing- and one instructed counsel.

Preliminary matters

Urgency

[62] Although this case was brought initially on an urgent basis, the sting was taken out of this aspect through an undertaking given by Mr Tjombe, on behalf of the respondents, at the initial hearing, that the to be interdicted article, would not be published pending the finalization of this case. Nothing more need thus to be said about this aspect.

Background considerations and context

²⁹ *Trustco Group International Ltd and Others v Shikongo* (SA 8/2009) [2010] NASC 6 (7 July 2010) at [28] 'Freedom of speech is thus central to a vibrant and stable democracy. The media play a key role in disseminating information and ideas in a democracy, which is why, no doubt, the Constitution specifically entrenches the freedom of the media and the press in section 21(1)(a). One of the important tasks of the media is to hold a democratic government to account by ensuring that citizens are aware of the conduct of government officials and politicians. In performing this task, however, the media need to be aware of their own power, and the obligation to wield that power responsibly and with integrity.'

The rights of the Intelligence Agency to prevent the publication of a newspaper article

[63] If one extricates oneself, for a moment, from the detailed submissions and arguments raised on behalf of the parties, and if one considers the dispute between the parties holistically, it appears that the applicants are essentially utilizing the statutory provisions of the Protection of Information Act 1982 and the Namibia Central Intelligence Service Act 1997 to prevent the publication of a newspaper article aimed at exposing certain alleged corrupt activity and unauthorized expenditure and the misuse of public funds.

[64] This dispute is then carried out also against the backdrop of the constitutional rights of the parties – which - on the one hand - and in terms of Article 21 (1)(a) - afford the respondents' the rights of freedom of speech and expression which rights include the freedom of the media and the press and which constitutional rights - on the other – in terms of Article 21(2) – subject such freedoms to the laws of Namibia (in so far as such laws impose reasonable restrictions on such rights and freedoms) and which constitutional provisions then also allow for a permissible limitation of the respondents' aforesaid constitutional freedoms in favour of the applicants if such limitation would also be in the interest of national security.

[65] Here it should possibly be added that I have no doubt that the said limitations of the said constitutional freedoms were written into the constitution in the recognition that also a democratic state would legitimately be obliged- and thus also become entitled to protect the state's interests through the establishment of a national intelligence agency to ward off- and deal with threats to national security.³⁰

[66] It is further without doubt – given the constitutional framework - that such security service, in principle, would also be entitled to prevent the publication a newspaper article in an appropriate case, if such article- and the information intended to be disseminated thereby, would prejudice the legitimate operations of the service or

³⁰ See for instance the Preamble to the *Namibia Central Intelligence Service Act 1997* which reads : 'To define the powers, duties and functions of the Namibia Central Intelligence Service; to provide for the continued existence of an account for that Service and for the utilisation and control of moneys in such account; to regulate the administration and control of that Service; to provide for the issue of directions authorising certain actions to be taken by that Service if the security of Namibia is threatened; and to provide for incidental matters.'

pose a genuine threat to national security, in which case the restrictions placed by the statutes on the rights of freedom of speech and the press could be regarded as reasonable and where such restrictions would also be in the interest of national security.

The Respondents' Constitutional Rights of Freedom of Speech and the Media

[67] On the other hand we have the freedom of speech and the press. Much has been said by the courts on the freedom of speech and the press. Although it may appear repetitive or overstating the obvious I believe that it is not only useful but also imperative to do so again, in this case, in order to demonstrate and call to mind the importance and weight that the highest court in this country and also the South African courts - whose decisions constitute persuasive authority in our jurisdiction - have attached to these rights.

[68] I have already referred to- and quoted the leading Namibian authority and what O'Regan AJA, with whom Chomba AJA and Langa AJA concurred, has stated in this regard in the context of the *Trustco Group Intl Ltd v Shikongo* case, a defamation matter.³¹

[69] In South Africa, Bertelsmann J, in deciding whether or not to interdict an intended broadcast by an independent television station relating to alleged malpractices in the treatment of women undergoing voluntary abortions at a public hospital, analysed the relevant judicial dicta available to him at that time in *MEC for Health, Mpumalanga v M-Net* 2002 (6) SA 714 (T). He summed up the applicable legal position as follows:

'[18] The media, including the respondents, have an indubitable right, and indeed the duty, to inform the public about matters which fall in the public domain and for which the applicant is accountable to the public. This right is safeguarded and the duty is imposed by the Constitution. Section 16 of the Constitution of the Republic of South Africa Act 108 of 1996 reads as follows:

'Freedom of expression

³¹ See n 29 supra.

(1) Everyone has the right to freedom of expression, which includes -

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

(2) The right in ss (1) does not extend to -

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.³²

constitutes incitement to cause harm.³²

[19] Freedom of expression lies at the very heart of our democracy, all the more so in the public sector where in the past the government, the Executive and officialdom were protected by a web of statutory and regulatory restrictions upon the freedom of the media to report on matters which might have cast an adverse light on the establishment or State officials whose repressive activities were conducted behind the shield of 'State security'. O'Regan J in *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) para [8] at 477E underlined its importance thus:

'(F)reedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.'

[20] The ability to form an opinion, particularly an opinion about the manner and fashion in which the authorities are performing their public duties or giving content to their obligation to deliver social services as demanded by the Constitution, is, of course, dependent in a very large measure upon the media's ability to provide accurate information on the way in which politicians and functionaries are fulfilling their mandate. Although said in a different context, the pronouncement by Kriegler J in *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) para [37] at 428J - 429C applies in equal measure to the media's right to report upon alleged malpractices by officials in the public sector:

³² Compare Article 21 (1)(a) and 21(2) of the Namibian Constitution (*My comment*).

'Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression - the free and open exchange of ideas - is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.'

[21] Langa DCJ confirmed this principle in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) para [27] at 307D - C:

'(W)e have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours".'

See further *SABC and Others v Public Protector and Others* 2002 (4) BCLR 340 (T); *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (A) and *Selemela and Others v Independent Newspaper Group Ltd and Others* 2001 (4) SA 987 (NC) (2002 (2) BCLR 197).

[22] In *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) (2002 (8) BCLR 771) O'Regan J, delivering the judgment of the unanimous Court, said in paras [21] - [22]: G

'Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.

[22] 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. As Deane J stated in the High Court of Australia,

". . . the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media". The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

[23] 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. As Joffe J said in *Government of the Republic of South Africa v "Sunday Times" Newspaper and Another* 1995 (2) SA 221 (T) at 227H - 228A:

"It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. . . . It must advance the communication between the governed and those who govern."

[24] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with the platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled.'

[23] The question then arises whether any transgressions, if they were indeed committed by the Carte Blanche team, justify the interdict which the applicant sought. ...'.

[70] In *Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others* 2018 (1) SA 471 (SCA) Ponnann JA, with whom Petse JA, Tsoka AJA, Mbatha AJA and Schippers AJA concurred, said this of the South African courts:

'[27] ... Our courts recognise that the media play a key role in a democratic society in ensuring that members of the public are informed about issues that are in the public interest. In *Khumalo v Holomisa*³³ the Constitutional Court stated that:

'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 and Others*³⁴ the Constitutional Court said of corruption that it had 'a deleterious impact on a number of rights in the Bill of Rights'.³⁵ 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.'³⁶

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 and Another v Makhanya and Others*³⁷ pointed out:

'In 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:

³³ 2002 (5) SA 401 (CC) (2002 (8) BCLR 771; [2002] ZACC 12) paras 22 – 23.

³⁴ 2011 (3) SA 347 (CC) (2011 (7) BCLR 651; [2011] ZACC 6) para 105.

³⁵ *Id* para 106.

³⁶ *Id* para 57.

³⁷ 2008 (6) SA 102 (W) (2008 (3) BCLR 338; [2007] ZAGPHC 161) para 44.

'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.'³⁸ ...'.

[71] It so appears that our Supreme Court has given recognition to the following aspects relating to the constitutional right of freedom of speech, which aspects can be extracted from what O'Regan AJA has stated in *Trustco*:

- a) that the right is central to a vibrant and stable democracy;
- b) that the media play a key role in disseminating information and ideas in a democracy, which is the reason why the Constitution specifically entrenches the freedom of the media and the press in art 21(1)(a);
- c) that it is one of the important tasks of the media to hold a democratic government to account by ensuring that citizens are aware of the conduct of government officials and politicians;³⁹
- d) that in performing these tasks the media have the obligation to act responsibly and with integrity.

[72] Without wanting to be exhaustive I would like to add that all this must of course also be seen in the context of the recognition of human rights and in the recognition of the inherent dignity of 'all members of the human family' whose right to liberty is best protected in a democratic society as expressed in the Preamble to the Namibian Constitution and the Constitution itself, which values where then expressed in the corresponding rights, which recognise:

- a) the principle of accountability⁴⁰ applicable in democratic states and rule of law

³⁸ Id para 37.

³⁹ *Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd t/a The Southern Times* 2009 (1) NR 65 (HC) at [33].

⁴⁰ See for instance : *Visagie v Government of the Republic of Namibia and Others* 2017 (2) NR 488 (HC) at [139].

jurisdictions;

b) that members of the public have a right to be informed about the manner and fashion in which the authorities are performing their public duties and mandates,⁴¹ which right includes the right to be informed about how public figures, officials and politicians execute the tasks entrusted to them;

c) that members of the public have the consequent right to form an opinion about the manner and fashion in which the authorities and public figures are performing their public duties, which opinion is dependent in a very large measure upon the media's ability to provide accurate information on the way in which politicians and functionaries are fulfilling their mandates;

d) that in this regard it is indeed so that the media plays a key role in that its members are important agents in ensuring that government is open, responsive and accountable to the citizens as the founding values of the Constitution require.

[73] For these additional reasons and also because of the principles already adopted by the Namibian Supreme Court in *Trustco* I am able to also endorse the views, as expressed by the learned judges in the *Maharaj* and the *MEC* cases.

The aspect of corruption in relation to the role of the media

[74] Having said this, and given the fact that the to be interdicted article is intended to expose corrupt activity, I believe that it is also apposite to say something about corruption. In this regard it does not take much to accept that also this court is entitled to recognize and take judicial notice of the general phenomenon of corruption, which has also raised its ugly head in this jurisdiction. After all the daily newspapers in our country, on a regular basis, feature reports relating to corruption and in any event the legislature has also deemed it fit to battle this scourge by passing the Anti- Corruption Act No 8 of 2003.

[75] In *Maharaj* the SCA has endorsed what the South African Constitutional Court had said in *Glenister*. about the negative effects and the negative impact of corruption

⁴¹ See for example *Khumalo and Others v Holomisa* at [[21] as approved in *Trustco*.

on the South African Bill of Rights and on the developing democracy in that country⁴² and that corrupt activity poses a real danger to the South African developing democracy. Also these aspects are to be endorsed without difficulty as they are similarly applicable to this country.

[76] This acceptance also translates itself in to the recognition of the important role that the media have in reporting on such activities. In this regard it has been aptly said, as quoted above, that '... *It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators...*'.⁴³ The press must reveal dishonest mal- and inept administration. This role of the media is obviously also in the public interest.⁴⁴ Here it should be kept in mind that corruption is not easily detected and that is often only uncovered by chance or through the anonymous hint of a whistleblower, which initial information and suspicion, after investigation and verification might, if substantiated, set the wheels of a criminal investigation in motion.

Good journalistic practice

[77] Finally I believe that it is apposite to comment on good journalistic practice.

[78] Also here guidance is to be obtained from what O'Regan AJA has said in her groundbreaking judgment⁴⁵ :

'[75] In considering whether the publication of an article is reasonable, one of the important considerations will be whether the journalist concerned acted in the main in accordance with generally accepted good journalistic practice. During the trial, the appellants tendered three codes of conduct relating to journalistic practice in evidence in the High Court: the Code of Ethics of the Society of Professional Journalists; The Star (a Johannesburg daily) newspaper Code of Ethics; and the Mail & Guardian (a South African weekly) Code of Ethics. Codes such as these provide helpful guidance to courts when considering whether a journalist has acted reasonably or not in publishing a particular article.

⁴² Id para 106.

⁴³ As per Joffe J in *Government of the Republic of South Africa v "Sunday Times" Newspaper and Another* 1995 (2) SA 221 (T) at 227H - 228A.

⁴⁴ Compare *Maharaj* supra at [27].

⁴⁵ *Trustco Group Intl Ltd v Shikongo* op cit.

[76] The Code of Ethics of the Society of Professional Journalists states that:

'Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should:

- test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
- diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.
- identify sources wherever feasible. The public is entitled to as much information as possible on sources' reliability.
- always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.
- make certain that headlines, news teases and promotional material, photos . . . and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.

. . .

- avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story.

. . .

- avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status. . . .'

[77] Of course, courts should not hold journalists to a standard of perfection. Judges must take account of the pressured circumstances in which journalists work and not expect more than is reasonable of them. At the same time, courts must not be too willing to forgive manifest breaches of good journalistic practice. Good practice enhances the quality and accuracy of reporting, as well as protecting the legitimate interests of those who are the subject matter of reporting. There is no constitutional interest in poor quality or inaccurate reporting so codes of ethics that promote accuracy affirm the right to freedom of speech and freedom of the media. They also serve to protect the legitimate interests of those who are the subject of reports.'

[79] Although it remains inexplicable to me why the Supreme Court was not referred to the '*Code of Ethics for the Namibian Media*' - which Code is easily accessible through a simple search of the internet - and although it is for purposes of this case not necessary to incorporate entire Namibian Code into this judgment - I would nevertheless like to add that also the Namibian Code, as per Schedule 1, demands of a journalist to ascertain, prior to a publication or broadcast, the reliability of the

contents of the article written or recorded, and it also tasks the local media practitioners to report accurately and fairly⁴⁶. Importantly also the Code obliges journalists to 'use all means within their powers to strive to achieve a high degree of accountability when it comes to public interest cases, which for instance expose the misuse of public funds or other forms of corruption by public bodies to such an extent that the Code even requires the Media Ombudsman to request a full explanation from an Editor 'demonstrating how the public interest was served' in respect of what was published in this regard.⁴⁷

[80] It can thus also be stated immediately that the way, in which the first respondent went about his business, as a reporter, to first research and verify the information obtained from the unnamed source or sources and then to also obtain comment thereon from the Director of the first applicant, Mr Likando, once he had obtained the lead for his potentially explosive story, from the informant, cannot be faulted. The responsible manner in which Mr Haufiku went about his task is also manifested by the fact that he also obtained legal advice on what could legitimately be published and what not.

[81] It is with these background considerations in mind that I believe that the stage has now been set to home in on the requirements pertaining to the granting of interdictory relief. Here it almost goes without saying that, for the applicants to be successful, they have to meet the requirements set for this type of relief as prescribed by the substantive law.

The requirements for a final interdict and the aspect of the court's discretion

[82] The applicants are seeking final interdictory relief. Accordingly they have to meet the requirements underlying such relief. The law is settled on this score - ie. they have to establish a clear right, secondly an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.⁴⁸ The Court retains a limited discretion, if at all.

⁴⁶ Paragraph 1.1 of the Code.

⁴⁷ See Paragraphs 7.1.4 and 7.2 of the Code.

⁴⁸ See for instance also : *Congress of Democrats v Electoral Commission 2005* NR 44 (HC) at 54 J to 55A, *Bahlsen v Nederlof and Another op cit* above, *Naango and Others v Kalekela and Others 2017* (1) NR 66 (HC) at [40] and many others.

[83] Wallis JA in *Hotz v UCT* 2017 (2) SA 485 (SCA) ([2016] 4 All SA 723; [2016] ZASCA 159) - (Navsa JA, Bosielo JA, Theron JA and Mathopo JA concurring) – has compellingly analysed this facet of interdictory relief by stating:

[29] ... Once the applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief.⁴⁹ That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to withhold an interdict, that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts for the resolution of disputes ... ‘.

[84] Again it is to be said that the aforementioned considerations are squarely applicable in our jurisdiction. Not only are the requirements pertaining to final interdicts based on the same legal background and principles, but also the constitutional environment, in which such principles operate here, is similar to that set by the South African Constitution. I believe that the reasons for- and the qualifications relating to the discretionary aspect pertaining to final interdicts can safely be endorsed in our jurisdiction as well.

The defences

[85] Before considering the applicants' case it might again be apposite to just call to mind that the respondents have raised various defences. They have contended in the main:

- a) that the applicants are not entitled to the orders sought as the orders are overbroad, vague and/or incapable of enforcement;
- b) that the applicants papers are excipiable and thus do not entitle them to any relief as they have failed to set out facts on which any relief could be based;
- c) that the relief sought would violate the respondents constitutional Article 21(1)

⁴⁹ *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA) ([2014] 1 All SA 402; [2013] ZASCA 95) paras 23 – 24; *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) at 347F – H. The more general statement regarding discretion in *Wynberg Municipality v Dreyer* 1920 AD 439 at 447 does not reflect the approach adopted by our courts. It is different when dealing with an interim interdict, where the remedy is clearly discretionary because of the need to consider the balance of convenience. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (2012 (11) BCLR 1148; [2012] ZACC 18) paras 41 – 47.

(a) rights;

d) that the material that the respondents intend to publish is in any event already public knowledge and in the public domain and it would thus be moot to grant the relief sought

e) that the intended publication is in the public interest;

f) that the intended publication will not violate the relied upon statutory law, on the facts and that the application should in any event be dismissed in the merits.

The approach

[86] Given the specific nature of the applicants' case and the myriad of defences raised, and before considering the legal framework and the facts against which this dispute is then to be resolved more closely, it should be stated that I believe that it is also my task to sift through the many issues raised and to select those, which in my view are determinative of this case. In following this approach I intend no disrespect to counsels' industry and extensive arguments for which I am grateful.

Have the requirements for a final interdict been met

The applicants' clear rights

[87] The first requirement set by the substantive law is the enquiry whether or not the applicants have shown a clear right?

[88] On this score it is clear that the applicants rely on the above quoted statutory provisions contained in the *Protection of Information-* and the *Namibia Central Intelligence Service Acts*. They have set out meticulously on which sections they rely and why, in their view, the perceived infringements would- and should afford to the applicants the relief contended for. It is beyond doubt that the applicants rely on clear statutory provisions, whose infringement/s or anticipated infringement/s would, in principle, afford them the sought remedies – but obviously not in overbroad form - if also the other requirements for interdictory relief would have been met. I will thus accept in favour of the applicants that this requirement has been met.

[89] In this context it must however be taken into account that the respondents have established the constitutional rights afforded to them by Article 21(1)(a). Here it is clear that such rights can be limited in terms of Article 21(2) by any law – which obviously includes the statutes relied upon - as mentioned above – and which statutes obviously impose restrictions on the exercise of the respondents' rights, which rights can also be limited if this should be required in the interests of national security.

[90] In the absence of a constitutional challenge I will thus have to assume further in favour of the applicants that the provisions of the *Protection of Information- and the Namibia Central Intelligence Service Acts* impose reasonable restrictions⁵⁰ on the exercise, by the respondents, of the fundamental freedoms conferred on them by Article 21(1)(a).

[91] I will also accept in principle, as I have already stated above, that such fundamental freedoms can legitimately be limited should this be in the interest of national security.

[92] Accordingly it is on these bases that I will accept, in favour of the applicants', that they have shown, that they have the clear rights relied upon. At the same time I do need to continue to be alive to the competing rights of the respondents. I will thus endeavor to ensure that, in this balancing exercise, I impair these rights as little as possible in order to strike a harmonious balance between the competing claims.

The absence of another alternative adequate remedy

[93] I believe that also this requirement has been met. I deal with this requirement out of sequence because I believe that the outcome of this case will hinge on the answer given to the second requirement to which I turn now.

An injury actually committed or reasonably apprehended?

[94] The injury, or rather the anticipated injury that the applicants complain of is essentially that the intended article prejudices its security operations. This

⁵⁰ In this regard it also needs to be kept in mind that I am duty- bound by my oath of office to uphold the law of Namibia and that in this regard it must be presumed that the legislature has acted lawfully and not unreasonably when enacting the relied upon statutes.

apprehension is founded on the set of questions which the first respondent sent to Mr Likando and the article that was to follow.

[95] On analysis this set of questions can be divided into questions relating to two farms allegedly bought in the Otjizondjupa Region by the NCIS and a house situated in Windhoek West, as well as questions relating to the 'Association of Former Members of the Namibia Intelligence Service'. At the same time these question are informative about the information that the respondents already have on these matters.

Re the farm near Otjiwarongo

[96] In regard to this farm the following information can be extracted from the papers before court:

- a) that the name of the farm is unknown;
- b) that its precise location is also unknown, save that is somewhere in the Otjiwarongo area and also in the Ojizondjupa Region;
- c) that these aforementioned two aspects, even if established, will not be published due to legal advice received;
- d) that its purchase price was apparently in the region of N\$ 40 million;
- e) that it is unknown whether or not this farm has a farm manager;
- f) that this farm is possibly used unlawfully to house retired NCIS workers/employees and their families;
- g) that it is unknown what farming activities are carried out on this farm;
- h) that one of the purposes of acquiring this farm was to monitor the volatile situation (with special reference to farmers owning a lot of guns and other ammunition).

Re the farm near Hochfeld – Farm Hartebeestteich Süd No 132

[97] Here the following information is available:

- a) the name of the farm;
- b) its location and size
- c) the date of its acquisition by Government;

- d) that the farm was purchased in terms of Section 14(1) and (2) of Act 6/1995;
- e) the purchase price of the farm, being N\$ 17 million;
- f) the name of the previous owner, Mr Rolf Toni Heiser;
- g) that the previous owner might have been appointed as farm manager of this farm;
- h) that Mr Heiser might since have been relieved of his duties;
- i) that it is unknown what led to the discontinuation of Mr Heiser's services;
- j) that it is unknown what farming activities are carried out on this farm;
- k) that this farm might be used to unlawfully house retired NCIS workers/employees and their families.
- l) that one of the purposes of acquiring this farm was to monitor the volatile situation (with special reference to farmers owning a lot of guns and other ammunition).

Re the Windhoek-West Property

[98] In this regard it is known:

- a) that this house is situated in Windhoek-West;
- b) that the newspaper is in possession of its address;
- c) that this aspect will not be published given the legal advice received;
- d) that this property was bought at a purchase price of N\$ 8.2 million;
- e) that the purpose of this acquisition is unknown;
- f) that it was bought at a time when the Government was- and is still experiencing a difficult economic situation;
- g) that it is unknown whether or not the necessary valuations were done in order to ensure that the house was indeed worth its selling price;
- h) That in regard to this property the provisions of the State Finance Act might have been contravened.

Re the Association of Former Members of the Namibia Intelligence Service

[99] The information available in regard to this voluntary association is :

- a) that it is a voluntary association of private individuals

- b) that it has a constitution;
- c) that it is a separate juristic entity;
- d) that it is thus not part of the NCIS;
- e) that it is not a party to these proceedings;
- f) that it has possibly unlawfully received two payments, in contravention of the State Finance Act.

[100] Mr Likando declined to comment on the questions posed to him in this regard as appears from the two letters written on behalf of the applicants by the Government Attorney. These letters also merely advise that the respondents were by law prohibited from publishing any information that relates or involves the assets of the NCIS.

[101] Also in the founding papers the first applicant similarly chose not to respond to any of these questions save to reiterate the prohibitions and purported violations in general terms and without precision. This vagueness then also attracted argument that the applicants should have pleaded factual matter 'informing the secrecy, sensitivity and classification (as well as the perceived compromise to national security) on the information and publication they seek to interdict.'

[102] I agree. The applicants should have taken the court into its confidence. This they have not done. Mr Khama has even submitted on their behalf that the NCIS is best placed to make the call in regard to what should be classified and what not, which call the court should simply accept without scrutiny. He disavowed the notion that the actions of the NCIS should be subject to any judicial oversight. This stance must be rejected. The NCIS operates in the context of a democratic state founded on the rule of law which rule subjects all public officials and all those exercising public functions, whether openly or covertly, in the interest of the State, to judicial scrutiny, this would include all operatives and functionaries of the NCIS. The agency has been established to serve that state and thus remains accountable to the judiciary. In any event the courts are, in my view, well equipped to deal with security issues. In this regard they could, for instance, exercise their inherent powers to regulate a preliminary *in camera* procedure, if required, for purposes of establishing whether any information required in judicial proceedings should be kept secret contrary to the open justice principle in the interests of national security or whether or not such information could be placed into

the public domain. When the applicants thus decided not appraise the court of the precise nature and ambit of their security concerns, they did so at their peril. The failure to plead factual matter and so to appraise the court, precisely and fully, on the exact nature and scope of their security concerns has, on its own, materially, detracted from the veracity of the applicants' case.

[103] In addition it is also beyond doubt that certain parts of the intended publication can in any event, and by no stretch of the imagination, as was correctly also argued, be regarded as falling within the ambit of any statutory prohibition. These are for instance:

a) the information obtained from the title deed - a public document⁵¹ - relating to Farm Hartebeestteich Süd –. This public document discloses who the purchaser and the seller of the property are, the farm's location, the purchase price that was paid for it by government and why government purchased that farm;

b) In regard to this title deed it is also important to keep in mind that it contains a declaration by Minister Utoni Nujoma, in his capacity as Minister of Land Reform, that Farm Hartebeestteich Süd was purchased by the Government of the Republic of Namibia in terms of section 14 (1) and (2) of the 'Agricultural Commercial Land Reform Act 6 of 1995. On the papers before the court there is nothing that would suggest that the Minister's declaration is untrue or amounts to a guise to cover up the fact that this farm was acquired by the government for the NCIS to conduct its operations from. Any allegations to the contrary must thus be rejected as being baseless;

c) The information requested in regards to the voluntary association, whose constitution has been annexed to the answering papers. It is clear from that constitution that the association is a separate juristic entity not forming part of the NCIS, which entity is also not a party before court.

⁵¹ here it is instructive to keep in mind what the common law requirements for such a document are – as summarized by Innes CJ in *Northern Mounted Rifles v O'Callaghan* 1909 TS 174 at 176 - 177 – and as applied by Van Niekerk J in *S v Kukame* 2008 (1) NR 313 (HC) at [3] which cases held that it is to be a document that : ' ... *must have been made by a public officer in the execution of a public duty, it must be intended for public use and the public must have a right of access to it.*' The title deed in question obviously falls within this category.

d) In regard to this entity is also telling how the Government Attorney elected to respond to the questions posed by the first respondent. In the first letter the stance was taken that the respondents should be advised that they are not to publish any information that relates to the Association of the Former Members of the NCIS. An about turn is made in the second letter where the stance was now taken that:

‘ With regard to your questions regarding the association, kindly be advised that the Namibia 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.’

This stance was changed again in the papers before court where the stance was now taken that also the disclosure of the relationship between the NCIS and the association should be regarded as classified.

e) Here it should be said that the Government Attorneys second response was correct. The applicants at no stage held a mandate to act on behalf of the association, a separate juristic entity. In respect of the change of stance it was correctly submitted that the applicants also cannot make their case in the replying papers. In any event the argument that the relationship between the NCIS and its retired members should be confidential seems also without merit as the allegations intended to be published are in regard to payments which were made unlawfully in contravention of the State Finance Act. I fail to appreciate how this part of the intended publication can properly fall within the ambit of the contended for prohibition.

[104] In these respects I then also find that the defence mustered on behalf the respondents that there is no violation of section 4(1)(b) of the Protection of Information Act must prevail. By the same token also the applicants’ argument that the information intended to be published by the respondents “...falls within the scope of sensitive and or classified information and its unlawful possession, circulation and or publication is prohibited by law” cannot be upheld.

Additional considerations

[105] The applicant seeks to interdict the publication of an article that is intended to expose the alleged misuse of public funds and corruption. The question thus arises

whether or not the law – and in this instance the relied upon statutory provisions can be used – to cover up potentially illegal- and in this case alleged corrupt activity? The court thus raised this question with counsel during the hearing of this matter to which Mr Khama's response was that this consideration did not come into play as his client's where relying on clear statutory provisions, and in respect of which which Mr Tjombe submitted that this could and should not be.

Can the law be used to cover up or prevent the exposure of corrupt activity?

[106] My instinctive response on this score is simple. I believe that the answer to this question must be a categorical 'no'. In my view the provisions of the law can- and should never be used for any illegal purpose or to cover up unlawful or potentially unlawful activity. This would clearly go against the grain of all legal principles and would be against what the law is intended to achieve and would negate all that the law stands for.

[107] A useful compendium of how the common law has dealt with similar questions was compiled by van Zyl J in the context of considering the constitutionality of search and seizure provisions enacted in the South African Proceeds of Crime Act 76 of 1996 in *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) (2000 (1) SACR 105; 2000 (2) BCLR 151). The learned judge summed up the common law as follows:

'[89] : ' ... It is, and always has been, part and parcel of our common law, which has developed appropriate maxims in this regard. Thus the Roman jurist, Ulpian tells us in Digest 50.17.134.1: 'Nemo ex suo delicto meliorem suam condicionem facere potest' ('no one can by his own wrongful act improve his position'). Anyone attempting to do so acts not only wrongfully, but also immorally. Thus agreements based on immoral considerations cannot be enforced. See, for example, Paul in Digest 2.14.27.4: 'Pacta, quae turpem causam continent, non sunt observanda' ('agreements which contain an immoral cause may not be observed'). This principle is reflected in the maxim 'ex turpi causa non oritur actio' ('no action arises from an immoral cause'). In English law similar maxims pertain, such as those referred to in Trayner's Latin Maxims 4th ed (1993) as 'ex dolo non oritur actio' ('no action arises from wrongdoing') and 'nemo ex proprio dolo consequitur actionem' ('no one pursues an action arising from his own wrongdoing'). This bears some resemblance to the well-known principles relating to unjustified enrichment, as in Digest 50.17.206, in which we are told by Pomponian:

'Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiolem' ('by the law of nature it is equitable that no one be enriched at the expense of another, and wrongfully so'). The Biblical concept of 'filthy lucre' (Tim 1.3.3) is anathema to the values of human dignity, equality and freedom pertaining in an open and democratic society.'

[108] On the bases of these general principles – (not all being squarely applicable, such as those applied in the context of the law of contract) - the applicants can in my view in any event never show on the facts of the matter that their statutory rights can or have been infringed, as to interdict the intended publication, would amount to the use of the law – here more in the sense of an abuse of the statutory provisions relied upon - to prevent and potentially cover up the exposure of alleged unlawful activity or the potential exposure of such alleged activity. Also the case law cited and the judicial pronouncements quoted above on the role of the media and the press in relation to corruption are supportive this approach. These factors would, on their own, also be a strong, if not conclusive indicator, that in such a situation the constitutional rights and freedoms of the respondents would have to prevail.

[109] Article 21(2) of the Constitution allows for reasonable limitations of the Article 21(1)(a) rights and freedoms. Any limitation that would lend itself to unlawful purposes could clearly not be considered as reasonable.

[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. I say this by way of example to illustrate the point. I am in no way suggesting that the suspected corrupt activities intended to be published by the 'Patriot' have been perpetrated by anyone. I recognize the presumption of innocence and that there may be an answer to the questions posed or that the full picture pertaining to the matter has not yet emerged. I acknowledge that the intended article is to be published in the execution of the duty of the media practitioner involved to expose corrupt activity. I need to add that the exposure of the culpability of those involved, if found to be true, must also be of public importance and

in the public- and national interest. Genuine and bona fide attempts at exposing corrupt activity should simply not be stifled.

[111] Here I would like to add that I would on these considerations - in any event - and in the exercise of my limited discretion - have exercised that discretion against the applicants.

Mootness

[112] My second overarching response would be that the essence of the content of the to be interdicted article is already in the public domain.

[113] This aspect and how it was dealt with in other jurisdictions was considered by the Supreme Court of Appeal in *Maharaj* in the context of an appeal in a case in which the South African National Prosecuting Authority had refused a national newspaper, permission to disclose the record of an interview conducted in 2003 in terms of s 28 of the NPA Act by the former Directorate of Special Operations with Mr Maharaj and his wife and in which a successful application had been brought in the High Court to have such refusal set aside. In regards to the 'public domain doctrine' the following was instructively said:

'[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 on Human Rights. The leading decision is that of *Attorney-General v Guardian Newspapers (No 2)*⁵² (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 own citizens the right to be informed of matters which are freely available throughout the rest of the world'⁵³

⁵² *Attorney General v Guardian Newspapers Ltd and Others (No 2)* [1988] 3 All ER 545 (Ch, CA & HL) (the *Spycatcher* case).

⁵³ *Id* at 652a.

[36] In *Vereniging Weekblad Bluf! v The Netherlands*⁵⁴ the European Court of Human Rights held that the Netherlands had infringed art 10 of the European Convention on 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*⁵⁵ 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 secrecy, even in a case where the documents in question had been lawfully classified as confidential in the interests of national security.

[38] The Constitution upon which the nation is founded is a grave and solemn promise to all its citizens.⁵⁶ 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.'⁵⁷ 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.⁵⁸ The NDPP is an important bulwark in that regard. The NDPP is there to inspire confidence ...'.

[114] This point was also squarely and correctly raised on behalf of the respondents who submitted that '... the applicants have acknowledged that the material (the identification of the assets) forming the basis of the intended publication (in respect of which the interdict is sought) has been divulged by the respondents in their answering affidavit and is now in the public domain'.

⁵⁴ *Vereniging Weekblad Bluf! v The Netherlands* [1995] ECHR 3 ((1995) 20 EHRR 189) at 203. See also *Weber v Switzerland* [1990] ECHR 13 ((1990) 12 EHRR 508); *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153.

⁵⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) (2008 (8) BCLR 771; [2008] ZACC 6) (Independent Newspapers).

⁵⁶ *The Public Protector v Mail & Guardian Ltd* 2011 (4) SA 420 (SCA) para [5].

⁵⁷ *The Public Protector v Mail & Guardian Ltd and Others* op cit at [143].

⁵⁸ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) ([2015] 4 All SA 719; [2015] ZASCA 156) para 44.

[115] I agree. Lord Griffiths has made the point fittingly in the *Spycatcher* case. To paraphrase: '(T)he law would indeed be an ass, if the interdict sought by the applicants would be granted in this case for it would seek to deny the Namibian public the right to be informed more fully, through the intended newspaper article, of the matters which have already become freely available through the publicly accessible court record as well as through, the public- and live television broadcast of the hearing and the television- and radio broadcasts and newspaper articles reporting on this case prior and after the hearing, which articles were also published nationwide in all the main newspapers of this country and even beyond Namibia's borders.

[116] I would think that the import of the public domain doctrine into the law pertaining to interdicts is that, in such circumstances, it can no longer be said that there can be any reasonable apprehension of an injury or harm, as the injury has already occurred. Put more pertinently it would be meaningless or moot as it would make no sense to interdict information which is to form the substance of a newspaper article in respect of which that substance is already in the public domain.

[117] It must follow for these reasons that the applicants have failed to show that their rights have or can be been injured or that such injury can still be reasonably apprehended through the intended publication.

[118] In these circumstances and as the applicants have thus failed to satisfy the second requirement for the interdictory relief sought I believe that the application should be dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel,

H GEIER
Judge

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