HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 49791/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 5 MARCH 2021

SIGNATURE

In the matter between:

FRANCINAH NTOMBENHLE VUMA	First Applicant
LEBEONA JACOB TSUMANE	Second Applicant
KHEHLA JOHN SITHOLE	Third Applicant
BONGANI MBINDWANE	Fourth Applicant

and

THE EXECUTIVE DIRECTOR: INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	First Respondent
THE MAGISTRATE: PRETORIA MAGISTRATES COURT	Second Respondent

J U D G M E N T (Leave to appeal)

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

1.1 On 13 January 2021, at the conclusion of a written judgment, this court granted an order in the following terms:

1. *The subpoenas issued by the Second Respondent on 21 May 2018 against the applicants as set out in paragraphs 1.1 – 1.5 of the applicants' notice of motion, are hereby reviewed and set aside.*

2. *The refusal or failure of the National Commissioner of Police to declassify the documents requested by IPID for the purposes of its investigation in Brooklyn CAS 565/11/2017 and IPID CCN 2018010527 is hereby reviewed and set aside.*

3. *The National Commissioner is ordered to immediately take all necessary steps to have the documents referred to in paragraph 2 above declassified for the purpose of IPID's investigation and any consequent prosecutions.*

4. *It is declared that the first to third applicants in the main application have breached their duties under sections 4(2) and 29 (2) of the IPID Act by failing to furnish IPID with information and documents for purposes of its investigations.*

5. *The costs of the counter-application are to be paid by the first to third applicants in their official capacities, which costs shall include the costs of senior and junior counsel.*

6. *Save as provided for in paragraph 5 above, there shall be no further costs order.*

1.2 On 3 February 2021, the first, second and third applicants delivered an application for leave to appeal the aforesaid judgment and orders.

1.3 The grounds upon which the applicants in the application for leave to appeal relied were the following:

> "*1. The court erred in declaring that the First to Third Applicants in the main application have breached their duties in terms of section 4 (2) and 29 (2) of the Independent Police Investigative Directive Act, 1 of 2011 by failing to furnish IPID with information and documents for the purposes of its investigation.*
>
> *2. The court should have found that:*
>
> *2.1 Since the subpoenas that were issued to compel the First to Third Respondents to furnish information were unlawfully issued, alternatively were set aside by a Court of Law, there was no duty on the First to Third Applicants to furnish the required information.*
>
> *2.2 The said information that the First to Third Applicants were required to furnish was classified. The First to Third Applicants do not have any legal authority to furnish information that was classified until such time that the Head of the office of the Department that classified the said information has declassified it. And further, the Second and Third Applicants do not have authority to declassify such information.*

2.3 *There was no evidence of direct request (sic) for the said information by IPID to the First to Third Applicants*".

1.4 Having regard to the abovequoted grounds, counsel for the said applicants, Adv. Van der Merwe SC (with Adv Mojapelo), confirmed that the only order against which leave to appeal is sought, is that contained in paragraph 4 of the orders mentioned in paragraph 1.1 above.

[2] The jurisdictional requirement

2.1 It is trite that the jurisdictional hurdle which the applicants have to cross, is the one statutorily imposed by Section 17(1) of the Superior Courts Act, 10 of 2013, the relevant portion of which provides that:

> "*Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
>
> *(a)(i) the appeal would have a reasonable prospect of success or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration*".

2.2 The applicants relied on section 17 (1)(a)(i) in their argument.

[3] The findings on which the order was based:

3.1 In the judgment in the main application, this court has found that:

3.1.1 there was no justifiable reason for the classification of documents relating to the IPID investigations as constituting "*issues that fall within the ambit of the National Strategic Intelligence Act, 39 of*

1994". This finding is not attacked in the application for leave to appeal.

3.1.2 the applicants' persistent refrain in their papers filed in the main application that the documents in question need first to be "declassified" and that this should be done via a request to the Chairperson of the Joint Standing Committee on Intelligence, was legally unsound. This finding is also not attacked in the application for leave to appeal.

3.1.3 Section 4(2) of the IPID Act imposes a duty on every organ of state (i.e. including the South African Police Services, of which the applicants are in its leadership structure) to assist IPID in performing its functions "effectively" and that section 29(2) of the said Act imposes a specific duty on each SAPS member (i.e. including the said applicants) to provide their "full cooperation" to IPID by providing "any information" (in addition to documentation) required for investigation purposes. Correctly, the applicants raised no quibble with these statutory obligations nor their applicability.

3.2 The specific findings in the judgment in the main application, dealing, in the context of the matter, with the breaches of duty by the applicants can be found in paragraph 6.3 thereof, which reads as follows:

> "*In fact, the contents of the affidavits as described in paragraph 3 above indicate that the applicants made no effort to comply with their obligations in terms of sections 4 and 29 of the IPID Act as referred to in paragraph 3.6 and 3.7 above. They have neither assisted IPID nor availed themselves for interviews nor have they*

furnished any documents relating to the I-View I investigation. Their claims of justification in respect of documents requested in relation to the I-View II investigation were clearly unfounded, both in respect of the subsequently aborted reliance on section 5 (2) of the Oversight Act as well as the purported protection of national interests. Although the discovery of or access to documents in respect of I-View III did not form part of the subpoenas or the counter-application, the applicants' silence in relation to the seriousness of the allegations is cause for concern. One would have legitimately expected SAPS management, upon hearing of allegations of a three-fold overpricing of basic equipment such as flak-jackets, to immediately raise a hue and cry and volunteer any assistance to the investigation of such a flagrant example of corruption within its ranks. The failure to do all of the aforementioned constitute a breach of the first three applicants' obligations, entitling IPID to the declaratory order sought in this regard as set out hereunder".

[4] Evaluation:

It is against this backdrop (and the case as a whole) that the applicant's application for leave to appeal must be considered:

4.1 In paragraph 2.1 of the applicant's application, reference is made to the subpoenas issued at the instance of IPID in an attempt to coerce the applicants to provide information and documentation. The applicants' arguments are that, until the subpoenas were set aside, they were under no obligation to assist IPID. Clearly this argument is untenable and ignores the duties imposed by law on the applicants. These duties were again referred to above. These duties of transparency and active assistance were

in existence at all relevant times, that is, long before the subpoenas (and during the attempted enforcement of the subpoenas and even subsequent to their setting aside). The duties were not dependent on the subpoenas and in fact, the subpoenas were resorted to in frustration by IPID and as a result of the fact that the applicants were already failing in their duties.

4.2 Adv. van der Merwe SC were at pains to point out that the applicants have responded to IPID's initial letter of request dated 23 January 2018 and that they should not be found in breach of their duties. This argument exacerbates the applicants' position: at best it showed that they sent a simple response, indicating that some of their dockets had been seized by the SIU. They did not furnish any further particulars. They did not produce any copies of documents. They did not furnish IPID with any information, clearly within their knowledge, of any aspect of the matters under investigations, nor did they "assist" IPID in any manner or fashion. In fact, when requested to make themselves available for interviews, rather than comply with their statutory duties as police officers willing to contribute to the investigation of crimes, they sought legal assistance and on this basis thwarted IPID's investigation.

4.3 The applicant's belated argument that there exists a reasonable prospect that another court would on appeal find that "there was no duty on the First to Third applicants to furnish the required information" until the subpoenas were set aside, therefore holds no water.

4.4 The First to Third Appellants further argue that they have "no legal authority to furnish information that was classified" and therefore they were not in breach of their duties. This argument does not assist the Third Applicant. He is vested with the authority to declassify the documents in question. In the circumstances where the Inspector General of Intelligence

has already determined that there was no reason for the documents to be classified, the failure or refusal of the Third Applicant (the National Commissioner) to declassify the documents, in itself amounts to a breach of his statutory obligations. Insofar as it pertains the Second Applicant, he had reported to IPID that he had requested the documents to be declassified. After having sent a single letter in this regard, he made no follow-up or any effort to have the documents indeed declassified. This amounts to a further breach of duty.

4.5 In dealing with the issue of a breach of duty by all three applicants, I pertinently asked Adv Van der Merwe SC what exactly his clients have done in compliance with their obligations to assist IPID (in contrast with letter-writing, deflection and avoidance of interviews) and he was constrained to concede that the record showed no active or positive steps taken in compliance with any of their stated duties. He suggested that the record was incomplete, but it was the applicants who had brought the application to court and any purported deficiencies in the documents could have been cured by themselves. In fact, in the judgment in the main application, it was pointed out that the main application itself, aimed at setting aside IPID's attempts at obtaining co-operation in IPID's investigations by way of subpoenas, amounted to conduct aimed at avoiding the duties imposed on the applicants by law.

4.6 IPID argued that at all material times the issue of classification was merely a red herring and, having regard to IPID's duties and the security clearances of IPID's investigators, the documents could lawfully have been disclosed to IPID. The applicant's failure to even entertain this proposition, let alone attempt to arrange access to the documents, equally amount to non-compliance with the duties imposed by the IPID Act.

4.7 In addition to the abovementioned evaluation, counsel for IPID, in lucid and structured heads of argument also dismantled the grounds on which the applicants rely in their application for leave to appeal, briefly in the following fashion:

4.7.1 The first ground misconstrues the duties imposed on the applicants by the relevant sections of the IPID Act. The duties to assist exist irrespective of the timing and manner in which assistance is requested, be it by way of a letter, an oral request or by way of a subpoena. Any failure to render assistance or to make any disclosure in respect of any request, already constitutes a breach of the statutorily imposed duties.

4.7.2 Regarding the second ground, the National Commissioner has the requisite authority to declassify the documents, as noted in paragraph 5.15 of the judgment (and by the Inspector General of Intelligence) and the reference to "second and third applicants" in paragraph 2.2 of the application for leave to appeal, should read "first and second applicants". This follows on the fact that no leave is sought to appeal against paragraph 2 and 3 of the order. In any event, declassification is not a prerequisite to the rendering of assistance in furnish the information requested by IPID.

4.7.3 From a reading of the heads of argument delivered on behalf of IPID, it appears as if the applicants' third ground is attacked on the basis that it cannot be open for the applicants to deny knowledge of the particularity of documentation (and information) sought by IPID. The various correspondences and contents of the affidavits relied on for the obtaining of the subpoena were again referred to. It seems to me though, as if the applicants' third ground did not

refer to a lack of knowledge of the particulars sought, but an argument that there was no request made by IPID directly to the applicants and accordingly, there could not have been any breach of duty. Both these grounds are, on a conspectus of the evidence, unfounded. The documents were clearly identified by way of the particularity furnished in the correspondence, in the affidavits referred to in the judgment which had preceeded the subpoenas and in the affidavits on which IPID relied for the subpoenas themselves. The whole process of litigation for more than two years, in particular the counter-application was premised on requests for co-operation and furnishing of information which were either refused or frustrated by the applicants. Absolutely no attempt has been demonstrated by any of the said applicants to comply with the provision of the sections of the IPID Act, referred to above. The classification-issue was clearly used as a shield or smokescreen to hide behind from any enquiry, as demonstrated in the judgment.

[5] Conclusion:

This court has not been furnished with nor been referred to evidence of any conduct by any of the first, second (save for his initial letter requesting declassification dated 31 January 2018) and third applicants displaying steps taken to ensure that IPID can perform its investigative functions in respect of any of the three I-View investigations "effectively" as required by the IPID Act. I find that there is, accordingly, no reasonable prospect of success that a court could, on appeal, find otherwise.

[6] Order:

The application for leave to appeal is refused with costs, including the costs of senior and junior counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 26 February 2021

Judgment delivered: 5 March 2021

APPEARANCES:

For the Applicants:	Adv. M P van der Merwe SC with Adv M Mojapelo
Attorney for Applicants:	Mketsu & Associates Inc., Pretoria
For the First Respondent:	Adv. S Budlender SC with Adv. J Bleazard
Attorney for First Respondent:	Adams & Adams Attorneys, Pretoria

No appearance for the Second Respondent