

**IN THE JUDICIAL COMMISSION OF INQUIRY INTO CRIMINALITY, POLITICAL
INTERFERENCE AND CORRUPTION IN THE CRIMINAL JUSTICE SYSTEM**

HELD AT PRETORIA

In the matter between:

THE EVIDENCE LEADERS

APPLICANT

and

**AMABHUNGANE CENTRE FOR
INVESTIGATIVE JOURNALISM NPC**

1ST RESPONDENT

DAILY MAVERICK (PTY) LTD

2ND RESPONDENT

MEDIA24 (PTY) LTD

3RD RESPONDENT

RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

- 1 The Evidence Leaders have applied for the entire evidence of Dr N Sifolo, Acting Coordinator of National Intelligence Co-ordinating Committee (“**NICOC**”), to be heard in camera.
- 2 The respondents oppose this application on three grounds:
 - 2.1 Ground 1: There is no evidential basis to close the proceedings;
 - 2.2 Ground 2: Classification does not dictate access and the Commission should not automatically defer to intelligence bodies;
 - 2.3 Ground 3: No case has been made for *blanket* secrecy.
- 3 We address each topic in turn, and will then explain why the evidence to be presented by Dr Sifolo should be heard in public and where appropriate subject to certain limited restrictions.

FACTUAL BACKGROUND

- 4 The Commission has before it *prima facie* evidence of significant criminality, political interference and corruption in the criminal justice system, including infiltration of SAPS and Crime Intelligence.¹
- 5 The unanswered question is how this occurred and why the intelligence structures mandated to prevent it failed to do so.²

¹ Respondent’s opposing affidavit, p 19, para 18.

² Respondent’s opposing affidavit, p 19, para 19.

- 6 The respondents successfully opposed the first *in camera* application concerning Mr Carrim.³ The respondents now oppose the *in camera* application brought in respect of Dr Sifolo.
- 7 In the Evidence Leaders' founding affidavit,⁴ the grounds advanced for Dr Sifolo's evidence to be presented completely *in camera* were that Dr Sifolo's evidence would address:
- 7.1 the role, mandate, functions, composition, reporting lines and accountability structures of NICOC;⁵
 - 7.2 the relationship between NICOC and other intelligence and security structures;⁶
 - 7.3 the identification, assessment and reporting of threats relating to organised crime and criminal syndicate infiltration of the criminal justice system;⁷ and
 - 7.4 National Intelligence Estimates and Intelligence Briefs relevant to the Commission's Terms of Reference, including threats identified and prioritised through those processes and the reporting of such threats to relevant role players".⁸

³ Respondent's supplementary opposing affidavit, p 14, para 10.

⁴ Founding affidavit, p 9 - 11.

⁵ Founding affidavit, p 10, para 8.1.

⁶ Founding affidavit, p 10, para 8.2.

⁷ Founding affidavit, p 10, para 8.3.

⁸ Founding Affidavit, p 10, para 8.4.

8 The Evidence Leader's replying affidavit ("**the Replying Affidavit**") disclosed that Dr Sifolo's evidence will be based on:

8.1 four National Intelligence Estimates issued from 2022 to 2025, and 11 NICOC Intelligence Briefs and a Special Report issued from January to July 2025, dealing with infiltration of the criminal justice system by organised crime syndicates;⁹

8.2 a 25 page statement and a 536-page exhibit bundle;¹⁰ and

8.3 documents that "*have been declassified for the limited purpose of their use by the Commission*"¹¹ and "*not ... for general publication or public dissemination*".¹²

9 The Evidence Leaders state that they have "*sympathy for the position advanced by the Respondents*", recognise the importance of open justice and the public interest, and do not suggest that the intelligence character of information automatically justifies exclusion.¹³

THE LEGAL FRAMEWORK

10 The proceedings of the Commission are governed by the Commissions Act 8 of 1947 ("**the Act**"). Section 4 of the Act provides that all the evidence and address

⁹ Replying affidavit, p 54, paras 10 to 10.2.

¹⁰ Replying affidavit, p 54, para 17.

¹¹ Replying affidavit, p 54, para 13.

¹² Replying affidavit, p 54, para 13.

¹³ Replying affidavit, p 54, paras 5 - 6.

heard by a commission shall be heard in public, subject to the Chairperson's discretion.

11 In terms of Rule 4:¹⁴

Hearings must be held in public

4.1. Subject to rule 4.2, the hearings of the Commission will be held in public and there must be physical attendance of all parties involved.

4.2. In an appropriate case, the Chairperson may make an order that a hearing be held in camera or via electronic means. In such a case, the Chairperson shall specify in the order those persons who will be permitted to attend the hearing in camera or by some other means.

4.3. At the request of the witness whose evidence is to be heard in camera, or, mero motu, the Chairperson must order that nobody may, directly or indirectly, disclose the identity of the witness who is to give evidence in camera.

12 The Rules recognise *in camera* proceedings as an exception to the default rule, and not as an alternative to it.

13 Accordingly, in the circumstances, the correct interpretive position is as follows:

13.1 public hearings are the rule;

¹⁴ Governing Proceedings of the Judicial Commission of Inquiry into Criminality, Political interference and Corruption in the Criminal Justice System on 6 July 2025, Authorities Bundle, pg 29.

- 13.2 *in camera* proceedings are a narrow exception, available only where the Chairperson is satisfied that a departure from the rule is justified on proper grounds; and
- 13.3 the party or person seeking a departure from the rule bears the burden of justifying it.

The Constitution

- 14 The following provisions of the Constitution of the Republic of South Africa, 1996 are applicable:

- 14.1 Section 16(1)(a) and (b) provides that everyone has the right to freedom of expression, which includes freedom of the press and other media, and freedom to receive or impart information or ideas.
- 14.2 Section 32(1)(a) provides that everyone has the right of access to any information held by the State.
- 14.3 Section 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing. While this section is directed at courts or other independent and impartial tribunals, it reflects the constitutional commitment to public adjudicative processes.
- 14.4 Section 36 provides that any limitation of a right in the Bill of Rights must be by law of general application, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the nature of the right, the importance of

the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.

- 15 The Commission, although not a court, performs a quasi-adjudicative function that is of the highest public importance. The constitutional values underpinning open justice apply, with necessary adaptation, to its proceedings.¹⁵ The subject matter of the inquiry is of public concern. The legitimacy of the Commission's findings will depend heavily on the transparency with which it conducts its work.

S v Geiges

- 16 In *S v Geiges*,¹⁶ the State filed an application to hold parts of a criminal trial concerning nuclear non-proliferation *in camera*, with exclusion of the public and media, a ban on disclosure of parts of the record and protection of expert witnesses' identities. The Court dismissed it, with the following reasoning:

- 16.1 Proceedings must take place in open court, in accordance with section 152 of the Criminal Procedure Act, 1977, and entrenched in section 35(3)(c) of the Constitution.¹⁷ *"If it then transpires that in the interests of the State, or of good order, or of the administration of justice, that such proceedings be held behind closed doors the court may make an appropriate order in the exercise of its discretion."*¹⁸

¹⁵ See *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO and Others* 2000 (4) SA 973 (C).

¹⁶ *S v Geiges and others (M & G Media Ltd and Others Intervening)* 2007 (2) SACR 507 (T) ("**Geiges**").

¹⁷ *Geiges*, paras 47 to 49.

¹⁸ *Geiges*, para 80.

- 16.2 Open justice rests on the notion of a fair trial and on publicity. The public is entitled to be informed, and the administration of justice benefits from publicity.¹⁹
- 16.3 The Constitution recognises the central role of the media and permits only the narrowest demonstrably justifiable infringement of access.²⁰
- 16.4 The starting point is open court unless there are compelling reasons for *in camera* proceedings. The State's argument that its order was merely interlocutory and could be revisited was rejected as having the wrong point of departure.²¹
- 16.5 The State's application was overbroad as it had claimed that there was no non-sensitive evidence, yet conceded that some would be led, and that the Court was probably obliged to release it.²²
- 16.6 The Court accepted that exposure of some materials would create a real security risk and breach international obligations, but still refused blanket protection. It indicated that the court might have to be cleared at certain stages, and that the State could renew its application at those stages, in open court if possible.²³

¹⁹ *Geiges*, paras 52 to 61.

²⁰ *Ibid.*

²¹ *Geiges*, para 80.

²² *Geiges*, paras 65 to 71.

²³ *Geiges*, paras 65 to 71, 81 and 82.

GROUNDS OF OPPOSITION

Ground 1: There is no evidential basis to close the proceedings

- 17 The Commission is inquiring into allegations of criminality, political interference and corruption at the heart of the criminal justice system, made by a senior officer of the South African Police Service (“**SAPS**”). The public interest in the inquiry is at its highest point. The evidence that the Commission will hear is, by its nature, evidence about the conduct of public officials and public institutions funded by and accountable to the public.
- 18 In the face of such high public interest and importance, the onus on the Evidence Leaders to justify secrecy is correspondingly high. Yet they have failed to adduce any evidence, at all, indicating what disclosures will damage national security, let alone how and why.
- 19 Their mere say-so is not good enough. Guidance from our jurisprudence on the Promotion of Access to Information Act, 2000 (“**PAIA**”) is apposite. In *President v M&G*,²⁴ the Constitutional Court held (per Ngcobo CJ, with our emphasis):

23. In order to discharge its burden under PAIA, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 81(3) of PAIA is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.

²⁴ *President of the Republic of South Africa and Others v M & G Media Ltd* [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC).

24. The recitation of the statutory language of the exemptions claimed is not sufficient for the state to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the state. The affidavits for the state must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the state is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.

20 By contrast, the Evidence Leaders rely on the mere fact that the documents have been classified by the intelligence services themselves.

21 That is also not good enough, as we explain next.

Ground 2: Classification does not dictate access

22 The Evidence Leaders argue that the exhibits have been declassified only for the Commission's use, which limitation the Commission cannot override or vary as it is not a High Court, with inherent jurisdiction.²⁵ Instead, the Evidence Leaders submit that the Commission must choose amongst the following three options:²⁶

22.1 bringing an urgent High Court application to review the declassification terms;

22.2 refusing to hear Dr Sifolo *in camera*, with the result that he cannot be questioned on the exhibits;²⁷ or

²⁵ Replying affidavit, pg. 54, paras 15 - 17.

²⁶ Replying affidavit, pg. 54, paras 17 - 17.1.

²⁷ Replying affidavit, pg. 54, para 17.2.

22.3 hearing him *in camera* and keeping a full record.²⁸

23 But this premise is incorrect.

24 Section 3(1) of the Act provides:

For the purpose of ascertaining any matter relating to the subject of its investigations, a commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province, to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.

25 Parliament has dictated that the Commission has the same powers as a High Court in respect of the treatment of evidence and documents. And the President – the ultimate Head of the Intelligence Services – fully knowing the nature of the issues this Commission was to address, proclaimed that its proceedings would be public, subject only to the Chairperson’s discretion in appropriate cases. The President did not create any exclusion for classified documents.

26 The question of whether classification on its own determines whether documents will be subject to open justice was settled long ago by the Constitutional Court in *Independent Newspapers*,²⁹ where Moseneke DCJ held (with our emphasis):

[53] In my view, the mere fact that documents in a court record carry a classification does not oust the jurisdiction of a court to decide whether they should be protected from disclosure to the media and public. We were not referred to, and I could not find, any legislative provision on the

²⁸ Replying affidavit, p 54, para 17.3.

²⁹ *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* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC).

classification and protection of information on grounds of national security or any other authority which purports to oust the jurisdiction of a court over any document which forms part of a court record. As I have said above, different considerations may very well apply where the request to disclose classified intelligence documents occurs in any context other than where the documents have been placed before a court by a party to the proceedings and thus form part of the court record. In that event, a court will always have the power to regulate the proceedings before it because it is clothed by section 173 of the Constitution with an inherent power to regulate its own process, taking into account what is in the interests of justice.

[54] I agree with the submission made by Independent Newspapers that ordinarily, the starting point is that court proceedings and so too court records must be open to the public. A mere classification of a document within a court record as “confidential” or “secret” or even “top secret” under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.

- 27 By virtue of section 3(1) of the Act, the same considerations apply to documents before this Commission.

Ground 3: No case has been made for blanket secrecy

- 28 In *Geiges* the court refused blanket protection where the State could not show that all the evidence was sensitive and conceded that some was not.³⁰ Accordingly, a limit on publication of particular documents does not justify closing the questioning on every document and every topic.

³⁰ *Geiges*, paras 65 to 71.

- 29 Moreover, in the replying affidavit, only three options are presented,³¹ failing to acknowledge the fourth possible option.
- 30 In *Geiges* the Court concluded that the proceedings would be public by default, with targeted closure at the relevant stage on renewed application.³² It is also the approach that was followed in the *Carrim* matter.³³ Similarly, the respondents submit that the Commission may hear Dr Sifolo's evidence in public, hear *in camera* only those portions that require reference to the contents of documents that cannot safely be published (and cannot be referred to using codenames), and publish a redacted record.
- 31 *Geiges* required the State to separate non-sensitive from sensitive evidence. Dr Sifolo's evidence concerns NICOC's role in identifying, assessing, prioritising and reporting intelligence on organised crime and infiltration. Questions on NICOC's structure, mandate, how warnings were or were not acted on, and the institutional response do not necessarily require disclosure of the contents of any exhibit.³⁴
- 32 Then there is the matter of the Evidence Leaders saying that, if blanket secrecy is not granted, Dr Sifolo will not testify in relation to any classified documents. That is untenable. If Dr Sifolo has relevant evidence to give, that falls within the Commission's terms of reference, he must give it. He has no other lawful option. And the Intelligence Services do not have the power to dictate to the Commission

³¹ Replying affidavit, p 55 - 57, paras 17 - 20.

³² *Geiges*, paras 81 and 82.

³³ Respondent's opposing affidavit, p 10 at para 10 and p 16 at para 17.4.

³⁴ *Geiges*, paras 65 to 71.

how it should conduct its proceedings, which they in effect seek to do by holding relevant documents hostage if their demands are not met.

- 33 It also does not lie within the gift of the Intelligence Services to declassify certain documents for the purpose of a Commission of Inquiry, knowing it to be a public forum by default, but not for the purpose of disclosure to the public, for whose benefit and welfare the Commission was established in the first place.

A LESS RESTRICTIVE ALTERNATIVE

- 34 The respondents propose that the Commission order that:

- 34.1 Dr Sifolo's evidence be heard in public, save for passages that cannot be given without disclosing the contents of material that the Evidence Leaders have specifically identified as security-sensitive;
- 34.2 before Dr Sifolo testifies, the Evidence Leaders identify those documents and passages, by page and paragraph, to the Chairperson and the respondents' representatives, subject to appropriate undertakings;
- 34.3 names of operatives and persons of interest, and dates and places of specific operations still relevant to ongoing matters, be redacted and replaced by codenames to be used in oral evidence.³⁵

³⁵ Respondent's supplementary opposing affidavit, pg. 32, para 17.

35 This approach reflects the procedure adopted in Mr Carrim’s matter,³⁶ and the staged approach endorsed in *Geiges*.³⁷

36 The Evidence Leaders, in their replying affidavit, have not even commented on this less restrictive alternative proposed by the respondents – let alone shown why it is not equally effective in protecting personal safety and national security.

37 This alone is fatal to an application for blanket secrecy.

CONCLUSION

38 For the reasons given above, the respondents respectfully submit that the total *in camera* relief be refused and replaced with a less restrictive alternative, along the lines set out above.

BEN WINKS

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19 October 2026

³⁶ Respondent’s opposing affidavit, pg. 14 - 16 at paras 10, 17.4, and pg. 27 at paras 56 - 58.

³⁷ *Geiges*, paras 81 and 82.