

SOUTH AFRICA / JUDGMENT

Savoi and Others v National Prosecuting Authority and Another (CCT 146/22) [2023] ZACC 38; 2024 (1) SACR 343 (CC); 2024 (5) BCLR 653 (CC) (28 November 2023)

[2023] ZACC 38

COURT

Constitutional Court

BEFORE

Kollapen, Madlanga, Majiedt, Makgoka, Mathopo, Potterill, Rogers, Theron

CASE / FILE NUMBER

CCT 146/22

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Source record

CONSTITUTIONAL
COURT OF SOUTH AFRICA
Case CCT 146/22
In

the matter between:

GASTON
SAVOI First
Applicant
INTAKA
HOLDING (PTY)
LIMITED Second
Applicant
FERNANDO
PRADERI Third
Applicant
and
NATIONAL
PROSECUTING AUTHORITY First
Respondent
SOUTH
AFRICAN POLICE SERVICE Second
Respondent
Neutral
citation: Savoi and Others v National
Prosecuting Authority and Another [2023] ZACC 38

Coram:	Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J
Judgments:	Theron J (unanimous) Heard
on:	No hearing Decided
on:	28 November 2023
Summary:	Section 32 of the Superior Courts Act 10 of 2013 — legal professional privilege / litigation privilege — in camera review — procedure ORDER On appeal from the High Court of South Africa, KwaZulu Natal
Division, Pietermaritzburg:	1. Leave to appeal is granted. 2. The appeal is upheld. 3. The order of the High Court of South Africa, KwaZulu Natal Division, Pietermaritzburg is set aside and replaced with the
following:	“(a) The applicants’ interlocutory application in terms of section 32 of the Superior Courts Act 10 of 2013 is granted with costs, including the costs of two counsel. (b) The procedure for considering the contested documents will be as
follows:	(i) The portion of the proceedings that relate to determining the status of the contested documents is to be held in camera. (ii) The court determining the status of the contested documents must keep a record of the proceedings. If it is determined that a particular contested document is not privileged, the part of the record which pertains to that document shall become public. (iii) Only the representatives of the respondents who sign the confidentiality agreement attached to this order are permitted to appear in court during those proceedings. (iv) Any person present in court during the in camera proceedings is not permitted to be involved in the subsequent investigation or prosecution of the applicants. However, if

all the contested documents are not privileged, this prohibition will fall away.”

4.

The respondents are to pay the costs of the applicants in this Court, including the costs of two counsel.

JUDGMENT

THERON J (Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ and Rogers J concurring):

Introduction

- [1] Section 34 of the Constitution guarantees the right to have disputes resolved in a “fair public hearing”. The principle of open justice is the operating principle in our constitutional democracy. In *South African Broadcasting Corp Ltd*,^[1] this Court held that “[t]he public is entitled to know exactly how the Judiciary works and to be reassured that it always functions within the terms of the law and according to time honoured standards of independence, integrity, impartiality and fairness”. Section 32 of the Superior Courts Act^[2] codifies this principle as follows:

“Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.”^[3]

- [2] In this matter, the Court is called upon to determine the appropriate judicial procedure for considering documents that are allegedly protected from disclosure by legal professional privilege, but necessary for the determination of an application for a permanent

stay of proceedings, and whether a deviation from the open justice principle is justified.

Background

and litigation history

- [3] The applicants in this matter – Mr Gaston Savoi, Intaka Holdings (Pty) Limited and Mr Fernando Praderi – are currently pursuing an application for a permanent stay of prosecution before the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg (Pietermaritzburg High Court). The applicants are charged with bribery, racketeering, money laundering, fraud and corruption in relation to an alleged criminal enterprise involving the supply of water purification plants and oxygen self generating units to the provincial health departments in KwaZulu Natal and the Northern Cape. There are separate High Court prosecutions against them in the KwaZulu Natal Division and the Northern Cape Division. The

basis of the permanent stay application is that 69 documents/categories of documents (contested documents) were seized from them by the state, allegedly in violation of legal professional/litigation privilege. The applicants contend that the extent of this violation of privilege will have the result that prosecuting them would tarnish the administration of justice.

- [4] In order to prevent further encroachment on their right to legal professional privilege, the applicants brought an interlocutory application in the Pietermaritzburg High Court in terms of section 32 of the Superior Courts Act requesting that it employ a mechanism to consider the contested documents in camera (in private). The respondents, the National Prosecuting Authority (NPA) and the South African Police Service (SAPS), opposed the interlocutory application. They dispute that the contested documents are in fact privileged. The present matter is an application for leave to appeal against the Pietermaritzburg High Court's decision in the interlocutory application.
- [5] The contested documents were identified in an annexure to the founding affidavit before the Pietermaritzburg High Court, but the Court did not have sight of the documents. The majority judgment in the Pietermaritzburg High Court held that, to establish a "special case" in terms of section 32 of the Superior Courts Act, the applicants were required to prove their claim of legal professional privilege, which they failed to do. The majority judgment further held that the descriptions of the documents in the annexure were insufficient to support a claim of privilege. In contrast, Henriques J, in her minority judgment, held that the privileged status of the documents need not be determined in interlocutory proceedings.
- [6] The Pietermaritzburg High Court also upheld two in limine complaints raised by the respondents. It held that an order made by Nkosi AJ (Nkosi AJ order), also in the Pietermaritzburg High Court, which prevents the state from accessing certain documents (some of which are among the contested documents in this case) pending the criminal court's determination of the documents' status, had the effect of precluding any court other than the criminal court from making a decision in respect of the documents listed in that order. The Pietermaritzburg High Court also held that it had no jurisdiction over the Northern Cape prosecutions.
- [7] The applicants sought leave to appeal from the Full Court and the Supreme Court of Appeal. Both applications for leave to appeal were refused. A reconsideration application in the Supreme Court of Appeal was also refused.

Jurisdiction and leave to appeal

- [8] This matter involves balancing the right to legal professional privilege and the principle of open justice, both of which are constitutional principles derived from the Bill of Rights. It raises constitutional issues that go to the core of the administration of justice in an open and democratic society. The applicants have reasonable prospects of success. This Court's jurisdiction is thus engaged and it is in the interests of justice for leave to appeal to be granted.

Submissions

in this Court

[9] The applicants were requested to make written submissions on the following questions:

- (a) whether a party seeking a deviation from the open justice principle on the basis that documents required for the determination of a case are subject to legal professional privilege must first establish such privilege;
- (b) whether an in camera hearing entails permanent secrecy of the proceedings;
- (c) the implications, if any, of Nkosi AJ's order on another court's ability to make a decision relating to the documents

that are the subject of that order; and

- (d) the jurisdiction of the KwaZulu-Natal Division in respect of the Northern Cape cases.

[10] In respect of the first question, the applicants submit that resolving the privilege question at the interlocutory stage prejudices

an issue that is central to the permanent stay application. Further, that by refusing to determine the procedure through which the privileged documents would be dealt with in the permanent stay proceedings, the Pietermaritzburg High Court decided that the appropriate procedure was to deal with that question in open court in interlocutory proceedings (and without regard to the content of all of the contested documents). The applicants say that a premature determination of this kind amounts to judicial overreach. In addition, they say that the Pietermaritzburg High Court's determination of the privilege question unduly "goes behind the oath" of the applicants that the documents in question are privileged. Even if there is an onus to prove privilege, the applicants submit that they met that onus.

[11] The respondents submit that the applicants were required to establish the documents' privileged status. The remainder

of their submissions on this question relate to whether the applicants met this onus. In the respondents' submission,

the list of supposedly privileged documents that the applicants presented to the Pietermaritzburg High Court provides insufficient information to support a claim of privilege. The respondents do not make any legal submissions suggesting why such an onus is appropriate.

[12] The applicants submit that an in camera hearing does not entail permanent secrecy of proceedings. An in camera hearing would be held pursuant to an interlocutory order, which is capable of amendment by the court that granted it. They provide a number of examples of courts that hear applications in camera and later make the proceedings public, including in proceedings for Anton Piller orders and preservation orders made under the Prevention of Organised Crime Act.[4] The applicants submit that, because the request for an in camera

hearing in this case is for the purpose of determining a narrow procedural question, if it is subsequently found that the contested

documents are not privileged, a record of the proceedings can be made public. Like the applicants, the respondents also submit that an in camera hearing does not entail permanent secrecy of proceedings.

[13] The Nkosi AJ order interdicts the SAPS and NPA from viewing documents seized from the applicants' representatives, Mazars Forensic Services (Pty) Limited (Mazars documents). The applicants submit that the Nkosi AJ order does not preclude

a court from fashioning a confidentiality regime by which the alleged privileged status of the contested documents can be determined for purposes of the permanent stay application. In any event, they submit that the Nkosi AJ order covers, at most, 36 of the 69 contested documents.

[14] Further, they submit that Nkosi AJ's order was made in a different context. The parties had agreed that the Mazars

documents would be kept in the custody of the Registrar of the Pietermaritzburg High Court, pending a determination of their alleged

privileged status. However, the state viewed and copied the documents in violation of that agreement. In response, the applicants brought an urgent application to prevent the state from further viewing and copying the documents. After the state returned the documents to the Registrar, which it had viewed and copied, the applicants and the state entered into a second agreement in terms of which they agreed that certain of the Mazars documents were privileged, that the non privileged documents would be provided to the state, and that the privileged documents would remain with the Registrar.

[15] The Nkosi AJ order prevents the state from accessing the documents in the custody of the Registrar pursuant to the second agreement until a decision has been made by the criminal court seized with the matter as to the documents' privilege. The applicants submit that the consideration of the privileged status of these documents for purposes of a permanent stay application is distinct. In addition, the applicants submit that the Nkosi AJ order binds the SAPS and NPA, but that the state's legal representatives in the permanent stay application do not consider themselves bound by that order. This also means that any order made in relation to the documents for purposes of the permanent stay application does not disturb the Nkosi AJ order.

[16] The respondents say that the privilege question in the criminal proceedings and the permanent stay proceedings are not distinct and that the applicants have other remedies available to them because the criminal court can determine the privilege of the documents.

[17] Finally, regarding the jurisdiction of the KwaZulu-Natal Division over the Northern Cape prosecutions, the applicants submit that this issue did not arise in the interlocutory proceedings and it ought not to have been decided by the Pietermaritzburg High Court.

Instead, they say it is relevant that, in 2015, the state and the applicants entered into an agreement in terms of which the permanent stay application would be determined before the criminal trials proceed and that the permanent stay application, which would deal with the KwaZulu-Natal and Northern Cape prosecutions, would be brought in the KwaZulu-Natal Division.

In camera review of contested documents

[18] The basis of the permanent stay application is that the state breached the applicants' legal professional privilege to the

extent that it would be unjust for the state, having accessed those documents, to proceed with their prosecution. The narrow

question in this matter is the appropriate procedure for the court determining the permanent stay application to consider the contested

documents. This narrow question does not require an assessment of whether the documents are in fact privileged or whether a violation of legal professional privilege is sufficient to ground an application for a permanent stay of prosecution – these are questions for the court that determines the permanent stay application.

[19] Both the open justice principle and legal professional privilege are important elements of the judicial system in an open and democratic

society. In Thint,[5] this Court explained the purpose of legal professional privilege at paragraph 182 as follows:

“The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of section 35 of the Constitution, and for that reason it is to be taken very seriously indeed.”[6]

[20] An appropriate balance must be struck between privilege and open justice. In my view, in camera consideration of the documents alleged to be privileged strikes that balance.

[21] The United States Supreme Court, in *United States v Zolin*,^[7] considered the process for determining whether attorney-client communications, which are generally protected by privilege, should be disclosed on the basis that such communications are alleged to be in furtherance of future illegal conduct (the crime-fraud exception). The question was whether the applicability of the crime-fraud exception must be established without reference to the contested communications by “independent evidence”, or whether it could be established by

an in camera inspection of the material. The United States Supreme Court said that a party seeking to overcome privilege must put up a factual basis to support a good faith belief by a reasonable person that in camera review may reveal evidence to establish that the crime-fraud exception applies.

- [22] South African courts engage in a similar process under the scheme of the Promotion of Access to Information Act (PAIA).[8] Section 80(3)(b) of PAIA empowers courts considering applications brought under PAIA to conduct an in camera review of the contested record. Section 80 also empowers a court to take a “judicial peek” which is a practice

occasionally used by our courts to privately inspect allegedly privileged documents.

- [23] In *A Company v Commissioner, South African Revenue Service*,[9] the following was said about judicial peek:

“Historically, the need sometimes arose in the context of the determination of interlocutory disputes about the right of one party to inspect discovered documents in respect of which the other party had claimed privilege. It entails the judge looking at material that is not available to the party against whom the alleged right of non disclosure is asserted. That self-evidently puts the party that is kept in the dark, as it were, at a disadvantage and it limits the assistance that a court is ordinarily able to derive for the purposes of deciding contentious questions from argument addressed to it by parties who are equally equipped.”[10]

- [24] Where a court takes a judicial peek, the other side is not able to view the contested documents. Conversely, in camera review proceedings allow representatives of the respondents to view the contested documents under conditions of confidentiality, which is arguably less drastic than a judicial peek. In camera review, however, is still a deviation from general principles in the administration of justice; it departs from the adversarial nature of judicial proceedings and it cloaks the court’s proceedings in secrecy. It is therefore a discretion that must be exercised judiciously – the power should only be invoked by a court when it is in the interests of justice to do so.[11]
- [25] The factors to be considered in determining the interests of justice will vary from case to case but may include the purpose for which the court must consider the documents in camera and the consequences for the parties if the documents are made public. In this matter, the applicants require the documents to be considered by a court because the alleged privileged nature of the documents grounds their application for a permanent stay of prosecution. Without recourse to an in camera review mechanism, they are placed in an “invidious position”, to use the words of Henriques J in the Pietermaritzburg High Court. But for an in camera review, they are forced to choose between dealing with the allegedly privileged documents in open court, where the contents will be disclosed to the respondents and the public, or drastically weakening their case for a permanent stay by arguing that legal professional privilege has been breached without giving the court sight of any of the privileged documents.

[26] In Shinga,[12] part of this Court's disquiet with a provision of the Criminal Procedure Act[13] that allowed criminal appeals to be held in chambers was that "no member of the public will know what transpired".[14] In an in camera review of allegedly privileged documents, secrecy is not absolute and irreversible. If the documents are indeed protected by privilege, our law allows for a deviation from the open justice principle. If a court determines that the documents are not protected by privilege, they should be disclosed in the main permanent stay proceedings and, thus, will enter the public sphere.

In the case of an in camera hearing, the court should ensure that a record of the proceedings is kept, and if it is subsequently determined that the documents are not protected, that record should be made available to the parties and the public.

The state's in limine complaints

[27] In dismissing the interlocutory application, the Pietermaritzburg High Court also reasoned that the Nkosi AJ order, which pertains to certain of the contested documents' status in criminal proceedings, prevented a further determination on the documents listed in that order. It also held that the Northern Cape prosecutions fell outside of the jurisdiction of the Pietermaritzburg High Court. These are matters for the court determining the permanent stay application to consider in due course, and it was not necessary for the Pietermaritzburg High Court to determine them. In the interlocutory proceedings, the Pietermaritzburg High Court should have concerned itself only with the procedure for considering the allegedly privileged documents in the permanent stay application.

Order

[28] The following order is made:

3. The order of the High Court of South Africa, KwaZulu Natal Division, Pietermaritzburg is set aside and replaced with the following:

"(a) The applicants' interlocutory application in terms of section 32 of the Superior Courts Act 10 of 2013 is granted with costs, including the costs of two counsel.

(b) The procedure for considering the contested documents will be as follows:

- (i) The portion of the proceedings that relate to determining the status of the contested documents is to be held in camera.
- (ii) The court determining the status of the contested documents must keep a record of the proceedings. If it is determined that a particular contested document is not privileged, the part of the record which pertains to that document shall become public.
- (iii) Only the representatives of the respondents who sign the confidentiality agreement attached to this order are permitted to appear in court during those proceedings.

(iv) Any person present in court during the in camera proceedings is not permitted to be involved in the subsequent investigation or prosecution of the applicants. However, if all the contested documents are not privileged, this prohibition will fall away.”

PRIVILEGE AND CONFIDENTIALITY UNDERTAKING

I,

do hereby state that:

1. I am an advocate / attorney practising at:_____.
2. I represent the [FIRST / SECOND RESPONDENT] in the application for the permanent stay of prosecution that is currently pending before the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, under case number 5867/2013 (and any appeal which may be brought in relation to this application) (permanent stay application).
3. After signature of this undertaking, I will be provided with access to certain information and documents, in respect of which the applicants in the permanent stay application claim legal privilege.
4. The contested documents comprise information which is claimed by the applicants to be privileged but which will be released on a restricted basis to me for the purpose of conducting the permanent stay application (including any appeals which may be brought in relation to the permanent stay application).
5. Having regard to the fact that the contested documents are claimed as privileged by one or more of the applicants, I understand the necessity of protecting them in the manner contemplated in this undertaking.
6. In the circumstances contemplated above and in recognition of the sensitivity of the contested documents, I hereby unconditionally and irrevocably undertake as follows:

6.1 Subject to the provisions of clause 6.2 below, I will treat the contested documents as strictly privileged and confidential.

6.2 I will not (in any manner or form, or to any extent whatsoever) divulge the contents of the contested documents or permit it to be divulged to any person except:

6.2.1

counsel and/or the instructing attorney of the respondents (together “the affected parties”), but only upon each of the affected parties entering into and agreeing to be bound by an undertaking which, mutatis mutandis, is identical to this one;

6.2.2

the Registrar of the High Court of South Africa (Durban or Pietermaritzburg Divisions of the KwaZulu-Natal High Court and his or her staff);

6.2.3

the Judge(s) presiding over the permanent stay application and his or her staff;

6.2.4

the Judge(s) presiding over any appeal that may be brought in relation to the permanent stay application, the Registrar and staff of the court hearing such appeal; and

6.2.5

owners of the contested documents and their experts, consultants and/or legal representatives.

6.3 Save for the purpose of use in the course of the permanent stay application (including any appeals), I shall not copy the contested documents or any portion thereof or permit it to be copied (in any manner or to any extent), nor shall I make any notes, summaries or annotations of the contested documents or permit such notes, annotations or summaries to be made.

6.4 Upon completion of the review application (including any appeal), I shall continue to keep confidential all contested documents in my possession, including without limitation:

6.4.1

all notes, summaries and annotations made by me in terms of paragraph 6.3 (including notes made in electronic form); and

6.4.2

contested documents which were made available to me in electronic form.

7. In the event that a court determines that a particular document is not privileged, the confidentiality undertaking above in relation to that particular document will fall away.
8. I confirm that, having signed this undertaking and had sight of the contested documents, I will not act as a legal representative of the state in any criminal or civil proceedings against the applicants, prosecute any criminal proceedings against the applicants, advise the state in respect of its proceedings against the applicants, or testify against the applicants in any future proceedings. However, in the event that all the contested documents are determined to not be privileged, I can be involved in the subsequent investigation or prosecution of the applicants despite being present in court during the in camera session.
9. These undertakings are given by me, _____, to each of the applicants.
10. This undertaking constitutes my entire undertaking in relation to the subject matter hereof and I shall accordingly not be bound by any undertaking or representation not recorded herein.

Signed at----- on _____.

Signature

As witnesses:

1.

2.

For the Applicants:

G Marcus SC, M Du Plessis SC, S Pudifin-Jones and G Gumede instructed by Edward Nathan Sonnenbergs Incorporated.

For the Respondents:

R Choudree SC and R Mansingh instructed by the State Attorney, KwaZulu-Natal and State Attorney, Pietermaritzburg.

[1] South African Broadcasting Corp Ltd v National Director of Public Prosecutions

[2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 32.

[2] 10 of 2013.

[3] Id at section 32.

[4] 121 of 1998.

[5] Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions

[2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC).

[6] Id at para 150.

[7] United States v. Zolin 491 US 554 (1989).

[8] 2 of 2002.

[9] A Company v Commissioner, South African Revenue Service 2014

(4) SA 549 (WCC).

[10] Id at para 37.

[11] President of the Republic of South Africa v M&G Media Ltd [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC) at paras 42 and 45.

[12] Shinga v The State (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell v The State

[2007] ZACC 3; 2007 (4) SA 611 (CC); 2007 (5) BCLR 474 (CC).

[13] 51 of 1977.

[14] Shinga above n 12 at para 25.

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