

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, GQEBERHA

INQUEST NO CC 19/2024

MATTHEW GONIWE

FORT CALATA

SICELO MHLAULI

SPARROW MKHONTO

Deceased

In Re: Application for Contempt of Court Order dated 4 March 2026

FAMILIES OF THE DECEASED

Applicant

and

ACTING SECRETARY FOR DEFENCE,

First Respondent

DEPARTMENT OF DEFENCE: DR

THOBKILE GAMEDE

DEPARTMENT OF DEFENCE

Second Respondent

**APPLICANTS HEADS OF ARGUMENT:
CONTEMPT OF COURT APPLICATION
APPLICATION TO SET ASIDE THE CLASSIFICATIONS**

INTRODUCTION

1. The current Deputy Minister of Defence, former Major General Bantu Holomisa (“**Holomisa**”) testified before this Court that during May 1992 he arranged the publication of the “*permanent removal signal*” in the New Nation newspaper. The

signal was classified “*top secret*” and had not been declassified. The Deputy Minister explained in his affidavit why he nonetheless released the signal:

“My role in facilitating the publication of the Signal was deliberate. Given my access to the material and my direct involvement in political negotiations, I was uniquely placed to ensure that the truth about the Signal, and the state’s responsibility, came to light.”¹

2. On 11 March 1993, held a press conference at the Holiday Inn in Port Elizabeth. In his statement to the media Holomisa said:

“Last year I unambiguously intimated to the broad South African public that I had in my possession a secret file detailing the tactics and strategies of the Nationalist Party Government of South Africa for destabilising . black communities throughout the country.

Let me address myself to the contents of the file and thereafter it will be apparent to all why the black communities are plagued by internecine civil strife costing thousands of lives.”²

3. Holomisa then released several top secret documents dealing with Operation Katzen.
4. Holomisa’s concluded his affidavit before this inquest as follows:

“Despite this overwhelming body of evidence, justice has not been done. The principal perpetrators of these crimes have evaded accountability. I submit this affidavit to assist in exposing the truth and advancing the cause of justice for the victims and their families.

The evidence I have provided herein demonstrates that the deaths of the Cradock Four formed part of a deliberate and systemic state policy of elimination of political opponents. The highest structures of the apartheid government were involved in authorising these killings.”³

5. The courageous actions of Holomisa more than 30 years ago to expose injustice and the hidden hand of violence stands in sharp contrast to the utterly shameful

¹ Para 37, BH Holomisa affidavit dated 25 October 2025.

² 1993/03/11, Press Conference by Major-General H.B. Holomisa with supporting documents, pp 162 – 278, Vol I - Goosen Bundle.

³ Paras 68 - 69, BH Holomisa affidavit dated 25 October 2025.

conduct of today's Department of Defence ("**DOD**"). That department invoked "*national security*" in 2026 to refuse to release documents classified by the apartheid state in the mid-1980s for purposes of propping up an illegitimate racist state.

6. At no point has the DOD, in any of its communications, affidavits or heads of argument, attempted to offer an explanation why '*national security*' concerns confronting the apartheid state in the 1980s implicates the national security of South Africa in 2026, more than 40 years later.
7. In our view, no explanation has been forthcoming because there is no rational explanation. We have little doubt that the Deputy Minister is aghast and deeply embarrassed at the conduct of DOD officials who seek to protect the actions of apartheid era institutions and officers. The question has to be asked, why are they doing so?
8. The current Secretary of Defence, Mr Basil Mthimkulu ("**Mthimkulu**"), states in his explanatory affidavit dated 11 June 2026, that the DOD was not in breach of the court order since it took:

"...reasonable steps to declassify the documents and as a result of such was not in a position to declassify the documents without placing the national security of the Republic at risk."⁴
9. Mthimkulu states that notwithstanding their "*reasonable steps*" not a single document from the package of documents sought, comprising thousands of pages, could be declassified. Not even one.
10. We will submit that the conduct of the DOD speaks for itself. It cannot be that the blanket approval of the classifications of these decades old documents, without exception, amounts to reasonable steps.
11. The DOD employs sleight of hand in claiming that despite their refusal to

⁴ Para 11.

declassify they have provided “controlled” access to the documents under “security conditions”.

12. The so-called ‘security conditions’ are that only the physical documents (which have been “masked/ redacted”) may be read by a limited number of representatives at a time (who have to register their personal details) at a secure location; and no documents may be duplicated or removed. No member of the general public may have sight of the documents.⁵
13. The DOD has been as obstructive as possible in blocking this Court from doing its job under law to seek the truth. Indeed, the conditions set out by Dr Gamede in her affidavit make it impossible to use the documents in the inquest.
14. The DOD, recognising that their conditions amount to an effective block to the documents, scrambled and have come up, only yesterday, with a convoluted procedure in its proposed consent order. This involves the legal teams applying in writing to the Secretary of Defence on a document by document basis for particular extracts to be “unmasked” or “unredacted”. The Secretary would then have 5 days to consider what to do. Its not clear what would happen thereafter.
15. The proposal is immensely labour intensive, time consuming and unworkable. It would still involve the lawyers having to physically read thousands of pages in a secure location under the conditions described above. It is also aimed at effectively blocking access while putting up the pretence of being co-operative.
16. With the final week of hearings just over 3 weeks away, the DOD cynically puts up a proposal they know up front will effectively amount to a denial of access. This Court should see through the pretence. It should not allow itself to be abused in this manner.
17. It speaks volumes that the families have been seeking disclosure of these documents since 2021 and the DOD has employed every avenue to avoid

⁵ Para 13 of the affidavit of Dr T Gamede dated 21 April 2026.

disclosing apartheid era documents; and only responded when compelled to do so by court order. Their conduct over the years, and in relation to the attempts by this Court to access the documents have been nothing less than contemptuous.

18. These heads of argument address the two prayers of relief sought:

18.1. First, the application to hold the First Respondent in contempt of court for non-compliance with the order of this Court granted on 4 March 2026 (“Part A: contempt application”).

18.2. Second, in addition, or in the alternative, the applicants seek an order declaring the continued classification of the documents unlawful, and/or their release in unredacted form (“Part B: Alternate or additional relief”).

PART A: CONTEMPT OF COURT APPLICATION

19. Section 165(5) of the Constitution makes orders of court binding on “*all persons to whom and organs of state to which it applies*”. The purpose of a finding of contempt, according to the Constitutional Court, is “*to protect the fount of justice by preventing unlawful disdain for judicial authority*”.⁶ The Supreme Court of Appeal noted that there is a “*broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law*”.⁷

Presumption of unwillingness: defence of interpretation

20. We submit that the applicant need only prove the order, service or notice, and non-compliance.

⁶ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) at para 48.

⁷ *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 8.

21. It is common cause that the order exists and the order was served on the respondents. These submissions will deal with why there was non-compliance with the order.
22. Before we deal with compliance, we must first deal with a proper interpretation of the order.
23. On 11 June 2026 – a day before the urgent hearing – the Department of Defence, through its Secretary of Defence, Mr Mthimkulu, deposed to an “explanatory” affidavit. In this affidavit he claimed that Mrs Gamede is not in breach of the court order because the Department was not in a position to declassify the documents, despite taking reasonable steps to do so.⁸ Arrangements were made under a controlled setting under various security conditions for the parties to view the masked / redacted documents.⁹
24. Mr Mthimkulu claims that the order only required “reasonable steps” to be taken to declassify the documents. The Department, he alleges took those steps and assessed the documents but decided not to declassify any of the documents because doing so would put South Africa’s national security at risk.¹⁰
25. Inferred from these averments is that the Department interpreted the order as a directive to take all steps to assess whether declassification can take place. Mr Mthimkulu apologises if he indeed not comply with the order suggesting that he may have breached the order – but not wilfully so.¹¹
26. We submit that the Department’s interpretation to take reasonable steps to assess the classification is untenable.
27. The order is set out as follows:

⁸ Explanatory Affidavit of Mr Mthimkulu, para 10.

⁹ Paras 11 – 12, read with para 13 of the affidavit of Dr T Gamede dated 21 April 2026.

¹⁰ Para 17.

¹¹ Para 26.

“Dr Thobekile Gamede, in her capacity as the present Acting Secretary of Defence, or her successors in title, shall take all reasonable steps to declassify, by no later than 15h00 on Friday, 13 March 2026 the documents appearing in the schedule below, and such declassified documents shall be released and be made available to the registrar by that date and time”.

28. The exercise of interpreting a court order is a purposive one. Relying on *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others*¹² the Constitutional Court in *Eke v Parson*¹³ noted that:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”

29. In order to ascertain the manifest purpose of the order, the relevant background must be set out. In summary:

29.1. During June 2021, the applicants' private investigator, Retired Brigadier Clifford Marion (“**Marion**”), delivered an application in terms of the Promotion of Access to Information Act (“**PAIA**”) to the DOD regarding the declassified documents.¹⁴

29.2. On 10 November 2021, a second PAIA application to the DOD was delivered to follow up on the first request.¹⁵

29.3. On 22 July 2022, Brig. Marion was granted limited access to inspect a portion of the documents that had been declassified.¹⁶ Those that

¹² [2012] ZASCA 49; 2013 (2) SA 204 (SCA).

¹³ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC).

¹⁴ Founding Affidavit, para 15.

¹⁵ Founding Affidavit, para 16.

¹⁶ Founding Affidavit, para 17.

were not declassified were those documents listed in the table under paragraph 2 of the order granted on 4 March 2026.

- 29.4. On 22 May 2025 the applicant's attorney addressed a letter to the Honourable Judge Beshe stating that the reopened inquest needed access to all DOD documents with a possible connection to the Cradock Four.¹⁷
- 29.5. On 2 July 2025, following the opening addresses, various counsel highlighted the need to gain expeditious access to the DOD documents, and complained that the withholding of the documents hampered efforts to prepare for the inquest. The Honourable Judge Beshe agreed on the importance of their production.¹⁸
- 29.6. On 10 September 2025 the Honourable Judge and the NPA were informed by the families that they were still waiting to hear of the status of the DOD documents and whether they have been declassified.¹⁹ On 28 November 2025 the families followed up with the NPA on the status of these documents²⁰ and an update on "compelling the Department of Defence to provide the outstanding documents".²¹
- 29.7. The NPA replied on 27 January 2026 in reply to the update on compelling the Department to provide the outstanding documents stating that *"a S205 subpoena for the Department of Defence has been prepared with a date for the receipt of the documents of 13 February 2026 failing which their appearance on 20 February 2026 before Judge Beshe"*.²²

¹⁷ Founding Affidavit, para 18.

¹⁸ Founding Affidavit, para 19.

¹⁹ Founding Affidavit, para 20.

²⁰ Founding Affidavit, para 21.

²¹ Founding Affidavit, Annexure FA7: email dated 28 November 2025 from Mr Luke Kleinsmidt to Adv Devendran Govender.

²² Founding Affidavit, Annexure FA7: email dated 27 January 2026 from Adv Devendran Govender to Mr Luke Kleinsmidt.

30. It is clear that the purpose of the subpoena and the hearing before Judge Beshe was to obtain reasons why the Department did not take steps to declassify and provide the outstanding documents listed in the court order. It is against this background we submit that paragraph 2 of the order granted on 4 March 2026 must be read.
31. It is evident from a reading of the order that the First Respondent was obliged to (“shall”) take all reasonable steps to declassify the documents appearing in the schedule.
32. This must be purposely defined as a direction from the Court for the Department to take all reasonable positive steps to declassify the documents. In other words, the Honourable Judge Beshe directed that declassification must take place and that the Department must take all reasonable steps to do so “*by no later than 15h00 on Friday, 13 March 2026.*”
33. The reasonable steps in the order was a requirement specifically and only to meet the deadline of 15h00 on Friday, 13 March 2026. It was not crafted as an invitation to the DOD to question the order and reconsider the merits or demerits of declassification.
34. Any and all steps taken by the Department must be to fulfil the purpose of declassifying the documents referenced in the schedule and to do so by the deadline.
35. Any interpretation by the Respondents to mean otherwise would be unreasonable and untenable. The Respondents took no steps to challenge the merits of the order but merely asked for an extension.
36. Consequently, compliance with the order, with respect, must mean that:
 - 36.1. The First Respondent was obligated to take all reasonable steps to declassify the documents by the deadline imposed; and

36.2. Once declassified, to produce and release the documents to the registrar.

37. We submit that the First Respondent failed to comply with order in that she neither declassified the documents nor made the documents available. Instead, Dr Gamede's stated that:

37.1. the documents have been "*masked/ redacted*"²³ and that even with such redactions the "*remaining content retains a security classification*"²⁴ and that the documents may only be made available to the Court and identified parties under the following "*security conditions*"²⁵:

37.1.1. No duplication of the records will be accepted by the Respondents in any form.

37.1.2. The records must be stored in a safe when not in use. The safe must be located in a secure area.

37.1.3. The records must not be made available for inspection and/or perusal by members of the general public.

37.1.4. No pages or sections of the documents are to be removed.

37.1.5. A register is to be kept of all persons who had access to these records, indicating date, time, name, identity number, and signature.

37.1.6. Subsequent to the completion of the inquest, all records are to be returned to the DOD.

²³ Gamede Affidavit, para 10.

²⁴ Gamede Affidavit, para 10.

²⁵ Gamede Affidavit, para 13.

37.1.7. An affidavit by all persons who had access to the documents confirming that the above have been adhered to must be forwarded to the DOD, Defence Intelligence.

38. The statement that “even in redacted form, the remaining content retains a security classification” and the highly restrictive controlled physical inspection conditions, which make it impossible to use the documents in the inquest:

38.1. Is clearly contrary to the order of this Court. and

38.2. Accordingly, the Respondents have not complied with the Court order.

39. If non-compliance is shown, the onus shifts on to the First Respondent, and she bears an evidential burden in relation to wilfulness and *mala fides*. As pointed out in *Fakie*, “*should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*”²⁶

40. We submit that the Respondents have failed to advance evidence that establishes doubt as to whether the non-compliance was in bad faith. The Department’s interpretation of the order is cynical, untenable and lacks *bona fides*.

41. This is underscored by the fact that the Respondents decided to impose:

41.1. A blanket ban on the declassification of every single document amongst thousands of pages dealing with historical apartheid-era classifications dating back more than 40 years.

41.2. Conditions that they were aware would make it impossible to effectively analyse the documents in the time available and which would prevent them from being used in the inquest.

²⁶ *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 42.4.

REMEDY: PART A

42. It is our submission that the Respondents have failed to explain why it has not acted in bad faith. The documents have been sought by the family since 2021. The Respondents delayed the production of these documents until compelled to do so in 2026. And when forced to act, the Respondents do so in a manner that effectively denies the families access and fundamentally violates the principle of open justice.

43. Accordingly, we submit that civil contempt proceedings arm this court with a wide range of remedies. As noted by the Constitutional Court in *Matjhabeng*:

*“The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamus, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest.”*²⁷

44. It is on this basis that we submit that paragraph 3 of the notice of motion is appropriate and within the jurisdiction of this Court to grant. Should the First Respondent persist in refusing to declassify and produce the documents, then this Court must sanction and penalize the First Respondent either by way of committal or monetary fine.

²⁷ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) at para 54.

PART B: ALTERNATIVE OR ADDITIONAL RELIEF

45. In the alternative or in addition to the Part A relief, the Applicants seek an order declaring the continued classification of the documents to be unlawful and of no force and effect. They also seek an order requiring the Respondents to produce and make available the documents in unredacted format in hard copy and electronic formats.²⁸
46. At the outset, it is noted that the Respondents do not oppose Part B of this application. Their explanatory affidavit asserts that they were not in wilful default of the court order. However, there are no averments – positive or otherwise – stating that they oppose the relief sought in Part B or that they dispute the assertions in support of such relief.
47. In maintaining the security classifications of the Respondents make the bare assertion that the documents remain classified under:
- 47.1. the Defence Act 42 of 2002;
 - 47.2. the Protection of Information Act 84 of 1982; and
 - 47.3. the Minimum Information Security Standards (“MISS”) (collectively referred to “the purported enabling legislation”).²⁹
48. The documents include records dating from 1982 to 1987 and are thus approximately 40 to 44 years old.
49. The Respondents make the bald claim, without the slightest elaboration, that the documents “*remain classified*” under various instruments. No evidence is provided of:

²⁸ Prayers 8 and 9 of the Notice of Motion.

²⁹ Gamede Affidavit, para 8.

- 49.1. the original classification decisions;
- 49.2. the legal framework under which such classifications occurred in the 1980s;
- 49.3. any subsequent reviews or reclassifications.

Apartheid-era classifications

- 50. Secrecy and security classifications in the apartheid era were wielded as tools of oppression. They were used to shut down opposition to white minority rule. Secrecy was the order of the day, and national security was aimed at safeguarding the apartheid state. Security classifications in the apartheid era served these pernicious ends.
- 51. The standards and approach of security classification in the apartheid-era are well summed up by Sachs J in his judgment in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President* 2008 (8) BCLR 771 (CC):

“...By its nature, minority rule was not only racist; it was hegemonic and autocratic. The security police received greater and greater powers and ended up virtually a law unto themselves. In the paranoid world-view of those in authority who spoke of a total onslaught on South Africa, everyone was a potential enemy, and secrecy became the order of the day. The impact on the lives of the majority of citizens was devastating. Although security policy was advanced as being in the ‘national interest’, its primary goal was to safeguard the racially exclusive state and the privileged status of the white community. Security strategy was formulated by a select group of cabinet ministers and security officials, excluding parliament and the public from effective participation.”³⁰

52. It scarcely needs to be mentioned that the post-apartheid constitutional era cannot countenance classifications made for such purposes. They are manifestly inconsistent with South Africa's new constitutional values.
53. Sachs J in *Independent Newspapers* contrasted the approach to secrecy under apartheid with the principle of openness in the new constitutional order which he asserts is an integral part of the constitutional vision of an open and democratic society:

*"Section 1 of the Constitution declares that the democratic government of South Africa is founded on the principles of accountability, responsiveness and openness. The theme of openness is underlined right through the Constitution: in the Preamble, the limitation clause in the Bill of Rights, in the provision dealing with the interpretation of the Bill of Rights, and in sections regarding the manner in which Parliament and other legislative bodies should function."*³¹

*"...An open and democratic society does not view its citizens as enemies. Nor does it see its basic security as being derived from the power of the state to repress those it regards as opponents. Its fundamental philosophy is quite opposed to the authoritarianism of the past...."*³²

54. Once the apartheid-era laws and guidelines that provided for security classifications were repealed, the classifications that were made in terms of them were also effectively ended. They did not survive the passage into the new constitutional order, unless they were specifically and lawfully reclassified.

The claim that the documents "remain classified"

55. To the extent that the Respondents rely on the original classification decisions in the 1980s this would be manifestly unlawful since they were made under legal instruments that no longer exist and for purposes that are no longer justifiable in

³¹ Para 153.

³² Para 155.

the new South African order. Such reliance is incompatible with the principle of legality.

56. In referencing post-apartheid legislation, the Respondents rely on inapplicable legislation. While the *Protection of Information Act 84 of 1982* and the *Defence Act 42 of 2002* prohibit the disclosure of certain information, neither provide for the classification of information. Moreover, the Defence Act did not exist at the time the documents were created, and no basis is advanced for its retrospective application to classification decisions made decades earlier.
57. While the MISS, which was only adopted in 1996, does provide for the classification of information, the Respondents put up no evidence of the documents being classified or reclassified under MISS.
58. The Respondents do not allege:
 - 58.1. that the documents were reviewed and reclassified under MISS;
 - 58.2. when such reviews and reclassifications occurred;
 - 58.3. by whom.
59. Accordingly, the statement that the documents “*remain classified ... under MISS*” is wholly unsupported.
60. In this regard it is noted that the MISS does not permit the classification of categories of documents en masse. Classification must rest on individual consideration of each document with a specific assessment of harm and sensitivity. Any claim to blanket classification would be manifestly unlawful.

Irrational and arbitrary classification

61. To the extent that the Respondents claim that each document was individually classified in terms of the MISS such decisions cannot have been rationally related to the purpose for which the classification power was given.
62. Documents classified in the apartheid era would only be protected from disclosure if they met the new the criteria and standards of the MISS and were accordingly reclassified.
63. The MISS made a fundamental departure in approach from the earlier apartheid era guidelines.
 - 63.1. The preface to the MISS notes that the guidelines were crafted taking into account that South Africa was now *“a democratic and open society with transparency in its governmental administration”*.
 - 63.2. The MISS proclaimed that its formulation was guided by the principles underlying an open democracy and the Interim Constitution.³³ These included the promotion of an open and democratic society, good governance, the transparent exercise of power, accountability and participatory democracy.
 - 63.3. The principles underlying the MISS and the Interim Constitution were diametrically opposed to those behind the earlier guidelines.
64. As mentioned above the focus of security classification in the apartheid era was aimed at suppressing information and knowledge to maintain the rule of an

³³ Constitution of the Republic of South Africa, No. 200 of 1993. The interim Constitution highlighted in the preamble and the postscript the “historic bridge” which it provided between a past based on “conflict, untold suffering and injustice” and a future to be founded on the recognition of human rights. The aspiration of the future is based on what is “justifiable in an open and democratic society based on freedom and equality”. It is premised on a legal culture of accountability and transparency. See R M Robinson, *Access to Information* (Volume 1 - Third Edition), LAWSA, 2013.

illegitimate regime. The MISS proclaims that its aim is to promote an open democracy.

65. The MISS defines categories of classification as restricted, confidential secret or top secret and explains what each category aims to protect. This ranges from preventing adverse consequences to individuals, institutions and the state.

- 65.1. At the '*restricted*' level this amounts to 'inconvenience' to institutions and individuals.

- 65.2. At the '*confidential*' level it is 'harm' to the functions and objectives of an institution or individual.

- 65.3. At the '*secret*' level it is 'disruption' to the functions and objectives of an institution or the state (not an individual).

- 65.4. Whereas at the '*top-secret*' level it is the 'neutralising' of the state or an institution.

66. The state and the institutions that the classifications sought to protect in the 1980s no longer exist. Attempts to retain classifications for institutional purposes must be viewed with great suspicion as it would amount to unwarranted and unlawful protection of the institutional order that propped up apartheid. Indeed, any attempt to do so would constitute an abuse of power.

67. The Respondents claim that the unrestricted release of the documents would prejudice South Africa's security and compromise the SANDF's intelligence methods, sources and operational capabilities. These are irrational and unsubstantiated claims of harm.

68. Madlanga J in *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of*

*Police v AmaBhungane Centre for Investigative Journalism NPC and Others*³⁴ stated that:

“The Constitution proclaims that “[n]ational security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life”. It does so against a historical backdrop in which the pursuit of a skewed notion of national security was weaponised and calculated to subvert the dignity of the majority of South Africans”

69. The Respondents provide no explanation as to:

69.1. why documents between 40 and 44 years old remain sensitive;

69.2. how their disclosure could realistically prejudice national security today.

70. The mind boggles as to how documentation drawn up to deal with threats to the apartheid regime of the 1980s could prejudice South Africa’s security more than 4 decades later. The claim beggars belief. It suggests that decision makers within the DOD have reason to frustrate the search for the truth into South Africa’s dark past.

71. The second reason provided by the Respondents is equally remarkable. The claim that the release of the documents will compromise the SANDF’s intelligence methods, sources and operational capabilities cannot be taken seriously.

71.1. To the extent that the documents deal with such matters, they were the methods, sources and operational capabilities employed by the military in the service of apartheid in the 1980s.

³⁴ [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC) at para 1.

- 71.2. It cannot be that democratic South Africa some 40 years later is employing the same sensitive (and likely illegal) methods that propped up an abusive and illegitimate regime.
- 71.3. The only conclusion to be drawn in these circumstances is that the DOD is improperly protecting the erstwhile SADF and its members from scrutiny.
72. These are not legitimate grounds for maintaining classifications that are more than four decades old.
73. In short, there is no rational link:
74. between protection of national security in the oppressive apartheid era of the 1980s and national security in the constitutional democracy of 2026; and
75. the security and military methods of a vicious and illegitimate regime from 40 years ago and the methods employed today in service of democracy.
76. Without this Honourable Court's intervention, the result will be the indefinite and unlawful perpetuation of secrecy of an important part of our history.
77. The continued classification is accordingly manifestly arbitrary, irrational and inconsistent with the Constitution, and should be declared as such.

SECURITY CLASSIFICATIONS ARE NOT BINDING

78. In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services 2008 (5) SA 31 (CC)* the Constitutional Court rejected the proposition that a claim of "national security" or a security classification automatically bars disclosure.
79. Instead, the Court held that courts must balance the constitutional principle of

open justice against legitimate secrecy claims tied to national security.

80. The Constitutional Court confirmed that:

80.1. a classification under MISS or related frameworks does not automatically prevent disclosure;

80.2. a security classification alone does not oust the jurisdiction of a court to decide whether material should be protected from disclosure to the media and public;

80.3. a contextual proportionality assessment is required to balance openness and secrecy.

81. The Constitutional Court held that the starting point of information and records before a court is that such 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.”³⁵

82. Once the documents are before the court, as they are in this inquest by virtue of the court order, *Independent Newspapers* sets out the powers of this Court to consider how such documents are utilised:

“It follows that where a government official objects to disclosure of a part of the record before a court on grounds of national security, the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public. This forms part of a court’s inherent power to regulate its own process that flows from section 173 of the Constitution. In my view, a court in that position should give due weight both to the right to open justice and to the obligation of the

³⁵ Para 54.

state to pursue national security within the context of all relevant factors. As in the present matter, it would not be concerned with a statute or other law of general application as the basis for restricting the disclosure of the material. In deciding whether documents ought to be disclosed or not, a court will have regard to all germane factors which include the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court. These factors are neither comprehensive nor dispositive of the enquiry.”³⁶

83. Accordingly, on the authority of *Independent Newspapers*, we submit that this Court is entitled to order the release of the documents:

- 83.1. No evidence of the specific reclassification of each document under the MISS in the post-apartheid era has been provided.
- 83.2. As stated above, the grounds for refusal are arbitrary and not rationally connected to any legitimate government purpose.
- 83.3. The bare and unsubstantiated claim of national security in relation to documents more than 40 years old under apartheid era protections aimed at propping up an illegitimate regime cannot apply today.
- 83.4. The families have a right to the truth as an element of the right to life and dignity, which is upheld through the right to access information the open justice principle.
- 83.5. The nature of inquest proceedings is inquisitorial and is aimed at finding the truth behind who was responsible for the murders of the Cradock Four. The conduct of the DOD obstructs the work of this Court and undermines the rule of law and prejudices the families and

³⁶ Para 55.

the wider community who have been waiting for justice for more than 40 years. In this regard we also refer to the supporting affidavit of Mbulelo Goniwe and the Cradock Community dated 10 June 2026.

84. Accordingly, we urge this Honourable Court to declare the continued classification of the documents to be unlawful and of no force and effect; and/ or it should order the release of the documents as per prayer 9 of the notice of motion.

REMEDY: PART B

85. We submit that this Court may make such declaration under section 172(1)(a) of the Constitution read with sections 1(a) and (c) and 2.
86. We submit that this court, exercising its inherent jurisdiction, read with section 172(1)(b) has the power to direct the Respondents to produce and deliver the documents to this Court in unredacted form in both physical and electronic formats.
87. Applicants also seek an order directing the Respondents to pay the costs of the application, such costs to include the costs of two counsel where so employed, each on scale C, alternatively on the attorney and client scale.
88. We submit that such costs are appropriate given that the Respondents, as state actors, have conducted themselves in a grossly improper manner by dragging out the production of the documents since 2021. Not only did they drag out this matter, but they wilfully defied this court order and then cynically devised a scheme to make it impossible for the parties to properly analyse the documents and use them in this inquest.
89. It is incumbent on state actors to act to a higher standard when litigating. They have not held themselves to this standard and should be appropriately penalized.

H Varney
MZP Suleman
12 June 2026