

SOUTH AFRICA / JUDGMENT

**Multichoice (Proprietary) Limited and Others v
National Prosecuting Authority and Another
(10193/2014) [2014] ZAGPPHC 37; [2014] 2 All SA
446 (GP); 2014 (1) SACR 589 (GP) (25 February 2014)
[2014] ZAGPPHC 37**

COURT

North Gauteng High Court, Pretoria

BEFORE

Mlambo JP

CASE / FILE NUMBER

10193/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 10193/2014

DATE:

25 FEBRUARY 2014

REPORTABLE

OF

INTEREST TO OTHER JUDGES

In the matter

between:

MULTICHOICE

(PROPRIETARY)

LIMITED.....First

Applicant

COMBINED

ARTISTIC PRODUCTIONS

CC.....

Second Applicant

PRIMEDIA

BROADCASTING, A DIVISION OF

PRIMEDIA (PTY)

LTD.....Third

Applicant

AND

THE NATIONAL

PROSECUTING AUTHORITY.....First
Respondent
OSCAR
LEONARD
PISTORIUS.....Second
Respondent

In re: THE
STATE
.....(CASE
NO: 13/25513)
VS
OSCAR LEONARD
PISTORIUS

AND IN RE: MEDIA
24
LIMITED.....(CASE
NO: 10378/14)
TIMES
MEDIA GROUP LIMITED
INDEPENDENT
NEWS AND MEDIA LIMITED
DIRECTOR OF
PUBLIC PROSECUTIONS
NORTH GAUTENG
E.Tv
PTY LIMITED
E.Sat PTY
LIMITED
Heard: 19
February 2014
Delivered: 25
February 2014

Summary: Application for broadcast permission of criminal trial –
Contestation of Constitutional Rights – Right of Freedom of
Expression – Right to a Fair Trial – Open Justice
Principle - Balancing exercise of contesting rights – Court’s
discretionary power in terms of Section 173 of the Constitution –
objective is to uphold Interests of Justice. Full audio
and limited
audio-visual and photography relief permitted.

JUDGMENT

MLAMBO, JP

- [1] The electronic, broadcast and print media have approached this Court to grant them permission to broadcast the entire criminal proceedings in the matter of The State vs Oscar Leonard Pistorius (Pistorius). They seek permission to do this through audio, audio-visual and photographic means. The matter brings into sharp focus the interface between the functioning of the criminal justice system on the one hand and the quest by the media and press to participate in that system on the other hand. This interface finds expression in a number of critical constitutional rights that are seemingly on a collision course with one another. These are the rights of an accused person and the prosecution to a fair trial on the one hand and the freedom of expression rights of the media as well as the open justice principle.

The

facts:

- [2] Pistorius is due to stand trial on a charge of murder arising from an incident that took place during the night of 14 February 2013, a date recognized by many as Valentine's Day. During this incident Ms Reeva Steenkamp (Steenkamp) lost her life. Steenkamp and Pistorius were involved in a romantic relationship. This trial is due to commence on 3 March 2014 in this Court. e.Tv and e.Sat (the e.Tv applicants) approached this court in August last year by way of notice of motion seeking permission to broadcast the entire criminal trial proceedings through audio-visual and/or alternatively audio means. At that stage the Director of Public Prosecutions (DPP) as well as Pistorius opposed the relief sought. Later, other applicants filed applications similar to the e.Tv application, specifically representing the print and broadcast media.
- [3] The print media applicants[1] sought the permission of this Court to install cameras in the trial court room to take still photographs of the entire proceedings. This application was similarly opposed by Pistorius. In the background there were discussions between all the applicants, the DPP and to some extent Pistorius seeking to strike a compromise position regarding the relief sought by the applicants and the stance adopted by the DPP and Pistorius. At that stage the broadcast media applicants[2] had not filed papers even though they were involved in the discussions. These applicants filed their application on the eve of a meeting convened by the Deputy Judge President of this Court aimed at bringing all the parties together with a view to case managing and streamlining the matter. The broadcast media applicants pertinently sought the permission of the Court to televise the entire criminal trial proceedings. As a result of the ongoing discussions, the opposition by the DPP fell away after a compromise position was arrived at which the applicants were agreeable to. I will revert to this part of the matter later on in this judgment. Pistorius is not amenable to

the compromise position arrived at and remains steadfastly opposed to the relief sought by the applicants. He is opposed to any form of coverage sought by the applicants. What is necessary at this early stage, however, is to dispose of an important housekeeping issue relating to the three applications before me regarding the consolidation of the print and broadcasting applications with the e.Tv application. That request is not opposed and in my view it is prudent that all the applications be consolidated and I hereby order this.

- [4] What all the applicants have set as their launching base for the relief they seek is in the first place the fact that Pistorius is a local and international icon and that Steenkamp was similarly placed. In their collective view the criminal trial proceedings, due to commence in a week's time, have captured the attention and imagination of both the South African and international communities. Based on this it is their view that is in the public interest that the heightened attention focused on this matter be adequately accommodated through the means for which they seek permission, to record and inform these communities of the

trial proceedings as exhaustively as possible.

- [5] Secondly, reference was made to the near chaotic situation that was experienced in the Magistrates Court of this city, when Pistorius applied for bail last year. It is common cause that during those proceedings the courtroom allocated for the bail proceedings was wholly inadequate and could not accommodate all the journalists and members of the public who showed up seeking to attend and cover the proceedings. It is also common cause that the media attention and coverage of the bail proceedings attracted journalists far beyond our borders. Those proceedings were in fact extensively covered by the print, broadcast and electronic media locally and internationally. The interest in the upcoming trial has remained very strong with international media houses sending scores of journalists to cover it. This background is relied on as a basis by the applicants to assert that it is in the public interest that they be granted permission to cover the trial with a view to informing all and sundry about it.

Right of freedom of expression

- [6] The applicants have forthrightly asserted their right to freedom of expression which in their view justifies the permission they seek. The applicants also rely on the open justice principle for the pending criminal trial proceedings to receive as much publication as possible. Section 16 of the Constitution[3], in particular section 16(1)(a), guarantees everyone the freedom of expression which includes the freedom of the press and other media as well as the freedom to receive and/or disseminate information and ideas. Our Constitutional Court articulated the content of this right in , *South African National Defence Union v Minister of Defence and Another*[4] in the following terms:

“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”

- [7] In a further articulation of the freedom of expression right the Constitutional Court in *Khumalo and Others v Holomisa*[5] stressed the following with regard to the role played by the media in that regard:

“The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected.”

- [8] Our Courts have also grappled with the issue of permitting the exercise and enjoyment of the freedom of expression right in court proceedings. A decision that comes to mind is *Dotcom Trading 121 PTY Limited v King NO and others*[6]. The issue in that matter was whether to allow the audio broadcasting of the proceedings of the King Commission that was established to investigate match fixing in the sport of Cricket in this country. That Court[7] expressed itself on this issue as follows:

“It is almost self-evident in my view that the prohibition of the direct radio transmission of proceedings by a radio broadcaster constitutes a limitation on what is essential to the activities of the medium of communication. I have heard no argument and I can see no reason in logic why a limitation on what constitutes the very essence and distinguishing feature of the radio broadcasters’ medium of communication does not constitute an infringement of the radio broadcasters’ freedom which is enshrined in section 16(1)(a). It is not without reason, so it appears to me, that section 16(1)(a) of the Constitution does not limit its guarantee to the freedom of the press, but specifically extends this freedom to other media of communication and expression as well. Each of these media of communication and expression has its own distinguishing features and each of them can be limited in a different way. The video camera most probably provides the ultimate means of communication. But radio also has its advantages over the print media. Not only the words spoken, but the emphasis, the tone of voice, the hesitations, etcetera can be recorded and communicated. To prevent the radio broadcaster from recording the evidence is to deprive him of that advantage over the print media”.

- [9] In *SA Broadcasting Corporation Ltd v Thatcher and Others*[8] the court was directly confronted with a request to broadcast criminal court proceedings. The court, after conducting an

authoritative analysis of the legal landscape regarding this issue, locally and internationally, granted limited coverage stating that it had to “exercise its discretion to issue a just and equitable order while taking cognisance of its inherent power to regulate its own proceedings”.

This involved balancing the right to privacy against the right of freedom of expression which, in the case of the media, translates into freedom of the press.

[10] In addition to the Dotcom and Thatcher decisions, other courts have also grappled with the issue[9]. The two Courts in this country whose decisions bind me have also spoken on this subject and I have derived valuable guidance from the decisions concerned. One such decision is from the Supreme Court of Appeal in *South African Broadcasting Corporation Limited v Downer SC NO and others*[10]. In that matter the Supreme Court of Appeal considered and refused an application by the SABC to televise and sound record the appeal proceedings it was due to hear. This decision was taken on appeal to the Constitutional Court whose judgment is reported as *South African Broadcasting Corporation Ltd v The National Director of Public Prosecutions*. [11] In its majority judgment our highest court whilst, confirming the SCA decision, explored the appropriate approaches to be followed by courts when considering applications of this nature. I will revert to these decisions shortly.

[11] It must be stated that when considering the exercise of the media's freedom of expression right in the courtroom one has to confront the elephant in the room, that is the right to a fair trial which is invariably asserted against the former right as we see in the Thatcher and Downer decisions referred to earlier. It is that situation that confronts us in this matter. Whilst this may not have been so pronounced in the Dotcom matter, this clash of rights has featured prominently in the decisions of the SCA and the Constitutional Court and how the competing rights should be balanced.

The right to a fair trial

[12] Pistorius contends that the live broadcasting of his criminal trial, through audio (radio), audio-visual (television) and still

photographic means, will infringe his right to a fair trial. His view is that the mere knowledge of the presence of audio visual equipment, especially cameras, will inhibit him as an individual as well as his witnesses when they give evidence. He has also asserted that his Counsel may also be inhibited in the questioning of witnesses and the presentation of his case. He further is of the view that covering his trial as is sought by the applicants will enable witnesses still to testify to fabricate and adapt their evidence based on their knowledge of what other witnesses have testified. In his view the requested broadcasting of his trial will have a direct bearing on the fairness of the trial and contends that should the relief be granted he will most certainly not enjoy a fair trial.

[13] Our Constitutional Court has been vocal regarding the protection of the right to a fair trial. Indeed any accused person who appears in a court of law facing any charge has the constitutionally guaranteed right to a fair trial, which includes the foundational

values of dignity, freedom and equality which are central to a fair trial. In this regard the Constitutional Court in *S v Dzukuda and Others*; *S v Tshilo*[12] confirmed that the right to a fair trial is “...a comprehensive right and embraces a concept of substantive fairness ...” and that “at the heart of the right to a fair criminal trial and what infuses its purpose is for justice to be done and also to be seen to be done.”

Interest of Justice

- [14] There is therefore a clear contestation of rights in this matter. In resolving that contestation section 173 of the Constitution enjoins me in whatever I do to ensure that the interests of justice are upheld. That section provides that “The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice”.
- [15] It is inevitable therefore that as any court goes about in exercising its power in terms of section 173, it must engage in a balancing exercise especially, as we have here, it deals with a number of competing rights, to ensure that the interests of justice are safeguarded. In the *South African Broadcasting Corporation Limited vs Downer* SC[13] matter the Supreme Court of Appeal articulated the necessary balancing exercise in the following terms: “The very issue here is whether that right should prevail at the expense of the respondents’ competing constitutional rights. To obtain the answer requires us to undertake a balancing exercise in which the rival rights are weighed up against each other after having regard, in the process, to the particular facts of the case. Implementation of the required balancing exercise is facilitated by the existence of section 173 of the Constitution which declares this Courts inherent power to regulate its own process.” And further “the interest of justice will naturally encompass the requirements of section 34 and 35(3) but in addition the court is empowered to decide how best the parties competing rights can be accommodated.”[14]
- [16] The Constitutional Court has also given guidance to courts in general on how to go about when considering applications of this nature and upon the exercise of their powers under section 173. In *South African Broadcasting Corporation v The National Director of Public Prosecutions*[15] the Constitutional Court confirmed that section 173 affirms the impartiality and independence of the courts especially in the regard

that the section recognizes the inherent power of the courts to regulate and protect their own processes. The court further

confirmed that in the exercise of the inherent power in section 173 the courts must ensure that primarily their proceedings are fair. The overarching objective of any court in the exercise of its power in terms of section 173 is that the court must take into account the interests of justice. Of particular importance is what the court said in paragraph 37 that:

“When courts exercise the power to regulate their own process it is inevitable that that power will affect rights entrenched in chapter 2 of the Constitution. A Court must regulate the way proceedings are conducted and this will inevitably affect both the right to a fair trial (section 35 of the Constitution) and the right to have disputes resolved by courts (section 34). Courts are bound by the provisions of the Bill of Rights and therefore bear a duty to respect those rights. In exercising the power, therefore, they must take care to ensure that those rights are not unjustifiably attenuated”.

[17] The phrase interests of justice does not only relate to an accused person’s right to a fair trial but also to the prosecutions

right to the same right as well as that other interested persons rights in the same proceedings should also be promoted. In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*, Kriegler J described the phrase as ‘a useful term denoting in broad and evocative language a value judgment of what would be fair and just to all concerned’.[16] As part of this court’s effort to regulate its processes a practice directive was also issued some time ago to regulate

matters of this nature. The balancing exercise that courts must undertake is related to how and to what extent does the court allow

the enjoyment of each right asserted.

Balancing exercise

[18] The right to a fair trial asserted by Pistorius suggests that the freedom of expression rights to which the applicants lay claim should be attenuated and that the open justice principle should necessarily suffer the same fate. It is inevitable that in the exercise of the balancing act as well as the power found in section 173, the rights at issue in this matter will inevitably be limited in one way or the other. The approach to ensuring that each right finds expression and the extent thereof was in my view clearly articulated by the Supreme Court of Appeal in the matter of *Midi Television Pty Limited v Director of Public Prosecutions (Western Cape)*[17] in par 9 to the following effect:

“Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily

curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36”.

[19] It is this test that I have employed in considering the applications and the rights asserted by the protagonists before me. My point of departure is to ensure that each of the rights asserted find proper expression and enjoyment without being unduly limited. In oral argument before me I was directed to the different forms of coverage sought i.e. audio-visual, audio and still photography. What is clear however when one considers the opposing representations filed on behalf of Pistorius is that whilst the focal point of his opposition is directed at the live audio-visual coverage of the criminal proceedings, his opposition to the audio and still

photography coverage of the trial requires further attention. In keeping with the approach suggested by the Supreme Court of Appeal, in *Downer*, it is not open for me to look at the value of each right and disqualify it in favour of another. My task is to look at each

right at stake and permit its enjoyment to achieve the objective for which it is asserted. In this regard the freedom of expression right, which itself is not immune from limitation, goes a long way into complementing the open justice principle that is relevant in the context of this matter and also requires articulation in my decision. When considering the freedom of expression right in so far as it relates to the audio-visual request, in particular, the cautionary injunction that was mentioned by the Constitutional Court in *South African Broadcasting Corporation Limited vs The National Director of Public Prosecutions*[18] must not be lost sight of. I have in this regard what that court said in par 68 to the effect that:

“Before turning to the question of the order, we consider it helpful to set out some considerations which in our view need to be taken into account in the future when the question of televising court proceedings is raised. The time has come for courts to embrace the principle of open justice and all it implies. However, in our view, it should be borne in mind that the electronic media create some special difficulties for the principle of open justice. Broadcasting, whether by television or radio, has the potential to distort the character of the proceedings. This can happen in two ways: first, by the intense impact that television, in particular, has on the viewer in comparison to the print media; and second, the potential for the editing of court proceedings to convey an inaccurate reflection of what actually happened. This is particularly dangerous given that visual and audio recordings can be edited in a manner that does not disclose the fact of editing. This distorting effect needs to be guarded against. It arises not so much from the presence of cameras and microphones interfering with the court proceedings themselves. But more dangerously, it may arise from the manner in which coverage can be manipulated, often unwittingly, to produce communications which may undermine rather than support public education on the workings of the court and may also undermine the fairness of the trial. Such distortions are much more likely to arise from edited highlights packages than from full live broadcasts.”

[20] It is also instructive not to forget that the Constitutional Court itself mentioned that in exercising the power in section 173; especially to uphold the interests of justice; both accuracy and balance are necessary to ensure this. Furthermore it is necessary to keep in mind that in the open democratic society envisaged by our Constitution and “in which the public have a right of access to the workings of the judicial system”, the issue is not whether

the electronic, broadcast or print media - should be allowed to cover court proceedings, “but how guarantees can be put in place to ensure that the public is indeed well informed about how the courts function”[19] when dealing with proceedings before them.

- [21] I am not persuaded that the objection by Pistorius to the coverage of his pending criminal trial should be jettisoned to the extent he suggests. I have found merit in the argument on behalf of the applicants that acceding to the objection by Pistorius fully will perpetuate the situation that only a small segment of the community is able to be kept informed about what happens in court rooms because of this minority’s access to tools such as Twitter. Acceding to that argument will also perpetuate the reality that the community at large remains dependent for news on what happens in the court room from the summarised versions of the journalists and reporters who follow these proceedings. These summarised versions or accounts have, in my view, been correctly categorized as second hand, liable to be inaccurate as they also depend on the understanding and views of the reporter or journalist covering the proceedings

The principle of open justice

- [22] My views to the objections raised by Pistorius find support in the open justice principle. Acceding to the objection in their entirety will surely jettison the noble objectives of the principle of open justice when one takes cognizance of our development in the democratic path. At this day and age I cannot countenance a stance that seeks to entrench the workings of the justice system away from the public domain. Court proceedings are in fact public and this objective must be recognized.
- [23] Our Constitution is underpinned by a number of values and for purposes of this case I refer to openness and accountability.

In this regard it is also important to take cognizance of the fact that sections 34 and 35(3)C make it very clear that even criminal

proceedings in this country are to be public. The basis for this is that courts of law exercise public power over citizens and for this it is important that proceedings be open as this encourages public understanding as well as accountability. Perhaps the clearest endorsement of the open justice principle is by the Constitutional Court in *S v Mamabolo* [20] where it was stated:

“Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticize, applaud or castigate the conduct of their courts. And, ultimately, such free and frank debate about judicial proceedings serves more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important attributes

prescribed for the judiciary by the Constitution”.

[24] It is also worth our while to take cognizance of what the House of Lords has said in this regard in the matter of McCartan Turkington Breen (A Firm) v Times News Papers Limited[21] to the effect that

“In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society The majority cannot participate in the public life of their society ... if they are not alerted to and informed about matters which call or may call for consideration in action. It is very largely through the media ... that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, profession and inquiring”.

[25] In balancing the competing rights at stake it is my view that the objection by Pistorius regarding the audio-visual recording as well as the still photography of him and his witnesses should not be taken lightly. It was argued on his behalf forthrightly that the inhibitory effect of audio-visual recording equipment, in particular the knowledge and awareness thereof by himself and his witnesses, will be great when they give their evidence. This potential was recognized by our highest court in the SABC vs NDPP[22]. For this reason I am of the view that the audio-visual or televising and still photography of Pistorius and his witnesses when they testify be disallowed as this has the potential to deprive him of a fair trial on the grounds spelt out in argument on his behalf. I am persuaded that there is merit in his fears and that of his witnesses that they may be disabled somewhat in giving evidence.

[26] On the other hand audio coverage in my view does not carry the same inhibitory or intrusive potential as the audio-visual form of coverage. In my view whilst there may be no visual image of Pistorius and his witnesses as they testify they should however be heard on radio. I am fortified in my view by what the Constitutional Court said in SABC v NDPP[23] that : “It might well be considered advisable to start with coverage on a trial basis” and in footnote 60 the following is relevant : “A further factor that might be considered is whether or not to start purely with radio coverage. Although print, radio and television are all instruments of the media, each presents its own possibilities and each carries its own dangers for inappropriate use. Radio is, accordingly, less amenable to being used in such a way as to risk misrepresentation and misunderstanding than is television.”

[27] I have further considered the extensive interest that the pending criminal trial has evoked in the local and international communities as well as in media circles. My view is that it is in the public interest that, within allowable limits, the goings on during the trial be covered as I have come to decide to ensure that a greater number of persons in the community who have an interest in the matter but who are unable to attend these proceedings due to geographical constraints to name just one, are able to follow the proceedings wherever they may be. Moreover, in a country like ours where democracy is still somewhat young and the perceptions that continue to persist in the larger section of South African society, particularly those who are poor and who have found it difficult to access the justice system,

that they should have a first-hand account of the proceedings involving a local and international icon. I have taken judicial notice of the fact that part of the perception that I allude to is the fact that the justice system is still perceived as treating the rich and famous with kid gloves whilst being harsh on the poor and vulnerable. Enabling a larger South African society to follow first-hand the criminal proceedings which involve a celebrity, so to speak, will go a long way into dispelling these negative and unfounded perceptions about the justice system, and will inform and educate society regarding the conduct of criminal proceedings.

[28] I must hasten to mention that the decision I have come to should be embraced with the objective I have spelt out in this judgment.

I mention this as it has come to my attention that there are media houses that intend to establish 24 hour channels dedicated to the trial only and that panels of legal experts and retired judges may be assembled to discuss and analyse the proceedings as they unfold. Because of these intentions, it behoves me to reiterate that there is only one court that will have the duty to analyse and pass judgment in this matter. The so-called trial by media inclinations cannot be in the interest of justice as required in this matter and have the potential to seriously undermine the court proceedings that will soon start as well as the administration of justice in general.

[29] Despite the order that I have arrived at it must be understood that the presiding judge over the criminal trial retains the ultimate discretion during the trial regarding aspects of the relief granted in this matter which may require her attention as the trial unfolds.

[30] I have also considered the compromise position mentioned earlier, reached by all applicants with the DPP. In the circumstances the following order is granted:

1. The applicants, MultiChoice and Primedia, or their authorized representatives, are permitted to set up equipment in accordance with the specifications below to obtain a video and audio recording and/or transmission of the permitted portions (as indicated in 3 and 4 below) of the criminal trial of Oscar Leonard Pistorius under case number 13/25513 (“the trial”).

Technical specifications

2. The equipment shall comply with the following specifications:

2.1 three cameras, as depicted in annexure A (“the cameras”), shall be installed in the courtroom where the trial is to take place, at least 72 hours before the trial commences;

2.2 the cameras shall be installed in locations in the courtroom which are as unobtrusive as possible, and so that the proceedings are not interfered with. The locations of the cameras shall be substantially in the areas of the courtroom indicated in annexure B;

2.3 the cameras shall be remotely controlled from a control room and no camera personnel are permitted to be present in the courtroom to operate the cameras during the trial;

- 2.4 the cameras must be pre-set to ensure that no extreme close-ups of any witness, legal representatives, the presiding judge, or any person in attendance at the trial, takes place;
- 2.5 the equipment is not permitted to record in any manner any confidential communication between legal representatives or between clients and their legal representatives, or any bench discussions (between the judge and any lay assessors that may be appointed). The presiding judge shall specifically direct when recording should start and when should they stop;
- 2.6 the equipment shall be deactivated so that no recording whatsoever can take place while the court is not in session, including any breaks (such as lunch and tea breaks), and during the time before the court is in session and after the judge has adjourned the trial at the end of each day;
- 2.7 the cameras shall not be accompanied by any “movie lights”, flash attachments or artificial lighting devices and no visible or audible light or signal is permitted;
- 2.8 MultiChoice and Primedia may install their own audio-recording system provided that this is unobtrusive and does not interfere with the proceedings;
- 2.9 The Judge President and/or the Deputy Judge President and/or the presiding judge and/or the Court Manager may visit the control room to check how the recorded images would appear on the Television screens when broadcast and to give directions regarding the images to be broadcast to avoid “extreme close up images”.

The portions of the trial that may be recorded and broadcast

3. MultiChoice and Primedia are permitted to broadcast the audio recording of the entire trial in live transmissions, delayed broadcasts and/or extracts of the proceedings.
4. MultiChoice and Primedia are permitted to broadcast the audio-visual recording of the following portions of the trial only, in live transmissions, delayed broadcasts and/or extracts from the proceedings:
 - 4.1 Opening argument of the state and accused;
 - 4.2 Any interlocutory applications during the trial;
 - 4.3 The evidence of all experts called to give evidence for the state, excluding evidence of the accused and his witnesses;
 - 4.4 The evidence of any police officer or former police officer in relation to the crime scene;
 - 4.5 The evidence of all other witnesses for the state unless such a witness does not consent to such recording and broadcasting and the presiding judge rules that no such recording and broadcasting can take place;
 - 4.6 Closing argument of the state and the accused;
 - 4.7 Delivery of the judgment on the merits; and

4.8 Delivery of the judgment on sentence, if applicable.

5. The Media 24 applicants or their authorized representatives are granted permission to set up equipment to obtain still photography of the trial, subject to the following conditions:

5.1 Two still photography cameras will be fixed at locations within the courtroom. These will be used for purposes of taking and publishing still photographs of the court proceedings during the trial, subject to the provisions set out below;

5.2 The cameras shall be installed in locations in the courtroom which are as unobtrusive as possible, and so that the proceedings are not interfered with;

5.3 Each of the cameras shall be controlled by one of the applicants' representatives, who will at all times remain behind the cameras while court is in process;

5.4 The aforesaid cameras may not be moved while the Court is in session, and no changes of lenses or film shall be permitted while the Court is in session.

5.5 No extreme close-up photographs of any witness, legal representative, the presiding judge, or any person in attendance at the trial shall be taken;

5.6 Flash photographs shall not be permitted;

5.7 No artificial lighting devices and/or visible or audible light or signal shall be permitted;

5.8 No cabling for the cameras on the floor of the court shall be permitted;

5.9 No identifying names, marks, logos or symbols may be used on any equipment or clothing worn by the representatives of the applicants;

5.10 The Media 24 applicants are permitted to take still photographs during the entire trial, excluding the accused and his witnesses when they testify, provided that witnesses other than expert witnesses for the state or police officers or former police officers who testify at the trial;

5.11 may object to being photographed whilst giving evidence and if the presiding Judge rules that such witness may not be photographed whilst giving evidence, the applicants shall refrain from doing so; alternatively

5.12 may subject his or her consent to reasonable conditions, including that his or her face be obscured in any photograph published or that only wide-angle photographs of him or her be allowed, meaning photographs that include not only the witness but as much of the physical surrounds of the courtroom as is technically possible.

6. Any witness whose testimony is to be broadcast in audio-visual form may subject his or her consent to such broadcast to reasonable conditions (which shall be communicated to MultiChoice and Primedia or their representatives by the state including:

6.1 The broadcasting of the evidence from behind with the face of the witness obscured from public view;

6.2 The broadcasting of the evidence from the front but with the face of the witness obscured from public view;

6.3 The broadcasting of the evidence only by way of a “wide shot”, i.e the central camera placed at the back of the courtroom would depict the entire courtroom with the judge at the center of the image and the witness only visible in the background;

6.4 The Presiding Judge may on good cause withdraw the permission and/or change the conditions set out above.

7. Objections by witnesses to the audio-visual recording and the still photographing of their evidence shall be in writing and will be served on the Prosecution and the accused’s attorney and be delivered to the Office of the Deputy Judge President at least 24 hours before the testimony of the said witness to avoid delaying the trial. The Deputy Judge President shall first deal with the said objections in chambers and if same cannot be resolved, the presiding judge shall make a final ruling on the issues after hearing the parties.
8. Notwithstanding the above, the presiding judge shall retain a discretion to direct that, in the event that it becomes apparent that the presence of the cameras or the recording and/or transmitting and/or broadcasting is impeding a particular witness’s right to privacy, dignity and/or the accused’s right to a fair trial, MultiChoice and Primedia and the print Media 24 applicants will be directed to cease recording and/or transmitting and/or broadcasting and/or photographing of the testimony.
9. The MultiChoice and Primedia and the Media 24 Applicants are directed to make the feed from the authorized broadcasts and still photograph referred to above available free of charge to the e.Tv applicants and any other broadcaster and/or media organization in “clean” form, that is free of any logos.
10. There is no order as to costs.

D MLAMBO

JUDGE PRESIDENT, GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

Representation for the Multichoice and Primedia applicants:

Counsel..... Adv F Snyckers

Instructed by Attorneys:.....Webber Wentzel Attorneys

(Ref: Dario Milo/2461431)

Representation for the Media 24 applicants:

Counsel.....Adv N Ferreira

Adv N Muvangwa

Instructed by Attorneys:.....Willem de Klerk Attorneys

(Ref Willem de Klerk/M24/A/032)

Representation for the e.Tv applicants:

Counsel..... Adv S Budlender

Instructed by Attorneys:Rosin Wright Rosengarten Attorneys

(Ref: D Rosengarten)

Representation for 1st respondent

State Attorney, Pretoria

(Ref: 7221/2013/z64/jb)

Representation for 2nd respondent

Counsel.....Adv B Roux SC

Instructed by.....Ramsay Webber Attorneys

(Ref: Brian Webber/gm/P165399)

[1] Media 24 Limited, Times Media Group Limited, Independent News and Media SA Limited.

[2] Multichoice (Proprietary) Limited, Combined Artistic Productions CC and Primedia Broadcasting, a Division of Primedia (Pty) Ltd.

[3] No 108 of 1996.

[4]

[1999] ZACC 7; 1999

(4) SA 469 (CC) at par 7.

[5]

[2002] ZACC 12; 2002

(5) SA 401 (CC) at par 22.

[6] 2000(4) SA 973 (C).

[7] Brand J (now JA) with Hlophe JP and Traverso DJP at par 43.

[8] [2005] 4 ALL SA 353 (C) at par 31.

[9] Midi Television (Pty) LTD t/a E-TV v Downer and Others (D+CLD15927/04) and (D+CLD 17272/04).

[10] [2007] 1 ALL SA 384 SCA.

[11] [2007(1) SA 534 (CC).

[12] 2000(4) SA 1078 (CC) at par 9 and 11 page 1091 – 1092.

[13] supra

[14] At para s 15 - 16.

[15] Supra

[16]

[1999] ZACC 8; 1999

(7) BCLR 771 (CC) at par 46.

[17]

[2007] ZASCA 56; 2007

(5) SA 540 SCA.

[18] Supra fn 11 at par 68.

[19] Supra at par 70.

[20]

[2001] ZACC 17; 2001

(3) SA 409 (CC) at par 29.

[21] [2000] 2 ALL ER 913 S922.

[22] Supra fn 11.

[23] Supra fn 11 at par 72.

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