SACHS J ABRIDGED JUDGMENT (CONCURRING FOR DIFFERENT REASONS)

Doctors for Life International v Speaker of the National Assembly and Others

135. The time has come for the judiciary, particularly in appellate courts, to look the question of television and radio coverage squarely in the eye. In this respect I fully endorse the spirit and reasoning of the judgment by Moseneke DCJ. Our constitutional order obliges appellate courts to facilitate the widest possible communication with the public. This is not in order to promote judicial vanity or to improve the ratings of the public broadcaster. It is to account to

the general public for the functioning of the courts and to do so in the way that best enables the people at large to be well-informed and to make up their own minds as to how well or badly the judiciary goes about its work.

136. In reviewing the judgment of the Supreme Court of Appeal, two things stand out for me. The first relates to what I would term the last straw argument. The second concerns what I will refer to as how best to cross the Rubicon.

137. A careful reading suggests that at the heart of the Supreme Court of Appeal's judgment lies the conviction that being compelled to function in the glare of live television coverage would be the last straw on the backs of the already overburdened participants. Given the intense public interest and wide ramifications of the case, this additional pressure might not break anyone's back but, according to the judgment threatens to create sufficient skeletal discomfort as to inhibit the achievement of a fair trial.

138. While I accept that any major innovation in the practice of courts can have an unnerving effect on participants, I cannot see that the fact that proceedings are widely communicated to the public can ever in itself be seen as a threat to their fairness. In this respect I would say that in principle, and as a general rule, appellate courts have no discretion, either broad or narrow, as to whether they should permit live coverage of their proceedings. As I understand the Constitution, they are obliged to provide the greatest possible access of the public to their proceedings. In particular cases, there might be good reasons for limiting such access, and courts from time to time will have to apply their minds as to whether such exceptional circumstances exist. But broadly speaking, their discretion is limited if they are being compliant with the open and participatory nature of our democracy.

139. As Moseneke DCJ's judgment establishes, the ineluctable logic of living in an open and democratic society is that where major institutions of state are engaged in the public aspects of law-making and law-enforcement, there should be the greatest degree of public involvement that can reasonably be achieved. Such facilitation should not be looked upon as an inconvenient intrusion by the public, or as a favour to be granted or withheld from the broadcasters. It involves fulfilment of an obligation. The standards which this Court set for the legislature in the recent case of *Doctors For Life*,[2] should apply with no less exigency to the functioning of the courts themselves. The powers of the Court do not originate from any discretionary power, but are derived from the character and foundational values of our Constitution. Exposure to the public gaze is particularly important in a country where historically all the major instruments of public power in general functioned in a way that was oppressive, distant, unresponsive and frequently mysterious. The combination of the achievement of democracy and the development of the electronic media, opens up new possibilities. For the first time, the workings of government can reach in an immediate and effective way to all parts of our society in all parts of the country.

140. The fact that the proceedings are already open in the sense that family and friends of the litigants, as well as interested members of the public and the press, can crowd into the court chamber, cannot in itself serve as a reason for limiting further access. Press reports are important, but reach only a limited section of the public. By their nature they will be compressed. There is no logical reason why coverage should

not be extended beyond the portals of the court room, or why such broader coverage should be restricted to the print media only. This is not a matter for case-by-case analysis to be conducted by the judges of how comfortable or otherwise they might feel in the presence of cameras and microphones. The starting-off point of the analysis must be that the public has a right to know what is going on in the courts, and that the courts have a duty to encourage public understanding of their processes. The base-line, accordingly, is determined by the fact that we live in a participatory democracy, and not by the principle of business as usual.

141. This is not to say that in a participatory democracy there cannot be limits on the right of the public to see and hear what is going on in the courts. It is well recognised, for example, that the interests of justice may require that the identity of children be protected, and that the names of complainants in cases involving sexual offences be withheld. In many countries cases involving matters of extreme importance to national security are held *in camera* (though this has frequently been criticized for leading to abuse). At a more general level, it has been widely held that televising trials where oral testimony is involved, risks imposing special pressures on the witnesses and thereby distorting the evidence and subverting the fairness of the trial.

142. These are circumstances where context and proportionality should be decisive. They do not challenge the principle that the public work of courts should be as accessible as possible. They simply provide narrowly-tailored exceptions of recognised provenance, which ensure that other important constitutional values are maintained.

143. What is at stake in each case, therefore, is not the comfort of the judicial officers - some of whom might in fact welcome moments in the limelight - but the fairness of the proceedings. Nor is it automatically related to whether the case involves a trial or an appeal. Thus in two trials in which Mr Jacob Zuma has been involved, one directly as the accused, and the other indirectly through the nature of the charges, the trial judges welcomed cameras into the court room at the stage of handing down judgments, and both judgments were widely communicated to the public at large. The educational value of such communication cannot be over-estimated. Viewers and listeners were able to see and hear the analyses of the

evidence and the processes of reasoning which led to the ultimate decisions. This was accountability by the judiciary carried to its highest conclusion. The public gained far more than they could have done through reading snippets in the press. And they certainly benefited in a way that they could not have done if the judgments had only been published in full some months later in the law reports.

144. In the present matter, where senior judges and experienced counsel are involved, it is difficult to see how fair trial rights are implicated at all. There is only one possible way in which the fair trial dimension could be engaged, namely, in respect of the participants being so subjectively affected as to be put off their stride and not able to do their work to the best of their ability. The unfamiliarity of all to cameras and microphones functioning in the court is indeed a factor that cannot be ignored, and should not be treated in a cavalier fashion or with attitudes of superiority. Yet to my mind this raises a question of process rather than of substance.

145. Appeal Courts in particularly sensitive matters will inevitably have the character of heated kitchens. But it is part of the judicial function to bring a cool mind to bear however great the temperature.

146. Fidelity to the Constitution requires us do more than we have done in the past. We have to break out of the vicious circle in terms of which cameras are excluded from courts because judges and counsel are unfamiliar with them, and judges and counsel are unfamiliar with cameras because they are excluded.

147. This is where the Rubicon factor comes in. We need to transform the whole manner in which the judiciary has become used to considering its responsibilities in this area. In our open and democratic society we have to cross an imaginary river which cuts us off from the full reach of what we can and must do so as best to fulfil our responsibilities. To extend the Rubicon analogy, tradition can be a treacherous stream. Some of its currents can help keep legal thought flowing so as to promote time-honoured notions of human dignity, equality and freedom. Others can tug us away from reaching and exploring the further shores of accountability, openness and responsiveness. In general terms the story of justice needs to be played out in as public an arena as possible. We need to shift from expectations of participating in a relatively cosy forensic drama, in which the public plays bit parts by sitting in the

back of the court. We have to embrace the full potential for public access by engaging the nation as a whole.

148. My concern, then, is not about whether cameras should be allowed to capture the proceedings in appeal courts. As a general rule I would say that appeal courts are under a constitutional obligation to facilitate public understanding of how they work, and this ordinarily would require granting of full access to electronic media. There might be exceptional cases where special factors regarding privacy or national interest might justify limiting exposure, but these would apply to the press as well as to the electronic media. There is one systemic problem however that has specific relevance to television and radio. This relates to the special dangers of distortion brought about by selective presentation.

149. As the majority judgment indicates, participatory democracy is not enhanced by unbalanced and selective reporting that provides entertainment for the public at the cost of dumbing-down the issues, and, possibly, misrepresenting them. These are serious concerns that need to be dealt with in a serious manner. It is true that serious problems may relate to press coverage, where inevitably snippets appear and, as many a judge will ruefully claim, under misleading headlines. Yet the potential damage from the electronic media is far greater. In the case of the press, by-lines are given and the public know that they are getting mediated reports. The very factor which gives television, and to a lesser extent, radio, its force and credibility, namely that you are seeing and hearing actuality, constitutes its danger. The public feel that they are getting ‘the real thing’. Extracting highlights and giving balanced reports requires great expertise and sensibility. Potential broadcasters must establish that they have developed the requisite capacity, coupled with objective and independent forms of control, before they can expect to have free use of their cameras and microphones.

150. To sum up: the courts have their responsibilities, and the SABC and other broadcasters have theirs. The courts have the double function of zealously protecting rights to a fair trial and actively encouraging public understanding of the judicial function. In general terms and particularly at the appeal court level, as the majority judgment indicates, these two court responsibilities should not be in tension with each other. Any possible tension should be reduced, if not eliminated, by means of discussion between the broadcasters and the judiciary. In particular, guarantees must

be established so as to ensure that broadcasting of proceedings is accurate, intelligent, appropriately focused and, above all, balanced. On the one hand, to have a camera in court but to muzzle it, makes no sense at all. On the other, to allow electronic broadcasting to be controlled by ordinary processes of news-oriented selection and editing, would be imprudent in the extreme, and do a disservice to the promotion of public understanding of how the courts actually work.

151. The reconciliation of all the different interests involved cannot be achieved by privileging one interest over another. Nor can it be accomplished by leaving each case to be determined in an ad hoc manner according to the robustness or sensitivity of the judges concerned. Nor should it be influenced by the extent of the clamour of broadcasters, who understandably will be interested in improving their ratings. Clear guidelines need to be established in advance so as to provide a principled and functionally operational basis for the granting or refusal of access to the electronic media. They should also deal with whether access should be made subject to any particular conditions. As I see it, such guidelines could well give to courts a certain margin of appreciation in terms of the application of these guidelines on a case-by-case basis. Pre-established and principled guidelines, subject to periodic review, would assist broadcasters in their planning. They would also substantially relieve the courts of the duty to make invidious judgments concerning their own capacities and responsibilities in particular cases. In addition they would save courts from having to hear appeals from these decisions, and from having to evaluate the assessments of their colleagues faced with the situation in their own court rooms.

152. In the result, I would agree with the majority that the appeal should not be allowed. But I do so on the limited grounds that the SABC erred in not raising the question of electronic broadcasts in a timeous manner so as to ensure that proper safeguards were put in place. Complete coverage would have met many of my objections and, if it were possible, I would wish to see the question of full radio coverage being explored even at this late stage. But I do feel it is not in the interests of justice for matters such as these to be resolved under a sword of Damocles. All the questions concerning accurate and balanced broadcasting should be worked out through an appropriate process of negotiation. This not only establishes clear points of

reference. It gives sufficient time for all those involved to accustom themselves to the major changes involved.

153. If this present case does no more than to act as a spur to the interested parties to engage in appropriate discussions with one another, and to encourage the applicant to negotiate over modalities rather than litigate over abstractions, I believe that it will have served the interests of justice very well.