CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 58/06

SOUTH AFRICAN BROADCASTING CORPORATION LIMITED	Applicant
versus	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
SHAIK, SCHABIR	Second Respondent
NKOBI HOLDINGS (PTY) LIMITED	Third Respondent
NKOBI INVESTMENTS (PTY) LIMITED	Fourth Respondent
KOBIFIN (PTY) LIMITED	Fifth Respondent
KOBITECH (PTY) LIMITED	Sixth Respondent
PROCONSULT (PTY) LIMITED	Seventh Respondent
PRO CON AFRICA (PTY) LIMITED	Eighth Respondent
KOBITECH TRANSPORT SYSTEMS (PTY) LIMITED	Ninth Respondent
CLEGTON (PTY) LIMITED	Tenth Respondent
FLORYN INVESTMENTS (PTY) LIMITED	Eleventh Respondent
CHARTLEY INVESTMENTS (PTY) LIMITED	Twelfth Respondent

Heard on : 13 September 2006

Decided on : 21 September 2006

JUDGMENT

LANGA CJ, KONDILE AJ, MADALA J, NKABINDE J, O'REGAN J, VAN HEERDEN AJ and YACOOB J:*

Introduction

[1] Should this Court intervene to require the Supreme Court of Appeal to permit the national broadcasting corporation to broadcast on radio and television proceedings before the Supreme Court of Appeal? This is the question raised in the present application which has been brought before this Court on the basis of urgency. The judgment has therefore been prepared in haste to ensure that the proceedings in the Supreme Court of Appeal are not delayed.

[2] The applicant, the South African Broadcasting Corporation Limited (the SABC), applies for leave to appeal against a judgment of the Supreme Court of Appeal refusing it permission to broadcast on radio and television appeal proceedings brought by Mr Schabir Shaik which are to be heard soon. Mr Shaik and the National Director of Public Prosecutions (NDPP) oppose the application for leave to appeal in this Court, as they did before the Supreme Court of Appeal.

Background

[3] The case arises from the conviction of the second respondent, Mr Shaik, by the Durban High Court (the High Court) in 2005 on several counts relating to corruption. The court found that Mr Shaik was guilty of a contravention of section 1(1)(a) of the Corruption Act, 94 of 1992,[1] in relation to payments he had made to the former

* Justice Van der Westhuizen was unable to participate in the Court's judgment.

Deputy President of the Republic of South Africa, Mr Jacob Zuma, and that Mr Shaik had bribed Mr Zuma to protect a French armaments company from exposure by official investigation. Mr Shaik was convicted and sentenced to 15 years' imprisonment. The third to twelfth respondents, all companies which Mr Shaik controls or in which he has a major interest, were also convicted and were required to pay fines.

[4] Mr Shaik and the third to twelfth respondents sought leave to appeal against the judgment of the High Court to the Supreme Court of Appeal. Mr Shaik also sought leave to appeal against an order of civil forfeiture granted by the High Court in terms of the Prevention of Organised Crime Act, 121 of 1998. The appeals are currently scheduled to be heard by the Supreme Court of Appeal on 25 – 29 September 2006.

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[1] Section 1(1) of that Act provides as follows –

> "(1) Any person
> (a) who corruptly gives or offers or agrees to give any benefit of whatever nature which is not legally due, to any person upon whom –
> (i) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law or to anyone else, with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty to commit or omit to do any act in relation to such power or duty; or
> (ii) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law and who committed or omitted to do any act constituting any excess of such power or any neglect of such duty, with the intention to reward the person upon whom such power has been conferred or who has been charged with such duty because he so acted; or
> (b) upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any post or any relationship of agency or any law and who corruptly receives or obtains or agrees to receive or attempts to obtain any benefit of whatever nature which is not legally due, from any person, either for himself, or for anyone else, with the intention –
> (i) that he should commit or omit to do any act in relation to such power or duty, whether the giver or offeror of the benefit has the intention to influence the person upon whom such power has been conferred or who has been charged with such duty, so to act or not; or
> (ii) to be rewarded for having committed or omitted to do any act constituting any excess of such power or any neglect of such duty, whether the giver or offeror of the benefit has the intention to reward the person upon whom such power has been conferred or who has been charged with such duty, so to act or not,
> shall be guilty of an offence."

[5] On 3 August 2006, when the proceedings were still set to commence on 21 August, the applicant informally sought permission, through the Registrar of the Supreme Court of Appeal, to televise the proceedings but was told that it would only be allowed to make visual recordings without sound.[2] The SABC then made a formal application and sought an order from the Supreme Court of Appeal in the following terms:

> "1. Granting the Applicant permission to be present at and record for the purposes of live broadcasting on television, with both visuals and sound,
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> 1.1 The hearing of the criminal appeal under case No 410/2005 instituted by the Second to Twelfth Respondents against the State as represented by First Respondent.
>
> 1.2 The hearing of the criminal appeal under case number 062/2006 instituted by Second to Twelfth Respondents against the State as represented by First Respondent and
>
> 1.3 The hearing of the criminal appeal under case number 248/2006 instituted by Second to Sixth Respondents against the State, as represented by the First Respondent,
>
> which appeals are due to commence on Monday 21 August 2006[3] in the above Honourable Court ("the criminal appeals").
>
> 2. In the alternative to 1 above, granting the Applicant permission to be present at and record the criminal appeals for the purposes of delayed broadcasting on television with both visuals and sound, by means of an edited highlights package, on a daily basis and for reporting on its daily news bulletins, on various current affairs programmes and in the news and public interest related programmes.

[2] This is in line with the current practice in the Supreme Court of Appeal in terms of which: "Die opname(s) moet stil wees – geen klankopnames nie."

[3] The proceedings were subsequently postponed to 25 – 29 September for reasons unrelated to this matter.

> 3. Granting the Applicant permission to be present at and record the criminal appeals for the purposes of live broadcasting on radio.
>
> 4. In the alternative to 3 above, granting the Applicant permission to be present at and record the criminal appeals for the purposes of delayed broadcasting on radio, by means of an edited highlights package, on a daily basis and for reporting on its daily news bulletins, on various current affairs programmes and in the news and public interest related programmes.
>
> 5. Permitting the Applicant to set up its electronic equipment in the manner contemplated in the Applicant's founding affidavit in order that it may relay the criminal appeals in the manner set out above."

[6] Before both the Supreme Court of Appeal and this Court, it was accepted by all parties that although prayers 1 and 2 and prayers 3 and 4 are framed in the alternative, the applicant did not intend them to be in the alternative. The relief sought therefore included both the right to broadcast the entire proceedings live on television and radio, as well as the right to produce edited highlights packages for television and radio audiences.

The Supreme Court of Appeal

[7] Before the Supreme Court of Appeal, the applicant argued that these broadcasts were necessary to enable it to fulfil its constitutional and statutory obligations to inform the public. The statutory obligation it referred to arises from the Broadcasting Act, 4 of 1999 (Broadcasting Act). Noting that the case involved matters of intense national interest, the applicant argued that broadcasting by way of television and radio would have educational benefits and would not disrupt the conduct of the hearing.

[8] The respondents argued that there was no constitutional right to broadcast judicial proceedings. Section 173 of the Constitution gives the courts the power to regulate their own processes and accordingly constitutes a constitutional restriction on the ambit of the free expression rights of the applicant. They argued that the free expression rights of the media were protected by other methods of reporting, and also that allowing the broadcast of the appeal would violate the respondents' right to a fair trial. Specifically, the presence of cameras in the courtroom would violate the second respondent's right to privacy, inhibit interactions between counsel and the bench, and prejudice Mr Zuma's right to a fair trial.

[9] The issue of privacy should be put aside immediately. In the Supreme Court of Appeal, the applicant undertook that neither Mr Shaik nor members of his family would be recorded with either visuals or sound during the appeal hearing. That undertaking stood in this Court. The question of privacy therefore does not require further consideration by us.

[10] In a unanimous judgment, the Supreme Court of Appeal took the view that the "applicant's right to freedom of expression and to impart information, and the public's right to receive such information, collide four square with the respondents' respective rights."[4] It noted that because of the power given to it by section 173 to regulate its own processes, it had to do so by considering how best to accommodate the competing rights of the parties. The Court held that a balancing exercise was required

[4] *SABC v Downer NO and Shaik* [2006] SCA 89 (RSA), Case No 435/06, 24 August 2006, as yet unreported at para 13.

between the right of the applicant to freedom of expression and the right of the respondents to a fair trial.

[11] In balancing the rights of free expression and fair trial, the Court held that the proper test was one that favoured the right to a fair trial. It stated that "live or recorded sound broadcasting should not be allowed unless the court is satisfied that justice will not be inhibited".[5] What the test amounted to was that fair trial rights had to take precedence over the right to free expression in the circumstances of this case. The Supreme Court of Appeal characterised the position as a "clash of rights" and held that if anyone has to give way, it should not be the litigant that faced a loss of liberty if convicted.[6]

[12] The Supreme Court of Appeal held that television and radio broadcasts would violate fair trial rights for two reasons. First, it would put "stress" on both counsel and the judges, inhibiting interaction that would "whether by way of being the last straw or in combination with all the other circumstances, create the material risk that justice will be impaired."[7] Second, there was a risk that television and radio broadcasts might prejudice the rights of both the State and Mr Zuma to a fair trial in his case because extensive radio and television broadcasting might deter witnesses from testifying in that trial due to the critical exposure to which they might be subjected during the appeal. Also the Court reasoned that the unfettered questioning

[5] Id at para 20.

[6] Id.

[7] Id at para 25.

of counsel might create the perception in the public mind that Mr Zuma's innocence or guilt was being prejudged.[8]

[13] The Supreme Court of Appeal thus took the view that it had a discretion conferred by section 173 of the Constitution as to whether to permit radio and television broadcasts. In the light of the foregoing considerations, it concluded that the application for the right to broadcast its proceedings live on radio and television should be dismissed. It also held that, to the extent that the applicant sought the right to produce edited highlights packages, such packages might create a risk of misrepresentation and misunderstanding. That relief too was accordingly refused. The applicant was ordered to pay the costs of the second to twelfth respondents.

Does the case raise a constitutional issue?

[14] We turn now to the question whether the case raises a constitutional issue. In our view, this must be answered in the affirmative. First, the SABC argues that the Supreme Court of Appeal's judgment has the effect of limiting the right to freedom of expression of radio and television broadcasters as enshrined in section 16 of the Constitution.[9] Since the media's role is to inform the public about the legal system, restrictions on broadcasting limit the information that may be imparted by the media and received by the public.[10] It accordingly becomes necessary to consider the ambit

[8] Id at para 28.

[9] Section 16(1)(a) provides that:

"Everyone has the right to freedom of expression, which includes –

(a) freedom of the press and other media".

[10] Section 16(1)(b) provides that:

of the rights to freedom of the press and to receive information. The applicant also argued that the decision of the Supreme Court of Appeal flies in the face of what counsel referred to as the "principle of open justice" which, he argued, forms part of our constitutional fabric. The existence and role of this principle is also a constitutional matter.

[15] Second, this case raises a constitutional issue because of the potential implications of broadcasting on fair trial rights. The respondents argue that broadcasting will violate the fair trial rights of both Mr Shaik and Mr Zuma. Whatever the correct approach to the right to a fair trial, this case undoubtedly requires us to examine the nature of that right under our constitutional system.

[16] Finally, this case implicates the power of the Supreme Court of Appeal to regulate its own process under section 173 of the Constitution. In determining whether we are entitled to interfere with the Supreme Court of Appeal's decision, we must also adopt a particular construction of section 173. That in itself is a constitutional matter.

Is it in the interests of justice to grant leave to appeal?

[17] The first respondent argues that we should not grant leave to appeal because, while the clarification and protection of the powers contained in section 173 are matters of substantial importance, the Supreme Court of Appeal judgment does not

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"Everyone has the right to freedom of expression, which includes –
(b) freedom to receive or impart information or ideas".

affect the substance of section 173 in a way which renders it desirable for consideration by this Court. We disagree. The reach of a court's power to regulate its own process is an issue of great constitutional moment and the current dispute raises the issue directly. In addition, this contention ignores the other constitutional issues of importance in the case and in particular the ambit of the constitutional protection of the freedom of the press.

[18] All the respondents argue that the applicant has placed insufficient evidence before the Court to enable it make a ruling. They also note that the date of the hearing of the appeal was made public on about 1 June 2006, yet the SABC did not approach the Supreme Court of Appeal for permission to televise the hearing until 3 August 2006. The second to twelfth respondents argue that any urgency in the matter is therefore of the applicant's own making as it should have been aware of a practice arrangement in the Supreme Court of Appeal, adopted in 1993 after discussions between members of the Court and the media, in terms of which filming of the proceedings of that Court is permitted but not sound recording.

[19] It is, of course, desirable for parties to bring matters to court as early as possible, and the SABC's unexplained delay in bringing this case shows a lack of respect for both the parties to the appeal and the programme of the Court. However, there remains sufficient information before this Court to decide this case. This case, unlike *Bruce and Another v Fleecytex Johannesburg CC and Others*, is not a case of

direct access where the issues have not been canvassed by lower courts.[11] *Christian Education South Africa v Minister of Education* is similarly inapposite, since this is not a case where the arguments were not fully canvassed by the parties.[12] In argument, counsel for the second respondent admitted that the applicant's failure to launch proceedings timeously was more properly relevant to the issue of costs than to the question of the interests of justice.

[20] We conclude in the circumstances that it is in the interests of justice to grant leave to appeal. Before considering the application for leave to appeal itself, we identify two important constitutional considerations we consider relevant to the application: the first is the obligation of a criminal court to ensure that the appeals it hears are conducted fairly; and the second is the importance of ensuring that appeals are public, which includes a recognition of the public's right to receive information about criminal appeals, as entrenched in section 16 of the Constitution.

Obligations of an appeal court in a criminal appeal

[21] It is important to start by noting that this is an application for leave to appeal against the judgment of an appellate court that had to determine the conduct of its own proceedings. The task of an appeal court in determining its own proceedings is an important one. Its primary constitutional responsibility is to ensure that the proceedings before it are fair and it must give content to that obligation. This obligation has always been part of our law and is now constitutionally enshrined as a

[11] 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 7.

[12] 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 27.

fundamental right in section 35(3) of the Constitution.[13] The task of ensuring that the proceedings are fair will often require consideration of a range of principled and practical factors, some of which may pull in different directions.

[22] The right to a fair trial has been interpreted by this Court as including the foundational values of dignity, freedom and equality which lie "at the heart of a fair trial in the field of criminal justice"[14] and as embracing "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force."[15]

The right of freedom of expression and the right of the public to receive information about criminal appeals

[13] Section 35(3) of the Constitution provides as follows:

> "Every accused person has a right to a fair trial, which includes the right –
> (a) to be informed of the charge with sufficient detail to answer it;
> (b) to have adequate time and facilities to prepare a defence;
> (c) to a public trial before an ordinary court;
> (d) to have their trial begin and conclude without unreasonable delay;
> (e) to be present when being tried;
> (f) to choose, and be represented, by a legal practitioner, and to be informed of this right promptly;
> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
> (i) to adduce and challenge evidence;
> (j) not to be compelled to give self-incriminating evidence;
> (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
> (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
> (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
> (o) of appeal to, or review by, a higher court."

[14] *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 11.

[15] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16.

[23] Freedom of expression is another of the fundamental rights entrenched in Chapter 2 of the Constitution.[16] This Court has frequently emphasised that freedom of expression lies at the heart of 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.[17]

[24] This Court has also highlighted the particular role in the protection of freedom of expression in our society that the print and electronic media play.[18] Thus everyone has the right to freedom of expression and the media and the right to receive

[16] Section 16 of the Constitution provides as follows:

> "(1) Everyone has the right to freedom of expression, which includes –
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (1) does not extend to –
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[17] In *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 at para 7, O'Regan J reasoned as follows:

> "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." [Footnotes omitted]

See also *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at paras 29-31, *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) 433 BCLR (CC) at paras 26-28; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as* Amicus Curiae*)* 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at paras 45-46.

[18] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 22-24.

information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression. As was said in *Khumalo* –

> "In a democratic society . . . the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16".[19]

[25] The question whether the right to freedom of expression and the media includes the right of the media to televise and broadcast court proceedings is not beyond doubt in other democratic jurisdictions.[20] Indeed, in the United States of America, there is a

[19] Id at para 24.

[20] For a full and helpful discussion of the legislation and case law in other jurisdictions see *SA Broadcasting Corporation Ltd v Thatcher and Others* [2005] 4 All SA 353 (C) at paras 51–109.

consistent line of jurisprudence which makes it clear that the First Amendment's guarantee of freedom of speech does not include a constitutional right to record and broadcast court proceedings. The United States Supreme Court has held that state courts are free to experiment with television cameras in the courtroom if they wish, as long as the right of an accused to a fair trial is respected. However, they are not constitutionally required to do so; it is a matter of policy choice.[21] Similarly in the *Lockerbie Bombers* case, the High Court of Justiciary held that there was no right under article 10 of the European Convention on Human Rights, which guarantees freedom of expression, to televise legal proceedings.[22] The question, therefore, of whether the ambit of section 16 of our Constitution does extend to confer a right on the applicant to televise court proceedings is not beyond debate. We prefer to avoid answering the question one way or the other given the urgent nature of the present proceedings, and assume in favour of the applicant that there is such a right.

[26] It should also be noted that the SABC, as the public broadcaster provided for and regulated in terms of the Broadcasting Act, has a special function to perform. Section 8 of the Broadcasting Act identifies the objectives of the corporation which include –

> "(b) to provide sound and television broadcasting services, whether by analogue or digital means, and to provide sound and television programmes of information, education and entertainment . . . ;

[21] See *Courtroom Television Network v State of New York* 5 NY 3d 222; 833 NE 2d 1197; *Westmoreland v Columbia Broadcasting System* 752 F 2d 16 (1984). See also the discussion in Eric Barendt *Freedom of Expression* 2nd ed (2005) at 349; see also the full discussion in M David Lepofsky "Cameras in the Court Room – not without my consent" (1996) 6 *National Journal of Constitutional Law* 161 at 168 and 223–224.

[22] *Petition No 2 of the BBC* [2000] HRLR 423.

> ….
> (d) to provide, in its public broadcasting services, radio and television programming that informs, educates and entertains".[23]

[27] Ultimately, however, what is central to the issue is not the responsibility and rights of the SABC as a broadcaster. What is at stake is the right of the public to be informed and educated as is acknowledged in the Preamble to the Broadcasting Act which reads –

> "Noting that the South African broadcasting system comprises public, commercial and community elements, and the system makes use of radio frequencies that are public property and provides, through its programming, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity . . . ".

[28] The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognized by the House of Lords in *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* that "[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring."[24] A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to

[23] See also section 10(1) of the Broadcasting Act which obliges the Corporation to –
> "(d) provide significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests".

[24] [2000] 4 All ER 913 (HL) at 922.

information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.[25]

[29] This case, then, is not essentially about the rights of the SABC. Rather it concerns the right of South Africans to know and understand the manner in which one of the three arms of government functions, namely, the judiciary. This is a strong constitutional consideration. The right of the people to be informed of judicial processes presupposes that courts are open and accessible. The fact that courts do their work in the public eye is a key mechanism for ensuring their accountability. As we have already said, this case is also about the obligation upon courts to ensure that accused people have a fair trial.

[30] Open court rooms are likely to limit high-handed behaviour by judicial officers and to prevent railroaded justice, to mention two of the risks of secret justice. It is not surprising then that section 35(3)(c) of the Constitution includes as one of the aspects

[25] Section 1 of the Constitution provides as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

of the right to a fair trial, the right to "a public trial before an ordinary court". Similarly, section 34 of the Constitution entrenches the right to have disputes resolved "in a fair public hearing before a court". Far from being intrinsically inimical to a fair trial, open justice is an important part of that right and serves as a great bulwark against abuse.

[31] It should be remembered, however, that open justice is observed in the ordinary course in that the public are able to attend all hearings. The press are also entitled to be there, and are able to report as extensively as they wish and they do so. It is clear that in this case these ordinary conditions were to apply. In addition, the Supreme Court of Appeal has permitted the applicant to make soundless recordings of the proceedings and televise these and any extracts of these if it wishes. The narrow issue raised by this case concerns the further extension of the open justice principle to include audio-recording and broadcasting of the entire appeal proceedings as well as edited highlights of those proceedings against the background of the Court's obligation to ensure that those proceedings are not only public but fair.

[32] Courts should in principle welcome public exposure of their work in the court room, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (ie the principle of open court rooms). The public is entitled to know exactly how the

judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.

[33] During argument before us, no one contended that the judicial function should be shrouded in mystique and protected at all times from the prying eye of the camera or the invasive ear of the microphone. On the other hand, no one suggested that the electronic media should be permitted to broadcast criminal trial proceedings when evidence is led and witnesses are cross-examined. Ordinarily, it will not be in the interests of justice for trial proceedings to be subjected to live broadcasts. Some of the reasons for this were identified in the case of *Midi Television (Pty) Ltd t/a E-TV v Downer and Others*,[26] in which E-TV brought an application to televise the proceedings in the criminal trial of the second to twelfth respondents –

> "[t]he right to privacy of each individual witness was hence, in the view of Squires J, the overriding factor in refusing the application. Infringement thereof by televised proceedings could lead to an unfair trial and conflict with 'the public interest in a democratic criminal justice system' which brings wrongdoers to book while ensuring that justice is done to them. Unless both the State and the defence witnesses consented to the televising of their evidence, the Court would not accede to their being prejudiced, intimidated, inhibited or prevented from communicating sensibly by the thought of having to appear on television.
>
> Inasmuch as this would invariably constitute an infringement of the applicant's right to freedom of speech (in the sense of freedom of the press), such right should, on a

[26] Case number 15927/04 (D), 12 October 2004, as yet unreported.

> proper weighing and balancing of the competing claims and conflicting interests of the parties, yield to the rights of the witnesses."[27]

[34] The issue in this case is therefore restricted to appeals only. It is also accepted that cameras and microphones should not distract advocates or judges from the proceedings and that proper decorum of the court room must be respected. The narrow issue, accordingly, is not whether cameras should be allowed into courts; it is whether this Court should interfere with the discretion of the Supreme Court of Appeal and order that radio and television coverage be permitted in this particular appeal before that Court, at this particular time, in the particular circumstances of this case.

Section 173 of the Constitution: the approach on appeal

[35] Section 173 provides that –

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

This is an important provision which recognises both the power of courts to protect and regulate their own process as well as their power to develop the common law. It is the former power that is of relevance in this case. It must be understood in the context of section 165 which provides that the judicial authority is vested in courts, that they are independent and must apply the law impartially and without fear, favour or prejudice.

[27] *SA Broadcasting Corporation Ltd v Thatcher and others,* above n 20, at paras 44-45, summarising the reasoning of Squires J above n 26 at 8-11.

[36] Courts, therefore, must be independent and impartial. The power recognised in section 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that courts have the inherent power to regulate and protect their own process.[28] A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that courts in exercising this power *must take into account* the interests of justice.

[37] 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[29] 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.

[38] It is clear that in this case the Supreme Court of Appeal exercised a section 173 power. The applicants argue that the power was not correctly exercised. The question that arises sharply for decision is the approach of this court upon appeal to the

[28] *Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 4; *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at paras 22 and 26.

[29] Section 8(1) of the Constitution provides:

> "The Bill of Rights applies to all law, and binds the executive, the legislature, the judiciary and all organs of state."

exercise of that power. The approach of an appellate court to an appeal against the exercise of a discretion by another court varies. This Court has accepted that an important consideration will be the nature of the discretion concerned.

[39] Where the discretion is a discretion in the strict sense, in that the court had a range of legal choices open to it, an appellate court will ordinarily only interfere with the exercise of that discretion in narrow circumstances.[30] However, this Court has also recognised that there will be occasions where a decision made by another court which does not involve the exercise of a discretion in the strict sense will also only be interfered with in narrow circumstances.[31] Relevant considerations in these cases will be the need for the exercise of judgment by the Court to determine whether the fairness of the proceedings before it is under threat. That judgment will often have to be exercised in the light of a range of complex factors, as this Court observed in relation to a different but related question in *Basson* —

> "When a trial court assesses the question whether the admission of evidence would render the trial unfair, it has to consider a range of factors: the nature of the evidence in question, and how much of it is of advantage to the parties; the need to be fair not only to the accused but also to the prosecution, in the interests of the broader community; the need to ensure that a trial can run efficiently and reasonably quickly; and the reasons underlying the fact that the admission of the evidence may render the trial unfair. These are complex factors which may well pull in different directions."[32]

[30] See *Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC) at para 20; *S v Basson* 2005 (12) BCLR 1192 (CC) at para 110; *Giddey NO v JC Barnard and Partners* CCT 65/05, 1 September 2006 as yet unreported at para 19.

[31] *Basson* above n 30 at para 111.

[32] Id at para 113.

[40] It may well be that the exercise of the powers recognised in section 173 are not capable of single characterisation for the purposes of determining the correct approach on appeal. However, in this case, we are persuaded that this court should only interfere in narrow circumstances. Our reasons for so concluding are the following –

- This case concerns the detailed arrangements for the conduct of appeal proceedings in the Supreme Court of Appeal.
- In the absence of a constitutional violation, it is generally undesirable for this Court to instruct the Supreme Court of Appeal[33] how to regulate the conduct of its proceedings.
- The case required a value judgment by the Supreme Court of Appeal as to how best to discharge its responsibility of ensuring that the proceedings before it were fair and to reconcile that obligation with the public's right to be informed of the conduct of those proceedings.
- In the exercise of the section 173 power, different courts might legitimately come to different conclusions.[34]
- The Supreme Court of Appeal prepared its judgment in haste, as have we, in response to an urgent application. Its judgment must therefore be analysed with that in mind. In particular, that Court might not have been able to formulate its reasons for its order as fully and meticulously as it would ordinarily do.

[33] The Supreme Court of Appeal is the highest court of appeal except in constitutional matters (section 168(3) of the Constitution). See also *Mabaso* above n 30 at para 20.

[34] This criterion is an important criterion in the determination of whether the discretion is a discretion in the narrow sense or not. See *Giddey* above n 30 at para 19.

- It is difficult for an appellate court to second-guess the decision of the Supreme Court of Appeal which is directly based on its first-hand knowledge of the record and all the circumstances of the appeal.

[41] Therefore the question for this Court is not whether we would have permitted radio and television broadcasting of the appeal in the circumstances of this case, but whether the Supreme Court of Appeal did not act judicially in exercising its section 173 discretion, or based the exercise of that discretion on wrong principles of law, or a misdirection on the material facts. As Cloete J formulated the test more laconically in *Bookworks*, the question is whether the Court committed some "demonstrable blunder" or reached an "unjustifiable conclusion".[35]

[42] As indicated above,[36] we have assumed in favour of the applicant that the refusal by the Supreme Court of Appeal to allow the SABC to make sound recordings for television and radio broadcasting during the hearing of the appeals before it does indeed affect rights to freedom of expression under section 16(1) of the Constitution. While the SABC, as the national public broadcaster, is obviously a bearer of section 16(1) rights, the general public also has a fundamental constitutional right to freedom of expression; indeed, it may be said that the primary bearer of the right to "receive information and ideas" *is* the general public. It is also true, as contended by counsel for the SABC, that openness and accountability are underlying values of the

[35] *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 808B; and see also *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 11.

[36] Para 25 above.

Constitution and that, in accordance with the principle of open justice, the public should, as far as possible, be informed and aware of what takes place in our courts.[37] Where a court exercises a discretion under section 173, it must ensure that if, in so doing, it impinges upon rights entrenched in chapter 2 of the Constitution, the extent of the impairment of rights is proportional to the purpose the court seeks to achieve. We do not need to consider here whether this is a section 36 limitation analysis or not. It is clear that it is a proportionality enquiry that a court exercising its section 173 powers must undertake.

[43] On the other hand, in exercising its discretion in terms of section 173, the Supreme Court of Appeal bore the primary obligation of ensuring that the proceedings before it were fair. As pointed out by the Supreme Court of Appeal in its judgment, "the fair trial right includes the right to an appeal [and] . . . the appeal must be as subject to considerations of fairness as the trial which gives rise to it."[38]

[44] In deciding whether or not to allow sound recording of the appeal proceedings before it, the Supreme Court of Appeal reasoned as follows –[39]

> "The interests of justice will naturally encompass the requirements of ss 34 and 35(3) but in addition the court is empowered to decide how best the parties' competing rights can be accommodated. It is to be noted that there is much that is interesting and informative to be gained in surveying the legislation and case law in other jurisdictions. Such a comparative survey is summarised in a recently reported

[37] See section 34 and section 35(3)(c) of the Constitution, which make it clear that both civil and criminal proceedings are to be "public".

[38] *SABC v Downer NO and Shaik* above n 4 at para 13.

[39] Id at paras 15 and 18-20.

> judgment in this country.[40] In the end, however, what will be decisive in a case like the present will be the exercise of the courts' discretion.
>
> . . . [G]iven the nature of the necessary balancing exercise and the role of the court under s 173 of the Constitution it would be wrong to place an onus on the broadcaster. The court must have a free hand in evaluating the pros and cons of live or delayed broadcasting based on the evidence without either side being encumbered by the burden of proof. Nevertheless there may be times where the decision could go either way and a basic criterion will be sought . . .
>
> The nature of the problem makes it clear, at least, that there can be no general rule where it comes to a contest between the broadcaster's right and the appellate litigant's right. It will have to be a case by case assessment.
>
> Apart from the consideration that it is difficult to conceptualise adequate reasons to truncate the free trial right, and the applicant did not advance any, it is a fact that the broadcaster can roam widely in its search for news. Its hunting ground is not limited to the courtroom. For the criminal trial accused, however, what happens in the courtroom in trial and on appeal is the be all and end all as far as maintaining reputation and liberty is concerned. Were anyone to have to give way in this clash of rights it should not be the accused litigant. For this reason I think one is justified in adopting the approach that live or recorded sound broadcasting should not be allowed unless the court is satisfied that justice will not be inhibited rather than to adopt the converse test."

[45] The test adopted by the Supreme Court of Appeal was therefore that the broadcasting should not be permitted unless that Court was satisfied that it would not inhibit justice in that Court. In our view, this test impliedly recognises that the Supreme Court of Appeal bears a primary obligation to ensure that the appeal proceedings before it are fair. It also recognises that it should not permit further extension of the principle of open justice beyond that already afforded unless it was satisfied that the fairness of the proceedings before it would not be threatened.

[40] Namely *SABC v Thatcher and Others* above n 27 at paras 51-109.

[46] In our view, this establishes an appropriate relationship of proportionality between the right to freedom of expression and the court's obligation to ensure that the proceedings before it are fair. While it may well be that this Court would not have adopted an identical test, that is not the issue in these proceedings. The adoption of this test is far from a "demonstrable blunder" on the part of the Supreme Court of Appeal. It incorporates a recognition of the primary obligation of the Court to ensure fair proceedings without denying the importance of the principle of open justice and the right to freedom of expression. In particular, it must be emphasised that this is not a case where there was to be a ban on reporting or a closing of the doors of the court. It concerns only a further and unprecedented – in the history of the Supreme Court of Appeal – extension of the principle of open justice to include full audio recording and broadcasting of the proceedings.

[47] It is against this background that the SABC's submissions must be examined. Counsel for the SABC contended that the approach of the Supreme Court of Appeal in this regard was seriously flawed in three respects. First, what was at issue before the Supreme Court of Appeal was not simply a "clash" of the competing rights to a fair trial and to freedom of expression. According to counsel, the need for the SABC to broadcast does not merely arise due to the right of freedom of expression; on the contrary, it is a consequence of the principle of open justice which itself flows from the values of openness, accountability and the rule of law in the Constitution and also flows directly from the requirement in sections 34 and 35(3)(c) that civil and criminal proceedings must be "public". The question before the Supreme Court of Appeal

should not, therefore, have been which right prevailed, but rather how best to give effect to the requirement of the Constitution that the appeal hearing be *both* "fair" *and* "public". In counsel's submission, the Supreme Court of Appeal completely failed to address this question.

[48] Second, even in respect of freedom of expression, the Supreme Court of Appeal was, so counsel contended, incorrect to rely on a model of "clashing" rights in which one right had to prevail at the expense of the other. Referring to foreign jurisprudence, counsel submitted that freedom of expression can bring substantial benefits to the notion of a fair hearing. A far richer, more nuanced analysis was required of the Supreme Court of Appeal – rather than simply concluding that there was a "clash of rights" and that the right to freedom of expression had "to give way". It was incumbent upon the Supreme Court of Appeal to investigate and evaluate how preventing or allowing the SABC broadcasts would impact on the right to freedom of expression, the right to a "fair" "public" hearing, the principle of open justice and the administration of justice. This, said counsel, the Supreme Court of Appeal did not do.

[49] Third, counsel submitted, the Supreme Court of Appeal materially misdirected itself in adopting the "test" set out above,[41] such test being inconsistent with the jurisprudence of this Court in cases such as *S v Mamabolo*[42] and *Laugh It Off Promotions CC*,[43] and with the jurisprudence of foreign courts. This test allowed the Supreme Court of Appeal to refuse to grant broadcast rights unless it was "satisfied

[41] See paras 43–44 above.

[42] Above n 17.

[43] Id

that justice will not be inhibited", thereby allowing for freedom of expression to be limited without the Court having concluded that the broadcast "really was likely to damage"[44] the right to a fair trial and the administration of justice and notwithstanding that the harm speculated consisted merely of "conjecture alone".[45] Moreover, the test adopted by the Supreme Court of Appeal inevitably and permanently privileges the right to a *fair* trial over the right to a *public* trial, the right to freedom of expression and the principle of open justice. In doing so, counsel argued, it creates a hierarchy of rights inappropriate for a Constitution such as ours.

[50] Each of these arguments needs to be considered separately. There can be no doubt, as we have observed earlier, that the right to a fair trial does include the right to a trial in public and that the principle that underlies that right may aptly be called a principle of "open justice". This principle does promote the accountability of courts and the administration of justice. It has traditionally been understood to mean that court hearings must be open to members of the public who wish to observe them and to journalists who wish to report upon them. Traditionally the principle has never been absolute. Trials and parts of trials may be, and often are, held behind closed doors to protect the privacy or security of witnesses.

[51] The right to a public hearing does not automatically mean that trials must necessarily be broadcast live in all circumstances. Indeed, as we have noted above, it will often not be in the interests of justice for a trial, where oral evidence is to be led,

[44] See *Mamabolo* above n 17.

[45] See *Laugh It Off Promotions CC* above n 17.

to be broadcast on radio and television. While the situation with appeal proceedings is different, in some circumstances, such as rape cases or those involving the testimony of minors, it may not be in the interests of justice to broadcast appeal proceedings. Moreover, many applications for leave to appeal are dealt with on the papers, without a hearing in open court. This court has held that such proceedings are not necessarily always inconsistent with the Constitution.[46] All this however need not finally be determined in this case.

[52] It was admitted in argument before us that the principle of open justice as conceptualised by counsel for the applicant in this Court was not put to the Supreme Court of Appeal in the same way, if at all. Be that as it may, contrary to what the applicant contended, on a fair reading of its judgment, the Supreme Court of Appeal did make the effort to determine how best to give effect to the requirements of the Constitution that the appeal hearing be both fair and public. It held that these requirements could best be accommodated by ensuring that no extension of the openness of the court room to permit broadcasting should be permitted unless it was satisfied that no threat to the fairness of the appeal proceedings would ensue. The test must be understood on the basis that the proceedings were to be open to the public and the press. The only issue was whether that openness should extend to radio and television broadcasts. Understood in its context, the test adopted by the Supreme Court of Appeal did seek to accommodate both the need to ensure that the proceedings took place in public and that the proceedings were fair. The fact that that

[46] *S v Rens* 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) at para 25; *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)* 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC) at paras 9-10.

accommodation might have been differently achieved by another court is not sufficient to suggest that the accommodation adopted by the Supreme Court of Appeal may be interfered with on appeal. Accordingly this criticism raised by the applicant is misconceived.

[53] The second criticism by applicant's counsel is the "clash of rights" model adopted by the Supreme Court of Appeal. In our view, as set out above,[47] when a court is seeking to determine whether the broadcasting of proceedings before it are "in the interests of justice" or not, it should seek to reconcile the fundamental rights at issue with its obligation to ensure that the proceedings before it are fair. Although the Supreme Court of Appeal may have used the language of a clash, what it did was to seek to reconcile appropriately its obligation to ensure that the proceedings before it were fair with the extension of the principle of open justice sought by the applicant. It held that it would not permit broadcasting unless it was certain that the fairness of the proceedings would not be threatened. This being so, the second argument raised by the applicant mischaracterises what the Supreme Court of Appeal in fact did.

[54] The third argument raised by counsel related to the test set by the Supreme Court of Appeal to determine whether the application to broadcast the proceedings should be granted. The applicant criticises the test on a number of grounds. First, it argues that it is inconsistent with the jurisprudence of this Court in that it posits a

[47] At para 43.

hierarchy of rights inconsistent with our constitutional order. Second, it argues that it fails to consider the trends in other open democracies.

[55] As to the first argument, although it is correct that our Constitution does not postulate a hierarchy of rights in the abstract, there are circumstances in which one right will take precedence over others. Given that a court has a primary obligation to ensure that the proceedings before it are fair, that obligation will always figure large in the exercise of discretion under section 173. We cannot agree that the Supreme Court of Appeal erred in recognising this in the particular circumstances of this case. We repeat that it may well be that another court might have perceived the interests of justice differently in relation to proceedings before it, but that is not the test on appeal here. The question is whether the Supreme Court of Appeal committed a "demonstrable blunder" in adopting the test it did. It did not.

[56] As to the second, most, if not all, of the foreign judgments relied on by counsel for the SABC are not directly on point. They deal either with considerations applicable to a total ban on the publication of court proceedings or with proceedings before an organ of state other than a court.[48] As against all these foreign cases relied

[48] Counsel for the SABC relied primarily upon the following cases: *Richmond Newspapers Inc et al v Virginia et al* 448 US 555 (1980) – this case is distinguishable on the basis that it deals with a jury trial and a blanket exclusion of everyone, including the media, from the court room. *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* 13 CRR (2d) 1 (SCC) is also clearly distinguishable as it deals, not only with the effect of a total ban on television coverage, but also with the televising of parliamentary proceedings and not court proceedings as in the present case. It is self-evident that different considerations apply to the publication of parliamentary proceedings, which is in any event already fully allowed in South Africa. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [1996] 3 SCR. 480 deals with a total exclusion of the public, including media reporters, from a court room at the sentencing stage of criminal proceedings where the accused has pleaded guilty. It is obviously distinguishable from the present case on a whole variety of grounds. *Dagenais v Canadian Broadcasting Corp.* [1994] 25 CRR (2d) is also distinguishable from the present appeal. Not only does it deal with jury trials, but it also concerns a ban prohibiting a third party

on by the applicant that are not on point, reference should be made to a fairly recent decision of the German Federal Constitutional Court[49] relied on by counsel for the first respondent. In this case, the court upheld a federal law which bans recording and filming in courts for broadcast purposes, holding that the legislature had properly decided to limit the openness of court proceedings to persons physically present during the proceedings. Broadcasting journalists were perfectly free to attend and to report proceedings; only live coverage was prohibited. The Court held that the ban took account of the parties' constitutional right to privacy, the importance of a fair procedure and the correct finding of facts. A majority of the Court also held that the law need not give courts a discretionary power to allow television coverage and filming in exceptional cases as media pressure would place an impossible burden on courts if they were to be given that discretion.

[57] Furthermore, as is evident from the wide-ranging discussion of the legislation and case law in other jurisdictions undertaken by Van Zyl J in *SABC v Thatcher and*

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from broadcasting a fictional television series until the jury trials in question were completed. It does not deal with a ban on the broadcast of court proceedings, the issue that is under consideration before this Court. It is also worth noting that the case of *Edmonton Journal v Attorney General for Alberta et al; Attorney General of Canada, Intervener* [1989] 2 SCR 1326, 64 DLR (4th) 577, , which was cited with approval by the majority in *Dagenais* and relied on by the applicant before us in support of the principle of open justice, concerned the constitutionality of certain statutory restrictions on the broadcasting of information arising out of civil proceedings, not criminal proceedings – it is hence also distinguishable from the present case. *R v Mentuck* [2001] 3 SCR 442 is also not on point. It deals with a publication ban relating to the participants in a police investigation, the purpose of which was to prevent a serious risk to the efficacy of similar operations which had already commenced. The circumstances of the ban were very different to those we have before us in the present case and the considerations weighed by the SCC were also very different to those with which we are grappling. *Ex parte The Telegraph Group plc and others* (2001) 1 WLR 1983 (CA), while factually analogous to the present case in many respects; differs crucially in that it deals with a total ban on press coverage of the trial, whereas in the current case only sound recording is prohibited. Moreover, in dismissing the appeal, the reasoning of the Court of Appeal and its conclusion actually support the reasoning of the SCA rather than the reverse, particularly insofar as the impact of sound recording and broadcasting of the appeal proceedings on the fairness of the subsequent Zuma trial is concerned.

[49] BVerfGE 103, 44 (2002).

Others,[50] it is by no means the case that the majority of such other jurisdictions allow the kind of broadcasting of court proceedings that the applicant seeks.

[58] Not only have courts not recognised a right to broadcast live court proceedings,[51] but academic experts on freedom of expression have also expressed severe doubts as to whether such a right exists. Eric Barendt in his recent work on freedom of speech writes as follows –

> "But the case for recognition of a right to televise as an integral aspect or consequence of free speech is very weak. First, we should recall the doubts expressed earlier concerning the coherence of access rights for the press and public to attend legal proceedings (as distinct from the right of the defendant to a fair public trial or a weaker open justice principle). Even if *access* rights are accepted, it would not follow that they confer rights to film and televise proceedings. For the arguments which can be deployed to support access rights do not justify recognition of these further rights. It is difficult to see why and how public confidence in the legal system and judicial accountability would be enhanced by the provision of rights going beyond the freedom of the public and press to attend legal proceedings and the media right to report them. Further, a right to film and televise would necessarily give the broadcasting media privileges which could not practically be enjoyed by others, say, by amateur film-makers who wanted to record trials for educational purposes. Another point is that in practice broadcasters would choose the trials they wished to cover and which parts or extracts to broadcast; that discretion is far removed from an access right which in principle belongs to the members of the general public as it does to the institutional media."[52]

[50] Above n 20 at paras 51-109. See also Lepofsky above n 21 at 203–206.

[51] In this regard, see the authorities cited in notes 21 and 22 above.

[52] Above n 21 at 347–348.

[59] It should also be emphasised that an application of this sort to broadcast appeal proceedings on radio and television where all of the parties to the appeal vigorously oppose it, is unprecedented in our legal system. Indeed, as stated above, as far as we have been able to ascertain in the short time available to us, there is no analogous precedent anywhere else in the world. None of the cases relied upon by the applicants is in any way similar to this one.

[60] Given the absence of acceptance of the existence of the right in other open and democratic societies, it cannot in our view be said that, in its application of legal principles and its consideration of the constitutional rights at stake, the Supreme Court of Appeal acted in such a way as to justify the conclusion that its decision was not judicially made.

[61] As regards the facts, counsel for the SABC contended that the Supreme Court of Appeal misdirected itself in finding that allowing the SABC to sound record the proceedings would distract and inhibit counsel and the Court to such an extent that an unfair hearing might well result. According to counsel, this finding was based on mere speculation which is not borne out by experience. We must disagree with this contention. The decision was reached unanimously by five judges of the Supreme Court of Appeal who are by definition experienced judges and familiar with the conduct of proceedings in their own court room. Whatever the situation may be in future it held that, the particular circumstances of this complex case make it an

inappropriate starting point for experimentation with live broadcasting. This conclusion cannot be said to be manifestly wrong.

[62] It is moreover important to bear in mind that, in arriving at their conclusion, the Supreme Court of Appeal had the benefit of having before it the entire record of the trial proceedings containing, in the words of the Supreme Court of Appeal, "a mass of facts and a myriad of factual issues laced with a variety of legal points."[53] Issues arising from a consideration of the full trial record that were clearly present to the mind of the Supreme Court of Appeal include the factual role of Mr Zuma, the "backdrop of foreign commercial interests jostling for political patronage in the early years of the new democracy; . . . the involvement of the so-called arms deal and allegations of irregularities that beset it; and . . . profound implications for the pending case against Mr Zuma."[54] As pointed out by the Supreme Court of Appeal in its judgment –

> "The long and demanding trial with this unusual overlay has given rise to a long and demanding appeal with the same overlay and in which the second respondent's liberty and substantial personal estate are set to stand or fall.. . . The *combination of circumstances thus sketched will place a double burden on counsel and the court*. Their respective primary tasks will be to cope with the presentation and evaluation of argument and counter argument canvassing manifold references to a massive record. Their additional burden will be to handle that task subjected to the distraction of the extensive publicity that will ensue.
>
> Although live television coverage may always, as far as most participants in court proceedings are concerned, be inhibiting, the nature and extent of the case in a given instance might be such that the court is nevertheless satisfied that justice would not be

[53] *SABC v Downer NO and Shaik* above n 4 at para 23.

[54] Id.

> impaired. That is not the position here. In my view to permit live television coverage in this case will add an inhibiting dimension which will, whether by way of being the last straw or in combination with all the other circumstances, create the material risk that justice will be impaired and the respondents' ss 34 and 35(3) rights to fair hearings infringed. I would add that the applicant does not need the relief it requests in order to inform the public of the nature of the issues, the essentials of the argument or the outcome. It can also, in terms of the directive referred to, provide visuals of all the participants in the proceedings." (our emphasis)[55]

[63] Counsel for the SABC also submitted that the Supreme Court of Appeal misdirected itself on the facts in taking the view that allowing the sound broadcasting of the appeal hearing might threaten or undermine any future prosecution of Mr Zuma in a material way. In this regard, the Supreme Court of Appeal pointed out that –

> " . . . the prosecution will need to rely on many of the same witnesses it called in the present instance. That is because two of the three charges preferred against the second respondent will also be preferred against Zuma. The evidence of those witnesses whose testimony is in dispute in the pending criminal appeal will be subject to searching examination and very likely trenchant criticism. This process of courtroom debate, sometimes acerbic, is unavoidable and it is counsel's duty to conduct it with the greatest freedom that forensic procedure and propriety will permit. The debate will of course be exposed to press coverage as it is but live television and radio coverage will enlarge such exposure to an immense degree which could well disadvantage the pending prosecution. The appellate court's findings on credibility could of course be adverse to such witnesses and reported in the press but expression of those findings in suitable terms would also be an unavoidable consequence of the present matter. What must be minimised as far as possible, in the interests of justice, is exposure of such witnesses that might cause them to refuse to testify in the Zuma trial. And the risk of that happening would not necessarily be undone even if the appellate court's credibility findings were favourable to them. Similar considerations

[55] Id at paras 23-25.

> correspondingly apply in respect of witnesses called in the second respondent's defence."[56]

[64] The ground upon which the SABC seeks to counter this finding by the Supreme Court of Appeal is not convincing. The SABC argues that witnesses may be subpoenaed, but this argument does not address the fact that a reluctant witness is much less likely than a willing one to be found credible and reliable. Furthermore, while there is merit in the submission by counsel for the SABC that distorted versions of criticisms advanced against witnesses during the course of the appeal hearing may in any event be a product of allowing only "second-hand" reports on the argument during the course of such hearing, on the SABC's account television will have a much greater impact on a far larger audience.

[65] The same considerations apply to the criticism by the SABC of the finding that another difficulty which justified the NDPP's opposition to the application before it was the fact that –

> " . . . although Zuma's alleged guilt is not in issue in the pending criminal appeal discussion and consideration of the case against the second respondent will necessarily involve exhaustive reference to Zuma and may even appear to the outside observer or listener to portray him as a co-accused and even as criminally liable. Obviously it will not be anyone's intention in the pending criminal appeal to consider or pronounce upon Zuma's alleged guilt but again it is in the interests of justice pertinent to the pending trial to minimise, if not eradicate, the risk that popular perception will regard the crucial question in the Zuma case as having already been

[56] Id at para 27.

> made. In regard to this second reason live or delayed coverage by radio would serve to create that risk just as much as live or delayed television coverage."[57]

[66] It is likely that, as contended by counsel for the SABC, the same risk will exist whether or not sound recording and broadcasting of the appeal proceedings is allowed. However, the submission by counsel that allowing a full broadcast of the appeal hearing to take place will ensure that members of the public witnessing the case will understand that the appeal is primarily about the second respondent and not about Mr Zuma, underplays the impact of the actual spoken words of counsel and of the judges in comparison with "second-hand" reports of the appeal proceedings. Moreover, the possible impact on witnesses remains a sufficient justification for the Supreme Court of Appeal decision to prohibit live broadcasting in this case.

[67] In conclusion, it cannot in our view be said that the Supreme Court of Appeal reached its decision other than judicially. Even if this Court might well have come to a different decision, no basis has been established for intervening in the exercise by the Supreme Court of Appeal of its discretion to regulate its own process and to ensure that the arrangements within its own court room do not interfere with the administration of justice.

[68] 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

[57] Id at para 28.

courts to embrace the principle of open justice and all they imply. 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.

[69] The interests of justice require that appropriate guarantees be in place to ensure both accuracy and balance. Sound bytes from political discourse, sometimes played over and over again on television, may or may not be justified in news or current affairs programmes. In the case of judicial proceedings, however, similar sound bytes carry the real risk of trivialising complex issues and converting what should be public education into public entertainment.

[70] This problem is by no means insuperable. As Howie P emphasised –

> "[D]elayed 'highlights' packages, which will most times contain 'sound bites', present a considerable risk of misrepresentation (even if unintended) and consequent misunderstanding. This is not the occasion on which to try to resolve that problem but resolution will unquestionably be necessary at some future stage."[58]

Indeed, in the open and democratic society envisaged by the Constitution, in which the public have a right of access to the workings of the judicial system, the question is not necessarily whether the electronic media should be able to cover appeals, but how guarantees can be put in place to ensure that the public is indeed well informed about how the courts function when hearing appeals. Television and radio may not be the only ways to ensure that this is achieved, and in addition may not necessarily be the best ways.

[71] In this connection reference was made to an agreement entered into between the media and the judiciary in 1993.[59] It would seem that the advent of a democratic constitution, technological advances and growing acceptance throughout the world of the power and impact of the electronic media may require this agreement to be reconsidered. The answer, however, is not to treat it as non-existent but rather to renovate and update it. It would be inappropriate for this Court at this stage to prejudge such a process. It is for the judiciary to work out the modalities working in

[58] Id at para 29.

[59] Counsel referred to it as the Goldstone Concordat, because it was negotiated by Goldstone J on behalf of the judiciary with representatives of the media. Its principal provision was that sound and film recording could be made but sound would not be broadcast save for the delivery of judgment. It was also agreed that the recording should be done in a non-intrusive manner.

cooperation with the media. The objective will be to get fair and balanced reporting of legal proceedings while maintaining the fairness and integrity of those proceedings.

[72] It might well be considered advisable to start with coverage on a trial basis.[60] It is certainly not in the interests of any of the parties to this litigation or the viewing public in general for the process to be impelled by a last-minute application followed by hastily improvised procedures.

Costs

[73] The applicant has sought the right to televise proceedings to which it was not a party. Inevitably, the parties to the proceedings were entitled to come to this Court to oppose that order. In the circumstances, it is appropriate that the applicant be required to pay the costs of the second to twelfth respondents' opposition in this Court. We do not think it appropriate to order the applicant to pay the costs of the NDPP who litigates on behalf of the public.

Order

[74] The following order is accordingly made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed

[60] 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.

3. The applicant is ordered to pay the costs of the second to twelfth respondents, such costs to include the costs consequent upon the employment of two counsel.

MOSENEKE DCJ:

Introduction

[75] Regrettably, this judgment is prepared in great haste. Our decision must be made known within a few days of hearing oral argument. We owe this unseemly rush to the fact that the South African Broadcasting Corporation ("SABC") is aggrieved that the Supreme Court of Appeal has refused it permission to record and broadcast live on television, with visuals and sound, or on radio, two appeals by Mr Schabir Shaik, the second respondent and ten other respondents due to be heard by the Supreme Court of Appeal on 25 to 29 September 2006. In the alternative, the public broadcaster had asked for permission to record the appeal proceedings for delayed broadcasting on television or radio as edited highlight packages to be reported on daily news bulletins and current affairs programmes. For that reason the SABC seeks to move us to grant it urgent leave to appeal the decision.

[76] I have had the benefit of reading the majority judgment. I am indebted to its rendition of the background. I support its discussion on the importance and relative space of free expression, free press and courts in our constitutional setting. Whilst I agree with the majority judgment on the proper approach to be adopted by an appellate court towards the exercise of discretion by another court, I regret that I am constrained to part ways on the manner in which the main judgment characterises the discretion conferred to a court by section 173 of the Constitution. I also disagree on whether the decision of the Supreme Court of Appeal is vitiated by a misdirection which entitles this Court to interfere.

[77] In order to know whether grounds exist which permit this Court to interfere with the impugned decision I have to answer three primary questions. They are: (a) what is the source and nature of the decision of the Supreme Court of Appeal when it disallows live sound television or radio broadcast of its appeal proceedings? (b) what is the proper test an appellate court should adopt towards the exercise of the discretion granted by section 173 where the exercise limits a right and affects founding values entrenched in the Constitution? (c) has the discretion been exercised properly?

[78] Before I traverse each of these issues, it is perhaps convenient to describe briefly the reasoning of the Supreme Court of Appeal in refusing leave to broadcast its appeal proceedings on television with sound or on radio. The Court approached the matter on the footing that the broadcaster's constitutional right to freedom of expression and to impart information and, in turn, the right of the public to receive the

information "collide four square"[1] with the right of all respondents to a fair public court hearing under section 34[2] and with the right of the second to twelfth respondents to a fair trial and subsequent appeal under section 35(3).[3] The Court considered the "very issue"[4] before it to be whether the television broadcasters' right should prevail at the expense of the respondents' fair trial right.

[79] The answer, the Supreme Court of Appeal finds, lies in undertaking a balancing exercise in which the rival rights are assessed against each other taking into account

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[1] *SABC v Downer NO and Shaik* [2006] SCA 89 (RSA), Case No 435/06, 24 August, as yet unreported at para 13.

[2] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[3] Section 35(3) provides:

> "Every accused person has a right to a fair trial, which includes the right—
> (a) to be informed of the charge with sufficient detail to answer it;
> (b) to have adequate time and facilities to prepare a defence;
> (c) to a public trial before an ordinary court;
> (d) to have their trial begin and conclude without unreasonable delay;
> (e) to be present when being tried;
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
> (i) to adduce and challenge evidence;
> (j) not to be compelled to give self-incriminating evidence;
> (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
> (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
> (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
> (o) of appeal to, or review by, a higher court."

[4] *SABC v Downer NO and Shaik* above n 1 at para 14.

the facts. This weighing up is made possible, the Supreme Court of Appeal held, by section 173[5] of the Constitution which gives that court the inherent power to regulate its own process. The Supreme Court of Appeal takes the view that, given the nature of the balancing exercise and the discretion the court enjoys under section 173 none of the parties should bear an onus. This will allow the court a free hand in evaluating the evidence on live or delayed broadcasting without any litigant being encumbered by the burden of proof. The Supreme Court of Appeal sees the competition between the broadcaster's right and the appellants' fair trial rights as one which must be assessed on a case by case basis as it does not to permit a general rule.

[80] However, the Supreme Court of Appeal concludes its approach to the balancing exercise by observing that:

> "For the criminal trial accused, however, what happens in the courtroom on trial and on appeal is the be all and end all as far as maintaining reputation and liberty is concerned. Were anyone to have to give way in this clash of rights it should not be the accused litigant. For that reason I think one is justified in adopting the approach that live or recorded sound broadcasting should not be allowed unless the court is satisfied that justice will not be inhibited rather than to adopt the converse test."[6]

[81] The Supreme Court of Appeal then considered what might inhibit justice in this case should live sound broadcast be permitted and advanced two main reasons. The

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[5] Section 173 provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[6] *SABC v Downer NO and Shaik* above n 1 at para 20.

first is that a combination of factors "will place a double burden on counsel and the court"[7] and the live sound television coverage "will add an inhibiting dimension which will, whether by way of being the last straw or in combination with all circumstances, create the material risk that justice will be impaired and the respondents' ss 34 and 35(3) rights to fair hearings infringed."[8] The combination of factors mentioned include that: television impacts on and impresses the viewer more readily than radio and newspaper; when the appeals are heard those "on camera" for several days to a country-wide audience will experience "a stress all its own",[9] the trial from which the appeals arise was long and demanding with many witnesses and many factual and legal issues; the appeal record runs to over 12 600 pages; the liberty and substantial personal estate of Mr Shaik are at stake; counsel and the court will have to manage the appeal hearing with the distraction of extensive publicity and the appeal will be heard in an atmosphere of heightened political tension.

[82] The second ground for refusing live sound broadcast relates to the pending criminal trial of the country's former Deputy President, Mr Zuma. The Supreme Court of Appeal observed that in the pending criminal trial the prosecution will rely on many witnesses whose testimony is in dispute in the criminal appeals and therefore will be subject to "searching examination and very likely trenchant criticism."[10] Furthermore, the Court found that live radio and sound television will increase the

[7] Id at para 24.

[8] Id at para 25.

[9] Id at para 22.

[10] Id at para 27.

exposure to an extent which could disadvantage the pending prosecution by causing the witnesses to refuse to testify in the trial of Mr Zuma. Another consideration advanced by the Supreme Court of Appeal is that in the appeals there will be frequent reference to Mr Zuma and that it is in the interests of justice in relation to his pending criminal trial to reduce or remove the likely popular perception that the decision on his guilt has already been made. The court took the view that both live and delayed radio and sound television will create that risk.

What this case is not about

[83] Before I move onto issues relating to the inherent jurisdiction of the court and its exercise in relation to public broadcasting, it may be expedient to clear some undergrowth by flagging what this case is not about. First, this case is not about recording and televising trials and the concerns associated with vulnerability of witnesses "on camera". It is rather about leave to record and televise appeal proceedings, which involve the forensic exchanges between the bench and counsel. Second, this case is not about whether the SABC may record and televise the appeals. The Supreme Court of Appeal has already issued directions permitting the recording on camera and televising of the appeals provided that the public broadcaster may not record and disseminate the images with sound. Therefore, the target of the publication ban is indeed narrow but mortal. It silences speech. Images may flourish but the spoken word may not. Third, the case before us is not about delayed sound coverage on television or radio. The Supreme Court of Appeal chose not to resolve that issue. Fourth, the privacy interests of the second respondent, which he had invoked in

opposition to the broadcaster's application, are no longer in issue. This is so because the public broadcaster has put up a draft order in which it agrees to be directed not to record and broadcast the second respondent or his family for the duration of the appeals.

Source and nature of the power to disallow live sound broadcast

[84] The Supreme Court of Appeal conceived of its power to ban the public broadcaster from disseminating sound recording of the appeals to derive from section 173 of the Constitution. The section affirms the "inherent power" of the Supreme Court of Appeal, and indeed of this Court and High Courts, to protect and regulate its own processes taking into account the interests of justice. In argument before us all parties, correctly so in my view, accepted that section 173 conferred on the Supreme Court of Appeal a discretion to regulate its process if it is in the interests of justice to do so and that the words "own process" are wide enough to include, not only written notices and pleadings but also the actual proceedings before a superior court. It follows that when the Supreme Court of Appeal declined the application of the public broadcaster it exercised an authority derived, not from legislation or the common law, but from the Constitution itself. I deal with the importance of this distinction later. However, first it is crucial to understand the nature and scope of the authority in issue.

[85] The text of section 173 suggests that the jurisdiction to control "process" is "inherent" in superior courts by reason only of their very nature as superior courts. That indeed was the approach of superior courts before the advent of constitutional

democracy. The reservoir of inherent jurisdiction is described as "the unwritten power without which the court is unable to function with justice and good reason" and derives neither from the common law nor from legislation but is modelled on the powers of an English superior court.[11]

[86] The scope of the inherent jurisdiction to regulate a court's own procedure in the pre-constitutional era was considered in *Universal City Studios Inc and Others v Network Video (Pty) Ltd*,[12] in which the Appellate Division held that although the court does not have an inherent power to create substantive law, the dividing line between substantive and adjectival law is not always an easy one. In the end the court accepted the distinction that substantive law is concerned with "the ends of the administration of justice" whilst procedural law prescribes "the means and instruments" by which the ends are to be attained.[13] Therefore, the court held that in its essence the inherent jurisdiction of the Supreme Court was procedural.

[87] In *Moch v Nedtravel (Pty) Ltd t/a American Travel Express Service*,[14] the court declined to entertain under its inherent jurisdiction an appeal against an order that was not otherwise appeallable. Following *Universal City Studios Inc and Others v Network Video (Pty) Ltd*, the court held that "the inherent reservoir of power to

[11] For a critical discussion of the inherent powers of superior courts prior to the advent of the Constitution and in particular the formulation of section 173 see: Taitz *The Inherent Jurisdiction of the Supreme Court* (Juta 1985). See also Jacob "The Inherent Jurisdiction of the Court" *Current Legal Problems* (1970) 23, LAWSA vol 3 at 3-4.

[12] 1986 (2) SA 734 (A).

[13] Id at 754J.

[14] 1996 (3) SA 1 (A) at 7E.

regulate its procedures in the interest of the proper administration of justice does not extend to the assumption of jurisdiction not conferred upon it by statute" and that its "inherent power is in any event reserved for extraordinary cases where grave injustice cannot otherwise be prevented."[15]

[88] It must however be stated that nowadays in our constitutional architecture all public power, so too judicial power, flows from the Constitution itself. No judicial power inheres in a superior court if not derived from the supreme law whose obligations must be fulfilled. It is the Constitution which vests judicial authority in courts, it makes their orders and decisions binding on all concerned and declares them independent subject only to the Constitution and the law, which the courts must apply "impartially and without fear, favour and prejudice."[16] Also important in this regard is that the Constitution is not silent on court procedures. Courts must function in terms of national legislation and their rules and procedures must themselves derive from national legislation.[17] Recently in *Phillips v NDPP*[18] this Court made a similar point that since courts derive their power from the Constitution itself, they do not enjoy original jurisdiction conferred by a source other than the Constitution.

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[15] Id at 7E-H. For examples of cases where our courts have exercised, or declined to exercise inherent power, see LAWSA vol 3 above n 11 at 4.

[16] See section 165(2) of the Constitution, which provides:

> "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[17] Section 171 provides:

> "All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation."

[18] *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC); 2006 (1) SACR 78 (CC) at para 47.

[89] In *S v Pennington and Another*[19] this Court said of section 173:

> "It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as the 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' which vested in the Appellate Division prior to the passing of the 1996 Constitution." [footnotes omitted].

The Court emphasized that when this power is exercised it must be done in a way that accords with the requirements of the Constitution. Again in *Parbhoo and Others v Getz NO and Another*[20] this Court turned to its "inherent power" to meet an "extraordinary" procedural situation pending the enactment of relevant legislation and the promulgation of rules of procedure. The Court made the point that ordinarily the power in section 173 to protect and regulate relates to the process of court and arises when there is a legislative *lacuna* in the process. The power must be exercised sparingly, after having taken into account the interests of justice in a manner consistent with the Constitution.

[90] In my view it must be added that the power conferred on the High Courts, Supreme Court of Appeal and this Court in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfill the judicial function of administering justice in a regular, orderly and effective manner. Said

[19] 1997 (10) BCLR 1413 (CC); 1997 (4) SA 1076 (CC) at para 22.

[20] 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095 (CC) at paras 4-5.

otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction. However, the inherent power to regulate and control process and to preserve what is in the interests of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution.[21]

[91] In our constitutional scheme a right entrenched in the Bill of Rights is certainly not absolute. Nor do we subscribe to a hierarchy of entrenched freedoms and fundamental rights. A right may be limited, but only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom or by any other provision of the Constitution.[22] The National Director of Public Prosecutions, the first respondent, argued that the broadcaster's right to free expression and freedom of the press under section 16(1) is limited by section 173 of the Constitution. The question that arises is whether the manifestly procedural character of the jurisdiction under section 173 serves the same purpose as the limitation of rights standard in section 36(1) of the Constitution. I think not.

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[21] The notion that the inherent power to regulate and control process does not translate into judicial authority to impinge on otherwise vested rights was fully recognised prior to the advent of the Constitution. For example, see *Chunguete v Minister of Home Affairs and Others* 1990 (2) SA 836 (W), in which the Court held, at 841H-I:

> "The inherent jurisdiction does not…influence the inability of the Court to impinge upon a right which has accrued to a party according to law except when the impingement is needed to protect the Court's functions and the fairness thereof."

See also Jacob above n 11 and *Halsbury Laws of England* vol 37 at para 12.

[22] Section 36(2) of the Constitution provides:

> "Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[92] If a court seeks to limit an entrenched right, such as the free expression of the media, relying only on the power to regulate procedure under section 173 and not on a law of general application that confers a discretion to limit an entrenched right, as was the case in *Giddey*,[23] the Court itself is imposing the limitation. It must follow that, at a bare minimum, the limitations must, in substance, fall within the bounds imposed by section 36(1). It seems to me plain that under section 173 the court does not have a strict discretion in the sense that it has more than one legitimate option. On the contrary, it is obliged to give effect to the entrenched right unless it is reasonable and justifiable to limit the right and even so only to the extent necessary to achieve the purpose of the limitation.

The proper test

[93] Before us all parties argued this case on the basis that the Supreme Court of Appeal exercised a discretion conferred by section 173 of the Constitution when it refused the application of the public broadcaster. I have described the nature of the discretion section 173 permits. However, for present purposes it is unnecessary to characterise the discretion as strict or not. Suffice it to draw attention to some differences between the discretion here and the one we were concerned with in *Giddey.*

[94] Most instances of discretion in the strict sense only affect the parties involved in the dispute. These include a decision to grant a postponement, a decision regarding

[23] *Giddey NO v JC Barnard and Partners* CCT 65/05, 1 September 2006, as yet unreported.

condonation,[24] a decision regarding security for costs[25]or the discretion regarding the admission of a bail record.[26] In contrast, the discretion exercised in this case affects not only the public broadcaster and the parties involved, but also every member of the public who might wish to observe the criminal appeals. Decisions involving broadcast rights relate to the limitation of fundamental rights and have a substantial impact on the broader public. It would therefore be inappropriate to conclude that in making such a decision on a particular set of facts, a court has a free choice regarding whether to grant such broadcasting rights or not. Another crucial difference is that here the Supreme Court of Appeal, on it own accord, has limited the right to free expression. This is not a case where the legislature itself has chosen to limit the rights. If it does limit enumerated rights, it may do so only in a manner compatible with the rights limitation precepts of the Constitution.

[95] I shall nonetheless approach this matter on a standard more favourable to the respondents and that is as if the appeal were against the exercise of a discretion in the strict sense. That means that I am obliged to interfere only if the Supreme Court of Appeal has not exercised its discretion judicially; has been influenced by wrong principles of law or by a misdirection on the facts; has taken into account irrelevant

[24] See for example, *Mabaso v Law Society of the Northern Provinces and Another* 2005 (2) SA 117 (CC), 2005 (5) BCLR 129 (CC).

[25] See for example, *Giddey* above n 23.

[26] *S v Basson* 2005 (12) BCLR 1192 (CC).

considerations; or has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and legal principles.[27]

Has the discretion been exercised properly?

[96] First, it bears repetition that the right of media, such as the SABC, to gather and broadcast information, footage and audio recordings flows from section 16(1) of the Constitution. Equally important is that the SABC is a public broadcaster and has the licence and obligations to broadcast under legislation and particularly the Broadcasting Act 4 of 1999. At the threshold enquiry, the rights to freedom of expression, freedom of the media and freedom to impart information and ideas must carry a generous import. It seems entirely apposite that its reach must include the right of the media to gather information, video footage and audio recordings for dissemination to the public. The right to freedom of expression would serve little purpose if the media, though entitled to convey information and broadcast footage and recordings, were not entitled to gather information, footage and recordings. The suggestion that the scope of the right of freedom of the media should be limited at the threshold on a context sensitive, case by case basis may well be inconsistent with the jurisprudence of this Court on the limitation of rights. In my view the Supreme Court of Appeal misappreciated the nature of the enquiry it was called upon to make, which is whether there exist reasonable and justifiable grounds to limit the right asserted by the public broadcaster.

[27] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 11; *Mabaso* above n 24 at para 20; *Basson* above n 26 at para 117; *Giddey* above n 23 at para 19.

[97] Second, there is much to be said for the submission of the public broadcaster that the Supreme Court of Appeal counted freedom of expression as the only interest in favour of broadcasts. It omitted to bear in mind that the principle of open justice, which is well entrenched in our law, provides a powerful reason for allowing the broadcast of court proceedings. The principle of open justice is an incident of the values of openness, accountability and the rule of law, as well as a core part of the notion of a participatory democracy. All these are foundational values entrenched in the Constitution. Its preamble contemplates "a democratic and open society in which government is based on the will of the people" whereas section 1(d) requires that our democracy shall ensure accountability, responsiveness and openness.

[98] In the judicial sphere, notions of openness are even more important. The public is entitled to have access to the courts and to obtain information pertaining to them. There is no gainsaying that the gathering of information pertaining to how courts function is indivisibly linked to representative democracy. Once more, sections 34 and 35(3)(c) of the Constitution require that court proceedings in this country must be "public". After all, courts of law exercise public and often coercive power. What they do and do not do is of legitimate public concern. In *S v Mamobolo*[28] this court makes the point in telling terms:

> "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

[28] 2001 (3) SA 409 (CC) at para 29.

> knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts. And, ultimately, such free and frank debate about judicial proceedings serve more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important aspirational attributes prescribed for the Judiciary by the Constitution."

[99] The principle of open justice is well settled in many democracies. A few examples will suffice. The House of Lords in *Scott v Scott*[29] endorsed the principle on the following terms:

> "Publicity is the very soul of justice. It is the keenest spur to exertion and the surety of all guards against improbity. It keeps the judge himself, while judging, under trial."

In *Richmond Newspapers Inc v Virginia*[30] Chief Justice Warren Burger, writing for an 8-to-1 majority of the US Supreme Court about the necessity for open courtrooms, observed:

> "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

In *Edmonton Journal v Attorney General for Alberta*, the Supreme Court of Canada, in endorsing the open justice principle, recognised its educational value:

> "It is also worth noting that there is an important educational aspect to an open court process. It provides an opportunity for the members of the community to acquire an understanding of how the courts work and how what goes on there affects them."[31]

[29] [1913] AC 417 at 477.

[30] 448 US 555 (1980) at 572.

[100] It is perhaps appropriate to draw attention to the fact that permitting audio-visual recording and broadcast of appellate proceedings is by no means without precedent. The Supreme Court of Canada provides a live feed of all appeals to the Canadian Parliamentary Press Gallery. The Court holds copyright over all video recordings. The Court has an arrangement with the Canadian Public Affairs Channel which allows the Channel to broadcast hearings at a later date. Upon written request, permission may be given to allow limited use of video recording of cases for educational, non-commercial purposes. Members of the media write to the Registrar to obtain permission.[32]

[101] In concluding the discussion on the principle of open justice it is important to recognise that its relevance in our context is even greater. On the papers the evidence suggests that the majority of South Africans receive news and information principally by means of radio and television. The printed media is a preserve of a few. This is so partly on account of the extensively high level of illiteracy. We are told that daily newspapers average a circulation of approximately 1.6 million. Whereas the national television network reaches approximately 18 million people and the radio has a daily adult audience of around 20 million people. These facts indeed make the point of the

[31] *Edmonton Journal v Attorney General for Alberta, Attorney General of Canada and Attorney General of Ontario* [1989] 2 SCR 1326 at 1360j.

[32] See "Access to the Court" Supreme Court of Canada website, online: http://www.scc-csc.gc.ca/mediaportal/accesscourt/index_e.asp (accessed 20 September 2006).

full bench in *Dotcom Trading 121 t/a Live African Network News v King NO and Others*[33] that:

> "In modern times there are many forms of communication. 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."

It is no answer to this telling point that the court will be open to the public during the appeal hearings. Besides obvious distance and space limitations, the vast majority of citizens prefer to rely on the media rather than personal attendance at court proceedings.

[102] Fourth, the dictates of our Constitution are that a court hearing must be not only fair but also public. The Supreme Court of Appeal started its analysis by pitting the right to freedom of expression against the right to a fair hearing. In doing so, in effect the Supreme Court of Appeal failed to bring to account the fact that the right to a fair hearing itself includes the right to a "public" hearing. Therefore, the issue is not one of a choice but of how best a court can reconcile the two elements of fairness and openness in the hearing. Freedom of expression does not necessarily threaten fair hearing rights. It can bring considerable benefits to the requirement. That means that courts are required to embark upon a nuanced analysis rather than simply opting, as the Supreme Court of Appeal did, for one right to prevail over another.

[33] 2000 (4) SA 973 (C) at para 44.

[103] Fifth, earlier in this judgment I alluded to the test developed by the Supreme Court of Appeal to determine when broadcasting should be allowed. Its view is that "live or recorded broadcasting should not be allowed unless the court is satisfied that justice will not be inhibited, rather than to adopt the converse test." Clearly, the test privileges the right to a fair trial over the right to freedom of expression and the open justice considerations and implies an inappropriate and unwarranted hierarchy of rights, which from the outset prejudices the rights of broadcasters.

[104] Lastly, on the facts, the Supreme Court of Appeal concluded that there was a reasonable possibility that allowing the public broadcaster to record the proceedings and to broadcast them on sound television and radio would "inhibit justice" because counsel and the court will be distracted by the extensive publicity surrounding the appeals such that an unfair hearing would result contrary to the fair trial guarantees in sections 34 and 35(3) of the Constitution. There is no doubt that the appeals have elicited unprecedented public interest and the political stakes are high. The record is indeed long and trying. The evidence therein will be subjected to incisive analysis and often trenchant criticism. A variety of legal arguments will be made and refuted. And certainly there will be searching and sometimes robust exchanges between counsel and the bench. This however seems to me as par for the course. It certainly comes with the territory. I have agonised much over the reasonable prospects of judges and counsel alike being inhibited in discharging their solemn duties. I am not persuaded, nor do the facts indicate any material risk that counsel, very senior ones at

that, would shirk their responsibility to advance as vigorously as is permissible the cause of their clients. I can find no real likelihood that senior counsel would not address the court "with their customary dignity, erudition and helpfulness".[34] Nor am I persuaded that judges would not discharge their obligations "impartially and without fear, favour or prejudice".[35]

[105] For the sake of completeness, I point out that during the hearing of this matter all counsel were invited to draw attention to any other manner in which the fair trial rights envisaged in section 35(3) of the appellants might be endangered by the sound broadcasting. None was advanced.

[106] In any event, there is a possible safeguard available during the hearing of the appeals. The Supreme Court of Appeal could at any stage halt the sound recording of proceedings should actual distraction take place. At this stage, as the first respondent submitted that we accept the "predictive analysis" of the effect of filming and recording the appeals. The difficulty, it seems to me, is to shore up with facts the

[34] SA Broadcasting Corporation Ltd v Thatcher and Others [2005] 4 All SA 353 at para 113.

[35] Section 165(2) of the Constitution. See also Schedule 2 *Oath or solemn affirmation of Judicial Officers*, para 6(1) which reads:

> "Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows:
>
> I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.
>
> (In the case of an oath: So help me God.)"

prediction that demonstrated a reasonable likelihood that fair trial rights are in jeopardy.

[107] The Supreme Court of Appeal refused to allow the sound broadcast of proceedings on the further ground that it would threaten or undermine the subsequent trial of Mr Zuma in a material way. It is common cause that the hearing will not be closed to other media. The question must arise whether the Supreme Court of Appeal's decision to refuse broadcast rights is not likely to lead to greater distortions in the public eye than would be the case if broadcast rights had been granted. The public will then have to settle for second hand accounts derived from other forms of media. In my view, preventing the SABC from broadcasting will in no way avoid or minimise the risk of distortion. Rather, an unfiltered relay of the proceedings on sound broadcast or television can only assist to quell the perception that the second respondent, the State or Mr Zuma are not being given a fair hearing.

[108] Another concern of the Supreme Court of Appeal related to the risk that witnesses in the trial of Mr Zuma to be held later will refuse to testify. This risk is attributed to increased exposure through live television and radio coverage. Two quick points need to be made in this regard. First, a ban on radio and sound television coverage will not prevent "searching examination and very likely trenchant criticism", as is anticipated by the Supreme Court of Appeal, from being reported widely in other media. Secondly, the risk that witnesses in a trial may opt not to testify is ever present in the face of profuse media reporting. It is however a hard fact that witnesses duly

subpoenaed are obliged to testify in an open court except if there are justifiable factors which compel a closed hearing. In these circumstances it seems to me that the prohibition of sound dissemination by the Supreme Court of Appeal is not an effective means of preventing the purported harm.

[109] It is not without significance that the judgments of the High Court against which the appeals lie were delivered not only in an open court, but were disseminated on radio and live sound television. The broad public, over a few days, heard the reasons for judgment directly from the mouth of the presiding trial judge. It may well be said that the public has a valid expectation to hear and perhaps see the court that set aside, varies or confirms the decisions of the trial court which were much of a public affair.

[110] Finally, in imposing the sound broadcast ban, the Supreme Court of Appeal, in my view, was obliged to consider whether there were less restrictive means to prevent the mischief at which the prohibition was directed. In its reasoning, the Court concentrated on sound television broadcast and to a lesser degree radio. However, in the order it made it appears to have conflated the different forms of relief sought by the SABC. In particular, there is no evidence that the Court considered whether it could allow sound broadcast to some extent or under particular circumstances in the proceedings. In argument before us, counsel for the respondents conceded that radio relay of the proceedings may well be less inhibiting than sound television and yet would reach millions of listeners. It is so that the Supreme Court of Appeal chose not

to make any firm decision about delayed broadcasting on television or radio by means of edited highlight packages.

[111] In the last instance the fair trial rights of an accused person are indeed important. In this case the second appellant faces a significant risk to his liberty and to a substantial portion of his estate. It is also important that he opposes the sound broadcasting of the appeal. The State too resists an order permitting a live sound broadcast. And it is so that ordinarily a court seized with a particular hearing is best positioned to determine what is in the interests of justice in relation to fair hearing rights. However, in my view, at a factual level there must be a demonstration of a substantial likelihood of harm relied upon. Moreover, none of these factors taken alone or together are decisive if it is not reasonable and justifiable to limit entrenched rights and founding values of our Constitution, particularly where the public itself is the beneficiary of the rights and values that are implicated.

[112] In the result I would uphold the appeal but order the SABC to pay the costs of the second to the twelfth respondents in the Supreme Court of Appeal and in this Court. In both Courts the SABC moved for relief on an urgent basis. The purported urgency was manifestly self-induced to the considerable inconvenience of this Court, the Supreme Court of Appeal and all respondents who are in the thick of things preparing for the forthcoming appeal hearings

[113] For no good reason, the public broadcaster was dilatory in moving the court for relief. It is just and equitable that private litigants such as the second to the twelfth respondents are not unduly out of pocket on account of fault which is not of their own making. I would order costs against the applicant in this Court and the Supreme Court of Appeal on the normal scale. The costs would be inclusive of costs for the employment of two counsel.

This being a minority judgment I need not formulate a formal order.

MOKGORO J:

[114] I have read the judgment of the majority of the Court and the dissenting judgment of Moseneke DCJ in this matter. I concur in Moseneke DCJ's judgment for the reasons he gives.

[115] I consider that it is important to emphasise by means of this brief concurring judgment, the constitutional values and principles that the Supreme Court of Appeal should have taken into account when it exercised its power under section 173 to limit the right to freedom of expression of the SABC provided for in section 16 of the Constitution.

[116] The permission sought by the SABC in the Supreme Court of Appeal was to broadcast live on radio and television the criminal appeals concerned. For those purposes, they sought to record with both visuals and sound for television and radio. Alternatively, permission was sought to broadcast edited highlights on radio and television. The Supreme Court of Appeal held that to allow such a request would interfere with fair trial hearing rights because it may inhibit interaction between the court and counsel. The Court held further that in view of the overlap between issues in their appeals and a possible prosecution of the former Deputy President, Mr Zuma, abroadcast of the proceedings in the Shaik case might impair the willingness of witnesses to testify in the Zuma case. The SABC submits that neither of these grounds was well founded and that the decision of the Supreme Court of Appeal dismissing its application violated its freedom of expression rights under section 16 of the Constitution.[1] Although the inherent power that courts have under section 173 to regulate their own processes is an important power for courts to determine how proceedings are to be conducted before them, it is critical in our constitutional democracy that power is exercised subject to the Constitution. In particular, section 173 provides that courts have to take into account the interests of justice.

[117] For convenience I set out the provisions of section 173 of the Constitution. It provides:

[1] Section 16 provides, in relevant part, that:

> "(1) Everyone has the right to freedom of expression, which includes—
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas . . .".

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

Section 173 therefore affords the Supreme Court of Appeal the power to determine the extent to which the SABC may exercise its right to freedom of expression. The Judiciary too, is bound by it.[2]

[118] As Moseneke DCJ does, I too will assume without deciding, that the discretion exercised by the Supreme Court of Appeal under section 173 is a strict discretion. I therefore agree that it can only be interfered with if it is shown that the Supreme Court of Appeal, in exercising that discretion, materially misdirected itself on the law or the facts; took into account factors which are not relevant or came to a conclusion which no reasonable court would have come to on the basis of the law or the facts before it.[3]

[119] In *South African National Defence Union v Minister of Defence and Another*,[4] the importance of the right to freedom of expression protected in section 16 of the Bill of Rights was emphasised when this Court held that:

> "Freedom of expression lies at the heart of 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

[2] Section 8(1) of the Constitution provides:
> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[3] *S v Basson* 2005 (12) BCLR 1192 (CC) at paras 110 and 154.

[4] 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7.

> 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 freely on a wide range of matters."[footnotes omitted]

[120] While the right of the SABC under section 16 consists primarily of the right and freedom to disseminate information, this right correlates with its duty as the public broadcaster to inform the public. The public in turn, has the right to receive information. In an open democracy based on the values of equality, freedom and human dignity, the right of the public to be informed is one of the rights underpinned by the value of human dignity.

[121] Thus, in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)*[5] this Court held that freedom of expression is a vital incident of dignity, equal worth and freedom with its own inherent worth and serving a collection of constitutional ends in an open and democratic society.[6]

[122] In *Khumalo and Others v Holomisa*[7] (*Khumalo*) this Court recognised the crucial role which the media plays with regard to freedom of expression:

> "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

[5] 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC); [2005] JOL 14579 (CC).

[6] Id at para 45.

[7] 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC).

> key agents in ensuring that these aspects of the right to freedom of information are respected . . . In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility . . . "[8].

It is with that constitutional duty and responsibility in mind that the SABC asks this Court to set aside the order of the Supreme Court of Appeal prioritising the right to a fair trial and denying the public broadcaster its right to freedom of expression.

[123] It is important to acknowledge the right to freedom of expression of the SABC. Like any other right in the Bill of Rights, the right to freedom of expression may be limited.[9] In circumstances where the right competes with other rights in the Bill of Rights, its limitation may be justified. However, that justification has to be subject to the Constitution.[10]

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[8] Id at paras 22-24.

[9] Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> *(a)* the nature of the right;
> *(b)* the importance of the purpose of the limitation;
> *(c)* the nature and extent of the limitation;
> *(d)* the relation between the limitation and its purpose; and
> *(e)* less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[10] Section 7(3) of the Constitution provides:

> "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill".

[124] In *Islamic Unity Convention v Independent Broadcasting Authority and Others*[11] Langa CJ stated:

> "There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests . . . . The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution."[12]

[125] Clearly therefore, when freedom of expression does conflict with other rights a court must balance the conflicting rights proportionally. Our Constitution does not envisage a hierarchy of rights where courts simply prefer one right over the other.[13]

[126] Although the right to freedom of expression is of cardinal importance in our constitutional democracy, in the context of this case, the Supreme Court of Appeal was well within its discretion under section 173 of the Constitution to limit this right. In considering the SABC's right to freedom of expression, the Court held the view that that right was in conflict with the litigants' right to a fair trial. The Supreme Court of Appeal recognised the need to engage in a balancing of the conflicting rights, an approach consistent with our constitutional rights limitation jurisprudence.

[11] 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC).

[12] Id at para 30. See also *Khumalo* above n 7 at para 25 where the Court held that although freedom of expression is fundamental to our democratic society, it is not a paramount value and must be construed in the context of other values enshrined in our constitution.

[13] See in this regard *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41.

[127] However, the Court proceeded to hold that in the event of a "clash of rights", the accused should not be the one to give way.[14] In coming to this conclusion the Court adopted a test that would in its terms logically favour the right to a fair trial over that of freedom of expression. The further application of the test, the Supreme Court had negligible regard to the imposition of the constitutional by the principle of open justice, which manifests in the notion of public trials in open court.

[128] The Supreme Court of Appeal, as indicated above, recognised the need to balance conflicting rights.[15] The Court, however, approached that balancing exercise by adopting a test which determined that audio recording will be permitted only if the court was satisfied that "justice will not be inhibited".[16] The application of that test clearly prioritised the right to a fair trial – a result that is not permitted in our Bill of Rights. For reasons stated above and these, I conclude, as he does, that the Court did not exercise its discretion judicially.

[129] The applicants also argued that the reasons of the Supreme Court of Appeal for concluding that the respondents' right to a fair trial would be jeopardised were highly conjectural. They argued further that the Court should only have concluded that the respondents' right to a fair trial would be jeopardised if the respondents established that there was a real likelihood of this happening.

[14] At para 20.

[15] At para 14.

[16] At para 20.

[130] In addition, the Supreme Court of Appeal based its refusal of the SABC's application on the possibility that counsel and judges might be inhibited to the extent that the respondents' right to a fair trial would be infringed. In a democratic society such as ours, the impracticality of accommodating millions of the interested public in our courtrooms makes it reasonable that the SABC be permitted to extend the court room into the homes of South Africans. This is particularly so in matters of profound interest and concern to them such as the one at hand.

[131] The request of the SABC to record live proceedings of the Court or to record with sound for later broadcasting is in my view, not a novel idea in a system which conducts criminal trials in open court. The principle of open justice insists that trial proceedings be conducted publicly in open court and ordinarily, that is how trials in our criminal justice system are held. There is then a physical public presence in court, a value integral to the idea of public trials, where the public trial in turn, is an enhancement of the right to a fair trial, rather than a detraction from it. In effect, the request of the SABC aims to extend the court room into the homes of the South African public, providing them with a virtual presence in open court. If their physical presence in open court does not inhibit counsel and the judges and witnesses, it is not convincing that a virtual presence will have that effect.

[132] Although appeal proceedings do not often have a public audience, a public presence is not barred. It is therefore part of the ordinary course of all trials that judges and counsel operate in the public eye. They cannot be heard to say a public

presence in court, virtual in this case, inhibits their performance. Besides, once the cameras are stationary and fairly unobtrusive, any consciousness of the cameras is likely to be overcome within no time. Further, the SABC was mindful to ask for a variety of less intrusive, optional ways for them to exercise their right, including the possibility of the Court setting conditions that it deems proper or reasonable in carrying out the recording and broadcasting. In the circumstances of this case and against the background of the importance of open justice in our democracy, those options should have been appropriately considered.

[133] I am of the view that the SABC broadcasts of the appeal proceedings would give effect to the principle of open justice and the right to freedom of expression, which is fundamental to our democratic society, without undermining the right to a fair trial. It would make the appeal proceedings a matter of utmost public interest and concern, accessible to millions of viewers as the statistics cited by Moseneke DCJ in his judgment show, bringing the courtroom into their houses and allowing them to be firsthand witnesses to the appeal proceedings. In balancing the conflict between the relevant rights, the SCA adopted an approach which created a hierarchy of rights which prioritised the right to a fair trial, contrary to the Bill of Rights in the Constitution. The Court did not exercise its discretion judicially.

I therefore agree with Moseneke DCJ that the application should be upheld.

SACHS J:

[134] I agree with paragraphs 1-34 and 47 of the majority judgment but do not accept the main thrust of reasoning in paragraphs 35-46 which deal with the manner in which the exercise of the Supreme Court of Appeal's discretion should be looked at. I would not uphold the appeal, but for reasons different to those given by the majority.

[135] In my view full electronic coverage of appellate court proceedings must await the establishment of appropriately negotiated procedures for guaranteeing accurate, balanced and fair broadcasting. 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.[1]

[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

[1] *SABC v Downer NO and Shaik* [2006] SCA 89 (RSA), Case No 435/06, 24 August 2006, as yet unreported at para 25.

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

[2] *Doctors for Life International v The Speaker of the National Assembly and Others* Case No. CCT 12/05, 17 August 2006 as yet unreported.

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.[3]

[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

[3] Though in fact cameras are physically present in the court, they are effectively neutered because they cannot record the dialogue which is at the heart of the proceedings.

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,[4] 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

[4] At paras 68-69.

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.

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