IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT58/06

South African Broadcasting Corporation Limited

vs

The National Director of Public Prosecutions and 11 Others

Decided on 21 September 2006

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This is an application for leave to appeal against a judgment of the Supreme Court of Appeal (SCA). The applicant, the SABC, seeks an order that will allow it to broadcast on radio and television the appeals of the second to twelfth respondents through the use of visuals and sound. Together with this, the applicant seeks permission to broadcast edited highlights packages on television and radio. The SCA will hear the appeals based on the criminal convictions as well as the civil forfeiture of the respondents' assets related to their offences, together in the week of 25 to 29 September 2006.

The applicant has already received permission from the SCA to broadcast visuals of the entire appeal proceedings (to stretch over five days), but without sound. The main argument of the applicant is that it has a right to broadcast the appeals and an obligation to inform the public arising from the right to freedom of expression guaranteed in section 16 of the Constitution. It argues that the SCA did not give due consideration to this right in refusing permission to sound record and broadcast the appeal proceedings.

The respondents include all the parties to the criminal appeal and all oppose the application. The respondents' primary argument is that this Court should not interfere with the exercise of discretion by the SCA in this case and instruct that Court to permit sound recording and broadcasting. They argue that the matter falls squarely within section 173 of the Constitution, which gives courts the inherent power to regulate their own processes. They argue that if sound recording and broadcasting were to be allowed, it would violate their fair trial rights. They also argue that the introduction of microphones to the court room might well inhibit the judicial process and be problematic for both the judges and counsel.

The Court had to consider whether it should interfere with the discretion exercised by the SCA in terms of section 173 not to grant permission to sound record and broadcast. By a majority (Langa CJ, Kondile AJ, Madala J, Nkabinde J, O'Regan J, Van Heerden AJ and

Yacoob J), the Court held that the application for leave to appeal should be granted but that leave to appeal should be dismissed. In dismissing the appeal the SCA exercised its discretion in terms of section 173 of the Constitution. This provision gives a court the inherent power to regulate its own process. Such discretion must however be exercised in accordance with the interests of justice. The SCA considered all the arguments of both parties and having weighed up all the factors within the factual matrix of the case, decided that given the specific nature of this case it was not in the interests of justice for the application to be granted.

In order to evaluate the discretion exercised by the SCA, the Court first considered two constitutional principles: the need for court proceedings to be fair and the importance of freedom of expression in our constitutional democracy. The Court held that the approach of an appellate court to an appeal against the exercise of discretion by the SCA in this case is that it will not interfere unless the decision is based on incorrect legal principles or incorrect facts. The question before the Court was not whether it would have reached the same conclusion as the SCA, but whether it could be said that that Court had made a "demonstrable blunder" in reaching its conclusion.

The majority held that a court, in determining whether to permit sound broadcasting of court proceedings, must adequately consider and weigh in the balance the relevant constitutional principles, particularly the rights in the Bill of Rights. The majority further held that the SCA had done so in the present case. An important consideration is that the applicant could point to no jurisdiction where permission to televise court proceedings based on freedom of expression had been successfully sought where parties to the litigation were opposed to it. Indeed, in other open democracies, such as Germany, the USA and the United Kingdom, it is clear that freedom of expression is not held to include the right to televise court proceedings. In the circumstances, the majority held that the reasoning and conclusion of the SCA could not be faulted.

Sachs J filed a separate judgment concurring with the order made by the majority but for different reasons. These reasons related particularly to those parts of the majority judgment dealing with the manner in which the exercise of the SCA discretion should be conceptualised and also on the limited ground that the SABC erred in not raising the question of electronic broadcast timeously to ensure that proper safeguards were put in place. He endorsed parts of Moseneke DCJ's judgment with regard to the exercise of the discretion and held that as a general rule appellate courts have no discretion, either broad or narrow, as to whether they should permit live coverage of their proceedings. Courts, he said, have to provide the greatest possible access of the public to their proceedings save in exceptional circumstances where the interests of justice may require, for example, where the identity of children needs to be protected. He held that while the unfamiliarity of cameras and microphones functioning in the court is indeed a factor that cannot be ignored, that should not be treated in a cavalier fashion or with attitudes of superiority.

Sachs J stated further that there is a need to transform the manner in which the judiciary has become used to considering its responsibilities in this area. Courts should zealously

protect the fair trial rights and actively encourage the public to understand judicial function but at the appeal level, the different constitutional considerations as the majority judgment indicated, need not be in tension with each other. He held that clear guidelines need to be established to provide a principled and functionally operational basis for the granting or refusal of access to the electronic media. He expressed a wish that a question of full radio coverage should be explored even at this late stage.

Finally, he held that it is not in the interests of justice for these matters to be resolved under a "sword of Damocles" but should be worked out through a process of negotiation rather than litigation.

Moseneke DCJ (with whom Mokgoro J concurred) dissented from the majority judgment. He would have allowed the appeal and would have ordered the SABC to pay the costs of the second to the twelfth respondents. Though he agreed with the majority judgment on the proper approach to be adopted by an appellate court towards the exercise of discretion by another court, Moseneke DCJ disagreed on the manner in which the main judgment characterised the discretion conferred on a court by section 173 of the Constitution. In particular, he held that the discretion conferred on a court by section 173 does not translate into judicial authority to impinge on a right that has been conferred by the Constitution. 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 discretion to limit an entrenched right, the court itself is imposing the limitation. It must follow that, at a bare minimum, the limitations must fall within the bounds imposed by section 36(1) of the Constitution, which requires such limitation to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Thus, under section 173, a 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.

Moseneke DCJ also disagreed with the majority judgment on whether the decision of the SCA is vitiated by a misdirection which entitled this Court to interfere. Though he found that the discretion exercised under section 173 was not a discretion in the strict sense, Moseneke DCJ nonetheless approached the matter as if it were an appeal against the exercise of such a discretion. .He observed that the media's right to free expression under section 16 of the Constitution must include the right to gather information, video footage and audio recordings for dissemination to the public. Thus, the SCA misappreciated the nature of the enquiry it was called upon to make. In addition, the SCA 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, particularly in South Africa where the majority of South Africans receive news and information principally by means of radio and television.

Moseneke DCJ also found that the SCA erred by pitting the right to freedom of expression against the right to a fair hearing, thus failing to consider that the right to a fair

hearing itself includes the right to a "public" hearing. That means that courts are required to embark upon a nuanced analysis rather than simply opting, as the SCA did, for one right to prevail over another. Another error on the part of the SCA, found by Moseneke DCJ, was its holding 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". This test privileges the right to a fair trial over the right to freedom of expression and the open justice considerations and implies an inappropriate hierarchy of rights, which from the outset prejudices the rights of broadcasters.

The SCA also erred on the facts, according to Moseneke DCJ, by concluding that allowing the public broadcaster to record and broadcast the proceedings would "inhibit justice" because counsel and the court would be distracted by the extensive publicity surrounding the appeals such that an unfair hearing would result. Moseneke DCJ was not persuaded that senior counsel would not address the court with their "customary dignity, erudition and helpfulness". Nor was he persuaded that judges would not discharge their obligations.

With regard to the SCA's concerns in relation to the trial of Mr Zuma, Moseneke DCJ held that an unfiltered relay of the proceedings could only assist to quell any perception that the second respondent, the State or Mr Zuma are not being given a fair hearing. With regard to the alleged the risk that witnesses in the trial of Mr Zuma will, due to intense media scrutiny, refuse to testify, Moseneke DCJ noted first that a ban on radio and sound television coverage will not prevent trenchant criticism of such witnesses from being reported widely in other media. Second, Moseneke DCJ observed that witnesses duly subpoenaed are obliged to testify in an open court except if there are justifiable factors which compel a closed hearing. Thus, Moseneke DCJ concluded that the prohibition of sound dissemination by the SCA is not an effective means of preventing the purported harm.

Finally, Moseneke DCJ held that in imposing the sound broadcast ban, the SCA was obliged, but failed, to consider whether there were less restrictive means to prevent the mischief at which the prohibition was directed.

Mokgoro J has written a separate judgment in which she concurred with the dissenting judgment of Moseneke DCJ. She assumed without deciding that the discretion under section 173 is a strict discretion, which can only be interfered with if the SCA misdirected itself materially on the law or the facts. She held that the test which the SCA adopted to balance the conflicting rights did not give due consideration to the right to freedom of expression and the principle of open justice and thereby prioritising the rights to a fair trial, creating a hierarchy of rights which is not envisaged in the Constitution. She also disagreed with the manner in which the SCA evaluated the facts and held that the facts on which the SCA relied to hold that the rights to a fair trial would be infringed should the SABC's application succeed do not present a real threat to the right to the fair trial rights of the litigants. She therefore concluded that the appeal should be upheld.

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