IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO 435/06

In the matter between

SOUTH AFRICAN BROADCASTING CORPORATION LIMITED
Applicant

and

WJ DOWNER SC N.O. First Respondent
SCHABIR SHAIK 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 Eight 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

CORAM: **HOWIE P, HARMS, STREICHER, NAVSA et HEHER JJA**

Date Heard: **14 August 2006**
Delivered: **24 August 2006**
Summary: **Live television and radio coverage of appeals in SCA sought – competing**

constitutional rights of broadcaster and litigant, especially latter's fair trial right – Court's discretionary power in s 173 of Constitution to regulate its own 'process' in the interests of justice – held in the circumstances that such interests warranted disallowing the requested broadcasts.
Neutral citation: This judgment may be referred to as *SABC v Downer NO and Shaik* [2006] SCA 89 (RSA)

J U D G M E N T

HOWIE P

HOWIE P

[1] The applicant is, in terms of the Broadcasting Act 4 of 1999, the national public broadcaster. It applies for an order granting it leave to televise and sound record the proceedings in two related pending appeals in this court. Its purpose is to employ such recordings in live broadcasts and delayed, highlights-package news broadcasts on both television and radio. The appeals were due to be heard consecutively in the week 21 to 25 August 2006 but have had, unavoidably, to be postponed for hearing in the week 25 to 29 September. The respective parties to the appeals have been cited as respondents. They oppose the application.

[2] The question of televising the appeal proceedings was first broached by the applicant on 3 August. In line with measures sanctioned in previous appeals it was directed, through the registrar, that the applicant was at liberty to make visual recordings without sound. The applicant was not satisfied with that and launched the application on 8 August. This is the first time we have been asked to permit sound recording whether for television or radio broadcasting.

[3] The appeals have their origin in a protracted criminal trial in the Durban High Court. The first respondent was leading counsel for the prosecution. Why he, rather than the Director of Public Prosecutions, has been cited as official representative of the State is unclear but nothing turns on that. The remaining respondents were the accused. It was alleged that the second respondent and the third to twelfth respondents (companies which he controlled or in which he had a major interest) committed a number of different offences the details of which are presently unimportant. What are material now are the main prosecution allegations. One was that the second respondent, over a period of more than five years, made a substantial number of corrupt payments to the erstwhile Deputy President of the Republic, Mr Jacob Zuma (Zuma), to influence him to use his various official capacities, both before and after his becoming Deputy President, to benefit the second respondent's business activities. The other was that the second respondent, Zuma and a French armaments company corruptly arranged to pay Zuma a bribe in return for which the latter would protect the French entity from exposure by official investigations in South Africa into alleged irregularities in the country's arms procurement dealings during the second half of the 1990's. (The French company was one of the approved suppliers with which arms contracts were concluded.) The trial court found the prosecution case duly proved. The second respondent was convicted on all the main counts he faced and was sentenced to an effective 15 years' imprisonment. Those of his companies that were also convicted were sentenced to pay fines.

[4] Subsequent to the criminal trial the National Director of Public Prosecutions applied under the Prevention of Organised Crime Act 121 of 1998 for a civil order against second respondent and those of his companies

found to have benefited from certain of the corrupt acts, that they forfeit such benefits. The application succeeded and a forfeiture order was made.

[5] Leave to appeal was sought in both matters. The learned trial judge, who also heard the forfeiture case, granted leave to appeal in that matter but only limited leave in the criminal case. An application to this court for unrestricted leave in the criminal case was partly successful. Where it was not successful (I except those respects in which it failed outright) the application was referred to this court for argument as part of the appeal proceedings. For present purposes it suffices to refer, as I have done, to both matters as appeals in the full sense.

[6] The applicant alleges, apparently with good reason, that there is intense public interest in the appeals. Accordingly it claims, by way of the order prayed, to fulfil its statutory duty to inform the public, and to exercise its constitutional right to freedom of expression and to impart information.

[7] In elaboration of its request the applicant maintains that televising the proceedings will also have public educational benefits and that the recording process will in any event not audibly or visually disrupt the conduct of the hearing.

[8] The respondents contend, on the other hand, that live television coverage in particular, quite apart from radio coverage, will cause the proceedings to be conducted before possibly millions of viewers. The persistent consciousness of this fact, they say, will present a continual distraction to counsel on both sides, and the judges, from the minutely careful

attention to the presentation and progress of the argument which the conduct of fair appellate proceedings essentially requires. Part and parcel of an appeal hearing are the exchanges between judges and counsel whereby submissions are clarified and tested. The awareness of a mass audience, they argue, carries the risk of disruption of that essential line of forensic communication with attendant prejudice to the parties and the attainment of a fair hearing.

[9] The first respondent goes on to advance a further reason for his opposition. Two of the charges are the subject of a pending prosecution of Zuma. Many of the witnesses who testified in the criminal trial in the present case will be liable to be called to testify in the pending matter. It is contended that the exposure which the applicant proposes, or its after-effects, may inhibit them from testifying, or while testifying, in the Zuma trial.

[10] Similarly, the second respondent also offers an additional ground for his opposition. It is that television coverage of the appeals would subject him to an invasion of privacy such as he was obliged to endure when delivery of the judgment in his trial was televised. One of the cameras, which was continually focused on him on that occasion, delivered constant close-up footage of his reactions to the trial court's findings.

[11] No replying affidavit was filed. The respondents' factual allegations are therefore unchallenged.

[12] In the founding papers the applicant summarised its case by asserting that it had the right to broadcast the appeal proceedings by way of television and radio with both visuals and sound. In the alternative it said that this court

had a discretion to permit such broadcasts. In argument, however, counsel for the applicant, having considered the implications of the respondents' respective rights to a fair hearing and to privacy, took up the position that the applicant was entitled of right to have its equipment in court but that its operation was subject to the court's discretionary control and direction.

[13] Accepting for present purposes that the applicant's cameras and recording equipment are capable of operation without visual or audible disturbance of the court's proceedings, the question in this matter nevertheless involves conflicting constitutional rights. The applicant's right to freedom of expression and to impart information [1]**, and the public's right to receive such information, collide four square with the respondents' respective rights. All the respondents have the right in s 34 of the Constitution to have the disputes raised by the allegations in the indictment decided in a fair public court hearing.**[2] **In addition, the second to twelfth respondents have the right under s 35(3) to a fair trial.** [3] **The fair trial right includes the**

[1] Sec 16(1) of the Constitution provides
'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; ...

[2] Sec 34 reads:
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] Sec 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;

right to an appeal. For obvious reasons the appeal must be as subject to considerations of fairness as the trial which gives rise to it.

[14] Counsel for the applicant set great store by the statement in a previous case that 'to prevent a radio broadcaster from utilising its broadcasting and recording equipment constitutes an infringement of its rights contemplated by s 16(1)(a) of the Constitution'. [4] **Assuming that statement to be correct and that it applies to the equivalent constitutional right of a television broadcaster it nevertheless begs the question. The very issue here is whether that right should prevail at the expense of the respondents' competing constitutional rights. To obtain the answer requires us to undertake a balancing exercise in which the rival rights are weighed up against each other after having regard, in the process, to the particular facts of the case.**

[15] Implementation of the required balancing exercise is facilitated by the existence of s 173 of the Constitution which declares this court's inherent power to regulate its 'own process'.[5] **Ordinarily 'process' can mean the documentation by means of which legal proceedings are initiated or it can mean the proceedings themselves. In s 173 it at least has the latter meaning. 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**

(l) not to be convicted of 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 at the time of sentencing;
(o) to appeal to, or review by, a higher court.

[4] *Dotcom Trading 121 t/a Live Africa Network News v King NO* 2000 (4) 973 (C), 987F.

[5] Sec 173 says:
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.

judgment in this country.[6] **In the end, however, what will be** decisive in a case like the present will be the exercise of the courts' discretion.
[16] One may begin the discussion with reference to the second respondent's right to privacy. Although nothing in the founding affidavit indicated either way whether such right might be infringed or not by the applicant's requested recording activities, counsel for the applicant annexed a draft order to their heads of argument in terms of which the applicant would be 'directed not to record and broadcast the second respondent or members of his family for the duration of the appeals, either inside or outside the court during the proceedings'. In argument an undertaking to similar effect was repeated. Counsel for second respondent therefore accepted that the exercise of his client's privacy right was no longer an issue.

[17] Turning, then, to a weighing of the applicant's right to free expression and the respondents' respective fair hearing rights, it was submitted for the second and further respondents that the requested recording should only be permitted were we 'entirely satisfied that justice would not be inhibited'. These words come from an address by the Deputy Lord Chief Justice of England and Wales at a seminar in the United Kingdom on the subject of televising court proceedings. [7]

[18] The words 'entirely satisfied' could lend themselves to some debate as to whether it is for the broadcaster to make out the case that entirely satisfies the court. However, given 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

[6] *SA Broadcasting Corporation Ltd v Thatcher and others* [2005] 4 All SA 353 (C), 369e-388b; and see *Courtroom Television Network LLC v The State of New York*, decided 16 June 2005 in the New York Court of Appeals in which the judgment was available at the time of this hearing but not the official report citation.

[7] Broadcasting Court Seminar organised by the Department of Constitutional Affairs and held on 10 January 2005 in London.

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. Should it be to allow broadcasting unless satisfied that justice would be inhibited or, as in the suggested test quoted above, should it be the other way?

[19] 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.

[20] 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 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. I am hesitant to use the term 'entirely satisfied' because if, as I think, no onus lies, it is best to shed the language of onus, in which, depending on the weight of the onus, one could understandably refer to degrees of satisfaction. Without any onus a court would surely be satisfied or not and, if satisfied, it would not assist to express any degree of satisfaction.

[21] Coming now to consider what might inhibit justice in this case should

the application be granted, the inescapable fact is that television has an impact on the viewer unrivalled by any other news medium. It conveys actuality with greater accuracy and force and visual images tend to impress more readily than a radio transmission or a newspaper article.

[22] From the point of view of the person filmed the prospect of being ‘on camera’ carries, for the inexperienced, a stress all its own. That stress can only be magnified by the realisation that one’s image is being conveyed for hours a day, and for several days, to a countrywide audience. I do not mean to shield the unduly retiring in our midst from television exposure should all other considerations justify the grant of leave for live television coverage. As counsel for the applicant rightly emphasised, television recording cannot be evaded simply by counsel protesting their diffidence.

[23] What are crucial in this matter are, predictably, its own peculiar circumstances. The trial ran from October 2004 to June 2005. The testimony of very many witnesses was heard. There was lay evidence and expert evidence. There was a mass of facts and a myriad of factual issues laced with a variety of legal points. The record runs to 12 600 pages. Thus far the experienced practitioner might well ask how all that distinguishes the case from any other long and demanding trial. The answer lies in those very circumstances which have aroused the public interest on which the applicant relies. The second respondent was a loyal supporter of the ruling political party and a substantial contributor to its funds; he was a close friend and admirer of Zuma who had by the time of some of the events in issue become the country’s Deputy President; there is a backdrop of foreign commercial interests jostling for political patronage in the early years of the new

democracy; there is the involvement of the so-called arms deal and allegations of irregularities that beset it; and there are profound implications for the pending case against Zuma. These considerations heighten the expected tensions of what is in any event a major case. 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. In the result there is a great deal at stake on both sides in a matter which will undoubtedly be fought out in the unrelenting glare of press publicity, whether with or without the television visuals which the applicant has already been given leave to record.

[24] 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.

[25] 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 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.

[26] Considering next the problem of the pending Zuma trial, it is not apparent why the prosecuting authorities did not charge both accused in one case. Their present predicament could well be of their own making. The fact is nevertheless that they did not do so and that difficulties exist which justify the first respondent's opposition to this application.

[27] I say that for two main reasons. The first is that the prosecution will need to rely on many of the 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 correspondingly apply in respect of witnesses called in the second respondent's defence.

[28] The second reason is 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 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.

[29] The considerations explained above are sufficient for the decision of the application without specifically discussing delayed sound coverage, whether by television or radio. It needs to be emphasised, however, that delayed '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.

[30] I accordingly conclude that the application cannot succeed. I would add that I have not lost sight of the applicant's contention that live coverage can serve to educate the public as to how appeals are conducted. I happen to

believe that public education in the workings of the courts is long overdue and that television is the most effective means of instruction. What I am clear about, however, is that this is not the instance by means of which to reach that goal. I am equally clear that educational enhancement was not the motive for the application. The motive was in my view the perfectly understandable one of securing the commercial advantage of enhanced viewer- and listenership.

[31] As to costs in the event of dismissal of the application, the applicant and the first respondent left the matter, as their respective counsel put it, in the hands of the court. For the second and further respondents it was urged that they were private litigants who should not have to bear their own costs. I think this last submission is right. As the application was made for a commercial purpose there is no reason why the applicant should not be liable for the second to twelfth respondents' costs. Because the first respondent did not ask for costs whether in his opposing affidavit or his heads of argument or through his counsel, no costs order in his favour will issue.

[32] The application is dismissed. The applicant is ordered to pay the costs of the second to twelfth respondents, including the costs of two counsel.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL
CONCUR:
HARMS JA
STREICHER JA
NAVSA JA
HEHER JA