

**IN THE HIGH COURT OF SOUTH AFRICA**  
**DURBAN AND COAST LOCAL DIVISION**

**DURBAN**

**CASE NO** 15927/04

**DATE** 2004/10/12

In the matter between

**MIDI TELEVISION (PTY) LIMITED t/a E-TV**

**Applicant**

and

**W J DOWNER SC**

**1st Respondent**

**SCHABIR SHAIK**

**2nd Respondent**

**NKOBI HOLDINGS (PTY) LIMITED**

**3rd Respondent**

**NKOBI INVESTMENTS (PTY) LIMITED**

**4th Respondent**

**KOBIFIN (PTY) LIMITED**

**5th Respondent**

**KOBITECH (PTY) LIMITED**

**6th Respondent**

**PROCONSULT (PTY) LIMITED**

**7th Respondent**

**PRO CON AFRICA (PTY) LIMITED**

**8th Respondent**

**KOBITECH TRANSPORT SYSTEMS (PTY) LIMITED**

**9th Respondent**

**CLEGTON (PTY) LIMITED**

**10th Respondent**

**FLORYN INVESTMENTS (PTY) LIMITED**

**11th Respondent**

**THINT (PTY) LIMITED**

**12th Respondent**

---

**BEFORE THE HONOURABLE MR JUSTICE SQUIRES**

---

**ASSESSORS:**

**MR J I JACOBSZ**

**MR A B MOHAMED, SC**

**ON BEHALF OF APPLICANT:**

**MR G MARCUS SC**

**ON BEHALF OF 1ST RESPONDENT:**

**MR G H PENZHORN SC**

**ON BEHALF OF 2ND - 11TH RESPONDENTS:**

**MR N SINGH SC**

**ON BEHALF OF 12TH RESPONDENT**

**MR H K NAIDU SC**

**EXTRACT**

**(Judgment delivered on 12 October 2004)**

**TRANSCRIBER**

**SNELLER RECORDINGS (PTY) LTD - DURBAN**

15927/04-NB/CD

- 1 -

JUDGMENT

CASE NO: 15927/04DATE: 12 OCTOBER 2004

In the matter between

MIDI TELEVISION (PTY) LTD t/a E-TV

and

W J DOWNER SC & 11 OTHERSJUDGMENT12 OCTOBER 2004

SQUIRES J The present application, made before the main trial commences, is brought by a company called Midi TV (Pty) Limited, which applicant is the holder of a private free-to-air television broadcast licence, which it exercises under the name of e.TV. And the substance of its application is the seeking of permission for access into the court during the trial proceedings, to televise and broadcast this trial, preferably in all its stages, including the evidence given by the witnesses, but subject to such limits as may be reasonably imposed, such as respect for proceedings *in camera*. While it was hoped to broadcast certain parts of the trial live, its main intention would be to show an edited version of each day's proceedings by means of a delayed package insert lasting about half an hour.

The applicant bases this request essentially on the provisions of section 16 of the Constitution, which not only guarantees freedom of expression to all persons, including the media, but also the right to receive and impart information. That guarantee is buttressed by the fact that, unless there are special reasons to depart from it, our Courts are required by statute to carry on all their proceedings in open court

15927/04-NB/CD

- 2 -

JUDGMENT

and, so the argument goes, televising these proceedings will be nothing more than an extension of that requirement.

Cogency is added to this reason by the fact that in the instant courtroom, which is as big as any in the Local Division Court, is manifestly too small to accommodate anything but a small number of the public who may be interested enough to follow the trial, an interest which is particularly heightened by the *prima facie* unusual circumstances of this case and which interest, the applicant says, is not confined to this country. It is just this sort of matter of particularly important public interest that the applicant says it is enjoined to broadcast in the conditions of its licence, particularly having regard to the large portion of the public who may, for various reasons, rely on the television medium as their source of information, a source which the applicant says is patently fuller, more accurate and instructive than the printed word of the print media or the spoken word of the radio.

On this basis it is said that the video camera, being the tool of trade of the television journalist, should also be allowed to be taken into the court and used in pursuance of that journalist's function to report news, just as the print media journalist is permitted to take his note-book or even his laptop PC into court to discharge his function.

Moreover, as it said, such televising of the trial will not be an entirely novel event. Both the Constitutional Court and the Supreme Court of Appeal have allowed their proceedings to be televised and courts in other parts of the English-speaking world are making enquiries into or even taking cautious steps to allow such cameras

15927/04-NB/CD

- 3 -

## JUDGMENT

into court proceedings with individual judges praising the virtues and attractions of the medium as suitable for reporting what takes place in a trial.

Against that application, on the other hand, is the fact that in this case both the State and the accused persons are opposed to the request being granted. The objections of these two parties essentially raise the question of the whole impact of the medium of television on the proceedings of a trial, especially a criminal trial. Not only does that impact embrace the potential obtrusiveness of the actual mechanical processes of filming and transmitting events in the courtroom but, more crucially, the impact on the consciousness of the individual witness of the realisation or knowledge that he or she is the subject of television filming and scrutiny. That may not be much to people whose public life exposes them to such inspection as a normal everyday occurrence but to a person not accustomed to it, it could be, at least, inhibitory and, at worst, positively intimidating and, if common experience is any guide, it can lead to a sudden inability to communicate intelligently or even intelligibly.

The State's objection rests on the premise that with the knowledge that this is a trial fraught with more than usual interest and potential consequences, the normally alarming and unnerving prospect of giving evidence and being cross-examined by experienced counsel, would be gravely compounded by having the evidence televised, increasing thereby an already marked reluctance on the part of some of them to testify at all; and that to require them to give evidence in such circumstances where what they say or do would be broadcast

15927/04-NB/CD

- 4 -

JUDGMENT

to the country at large is an invasion of their individual right to privacy.

The protest of the accused persons, on the other hand, based on the same possible effect of the television cameras on a witness, both on their own witnesses and some of the State witnesses whose evidence may occasionally help the accused, is that the consequences of this may well infringe his or their right to a fair trial.

5

So those objections import two other constitutional rights into the present exercise. The right of an individual to privacy is enshrined in section 14 of the Constitution and the right to a fair trial in section 35, and I shall just deal briefly with each of those in turn. The right to privacy afforded by the Constitution is not merely the four paragraphs of section 14 of the Bill of Rights and while, like obscenity, it may be an illusive concept to define precisely and exactly, the right to privacy must include the right to be free of intrusions and interferences in one's life, whether by the State or any other persons, private or public. And there is judicial authority in the shape of the Appeal Court decision in *National Media v Jeeze* for the argument that this implies a control on the part of individuals not only over who may communicate with them, but also over who is to have access to the information disclosed in any such communication. It clearly embraces a respect for individual sensitivity to publicity.

10

15

20

Then there is the right of an accused person to a fair trial. While the specific question of a right to object to a particular method of reporting evidence is not included in the several sub-paragraphs of sub-section (3) of section 35, the question of what is a fair trial

25

15927/04-NB/CD

- 5 -

JUDGMENT

obviously goes further than an infringement of one or more of those provisions. And if it could be said that any witness, whether called by the State or the accused persons, was in any way inhibited or dissuaded by the prospect of his evidence being captured on film for later showing from disclosing facts that might help the accused in his defence or their defence, then the question of a fair trial could be put at serious risk.

6

None of those rights is absolute in the sense that by operation of law one must prevail over the other in the case of conflict. Each party recognises this limitation but argues in turn that such limitation as is possible should be applied to the other. In such a situation of conflict the decision is essentially which right should defer to the others, the decision being complicated by the fact that the choice is not one between right and wrong but between right and right. One has to balance the different interests, taking into account the nature of the right infringed, its importance in an open and democratic society based on human dignity, equality and freedom, and the nature and extent of the limitation. And, in the process, one has to consider the relation between the limitation imposed and its purpose, as well as the possibility of achieving the purpose of the right by less restrictive means and not simply limiting its operation without further ado, to accommodate a rival claim.

10

15

20

Mr *Marcus*, in his persuasive argument, urged that freedom of the press, and particularly the freedom of expression, was paramount in the function of an open, democratic society. Its importance had been acknowledged and emphasised on many occasions by the

25

15927/04-NB/CD

- 6 -

JUDGMENT

Constitutional Court and the Appeal Court and I cannot think that anybody doubts that. It plays a vital part in exposing corruption, ensuring transparency in public affairs, generally acting as a surrogate *vox populi*, keeping governments and other public bodies in check. Proceedings in open court are no less part of a healthy democratic society, and bringing these to the public was a legitimate and necessary part of the media's function. Witnesses giving evidence in open court were obliged to answer questions in a courtroom which may be packed with spectators and a televised audience outside the courtroom was merely an extension of this aspect. If witnesses were prepared to give evidence in open court to the public and the inspection of spectators there was no reason to limit that public to the confines of the courtroom.

5

10

But the substance of his argument was to urge me to follow the decisions, or the effect of the decisions, in the *Dot Com Trading 121 (Pty) Limited v King N.O.* in the Cape Provincial Division and the more recent decision of the *SABC and Others v The Public Protector* in the Transvaal Provincial Division, both of which were given by the Full Bench of those Courts. I have read those judgments as carefully as I can but I do not think, with respect to Mr *Marcus*, that they are any authority for holding that criminal trial proceedings should also be televised in the public interest. In the *Dot Com* judgment it was said that the mere right to access to proceedings in a court enjoyed by the public and the print media could not be simplistically applied to the electronic media because the making of a video film is an inherent part of the freedom of expression enjoyed by the television journalist. That

15

20

25

15927/04-NB/CD

- 7 -

JUDGMENT

may be accepted, certainly for the present purposes. But the judgment centred on the fact that, having excluded all the electronic media as a blanket ban because of the intrusion caused by television cameras, which intrusion the respondent commissioner described as "a scrum", the commissioner did not consider a less restrictive way in which that freedom could be accommodated. He banned all electronic media and since it could have been met by allowing radio broadcasts of proceedings, which was what the applicant sought, he had not considered the requirement of section 36(1)(e) and his decision was flawed.

5

10

Similarly, in the *Public Protector* matter I do not think it is correct to read the judgment as establishing that, but for section 7 of the Public Protector Act of 1994, the right of the electronic media to broadcast that tribunal's proceedings would have been allowed. It seems clear from the judgment that the tribunal was aware of the obligations imposed by section 16 of the Constitution to afford the public information about its proceedings. But it weighed that obligation against the concerns which pursuit of its investigation might generate, such as the integrity of informants and the interests of witnesses. The judgment thought that in excluding the media the tribunal may have been too cautious about the need to protect witnesses but, the proceedings being a review and not an appeal, it could not be said that the tribunal had exercised its discretion on an irrational basis and the application for a review was dismissed. The judgment does not at any point infer that television presence in a courtroom during a trial was to be allowed. On the contrary, after

15

20

25



15927/04-NB/CD

- 8 -

JUDGMENT

setting out excerpts from several investigations into the question, the judgment concluded that it raised vexed questions of public policy involving complex problems of taste, commercialism, tradition and the goals of the administration of justice.

Now turning to consider a limitation of these conflicting rights  
and in view of that background, I do not think it is acceptable to say  
that televising evidence of a witness in court is no more than the  
witness telling his story in ordinary open court. The video camera  
may be the necessary tool of the television journalist but its visible  
presence, in this courtroom at any rate, would be undoubtedly a  
visible operation, with both its presence and its operation being  
conspicuously intrusive. To most people it would be a potentially  
distracting feature, even if they were not giving evidence. But I think  
the argument also overlooks an important difference between the  
fleeting moment of communication by word of mouth, given only as  
part of the normal narrative of evidence and given in answer to a  
question when, even if spectators may be paying attention, what is  
said may be reported in print the next day but will soon be forgotten.  
Contrast that with a permanently-captured moment of inadvertent  
folly, embarrassment or humiliation that will appear time after time, if  
thought desirable, in the living rooms of the country's television  
watchers when every pause, every frown, every hesitation, every  
unguarded response or unavoidable disclosure of some private fact is  
preserved on tape or film for as long as thought desirable, and  
especially when that frown or hesitation is not part of the evidence or  
the reason for it; but is caused by the witness's realisation that he is

5

10

15

20

25

15827/04-NB/CD

- 9 -

JUDGMENT

being exposed to television scrutiny. No one but the witness could tell what the cause was. Nor would he waive or limit his right to privacy by being subpoenaed to give evidence in court.

So far as the right to privacy is concerned, I think that if the applicant's request is accepted it will potentially undermine the Court of Appeal's decision which it has held to be part of the right to privacy, namely inclusion of the competence to determine the destiny of private facts. That is to say the right to decide when and under what circumstances private thoughts, statements, reactions and idiosyncrasies may be made public. And even the person accustomed to television portrayal could appreciate a residual right to privacy if his evidence should include some revelation that was solely personal and not part of his public life.

Then, so far as the right to a fair trial is concerned, if the thought of having his or her evidence televised and broadcast countrywide caused a reluctance or qualification by a witness of what he may otherwise be prepared to say, the question of a fair trial will become critical with the eventual prospect of proceedings being challenged because that right has been infringed. And the notion of a fair trial, it should be added, includes the public interest in a democratic criminal justice system, that brings wrongdoers to book, as well as one that ensures justice is done for that wrongdoer.

In the light of the refusal by the State and the defence witnesses to consent to such evidence being televised, I do not think I can readily accede to the application and override the possible, if not likely, detriment to witnesses being so intimidated or inhibited or in

15927/04-NB/CD

- 10 -

JUDGMENT

any way prevented from communicating sensibly, by the thought of appearing on television and the quality of their evidence being thereby affected.

Against that provisional conclusion I have to weigh the effect of such limitation on the applicant's right to broadcast by means of television. By declining to accede to its request I will certainly be limiting its right to use the tools of its trade in this court. It is then confined to televising events outside the courtroom or later reporting the information gathered by one of its journalists who listen to the proceedings inside, as usually happens these days. But to that extent the applicant can still impart any information about the trial. The only difference is that it is prevented from doing so by the use of its cameras in the courtroom. Nor would refusing the request to bring cameras into court mean that the proceedings of the trial will not be open to public scrutiny, since members of the public, including the applicant's journalists, will be present and able to disseminate information of and about the proceedings, albeit on a less instantaneous or comprehensive basis.

Similarly, and to consider whether such limitation on the applicant's rights to freedom of expression can be achieved in a less restrictive way, there is the limited broadcast scenario accepted by Mr *Marcus*, namely that filming would be stopped whenever ordered by the Court and only an edited version at the end of each day would be broadcast. But neither of these half-way suggestions meets the difficulties I have endeavoured to set out. Both still require the constant presence and operation of the television cameras. Even

15927/04-NB/CD

- 11 -

JUDGMENT

allowing this to be halted when ordered, requests to do so by the witness or counsel or the observations of the Court, could provide a steady stream of interventions which would entirely disrupt the narrative flow of witness evidence. It would make the conduct of the trial exceedingly difficult, at best, and result in a possible invalidation of the entire proceedings at worst.

5

The only effective basis on which the applicant's rights can be entertained in trial proceeding, and which I shall raise later, is if no television viewing of objecting witnesses takes place at all.

In the result, weighing and balancing the competing claims against each other as best I can, I am eventually of the view that the individual rights of the witnesses and the objections of the accused should be accepted as prevailing and such right as the applicant may have to this end should yield. As I assess the situation, it will be more beneficial to the proper administration of justice, and *pro tanto* to the public good in the society we have, if their rights are respected and the propriety and validity of the trial proceedings are not impaired or jeopardised by the presence and consequence of video cameras and televised proceedings. Nor do I eventually think that it is necessary for court proceedings to be broadcast to the public at large to meet the requirement that these be in open court to which the public has access. That requirement is certainly part of our procedure to ensure publicity and transparency in the administration of justice in a democratic society. But that is achieved by ordinary access to the court's proceedings by the public and the media. Disallowing television cameras in a trial is not going to detract from that. All it

10

15

20

25

15927/04-NB/CD

- 12 -

JUDGMENT

means is that the public at large will not have the instantaneous knowledge and the greater clarity that television can present. I think that is a small sacrifice against the public's greater need to have this trial conducted expeditiously and free of possible controversy and eventual negation.

5

Nor are these the only reasons for the conclusion that the application should not be granted. Almost as weighty are the unavoidable practical difficulties in entertaining the request in the present circumstances. There is simply no space in the limited confines of this courtroom to accommodate the presence and operation of even one camera crew, let alone the three that the applicant thinks would be ideal. The necessary operation would be inescapably and obviously visible and potentially distracting. If there was the equivalent of a projection room in a cinema in the court where the operation of cameras would be at least be unobtrusive, if not wholly concealed, then this particular objection might disappear, but that is, unfortunately, not the case. With the best will in the world and however careful the cameramen or crews might be, their very visible presence could not fail to be noticed and be a focus of distraction to everyone in court.

10

15

20

Nor does the fact that the televising of court proceedings is contemplated or even permitted in other jurisdictions carry any present weight. It must depend in each case on the circumstances of that case. The courts where this is permitted may be blessed with governments that have more money than ours to spend on court facilities that allow televising proceedings without impairing or

25

15927/04-NB/CD

- 13 -

JUDGMENT

intruding on the quality of the evidence. One has little, if any, idea of the facts of each case, and for every Court or Judge who has supported the use of television for court proceedings there are others who denounce it strongly and forbid it to take place in a trial.

Even commissions of inquiry seem to me to be different. No one's liberty or patrimony is at risk in those proceedings, which are designed simply to establish facts not prove criminal charges. So are Appeal Courts different. There is a world of distinction in the reactions to television scrutiny of professional lawyers putting argument to a Bench of Judges and a witness giving *viva voce* evidence in a criminal trial.

Then there is also the point made by the first respondent, namely the salutary practice of witnesses being excluded from court before giving evidence. The object of this precaution is to prevent a witness telling his evidence to what other witnesses called before him may have said. It is one of the ways in which the truth of the matter can be elicited and tested. To show a witness's evidence on nationwide television that can be watched by witnesses still to give evidence, would successfully negate this precaution. The applicant seeks to meet that by undertaking that it will not broadcast verbatim proceedings but only an edited version of the day's events. But I don't think even that meets this objection completely for even watching an edited version of a witness's evidence by a witness still to give evidence could give the latter a good idea of what was said and therefore the ability to measure what he intends to say against what has been said.

15927/04-NB/CD

- 14 -

JUDGMENT

In the result then, the application to televise the entire proceedings must be refused.

That is not to say, I should add, that the applicant's request can never be entertained. It is abundantly clear that this trial has attracted considerable public interest and the space in this courtroom is seriously restricted, so that using the medium of television to bring access to a wider spread of the public is perceptibly a basis for meeting that interest.

Mr *Singh*, for the second to tenth respondents, said I should not entertain any application for such relief as the applicant now seeks because the whole question is one of public policy and should be decided by the Legislature or at least by a body such as the Rules Board of this court. However, as Mr *Marcus* reminded me, the Constitution gives me a discretion to direct procedures in my own court. Speaking for myself entirely, and stressing that I do not even speak for the Natal Provincial Division, much less any other division of the High Court, I would have no objection to at least parts of the proceedings being televised where the difficulties I have tried to describe are no longer an obstacle, for example, the stage of argument if anyone else is still interested by then or perhaps even when judgment is delivered.

So although the application in its present form is refused I will give the applicant leave to approach me later if a stage is reached in the trial where the instant objections are not present, to see if some accommodation of its request can be achieved. It can do this informally in chambers or formally in court. But any such approach

15927/04-NB/CD

- 15 -

JUDGMENT

must be on adequate notice to the other parties.

In conclusion I should just like to say, because it has come to my attention that the SABC's application for similar relief has not been dealt with, this was handed to me five minutes before Court sat, and without any notice to the other parties. It could not therefore be entertained at the same time, although I was invited by Mr *Marcus* to regard the SABC application as being joined to his own. He did not urge any argument on behalf of the SABC, nor have I heard any argument to that end. It was not filed timeously or properly, and was therefore not considered. If it is still wished to be raised, then it may be pursued separately by that party.

6

10

There will, of course, by agreement, be no order as to the costs of the instant application.

-----