

Fair trial rights, freedom of the press, the principle of ‘open justice’ and the power of the Supreme Court of Appeal to regulate its own process

South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others 2007 (2) BCLR 167 (CC)

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1 FACTS

One Mr Shaik was convicted in the Durban High Court on several counts relating to corruption with regards to payments he had made to the former Deputy President Mr Jacob Zuma and that he had bribed Mr Zuma to protect a French armaments company. Several companies which Mr Shaik controls, or in which he has a major interest, were also convicted. Mr Shaik and the companies sought leave to appeal against the convictions by 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 1998.¹

Before the proceedings commenced the applicant informally requested permission from the Registrar of the Supreme Court of Appeal to broadcast the proceedings. The Registrar, in line with the practice of the Supreme Court of Appeal, informed the applicant that visual recordings only without sound would be allowed. The applicant then made formal application to the Supreme Court of Appeal 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.

2 ARGUMENT BEFORE THE SUPREME COURT OF APPEAL

The Applicant argued that the broadcasts were necessary to enable it to fulfill its constitutional, as well as statutory obligations in terms of the Broadcasting Act 4 of 1999, adding that the case involved issues of intense national interest; the broadcast would have educational benefits and would not disrupt the conduct of the hearing.

¹ Judgment of the Constitutional Court, *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others*, case no. CC-2006/58, 21 September 2006, para 3, available at http://concourt.law.wits.ac.za/judgment.php?case_id=13372

The respondents argued that there was no constitutional right to broadcast judicial proceedings. They contended that section 173 of the Constitution, 1996 gave the courts the power to regulate their own proceedings and hence constituted a constitutional limitation to the right to freedom of expression. They argued that the right to freedom of expression was protected by other methods of reporting and that broadcasting would violate the respondent's rights to a fair trial.

3 JUDGMENT IN THE SUPREME COURT OF APPEAL

The court held that the right of the applicant to freedom of expression and the respondent's right to a fair trial were in direct conflict with each other. The court held that because of section 173 of the Constitution it had to embark on a balancing exercise between the right of the applicant to freedom of expression and the respondent's right to a fair trial. The court held that in the exercise fair trial rights had to take precedence over the right to freedom of expression. '[I]f anyone has to give way, it should not be the litigant that faced a loss of liberty if convicted.'

The court found that the television and radio broadcasts violated fair trial rights because of two reasons. Firstly, the broadcast would put 'stress' on both counsel and the judges, inhibiting interaction, thereby creating the material risk that justice would be impaired. Secondly, there was a risk that the broadcasts might prejudice 'the rights of both the State and Mr Zuma to a fair trial' because the extensive broadcasts might deter witnesses from testifying in the Zuma trial due to the critical exposure they may be subjected to which during any appeal. The court also held that the unfettered questioning of counsel may create the impression with the public that the guilt or innocence of Mr Zuma is being prejudged. The court accordingly dismissed the application. The court also held that edited packages might create a risk of misrepresentation and misunderstanding and refused that relief.

The applicant then approached the Constitutional Court on an urgent basis seeking leave to appeal against the judgment of the Supreme Court of Appeal. All the parties to the criminal appeal and the National Director of Public Prosecutions opposed the application. The Constitutional Court found that the application for leave to appeal should be granted.

4 ISSUES BEFORE THE CONSTITUTIONAL COURT

The following constitutional issues were raised before the Constitutional Court:

- (1) The nature of the right to a fair trial in context of a criminal appeal.
- (2) The ambit of the right to freedom of expression of the press and to receive information in section 16 of the Constitution, 1996, with specific regard to the media's role to inform the public about the legal system.
- (3) The existence and role of the 'principle of open justice.'
- (4) The power of the Supreme Court of Appeal to regulate its own proceedings under section 173 of the Constitution, 1996.

5 JUDGMENT IN THE CONSTITUTIONAL COURT

The Constitutional Court held that it was the primary constitutional responsibility of a court of appeal to ensure that the proceedings before it were fair and the court must give content to that obligation. This obligation has always been part of South African law and is now constitutionally enshrined as a fundamental right in section 35(3) of the Constitution. The brief to ensure that proceedings are fair will often require that principles and practical factors which may not point in the same direction have to be considered.

The Court furthermore held that the right to a fair trial had been interpreted by the Constitutional 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' 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.'

The Court, as it had frequently done before, emphasised that freedom of expression lies at the heart of every democracy. However, the Court noted that whether right to freedom of expression included the right of the media to televise and broadcast court proceedings was debatable. The Court noted that in democratic jurisdictions such as The United States of America, Germany and England the right to freedom of expression has been held not to include the right of the media to televise and broadcast court proceedings. The Court preferred to avoid answering this question because of the urgent nature of the proceedings and assumed in favour of the applicant that there is such a right.

The Court noted that it was not the rights and responsibility of the South African Broadcasting Corporation that was central to the issue. It was rather the right of the public to be informed and educated. This was essential for meaningful involvement of ordinary citizens in public life. In this case it concerned the right of South Africans to know and understand the way and manner in which the judiciary functions. This presupposes that courts are open and accessible. This is important in ensuring that courts are accountable and that accused individuals have fair trials.

The Court accordingly did not find it surprising that section 35(3)(c) of the Constitution included as one of the aspects of a fair trial the right to 'a public trial before an ordinary court'. The Court also noted that section 34 of the Constitution similarly entrenched the right to have disputes resolved 'in a fair public hearing before a court.'

The Court held that courts should in principle welcome exposure of their workings as long as the proceedings are fair. The Court noted that the open justice principle is observed in the ordinary course by allowing the public and the press to attend the hearings and for the press to report on the proceedings. In addition the Supreme Court of Appeal had given the applicant permission to make recordings without sound and to televise the recordings or extracts thereof. The narrow issue was therefore the extension of the open justice principle to allow the audio coverage, the broadcasting of the entire proceedings as well as edited highlights.

The Court noted that the question before it was not whether cameras should be allowed into courts, it is whether the Court should interfere with the discretion of the Supreme Court of Appeal in the particular appeal in the specific circumstances and order that the additional coverage be permitted.

In terms of section 173 of the Constitution, 1996, the Supreme Court of Appeal has the power to regulate and protect its own process taking into account the interests of justice. A primary aspect of the exercise of that power is to ensure that the proceedings are fair. The Court held that the exercise of this power will inevitably affect rights in the Bill of Rights including the right to a fair trial in section 35 and the right to have disputes resolved by courts in section 34. In the exercise of this power these rights must not be unjustifiably interfered with. The judgment will furthermore often have to be exercised in the light of a complex range of factors.

The Court did not see the question being as to whether they would have adopted an identical test. The question was whether the Supreme Court of Appeal did not act judicially in exercising its section 173 rights, or based the decision on incorrect principles of law or on a misdirection of the facts.

The Constitutional Court noted that it had on the one hand assumed that the judgment by the Supreme Court of Appeal had infringed the right to freedom of expression. The Court furthermore acknowledged that openness and accountability were underlying values of the Constitution. On the other hand the Supreme Court of Appeal had the primary obligation to ensure that trials are fair. The Court, as the Supreme Court of Appeal had done, held that fair trial rights included the right to an appeal and 'the appeal must be subject to considerations of fairness as the trial which gives rise to it.'

The Court pointed out that the Supreme Court of Appeal had found that broadcasting would not be permitted unless the Court was satisfied that it would not inhibit justice in that Court. The test incorporated the recognition of the primary obligation to ensure fair proceedings without denying the importance of the right to freedom of expression and the principle of open justice. The Constitutional Court held that it was satisfied that the decision by the Supreme Court of Appeal established an appropriate relationship of proportionality between the competing rights.

The Court concluded that it cannot be said that the Supreme Court of Appeal did not reach its verdict judicially and dismissed the appeal.

6 DISCUSSION

6.1 General

The finding by the Constitutional Court that a court of appeal had the primary constitutional responsibility to ensure that proceedings before it are fair may convince some that a court of appeal is constitutionally obligated to treat the convicted individual or entity on appeal, and the prosecution fairly. However, in light of the fact that the Court proceeded to hold that this right was taken up in section 35(3) of the Constitution I have assumed the Court to have meant that a court of appeal was obligated to treat a convicted individual or

entity on appeal fairly. Section 35 provides arrested, detained and accused persons confronted by the criminal justice system with Constitutional rights and not the prosecution.

I do not think that many will disagree with a finding that the Supreme Court of Appeal was obligated to ensure that Mr Shaik and the respondent companies on appeal before it were treated fairly. However, even then the reasoning by the majority of the Constitutional Court in reaching this decision raises some concerns in view of earlier decisions by the Constitutional Court and the wording of the Constitution, 1996. I will now discuss these concerns.

6.2 The assumption by the Constitutional Court that section 16 of the Constitution included the right to televise and broadcast criminal court proceedings

My first concern is the assumption by the Constitutional Court that section 16 which entrenches the right to freedom of expression of the press and the right of the public to be informed, included the right to televise and broadcast criminal court proceedings. The Constitutional Court has in a line of decisions when it specifically dealt with the interaction between the criminal procedure rights in the Bill of Rights and other rights in the Bill erected a conceptual wall between the criminal procedure rights and the other rights.

In *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) the Court erected such a wall between sections 11 and 25 of the interim Constitution. Chaskalson P for the majority held that the primary though not necessarily the only purpose of section 11(1) was to ensure the protection of the physical liberty and physical security of the individual. According to the majority it did not depend on the construction of section 11 in isolation whether 'freedom' had a wider meaning but on its construction in the context of chapter 3 (paragraph 170). They found chapter 3 to be an extensive charter of freedoms that guarantees and gives protection in very specific terms (paragraph 171). The detailed formulation of the rights in chapter 3 could therefore not be ignored in construing section 11. However, the majority did accept that section 11(1) has a residual content and that it may, in appropriate cases, protect fundamental freedoms not enumerated elsewhere in chapter 3 (paragraph 184).

In *De Lange v Smuts NO* 1998 (3) SA 785 (CC) the Court erected the same wall between the equivalent rights in sections 12 and 35, of the Constitution, 1996. The court in reading the interaction between sections 12 and 35 in much the same way as the majority in *Ferreira v Levin* held that the right to freedom and security primarily protect an individual's physical integrity. The Court similarly held that the right to freedom functions as a 'residual right – and may protect freedoms of a fundamental nature - especially procedural guarantees – not expressly protected elsewhere in the Bill of Rights' (page 794 paragraph 16 and further).

The inclusion of a right to information in section 23 the interim Constitution furthermore sparked the debate as to whether an accused should have

access to the information held by the state. At first, it was primarily the issue concerning the right to discover the contents of the police docket for purposes of trial that came before the courts. Before the decision by the Constitutional Court in *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC) there had been considerable debate as to whether or not section 23 of the interim Constitution applied when access to the police docket is required to advance an accused's defence. Some high courts decided that section 23 was applicable. Other courts indicated that they were uncertain. In some cases there were positive arguments that section 23 did not apply.

In *Shabalala* the Constitutional Court decided on the right to information at trial in the context of the fair trial provision in section 25 of the Interim Constitution and not on the basis of section 23 (paragraph 34). Yet, the court still indicated that section 25(3) should not be read in isolation, but together with section 23 and in the broad context of a legal culture of accountability and transparency manifested by both the preamble to the Constitution, and the detailed provisions of chapter 3 (paragraph 35).

However, it is clear that the Constitutional Court in *Shabalala*, when it declared the blanket docket privilege unconstitutional, decided the matter in the context of ensuring a fair trial. The test was therefore formulated as to whether the contents of the docket were necessary to enable the defence to prepare properly. Would the defence therefore be able to effectively exercise the constitutional right to properly 'adduce and challenge evidence', without access to the docket?

When the duty of the state to disclose information for purpose of the bail hearing eventually came before the high court, and on appeal to the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) the question was also not decided on the basis of the right to information afforded by section 32 of the Constitution, 1996. It was not even argued by counsel that section 60(14) of the Criminal Procedure Act 51 of 1977, which refused an applicant for bail access to the contents of the police docket, had to comply with section 32 or, if in violation of section 32, that the government had to justify the infringement under section 36(1) of the Constitution which is the general limitation clause.

However, the Constitutional Court seems to have changed its mind concerning the interaction between sections 12 and 35 of the Constitution without indicating it as such. Twice the court denied conceptual similarity in the analytical process when it built up a conceptual wall between sections 11 and 25 of the Interim Constitution and sections 12 and 35 of the Constitution, 1996. When the same court was faced with certain issues concerning bail in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat supra* the unanimous court, some of whom were instrumental in erecting the wall, and all the parties concerned, seemed to accept that the 'right to bail' in section 35(1)(f) is part of, or is a specific instance of, the right enumerated in section 12 (see the approach in paragraphs 6, 36 and 99 of the judgment and page 86 of the heads of argument by the Director of Public Prosecutions). It therefore seems that the parties concerned, including the court, while not specifically

deliberating about the interaction between sections 12 and 35, chose to ignore the prior decisions by the Constitutional Court. Meanwhile many high court decisions tested bail problems as a liberty issue in terms of section 12. (The applicability of section 12 is of course crucial for the criminal process because it guarantees due process, and, as will be indicated later, allows for the transplantation of persuasive doctrines and principles leaving little scope for foundational confusion. The approach by the Courts in these decisions is also important for the discussion hereunder whether a court of appeal is constitutionally obligated to ensure that proceedings before it are fair).

Following the argument of the Constitutional Court in *Ferreira, De Lange* and *Shabalala* it seems that there will be a similar barrier between section 16 and section 35 of the Constitution. Because section 35(3)(c) expressly provides an accused person with the right to a public trial before an ordinary court, section 16 will not apply.

6.3 The Court's application of section 34 of the Constitution to a criminal appeal

My second concern is the Court's application of section 34 of the Constitution to a criminal appeal. In *S v Pennington* 1997 (10) BCLR (CC) paragraph 46 the unanimous Court remarked *obiter* that section 34 of the Constitution did not apply to criminal proceedings:

'The words "any dispute" may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted.'

The concluding part of the argument here is much the same as in *Ferreira, De Lange* and *Shabalala*. Because section 35 provides for the manner in which criminal proceedings are to be conducted section 34 will not apply.

6.4 The Court's reliance on section 35(3) of the Constitution to ensure fairness on appeal

My third concern is the fact that the Constitutional Court relied on section 35(3) of the Constitution to hold that it was the constitutional responsibility of the court of appeal to ensure that the applicants in the appeal were treated fairly.

Section 35(3) bestows on an *accused person* the right to a *fair trial* which includes specific enumerated rights. A person convicted of an offence is no longer an accused person and an appeal hearing is not a trial. However, the inclusion of subsection 35(3)(o) which provides for the right to 'an appeal to, or review by, a higher court' as one of the enumerated rights in section 35(3) might create the impression that one remains an accused until after the final appeal or review in a case. If this were true a person on appeal must be entitled to the other enumerated constitutional rights in section 35(3) available to an accused confronted by a criminal trial. A convicted person would then for example have the following rights on appeal: to be informed of the charge

with sufficient detail to answer it, to be informed promptly that he may be presented by a legal practitioner of his choice, to be presumed innocent, to remain silent and not to testify during the proceedings, to adduce and challenge evidence. I submit that these rights were clearly meant only to apply to a person that has not been convicted and to a criminal trial.

6.5 The Court's finding that the Supreme Court of Appeal was obligated to ensure that appeal proceedings are fair because of its powers in terms of section 173 of the Constitution

My fourth concern is the finding by the Constitutional Court that the Supreme Court of Appeal had to ensure that the appeal proceedings before it were fair because of its powers in terms of section 173 of the Constitution, 1996. The Court even found that the exercise of this power will inevitably affect rights in the Bill of Rights including the right to a fair trial and cautioned that in the exercise of this power these rights must not be unjustifiably interfered with.

I submit that the Supreme Court of Appeal cannot use this power to interfere with a procedural right that has been provided for in the Constitution. In this instance the Constitutional Court cannot hold that a convicted person has a constitutional right to be treated fairly on appeal if the Constitution when dealing with the matter in section 35 provides only a person accused of an offence such a right at trial. The power in section 173 must be used in a manner consistent with the Constitution (see also *Pennington and Another supra* paragraph 23). The position held by the Constitutional Court brings about that the High Courts, the Supreme Court of Appeal and the Constitutional Court could deviate from the Constitution on procedural issues if the court thought it appropriate.

The power must furthermore be used sparingly (see *Parbhoo and Others v Getz NO and Another* 1997 (10) BCLR 1337 (CC) paragraphs 4 and 5 and *Pennington supra* paragraph 22). In *Parbhoo* the Court used its powers in terms of section 173 to resolve an extraordinary situation pending the enactment of legislation and the promulgation of rules of procedure. The Court made the point that the power related to the process of court arises when there is a legislative *lacuna* in the process (see also the separate dissenting minority judgment by Moseneke DCJ in the case under discussion with which Mokgoro J concurred in separate dissenting minority judgment).

6.6 Concluding remarks

However, I agree that there must be and is a constitutional duty on the Supreme Court of Appeal to ensure that a convicted person is treated fairly on appeal. Section 12 of the Constitution bestows this duty. I submit that the approach by all the parties concerned in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat supra* in tearing down the wall between sections 12 and 35 is correct. The criminal justice process constitutes an interference with the liberty of the subject by the state starting with the framing of laws which

prohibit conduct. This is followed by the arrest and detention of suspects, the process of determining guilt, the passing and enforcing of sentence, up to the restoration of the subject's liberty, either upon acquittal or the setting aside of a conviction, or after service of sentence, or on parole. It does, therefore, seem that the rights in section 35 of the Constitution, 1996 must be regarded as part of, or specific instances of, the right enumerated in section 12 of the Constitution.

It is a pity that the substantial jurisprudence under Canadian law did not point the way. The relationship between section 7 and sections 10 and 11 of the Canadian Charter of Rights and Freedoms clearly spelt out and is apparent for all who would wish to study it.

The Canadian courts have opted for (due process) seepage of the provision in the Canadian Charter relating to deprivations of liberty 'in accordance with the principles of fundamental justice' in section 7 above, to the specifically enumerated criminal procedure rights found in sections 8 to 14 of the Charter. In *Reference re section 94(2) of the Motor Vehicle Act* [1985] 2 SCR 486 at 502ff (Can) Lamer J held that the enumerated criminal justice rights in sections 8 to 14 of the Charter were merely illustrative of the generic due process right contained in section 7. It also seems that section 7 is not limited in its ambit to procedural challenges, but the Supreme Court appears to have imputed a substantive dimension to the term 'fundamental justice'. Section 7 therefore not only protects those values already guaranteed in the criminal justice rights provided for in sections 8 to 14 of the Charter. If none of the provisions in sections 8 to 14 is understood to apply to a particular factual situation, section 7 will also be used to determine whether the law in question corresponds with the principles of fundamental justice.

Under Canadian law section 7 of the Charter therefore operates as a generic and residual 'due process' right and assumes the character and status thereof. This due process right operates independently and informs the interpretation of all the rights dealt with in sections 8 to 14 of the Charter. If none of the provisions in section 8 to 14 is understood to apply to particular facts, section 7 will be used to determine whether the law in question corresponds with the principles of fundamental justice.

The utilisation of section 7 as a generic and residual due process right ensures structural and conceptual similarity in the analytical process that would allow for transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. The safeguard built into this conceptual structure could then be easily assimilated into an analysis of constitutional criminal procedure rights.

This confusion concerning the basic structure of the fundamental protection of the individual's right to freedom and security and the interaction thereof with the criminal procedure rights in the Constitution under South African law must be corrected. More specifically, the operation of section 12 of the Constitution as a general and residual due process right must be substantiated. Without this correction we will forever be plagued by dissimilarity in the way persons that come into contact with the criminal justice system are

to be treated. Because the Constitutional Court has erected a conceptual wall between sections 12 and 35 when it specifically dealt with the interaction between these rights, we must at present accept that a person confronted by the criminal justice system does, for example during pre-trial procedures and during the appeal hearing, not have to be treated fairly in terms of the Constitution. However, the Constitution directs that an accused person be treated fairly during the trial.

Perhaps the most compelling reason for the existence and acceptance of a general 'principle of fundamental justice' is the fact that provision cannot be specifically made for fairness at each occurrence that might present itself in the criminal justice process. This is presumably exactly the reason why an accused is guaranteed a fair trial apart from the specific enumerated rights in section 35(3) of the Constitution.

Taking into account the close link between the presumption of innocence, the right to freedom and security in section 12 and the criminal procedure rights in section 35, it is difficult to accept otherwise than that section 12 must have a residual due process function in the Canadian fashion. As far as the protection of the liberty of someone confronted by the criminal justice system goes section 34, therefore, seems redundant. Because section 12 has its own due process function, the application of section 34 to issues of liberty alongside section 12 might even cause dissimilarity in approach by the criminal justice system towards someone who comes into contact with the system.