IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 5027/2017

In the matter between:

MEDIA 24 LIMITED Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

HENRI VAN BREDA Second Respondent

ADV LOUISE BUIKMAN SC Third Respondent

In re:

THE STATE

and

VAN BREDA Accused

REASONS DELIVERED 4 APRIL 2017

DESAI J.

[1] Time constraints, regrettably, do not permit me to give this matter greater consideration.

[2] The application came before me as one of urgency on Friday, 24 March 2017. The much publicised trial to which it relates was scheduled to start on Monday, 27 March 2017.

[3] Mr H Epstein SC, appearing for the First Respondent, quite correctly, raised the issue of the Applicant creating its own urgency herein. The implied assertion being that this Court should not entertain the application.

[4] Several weeks prior to the launch of this application I received a flurry of letters from divers journalists and the Applicant requesting permission to do visual and audio recordings at the trial. These letters were forwarded by my Registrar to the various Counsel involved in the trial and their responses were in turn forwarded to the journalists. This took some time and, it appears, there was some uncertainty as to the next step until this application was launched.

[5] In these circumstances I exercised my discretion in favour of the Applicant and elected to entertain the matter, especially in that the principal issue raised herein relates to fundamental Constitutional Rights which may warrant enforcement.

[6] After hearing Counsel I granted the order which is annexed. No reasons for the decision were furnished at that stage. As Counsel for the First and Second Respondents had indicated that they wished to appeal my Order, I furnish these reasons urgently as I do not wish to delay the trial any further. It is scheduled to recommence on 24 April 2017.

[7] The Second Respondent stands accused of a number of murders of members of his family, allegedly committed at their home on a golf estate near Stellenbosch in the Cape.

[8] A survivor of the attack, one Marli, is in a vulnerable position because of the injuries sustained by her. Her curatrix, Ms L Buikman SC, was cited in these proceedings and the views of Ms Buikman have been taken into account in the order made by me.

[9] The Applicant describes itself as a publisher and "purveyor of news to the general public". Its media enterprise includes internet news and several newspapers and magazines.

[10] Its case to install two video cameras in the Court and record the proceedings, and other related relief, was essentially premised upon Section 16 of the Constitution and, perhaps less strenuously, upon Section 9 of the Supreme Court Act. Section 16 of the Constitution asserts the right to freedom of expression, which includes both the freedom of the press and other media, and the freedom to receive or impart information and ideas. These freedoms constitute central pillars of the democratic state and help to ensure its proper functioning. As frequently stated, they are a guarantor of democracy.

[11] The Applicant contends that the alleged murders have received a great deal of publicity and there is an acute public interest in the matter both locally and elsewhere. The public, they argue, is aware of the matter and interested in the

administration of justice, the trial and its outcome. Though Counsel for the Respondents have sought to draw a distinction between this and other recent high profile criminal trials, they are unable to rebut this aspect of the Applicant's case.

[12] The First Respondent – that is the National Director of Public Prosecutions – NDPP – contends that witnesses may be intimidated by the presence of recording equipment in Court. The Second Respondent raises a similar objection. It is the First Respondents case that some witnesses have indicated that they would be unwilling to testify if there was recording equipment in the Court.

[13] There are several responses to these objections as Mr JC Butler SC, who appeared with Ms BJ Vaughn for the Applicant, correctly pointed out. Firstly, there are already recording devices throughout the Court. The evidence of witnesses is recorded continually and, of course, the public has a right of access to the records of the Court. What genuine concern would a witness, or the accused have if an additional microphone is placed in Court or for that matter one or two cameras placed unobtrusively in the Court?

[14] The point is this. Practitioners and witnesses quickly become accustomed to the equipment already in Court and there is in this regard the evidence of the expert Professor Labuschagne, who says:

> "My own experience in the Pistorius matter was that the cameras were soon forgotten once proceedings started."

[15] The Second Respondent, through his attorney and supported by one Doctor Panieri-Peter, has raised, at best, the theoretical possibility of witnesses being influenced by the presence of the equipment. As Butler SC pointed out her evidence is vague in this regard.

[16] The evidence of Professor Labuschagne is based on extensive personal experience and is compelling.

[17] More worrying is the suggestion by the First Respondent that witnesses would prefer not to testify if such equipment was placed in Court. Would they also not feel apprehensive of the Court's recording equipment? Moreover the Prosecuting Counsel in her affidavit states:

> "Either during, after or before consultation all of the witnesses, some to a lesser extent than others, expressed their fears . . .".

I suppose this merely reflects a degree of apprehension and little else.

[18] In any event, in terms of paragraph 5 of my order, it may be varied at any stage. If any witness, on good cause, asks that his evidence not be broadcast, the Court will come to his assistance.

[19] With regard to the Second Respondent, one only has the not unbiased view of his attorney that he may find the presence of the recording equipment inhibiting. Such argument, incidentally, did not hold sway in the case *Dotcom Trading121 (Pty) Ltd t/a Live Africa Network News v King NO* 2000 (4) SA 973 (C).

[20] Second Respondent also raised the argument usually raised in such circumstances, namely that the broadcasting of evidence would prejudice cross-examination. The suggestion being that the witness waiting outside, or at home, would have access to the proceedings and the value of his testimony will be compromised. There is a logical difficulty with this argument. The media will be in Court reporting on this matter extensively in the various newspapers. Then also the modern day reality. The social media will be relaying the evidence in the Court room almost instantly. If a witness wished to access those accounts of the proceedings, he or she could do so with great ease.

[21] With regard to the possible editing of the evidence, I need only note that unlike a journalist's summary of the evidence, live radio or TV coverage is a more accurate account of the actual evidence

[22] At issue in the *Dotcom case supra* was whether the refusal to allow broadcasting infringed Section 16 rights. Brand J commented:

> "It is not without reason, so if appears to me, that Section 16 (1) (a) of the Constitution does not limit its guarantee to the freedom of the press, but specifically extends this freedom to the other media of communication and expression as well. In modern times there are many forms of communication."

[23] I may add that the forms of communication have increased significantly since Brand J delivered the *Dotcom* judgment in 2000.

[24] What is required in a case such as this is the balancing of competing interests and rights. On the one hand the Second Respondent has a Constitutional Right to a fair trial. In terms of Section 35 (3) (c) of the Constitution he has a right to a fair public trial. And the Court has a duty to ensure that the trial is conducted fairly and that the interests of witnesses and the Court process are appropriately protected. On the other hand, the weight to be attached to the rights under Section 16 of the Constitution – the rights of the media and the public respectively – cannot be overstated.

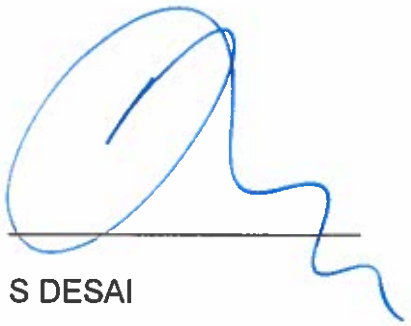
[25] The balancing proceeds logically from the above.

[26] The bald claim that the presence of recording equipment in Court might be seen by witnesses or the accused to be inconvenient or intimidating should not constitute a limitation of the Constitutional Rights of the media and the public under Section 16. That would be an unjustified limitation of the right. Any limitation to pass Constitutional muster under Section 36 of the Constitution must meet the high threshold imposed by the said Section.

[27] As Butler SC pointed out, the issue is not whether witnesses and participants in the judicial process will experience a degree of stress if the evidence was to be broadcast. The question is whether any additional burden imposed is so sufficiently serious as to justify a limitation of the fundamental rights under Section 16.

[28] The interests of justice do not dictate that I place greater emphasis upon any of the competing interests. The order I made least impairs the interest of the parties and as I have already indicated it shall be adapted as the need arises.

[29] In the result I made the order attached hereto.



S DESAI

Judge of the High Court