Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v The Honourable Mr Justice King NO and others [2000] 4 All SA 128 (C)

Division:	Cape of Good Hope Provincial Division
Date:	2 August 2000
Case No:	4301/2000
Before:	Hlophe JP, Brand and Traverso JJ
Sourced by:	C Webster and AD Maher
Summarised by:	D Harris
Parallel Citation:	2000 (4) SA 973 (C)

• Editor's Summary • Cases Referred to • Judgment •

[1] Constitutional law – Freedom of expression – Whether includes right to broadcast proceedings of commission of inquiry by radio – Freedom of expression includes freedom of press and other media, and freedom to receive and impart information.

[2] Constitutional law – Infringement on guaranteed rights – Limitation clause in section 36 of Constitution of the Republic of South Africa Act 108 of 1996 – Test – Constitutionally guaranteed rights may only be limited, in terms of section 36, to the extent that the limitation is reasonable and justifiable in an open and democratic society, taking into account relevant factors including the nature of the right; the importance and purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means available for that purpose.

[3] Constitutional law – Infringement on guaranteed rights – Limitation clause in section 36 of Constitution of the Republic of South Africa Act 108 of 1996 – Whether imposition of blanket ban on radio broadcast of proceedings is objectively justifiable.

[4} Media – Freedom of expression – Whether includes right to broadcast proceedings of commission of inquiry by radio – Freedom of expression includes freedom of press and other media, and freedom to receive and impart information.

Editor's Summary

Allegations of match-fixing in international cricket led to the appointment of the Second Respondent in terms of the Commissions Act 8 of 1947. The Second Respondent became colloquially known as the "King Commission". On commencement of proceedings, the First Respondent, as chairman of the Second Respondent, announced that he would not allow media broadcasts of the proceedings. The Applicant was one of two parties who submitted applications requesting the chairman to relax this directive. After hearing submissions from all concerned parties, the chairman ruled against the Applicant. The latter now sought an order reviewing and setting aside the chairman's ruling on an urgent basis. The Applicant was a news-provider to the independent radio sector in South Africa.

The request that it be permitted to broadcast the commission's proceedings was based on the argument that the Applicant had the constitutional right to do so, and that the public had the concomitant right to hear what was actually said in the voice of the witness. The erstwhile national cricket captain who was the main witness and 37 other cricket players opposed the request. Their objection was based on the contention that allowing the proceedings to be broadcast would place unnecessary strain on witnesses who were already under severe pressure. They also denied that the exclusion of the electronic media would constitute an infringement on any constitutional rights. In support of this

contention, the objectors argued that the constitutional right of freedom of the press did not include the right to broadcast the commission's proceedings by radio, or to record the proceedings for broadcast purposes.

In justifying his ruling, the First Respondent relied upon section 4 of the Commissions Act, which bestowed a discretion on him to exclude from the proceedings any person whose presence was in his opinion not necessary or desirable. The Applicant's case was that such discretion was exercised improperly in that the chairman had not appreciated that the exclusion of the Applicant would constitute an infringement of its and the public's constitutional rights. It was further argued that the chairman also did not appreciate that such a limitation could only be justified in terms of section 36 of the Constitution of the Republic of South Africa Act 108 of 1996.

Held – The crux of the dispute between the parties was whether the constitutionally guaranteed right to freedom of expression includes the right to broadcast and/or to listen to a broadcast of the actual proceedings before the commission. Freedom of expression in the Constitution includes the right to freedom of the press and other media, and freedom to receive or impart information or ideas. Both parties agreed that the issue under consideration was *res nova* in South African courts. The Court therefore considered the manner in which the issue was dealt with in foreign jurisdictions.

The Respondents purported to rely on two cases, one Canadian and the other Scottish, in support of its stance. The Court held that the Scottish case did not address the question at issue *in casu* and was therefore of no assistance to the Respondents. The Canadian case, while supporting the Respondent's viewpoint, was overruled

on appeal.

The Court conceded that the Applicant was not denied access to the proceedings, as it was free to attend and make notes, which it could later broadcast. However, it was important in this regard to distinguish between the nature of the Applicant's activities as a radio broadcaster, and those of the printed media. The fact that the Applicant could broadcast the actual evidence led at the commission gave it an edge over printed media. Requiring it to restrict itself to the same activity as print media compromised this advantage. As an alternative argument, the Respondents contended that should the First Respondent's ruling be found to constitute a limitation on the Applicant's rights, such limitation was objectively justifiable in terms of section 36 of the Constitution. The Court therefore turned to consider this alternative argument.

Relying on the cases referred to above, the Respondent averred that they constituted authority for the proposition that the exclusion of television cameras from court proceedings was an objectively justifiable limitation on the media's constitutional rights. This led the Court to positively identify the issues in the case. The case did not concern court proceedings, but those before a commission of inquiry. Secondly, the case was concerned with broadcasting by radio, rather than television. The proper issue to be decided was whether on the facts before the First Respondent, he had exercised his discretion in a proper manner, and whether the decision to impose a blanket ban on radio was objectively justifiable. The latter question had to be determined in accordance with the provisions of section 36(1) of the Constitution.

Constitutionally guaranteed rights may only be limited, in terms of section 36, to the extent that the limitation is reasonable and justifiable in an open and democratic society, taking into account relevant factors including the nature of

the right; the importance and purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means available for that purpose. Competing values must be weighed up in this process, and an assessment based on proportionality must be made.

The First Respondent's ruling was motivated primarily by the fact that he wanted the atmosphere to be conducive to witnesses' telling the truth, which they might be reluctant to do in the presence of intrusive media. However, the Court was not convinced that a blanket exclusion of radio broadcasting was justified. The blanket exclusion was thus held to be inconsistent with the Constitution, and therefore invalid.

Notes

For Constitutional Law see *LAWSA* Reissue (Vol 5(3), paras 15 – 239)

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed. **H N** refers to corresponding headnote number.)

South Africa

Bell v Van Rensburg 1971 (3) SA 693 (C)

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC)

National Media Limited and others v Bogoshi [1998] 4 All SA 347 (A); 1998 (4) SA 1196 (A)

President of the RSA and others v South African Rugby Football Union 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC)

S v Makwanyane and another 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC)

South African National Defence Union v Minister of Defence 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC)

Canada

R v Butler (1992) 50 CCC (3d) 129

Regina v Squires (1992) 78 CCC (3rd) 97

Regina v Squires (No 2) (1986) 23 CRR 31

Scotland

In Re: The British Broadcasting Corporation (No 2), Unreported, 20 April 2000, Scottish High Court of Justiciary – **D**

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Judgment

BRAND J

[1] Mr Hansie Cronjé ("Cronjé") is the erstwhile captain of the South African National Cricket team. Recently the Indian police alleged that Cronjé and other members of the South African cricket team took money for fixing the outcome of international cricket matches. Cronjé then dropped the proverbial bombshell by admitting that he

accepted money from a bookmaker for information regarding an international cricket test.

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[2] As a result, the President of the Republic, together with the Minister of Justice, on 8 May 2000 appointed a commission of enquiry by virtue of the provisions of the Commissions Act 8 of 1947. According to its creating proclamation, the commission was officially named as The Commission of Enquiry into Cricket Match Fixing and Related Matters. Colloquially it soon became known, however, as the King Commission. This name is derived from that of the chairperson of the commission, the Honourable Mr Justice Edwin King, who was, until his recent retirement from the bench, the Judge President of this court.

[3] Applicant is a provider of news, including sports news, to the independent radio sector in South Africa. The independent radio sector comprises a large number of community and commercial radio stations, independent of the State controlled media.

[4] On 7 June 2000, the King Commission commenced its proceedings. In the course of his opening address, the chairperson directed that he would not allow television and radio broadcasts of the proceedings of the commission.

[5] Immediately after these opening remarks, two applications were presented to the chairperson to relax his directions regarding the electronic media. The first was on behalf of Midi Television (Pty) Ltd ("Midi"), the proprietor of e-TV and the other by applicant's chief executive officer, Mr Paul Cainer ("Cainer") on behalf of applicant. Midi's application was to broadcast the proceedings of the commission by television, either live or by way of a delayed broadcast. Applicant's request was along similar lines but related to another form of electronic media, namely radio.

[6] The chairperson enquired from the parties represented before him as to their stance regarding these two applications. The United Cricket Board indicated that they would abide the decision of the chairperson. The representatives of all the other parties, including Cronjé and other

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members of the South African cricket team, who were potential witnesses at the hearing, conveyed that their clients would be unsettled by live broadcasts or recordings of the proceedings and that they thus objected to the presence of the electronic media.

[7] In the event, the chairperson afforded the representatives of all parties concerned, including Cainer, the opportunity to address him. Thereafter he reserved his ruling until the next morning, Thursday 8 June 2000.

[8] On 8 June 2000, Mr Justice King then gave his ruling in terms whereof the applications of both Midi and applicant were refused. It is this ruling, and more particularly the chairperson's refusal to allow radio broadcasting of the proceedings of the commission that gave rise to the present application being brought before this court, as a matter of urgency, on 14 June 2000.

[9] The relief sought is, in essence, that the chairperson's rulings on 7 and 8 June 2000, refusing applicant permission to operate at and during the sittings of the commission be reviewed and set aside.

The parties

[10] Applicant has already been described. First respondent, is the chairperson of the commission, whereas the commission itself is cited as second respondent. Third respondent is the President of the Republic of South Africa, while the Minister of Justice and the Minister of Sport are, respectively, cited as fourth

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and fifth respondents. The application is opposed by first and second respondents. Third, fourth and fifth respondent indicated that they abide the decision of this court. For the sake of convenience I propose to refer to first and second respondents collectively as "the respondents", to the chairperson of the commission as "first respondent" and to second respondent as "the commission".

The first hearing

[11] At the first hearing of the matter before us on Wednesday 14 June 2000 there was representation on behalf of applicant and respondents as well as on behalf of various other interested parties. Included amongst the other interested parties were Cronjé and 37 other member and former members of the South African national cricket team. Cronjé was represented by his attorney, Mr KG Druker, while the other cricketers were represented by Mr Fitzgerald.

[12] Because the application was brought at very short notice, respondent's request on 14 June 2000 was in essence for an opportunity to file answering papers. Applicant, on the other hand, sought interim relief pending the filing of respondents' answering papers and the consequent postponement of the matter. The declared reason for applicant's anxiety that the proceedings before first respondent should not be allowed to continue without applicant being afforded some form of interim relief, was that Cronjé himself was destined to give evidence on the very next day, that is Thursday 15 June 2000. During an adjournment of the hearing, the parties entered into negotiations. The result thereof was that

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an order was made by agreement which provided for a postponement of the application until Monday 19 June 2000

as well as a timetable for the filing of further papers. A further consequence of the agreement between the parties was that Cronjé consented to his evidence being broadcasted live by both radio and television. At the postponed hearing, argument was eventually concluded on 20 June 2000. Due to the obvious urgency of the matter, the court issued its order which is annexed hereto on 21 June 2000 ("the Order"). These are the reasons for the Order.

The resumed hearing

[13] At the resumed hearing on 19 June 2000, applicant was represented by Mr *Albertus* who appeared with Mr *Katz* while Mr *Seligson* appeared for respondents together with Mr *Butler*. The United Cricket Board as well as Cronjé and all other parties represented before the commission indicated that they abide the decision of this court.

[14] At the commencement of proceedings on 19 June 2000 the court was presented with three applications. Apart from this application, in which the parties were ready to proceed, there were two new applications. The first of these was an application on behalf of the South African Broadcasting Corporation ("the SABC"). Mr *Albertus* – who also appears for the applicant in this application – indicated that he and Mr *Katz* were appearing for the SABC as well. The second new application was by Mr *Breytenbach* who appeared with Ms *Bawa*, on behalf of the Institute for Democracy of South Africa ("Idasa"). Unlike the present application which only pertains to radio, the applicants in both new applications sought an order that first respondent's ruling be set aside with reference not only to radio but to television as well. Applicants in both these applications also requested that their applications be heard and adjudicated

upon together with the present application. Mr *Seligson*'s response was that respondents would want an opportunity to deal with the two new applications by way of answering affidavits. It therefore became apparent that the request that the two applications be heard simultaneously with the present application was practically untenable and was thus refused. Mr *Breytenbach* then made an alternative request, that he be allowed to appear, together with Ms *Bawa*, as *amici curiae* in order to present additional submissions in support of the relief sought by applicant in this matter. Mr *Albertus* accepted this offer of support while Mr *Seligson* indicated that he would have no objection to Mr *Breytenbach's* request on condition that the *amici curiae* limit their submissions on the facts to those of the present application. In the event, the court acceded to Mr *Breytenbach's* request. As a consequence, the only application before the court concerned radio. More specifically, we were not asked to consider any application that first respondent's decision to exclude television should be reviewed and set aside as well.

First respondent's ruling

[15] In the course of his address to first respondent, applicant's representative, Cainer, motivated his request for permission to broadcast and/or record the evidence before the commission on the basis that

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applicant has the constitutional right to broadcast and the public has the concomitant right to hear what is actually said in the voice of the witness. He also explained to first respondent that the intrusion in the proceedings, caused by the introduction of applicant's electronic equipment, could be limited to the extent where it would be minimal. In this regard he, *inter alia*, gave the assurance that there would be no operator in the room where the hearing took place; that the microphones could be physically installed in such a manner that it would hardly be distinguishable from the existing microphones already in use at the hearing and that applicant would be prepared to allow other radio stations who were interested in the direct broadcasting of the proceedings, to utilise its electronic equipment. Moreover, Cainer suggested, if first respondent was of the view that radio broadcasts of the proceedings should be limited in other respects so as to protect witnesses, applicant would be prepared to submit to such restrictions as first respondent may decide to impose. Thus, for example, Cainer indicated that if first respondent were to decide that radio broadcasts should not be done live, but only in delayed form, applicant would not object to the imposition of a condition to that effect.

[16] Applicant's request, as already stated, was opposed on behalf of Cronjé and the 37 other cricket players. In motivating their objection, counsel for these parties did not distinguish between television and radio. They conflated their objection to both forms of electronic media on the basis that both would place an unnecessary strain on witnesses who were already under severe pressure. Counsel for the objectors also denied that an exclusion of the electronic media from the sittings of the commission would constitute an infringement of any right enshrined by the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). According to their argument, the electronic media were entitled to the same unrestricted access to the proceedings as the general public and the print media, but no more. The constitutional right of freedom of the media, guaranteed by the Constitution, so counsel for the objectors contended, did not include the right to broadcast the proceedings of the commission

either by television or radio or to record the proceedings for broadcasting purposes.

[17] First respondent introduced the motivation for his ruling by reference to the following provisions of section 4 of the Commissions Act:

> "4. Sittings to be public
>
> All the evidence and addresses heard by a commission shall be heard in public: Provided that the chairman of the commission may, in his discretion, exclude from the place where such evidence is to be given or such address to be delivered any class of persons whose presence at the hearing of such evidence or address is, in his opinion not

necessary or desirable."

[18] What he thus had to decide, so first respondent directed himself, was whether in his opinion the presence of the electronic media with their equipment at the hearing could be said to be not necessary and not desirable. As to the requirement of necessity, first respondent had little

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difficulty in deciding that the electronic media and their equipment was not necessary for the smooth running of the commission.

[19] After consideration, which transpires from the ruling, first respondent also decided that the presence of the electronic media at the hearing was indeed not desirable. In motivating this decision, first respondent referred to statements by counsel for Cronjé and the other cricket players to the effect that television cameras and other equipment of the electronic media would put additional and unnecessary strain on witnesses; that it may intimidate witnesses and thus engender in witnesses a reluctance to testify freely and to tell the whole truth. Thereafter he proceeded to express himself as follows:

> "This commission is seeking the truth and the source of that truth is to be found almost exclusively, but certainly very materially, in the evidence, the oral testimony of witnesses. And I believe that unless the ambience in which they testify is witness-friendly, as far as giving evidence before a Court or a commission can ever be witness-friendly, unless it is that, there is a very real possibility that they will not come forward with the truth. This would stifle the commission, and it is a risk which must, I believe, at all costs be avoided, even if that means that the public is deprived of valuable sources of information.
>
> In that context it must be borne in mind that these hearings are public, transcripts of the evidence will be available and the wider public will be informed, not only by the printed media, but also by the audio and visual media although not to the extent that the latter would like.
>
> My concern at the inhibitions which may affect witnesses, outweighs the desirability of the additional facilities which would be available were I to grant the application.
>
> …
>
> Accordingly, in the exercise of my discretion, neither television nor the audio service provided by Live Africa, will be permitted at and during the sitting of this commission."

The issues

[20] In formulating the issues to be decided I find it convenient to start by referring to that which is common cause between the parties. First, it is not

disputed by applicant that in principle, section 4 of the Commissions Act affords first respondent the discretion upon which he based his ruling. On the other hand it is not disputed by respondents that in the exercise of that discretion, first respondent was bound to give effect to and to promote the principles of the Constitution.

[21] Shorn of unnecessary frills, applicant's case is that first respondent failed to appreciate that a total ban on radio broadcasting of the commission's proceedings would constitute an infringement of constitutional rights. First, on the constitutional right of freedom of the media and, secondly, on the constitutional right of the public to receive information, which rights are guaranteed, respectively, by section 16(1)(*a*) and (*b*) of the Constitution. As a consequence of this failure to realise that such total ban would result in an infringement of constitutional rights, so applicant's case proceeds, first respondent failed to appreciate that such limitation could only be justified pursuant to the provisions of section 36 of the Constitution.

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[22] The ultimate consequence of first respondent's failure to appreciate that a blanket prohibition of radio broadcasting involves an infringement of constitutional rights, applicant concludes, was that first respondent had failed to exercise his discretion in a proper manner. Therefore, so applicant contends, first respondent's decision falls to be reviewed and set aside by this court.

[23] On behalf of respondents it is conceded that first respondent did not approach the exercise of his discretion on the basis that a refusal to broadcast the proceedings before the commission – either by way of television or radio – would constitute a limitation of constitutional rights. On the respondent's papers the answer to applicant's case is, however, that the right to freedom of the media enshrined in section 16(1)(*a*) of the Constitution does not include the right to broadcast the proceedings before the commission directly, nor the right to record these proceedings for broadcasting purposes. As to applicant's contention that first respondent's ruling constitutes an infringement of the right to freedom of the general public to receive information – guaranteed in section 16(1(b) of the Constitution – first respondent's answer is that this contention is equally unsustainable.

[24] Mr *Seligson* also relied on an alternative answer to applicant's case, namely that even if it should be found that any of the freedoms enshrined by section 16(1)(*a*) or (*b*) do extend to the broadcasting of the proceedings before the commission, first respondent's refusal to allow such broadcasting is objectively justifiable.

The alleged violation of constitutional rights

[25] As appears from the aforegoing, the nub of the issues between the parties is whether the right to freedom of

expression, guaranteed in section 16(1)(*a*) and (*b*) of the Constitution, includes the right to broadcast and/or to listen to a broadcast of the actual proceedings before the commission. This section provides:

> "16(1) 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."

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[26] Applicant's first contention in this regard is that the "right to freedom of expression … which includes freedom of the press and other media" – contemplated in section 16(1)(*a*) – extends to the right to broadcast the actual proceedings before the commission by means of radio. First respondent's answer is that it does not.

[27] In support of respondents' case, Mr *Seligson* pointed out that, like all members of the public, and the print media, applicant had full access to the proceedings and that applicant was merely denied the opportunity to bring its recording equipment into the hearing for the purpose of broadcasting the proceedings. Section 16(1)(*a*) of the Constitution, Mr *Seligson*'s argument proceeded, does not confer greater rights on the

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electronic media than on the print media. In the event, first respondent's ruling did not result in an infringement of applicant's constitutional rights.

[28] Both Mr *Albertus* and Mr *Seligson* as well as Mr *Breytenbach* were in agreement that as far as South African Courts are concerned the issue under consideration is *res nova*. As to decisions from foreign jurisdictions, Mr *Seligson* found support for respondent's case in two judgments. First in a judgment of the Ontario Provincial Court in the case of *Regina v Squires (No 2)* (1986) 23 CRR 31. Secondly, in a thus far unreported judgment of the Scottish High Court of Justiciary *in Re: The British Broadcasting Corporation* (No 2), handed down on 20 April 2000.

[29] In the *Squires* case a television journalist was charged under section 67(2)(*a*)(ii) of the Ontario Judicature Act with filming a person leaving a court room in the Provincial court building. One of the defences raised by the accused was that section 67(2)(*a*) was inconsistent with the right to freedom of the press guaranteed in section 2(*b*) of the Canadian Charter of Rights and Freedoms. In view of this defence the statutory provisions to be considered by the Court were those contained in section 67(2)(*a*) of the Ontario Judicature Act and section 2(*b*) read with section 1 of the Charter.

[30] Section 67(2)(*a*) of the Ontario Judicature Act, insofar as it is relevant hereto reads:

> "(2) … [N]o person shall
>
> (*a*) take or attempt to take any photograph, motion picture or other record capable of producing visual representation by electronic means or otherwise,
>
> (i) at a judicial proceeding, or
>
> (ii) of any person entering or leaving the room in which the judicial proceedings is to be or has been convened; or
>
> (iii) …"

Section (2)(*b*) of the Canadian Charter provides:

> "2. Everyone has the following fundamental freedoms:
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

Section 1 of the Canadian Charter – which is the counterpart of section 36 of our Constitution – provides that:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

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[31] In the Provincial Court it was accepted as a point of departure by everybody concerned, including counsel and the presiding judge, that section 67(2)(*a*) has to be considered as a whole; ie that no distinction can be made between section 67(2)(*a*)(i) – prohibiting the filming of judicial proceedings in the courtroom – and 67(2)(*a*)(ii) – ie the prohibition of filming persons entering or leaving the courtroom. Accordingly, the judge presiding, Vanek Prov J, formulated the questions to be decided by him as follows (at 37 of the report):

> "What is in issue in this application is the complex and controversial question whether the media have a constitutional right under the Canadian Charter to

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> photograph and to telecast judicial proceedings in court and persons who are present in the courtroom or the courthouse for the purpose of attending proceedings and, if so, whether s 67 of the Judicature Act is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society."

[32] After consideration, Vanek Prov J came to the conclusion that section 2(*b*) of the Charter affords the electronic media no greater rights than members of the general public. Accordingly, he found that section 2(*b*) merely guarantees the right of the electronic media to attend and observe judicial proceedings as members of the public and to report on what has been seen and heard. However, even on a liberal construction of 2(*b*), the learned Judge stated, he was unable to find any justification "to confer upon the electronic media a constitutionally guaranteed right to televise judicial proceedings or persons involved in such proceedings." (60 of the report).

[33] In the view that Vanek Prov J took of the case, it was strictly speaking not necessary for him to consider whether, if section 67(2)(*a*) of the Judicature Act constituted an infringement of constitutional rights, this section would nevertheless be justified under section 1 of the Charter. However, for the sake of completeness, he did consider this issue as well and came to the conclusion that even if section 67(2)(*a*) were inconsistent with section 2(*b*) of the Charter, it would be justified under section 1 of the Charter as a "reasonable limitation". (76 of the report.)

[34] The second case relied upon by Mr *Seligson*, the judgment of the High Court of Justiciary in *Re: The British Broadcasting Corporation (No 2)* was an application preliminary to the well-known *Lockerbie* trial which was due to commence on 3 May 2000. The trial resulted from the destruction of a civilian aircraft at Lockerbie in Scotland on 21 December 1988. As a result of an agreement between the Government of the United Kingdom and the Netherlands, the trial was to take place in the Netherlands but would be conducted according to Scots law and be presided over by three Scottish judges.

[35] With the support of the Scottish Lord Advocate, an approach was made to the judge destined to preside at the trial, Lord Sutherland, on behalf of relatives of the victims of the air disaster for television transmissions of the whole of the trial proceedings to four remote sites in the United Kingdom and the United States of America where it could be viewed by immediate family members of the victims. Such permission was granted on a restricted basis. Included among the restrictions imposed by Lord Sutherland was the provision that the television signals would be incrypted so that they would not be able to be intercepted and used by others and that no journalist would be allowed to view the trial at any of the remote sites under any circumstances.

[36] Subsequently, the petitioner ie the British Broadcasting Corporation ("the BBC") sought leave from the High Court of Justiciary in Scotland to broadcast the proceedings in the trial by means of television.

[37] As a basis for its application, the BBC relied upon section 57(2) of the Scotland Act, 1998 read with Article 10 of the European Convention for

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the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). According to section 57(2) of the Scotland Act:

> "a member of the Scottish Executive has no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights …"

Article 10 of the European Convention, insofar as it is relevant hereto, provides:

> "Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority …"

[38] According to the judgment, the starting point of the petitioner's case was that consent had already been given to limited television transmissions of the trial proceedings to members of the public, subject to the restriction that the members of the public are to be limited to family members of the victims. Since permission had already been given, so the petitioner argued, the restrictions which prevented it from receiving the signal and from broadcasting the trial proceedings constituted a violation of its rights under Article 10 of the European Convention to receive and impart information.

[39] As I understand the opinions of the members of the court, the petition was refused for two reasons. First, on the basis that the restrictions objected to were not imposed by a member of the Scottish Executive but by the Court and that, consequently, section 57(2) of the Scotland Act did not find any application at all. The second reason appears to be reflected in the following dictum from the opinion of Lord Kirkwood:

> "In my view the restriction imposed by the court cannot be said to be incompatible with the petitioner's rights under Article 10. Even if that restriction was held to be in contravention of the petitioner's rights under Article 10 it does not, in my view, necessarily follow that if the restriction is held to be unlawful the consequence will be that there will remain an unconditional permission to televise the trial to the general public. One obvious possibility is that if the restriction was held to be unlawful, the court which had imposed the restriction could refuse to permit any television transmissions at all … In my opinion, the consent granted by Lord Sutherland for transmissions to the four remote sites could not be said to constitute consent in principle for public broadcasts of the whole trial and, that being so, the fundamental basis of the petitioner's contention disappears."

[40] In considering the two judgments relied upon by Mr *Seligson* I refer to the Scottish case first, because the answer to Mr *Seligson*'s reliance thereon is in my view a short and simple one. It was not the BBC's case that a refusal to allow them to broadcast the court proceedings by way of television would in itself constitute an infringement of a breach of their rights under Article 10 of the European Convention. The question whether such refusal would indeed constitute such infringement was therefore never asked nor answered by the Court. Consequently this judgment by the Scottish High Court of Judiciary does not support Mr *Seligson*'s argument.

[41] The judgment by Vanek Prov J in the case of *Regina v Squires* (*supra*) does in fact lend support to Mr *Seligson*'s argument. This judgment was

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however overruled on appeal to the Ontario Court of Appeal in *Regina v Squires* (1992) 78 CCC (3rd) 97. The appeal bench consisted of five judges, Dubin CJO, Houlden, Tarnopolsky, Krever and Osborne JJA. Unlike Vanek Prov J, all five judges of appeal held that their considerations should be limited to the constitutionality of section 67(2)(*a*)(ii) of the Ontario Judicature Act, ie the prohibition on filming of persons entering or leaving the courtroom and that it was not necessary to consider the wider question of television cameras in the courtroom. As to the first question that arose for decision, namely whether section 67(2)(*a*)(ii) constituted an infringement of section 2(*b*) of the Canadian Charter, four of the judges – Houlden, Tarnapolsky, Krever and Osborne JJA – held that it did. As to the next question, namely whether this infringement of section 2(*b*) could be justified under section 1, two judges – Houlden and Osborne JJA – held that the infringement was justified, whereas two judges – Tarnapolsky and Krever JJA – held that it was not so justified. Dubin CJO agreed with Houlden and Osborne JJA that even if section 67(2)(*a*)(ii) constituted an infringement of section 2(*b*) of the Charter it would have been justified under section 1 thereof. He therefore found it unnecessary to pertinently decide the first question, namely whether section 2(*b*) was indeed infringed by the prohibition in section 67(2)(*a*)(ii).

[42] With regard to the first question, ie the one I have to consider at this stage, Houlden JA referred to the following dictum from the Canadian case of *R v Butler* (1992) 50 CCC (3d) 129 at 154:

> " ... in creating film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. … [T]he meaning of the work derives from the fact that it has been intentionally created by the author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression."

Thereafter Houlden JA proceeded as follows (at 104 of the report):

> "The freedom of expression enjoyed by television journalists, such as the appellant, is the freedom to film events as they occur and to broadcast the film to the public. If television journalists are unable to photograph persons entering or leaving a courtroom, their freedom of expression is curtailed."

[43] I find myself in respectful agreement with the reasoning that transpires from these statements. Moreover, I hold the view that it applies with equal force to a limitation imposed on broadcasting by means of radio. It is true, as Mr *Seligson* argued, that the applicant in this matter was not denied access to the proceedings; that applicant's journalists could make notes and that applicant could broadcast the contents of the evidence placed before the commission, even verbatim if it is so wished. *Non constat*, however, that the refusal to allow applicant to broadcast the proceedings or to make a sound recording of the proceedings does not constitute an infringement of applicant's rights in terms of section 16(1)(*a*) of the Constitution. It is almost self-evident in my view that the prohibition of the direct radio transmission of proceedings by a radio broadcaster constitutes a limitation on what is essential to the

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activities of that medium

of communication. I have heard no argument and I can see no reason in logic why a limitation on what constitutes the very essence and distinguishing feature of the radio broadcaster's medium of communication does not constitute an infringement of the radio broadcaster's freedom which is enshrined by section 16(1)(*a*). It is not without reason, so it appears to me, that the section 16(1)(*a*) of the Constitution does not limit its guarantee to the freedom of the press, but specifically extends this freedom to other media of communication and expression as well. In modern times there are many forms of communication. Each of these media of communication and expression has its own distinguishing features and each of them can be limited in a different way. The video camera most probably provides the ultimate means of communication. But radio also has its advantages over the print media. Not only the words spoken, but the emphasis, the tone of voice, the hesitations etcetera can be recorded and communicated. To prevent the radio broadcaster from recording the evidence is to deprive him of that advantage over the print media.

[45] Consequently, the argument that a prohibition of radio broadcaster's right to broadcast directly does not interfere with the rights of that medium because it still has the same rights as the print media, in my view, amounts to a *non sequitur*. The equivalent of the newspaper journalist's shorthand notes to the radio broadcaster is *not* shorthand notes, but an audio recording. I do not think it can be argued that a prohibition against a newspaper journalist taking shorthand notes would not constitute an infringement of that journalist's rights under section 16(1)(*a*). I believe that, by the same token, to prevent a radio broadcaster from utilising its broadcasting and recording equipment, constitutes an infringement of its rights contemplated by section 16(1)(*a*) of the Constitution.

[46] In these circumstances it is not necessary to consider the validity of the further contention by applicant that first respondent's ruling also constitutes an infringement of the public's right to receive information as contemplated in section 16(1)(*b*). Suffice it to say in my view that there is a great deal of merit in this contention.

[47] As indicated, applicant's case is that since first respondent failed to appreciate that a refusal of applicant's request to record and broadcast the proceedings would constitute an infringement of applicant's constitutional rights, he also failed to appreciate that such infringement could only be justified under section 36 of the

Constitution and, consequently, failed to exercise the discretion afforded to him by section 4 of the Commissions Act in a proper manner. On the papers Mr *Seligson*, could not and did not argue that the provisions of section 36 of the Constitution were considered and applied by first respondent. What he did argue, however, was that if first respondent's ruling was found to be a limitation of applicant's rights under section 16, such limitation was in fact objectively justifiable in terms of section 36. I therefore proceed to deal with this alternative contention.

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The limitation of section 16 justifiable

[48] In support of his contention that the limitation of applicant's rights imposed by first respondent could be justified objectively, Mr *Seligson* again relied on the judgment of Vanek Prov J in the case of *Regina v Squires (No 2)* (1986) 23 CRR 31. This time, however, he also found support for his submission in the views held by the majority in an appeal to the Ontario Court of Appeal in *Regina v Squires* (1992) 78 CCC (3rd) 97.

[49] According to Mr *Seligson*'s argument these judgments constitute authority for the proposition that as a matter of principle, exclusion of television cameras

from court proceedings is an objectively justifiable limitation to the constitutional rights contemplated in section 2(*b*) of the Canadian Charter and consequently also of the rights contemplated in of section 16(1)(*a*) of our Constitution. Mr *Seligson*'s reliance on these two cases gives me the opportunity to note what is *not* in issue in this case. This case, firstly, does not concern court proceedings but the proceedings before a commission which was established by the President in terms of the Commissions Act. It is a trite principle that such a commission is not a court but a mechanism for ascertaining facts and reporting to the President thereon (see eg *President of the RSA and others v South African Rugby Football Union*[1] 2000 (1) SA 1 (CC) [paragraph 147] 70D–E and *Bell v Van Rensburg* 1971 (3) SA 693 (C) at 707). Secondly, this case does not concern television broadcasting but broadcasting by means of radio. I agree with Mr *Seligson*'s argument that the question whether the electronic media in general and television in particular should be allowed to broadcast court proceedings, is a matter of policy. I am also in agreement with his further submission that this court should be hesitant to decide such an important matter of policy on inadequate material and without the matter being fully canvassed in evidence before it. As I have already indicated however, that is not the issue we have to deal with. The issue before this court is not even whether first respondent should or should not allow radio broadcasting of the proceedings before him. That is for first respondent to decide. The issue that we must decide is whether on the facts and considerations presented to first respondent, first respondent exercised his discretion in a proper manner and – as a result of Mr *Seligson*'s alternative argument – whether on the facts and arguments presented to this court, the decision to impose a blanket ban on radio is objectively justifiable.

[50] The question whether a total ban on radio broadcasting of the proceedings before first respondent is justifiable must be determined in accordance with the provisions of section 36(1) of the Constitution. This section provides:

> "36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (*a*) the nature of the right;
>
> (*b*) the importance and purpose of the limitation;

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> (*c*) the nature and extent of the limitation;
>
> (*d*) the relation between the limitation and its purpose; and
>
> (*e*) less restrictive means to … the purpose."

[51] The application of section 36 involves a process of weighing-up of competing values and ultimately an assessment based on proportionality which calls for the balancing of different interests. Inherent in this process of weighing-up is that it can only be done on a case-by-case basis and with reference to the facts and circumstances of the particular case (see eg *S v Makwanyane and another*[2] 1995 (3) SA 391 (CC) at 436 – paragraph 104 and *National Coalition for Gay and Lesbian Equality v Minister of Justice*[3] 1999 (1) SA 6 (CC) at 30 paragraph 33).

[52] As a consequence, considerations which may lead to the exclusion of television broadcasting or video recording of court proceedings may or may not be relevant to the exclusion of radio broadcasting or audio recording of the proceedings of a particular commission. What is clear, however, is that the one does not necessarily follow from the other. Because the law should be developed on a case-by-case, or incremental, basis it is neither necessary nor desirable for this court to map out in advance what the future developments regarding the position of the electronic media should be.

[53] From first respondent's ruling as well as the contents of his opposing affidavits, it appears that in refusing the applicant's request to broadcast, he was primarily swayed by the consideration that:

"since its [the commission's] primary purpose is to pursue the truth regarding the incidents outlined in its terms of reference, it is essential that every effort be made to ensure the candour and forthrightness of the witnesses to the extent that this can be achieved."

and that:

"therefore… the atmosphere should be witness-friendly"

and that:

"this is not encouraged by the presence of television and radio broadcasters around the venue."

[54] In his opposing affidavit, first respondent describes the "scrum" of reporters and cameras which occurred when Cronjé, pursuant to an arrangement between the parties, agreed to the radio and television coverage of his evidence-in-chief. This behaviour by the media, first respondent states, was so intrusive that he "cannot accept that Cronjé would find the presence of the media anything but inhibiting and intimidating". According to first respondent, it is evident from these events that his initial fears were justified, that the commission could very well be transformed in a forum which resembles the *OJ Simpson* trial, if the electronic media were to be allowed.

[55] On behalf of applicant it was submitted by Mr *Albertus* that there is no evidential basis that an ambience of witness friendliness will induce or facilitate truth telling. He also submitted that there is equally no

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evidential basis for concluding that the presence of electronic media will inhibit potential witnesses from telling the truth.

[56] Despite the absence of pertinent evidence of the nature referred to by Mr *Albertus*, I am prepared to accept that the performance by the media – including radio and television – which resulted from their unrestricted access to the proceedings when Cronjé gave evidence, as described by first respondent, would most likely be inhibiting and intimidating to the majority of witnesses and that it should not be allowed. However, the question remains whether first respondent was justified to ban the electronic media, including radio, entirely from the proceedings.

[57] Otherwise stated, the question remains whether, having regard to the worthy consideration of a witness-friendly atmosphere which does not inhibit witnesses from testifying, there is sufficient evidence to invoke the provisions of section 36(1) of the Constitution to justify the imposition of a blanket exclusion on radio broadcasting. I believe the short answer to this question must be "no".

[58] I find it unnecessary to refer to all the limitation factors referred to in section 36(1). I agree with Mr *Breytenbach's* argument that two of these factors in particular suggest that the facts and considerations presented to first respondent are insufficient to justify a blanket exclusion of all radio broadcasting and recording equipment from the sittings of the commission. These two factors are the nature and importance of the constitutional rights which are infringed and the availability of less restrictive means to achieve the same purpose.

[59] The importance of the rights guaranteed by section 16(1) appears, for example, from the following dictum by O'Regan J in *South African National Defence Union v Minister of Defence*4 1999 (4) SA 469 (CC) at 477 paragraph 7:

"Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."

And from the following dictum by Hefer JA in *National Media Limited and others v Bogoshi*5 1998 (4) SA 1196 (A) 1207 *in fine* – 1208D:

"The freedom of expression … has been referred to as 'the matrix, the indispensable condition of nearly every other form of freedoms' (*Palko v State of Connecticut* 302 US 319 (1937) at 327); and in the majority judgment of the European Court of Human Rights in *Handyside v United* Kingdom (1976) 1 EHRR 737 at 754 it was said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. That this is not an overstatement appears from McIntyre J's reminder in *Retail, Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd* (1987) 33 DLR (4th) 174 (SCC) at 183 that

'(f)reedom of expression … is one of the fundamental concepts that has

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formed the basis for the historical development of the political, social and educational institutions of western society.'"

Writing about the freedom of the press, Kranenberg *Het Nederlands Staatsrecht* at 524 also starts with the remark that

'(d)e vrijheid van drukpers is een der belangrijkste grondrechten, ja, na de godsdienstvrijheid misschien het belangrijkste'."

[60] Regarding the importance of the right which is limited it is also significant, in my view, that on the undisputed facts, the matters being inquired into by the commission has provoked widespread national and international

interest. This is hardly surprising inasmuch as the inquiry involves the conduct of members of the South African National cricket team and, obliquely, other international cricket players as well. What should also be borne in mind in considering whether and to what extent the rights of a radio broadcaster should be limited, is that on the uncontraverted facts, the radio constitutes the only access to information for many South Africans.

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[61] As to the consideration of less restrictive means to protect the interest of witnesses, which essentially formed the basis for first respondent's concern, it appears from the record of the proceedings before the commission that counsel for the objectors did not distinguish between television and radio. They objected to both on the same basis. This failure to distinguish between the two electronic media was perpetuated in first respondent's ruling as well as on first respondent's papers before this court. In fact, when first respondent refers to the OJ Simpson-like performance by the electronic media which occurred when Cronjé gave evidence, it is apparent that his complaint is directed mainly at the intrusive effect of the video cameras. Applicant's case is that its radio microphones would be far less intrusive than video cameras. It appears to me that this must be so and that first respondent ought to have considered the compromise of allowing radio but excluding television cameras. Moreover, Cainer indicated to first respondent that, from a technical point of view, it would be possible for first respondent to impose restrictions which would render the presence of radio broadcasting and recording equipment even less obtrusive. He also tendered on behalf of applicant to be subjected to such restrictions. It does not appear from respondents' papers that first respondent considered the possibility of removing the objections against the presence of radio by imposing some or all of the restrictions suggested by Cainer, instead of imposing a blanket prohibition on all electronic media.

[62] On an objective approach, I do not believe that there are sufficient facts before this court to justify the conclusion that nothing short of a total ban on the electronic media would suffice to protect the interest of witnesses before the commission.

[63] In all the circumstances, I therefore find that, having regard to the provisions of section 36 of the Constitution, the facts presented to first respondent and to this court were not sufficient to justify the infringement of applicant's rights under section 16(1)(*a*) of the Constitution. Consequently, I find that the blanket exclusion of applicant's radio broadcasting and recording equipment from the sittings of the commission is inconsistent

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with the Constitution and therefore invalid. In accordance with the provisions of section 172(1)(*a*) of the Constitution the latter finding necessitated the declaration to that effect in paragraph 2 of the Order.

Costs

[64] As appears from paragraph 5 of the Order, it was decided not to make the normal costs order to the effect that costs should follow the event, but to make no order as to costs. A number of considerations gave rise to that decision. These considerations included the following. The application was brought on such short notice that, through no fault of respondents, it could not be finalised at the first hearing. At the second hearing we allowed argument by *amici curiae* which was of assistance to the court, but which unavoidably resulted into this hearing running into a second day. Thirdly, the application ventured into new territory and it was brought against a public office bearer acting in his capacity as such. In the circumstances the court found that a costs order against respondents would not be in the interest of justice.

(Hlophe JP and Traverso J concurred in the judgment of Brand J.)

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ORDER OF 21 JUNE 2000

The following order is made:

1. The rulings ("the rulings") of the first respondent on 7 and 8 June 2000 refusing the electronic media permission to operate at and during the sittings of second respondent are hereby set aside.

2. In terms of section 172(1)(*a*) of the Constitution Act 108 of 1996 ("the Constitution") the rulings are declared to be inconsistent with the provisions of the Constitution in that:

   a. First respondent failed to appreciate that a blanket exclusion of applicants radio broadcasting and recording equipment from the sittings of the second respondent constituted an infringement of the fundamental rights which applicant and/or the general public derive from section 16(1)(*a*) and/or (*b*) of the Constitution.

   b. Consequently, and in any event, first respondent failed to consider that of these fundamental rights could only be limited in accordance with the provisions of section 36(1) of the Constitution.

   c. First respondent failed to interpret section 4 of the Commissioners Act 8 of 1947 in accordance with section 39(2) of the Constitution in that he did not interpret the legislative provision in a manner which promotes the spirit, purport and objective of the Bill of Rights, and particularly section 16(1)(*a*) and (*b*) read with section 36(1) thereof.

   d. First respondent failed to consider whether a clear distinction should not be made between radio and television in applying the provisions of section 36(1) of the Constitution.

3. First respondent is directed to allow the applicant to operate its radio broadcasting and recording equipment during the sittings of the second respondent in such a manner as determined by first respondent. Provided that

upon good cause shown in relation to a particular person giving evidence before the second respondent, he may direct that such equipment be excluded.

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4. In determining whether applicant's aforesaid rights are to be excluded or limited as envisaged in paragraph 3 hereof, first respondent must consider whether he had been presented with sufficient evidence so as to properly invoke the provisions of section 36 of the Constitution.

5. There will be no order as to costs.

For the applicant:

MA Albertus SC and *A Katz* instructed by *Murphy Wallace Slabbert Incorporated*, Claremont

For the respondents:

M Seligson SC and *JC Butler* instructed by the State Attorney

Amicus Curiae

AM Breitenbach and *N Bawa*

Footnotes

1
Also reported at 1999 (10) BCLR 1059 (CC) – Ed.
2
Also reported at 1995 (6) BCLR 665 (CC) – Ed.
3
Also reported at 1998 (12) BCLR 1517 (CC) – Ed.
4
Also reported at 1999 (6) BCLR 615 (CC) – Ed.
5
Also reported at [1998] 4 All SA 347 (A) – Ed.