THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 100/06
REPORTABLE

In the matter between

MIDI TELEVISION (PTY) LTD **Appellant**

and

DIRECTOR OF PUBLIC PROSECUTIONS (WESTERN CAPE) **Respondent**

Coram:	HOWIE P, NUGENT, CLOETE, LEWIS JJA & SNYDERS AJA
Heard:	19 MARCH 2007
Delivered:	18 MAY 2007
Summary:	Restricting press freedom – prohibiting broadcast of documentary unless DPP permitted first to view it – whether constitutionally permitted.
Neutral citation:	This judgment may be referred to as Midi Television (Pty) Ltd v Director of Public Prosecutions [2007] SCA 56 (RSA)

JUDGMENT

NUGENT JA

NUGENT JA:

[1] On 15 June 2005 an awful crime was committed in Cape Town. Four men gained access to the home of Ms Norton, who was away at work at the time, snatched her six month old child from the arms of her domestic worker, and the child was deliberately stabbed to death. What had occurred immediately captured the attention of the public and received extensive media coverage, which continued as the police investigation progressed and suspects were arrested. (The trial of the suspects commenced subsequent to the commencement of these proceedings and was not completed at the time this appeal was heard.)

[2] The appellant is a television broadcaster that broadcasts under the name 'e-tv' and I will refer to it by that name for convenience. Soon after the crime was committed e-tv decided to make a documentary relating to the events and their impact upon the child's family for broadcast on a weekly current affairs programme. On 22 June 2005 it recorded interviews with various people, including Ms Norton's brother and her domestic worker, who had witnessed what had occurred. A decision was taken not to broadcast the documentary before the police had made arrests. By 9 July 2005 four men and a woman had been arrested and charged and e-tv proceeded to schedule its broadcast.

[3] It intended broadcasting the documentary on the night of Tuesday 2 August 2005. On Friday 29 July 2005 the Director of Public Prosecutions for the Western Cape (DPP) became aware that the documentary was to be broadcast. His representatives asked e-tv to allow them to view the documentary so as to satisfy themselves that the broadcast would not prejudice the forthcoming trial but e-tv refused. Discussions ensued, certain undertakings were offered to the DPP, but the impasse continued. On 2 August 2005 the DPP applied to the High Court at Cape Town as a

matter of urgency for an order prohibiting the broadcast until he had been furnished with a copy of the documentary and had been afforded 24 hours to institute any further proceedings that he might consider to be necessary. E-tv agreed to suspend its broadcast pending the outcome of the application, thereby relieving the urgency, and answering and replying affidavits were filed. The matter came before Zondi AJ who granted the relief that was claimed.[1] This appeal against that order is before us with his leave.

[4] There is a preliminary matter that can be disposed of briefly. The DPP's objection to the broadcast of the documentary has since been overtaken by events and he has withdrawn it. (As a result of the objection being withdrawn the documentary had been broadcast at the time this appeal was heard.) It was submitted on his behalf that this appeal will accordingly have no practical effect and should be dismissed on those grounds. Section 21A of the Supreme Court Act affords us a discretion to dismiss an appeal for that reason[2] but I do not think this is a case in which we should do so. The case raises important questions of law on which there is little authority and they are bound to arise again. With the benefit we have had of full argument I think we should deal with those questions not only to resolve what was contentious between the parties but also for future guidance.

[5] Freedom of expression, which includes freedom of the press and other media, is protected by s 16 of the Bill of Rights. That a free press (by which I mean the media in all its forms) is indispensable to democracy is axiomatic and has been articulated so often that nothing is served by adding to what has been said in that regard. Yet the constitutional promise of a

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[1] Reported as *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E TV* 2006 (3) SA 92 (C).

[2] Cf *Coin Security Group (Pty) Ltd v SA National Union for Security Officers* 2001 (2) SA 872 (SCA) para 8 and *Land en Landbouontwikkelingsbank van Suid Afrika v Conradie* 2005 (4) SA 506 (SCA).

free press, like other constitutional promises, is not absolute. In issue in this appeal is the extent to which that protected freedom may be abridged in favour of preserving the integrity of the administration of justice.

[6] It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press. As pointed out by Anthony Lewis, in a passage that was cited by Cameron J in *Holomisa v Argus Newspapers Ltd*:[3] 'Press exceptionalism – the idea that journalism has a different and superior status in the Constitution – is not only an unconvincing but a dangerous doctrine.' The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself.

[7] The extent to which the full enjoyment of a constitutionally protected right might be limited is circumscribed by the Constitution itself. Any such limitation is constitutionally permitted only if the limitation has its source in law of general application and only 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, amongst others, the factors enumerated in s 36.[4]

[8] Law of general application that purports to curtail the full exercise of a constitutionally protected right might take the form of legislation, or a

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[3] 1996 (2) SA 588 (W) at 610E.

[4] 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 of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose and
(e) less restrictive means to achieve the purpose.'

rule of the common law, or even a provision of the Constitution itself. In each case the extent to which the intrusion that it purports to make upon a protected right is constitutionally valid is to be evaluated against the standard that is set by the provisions of s 36 because there are no other grounds upon which it is permissible to limit protected rights.

[9] Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36. That they are to be reconciled within the constraints of s 36 is apparent from the following observation of Langa DCJ in *Islamic Unity Convention v Independent Broadcasting Authority:*[5]

'There is thus recognition of the potential that [freedom of] expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36(1) of the Constitution.'

[10] The proper enquiry when evaluating the extent to which protected rights might be limited by a statute (which must apply equally when

[5] 2002 (4) SA 294 (CC) para 30. See, too, Moseneke DCJ in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 (1) SA 512 (CC) para 96 to similar effect, but cf Langa CJ et al para 42.

protected rights are to be reconciled) was summarised by O'Regan J and Cameron AJ, in a passage from their dissenting judgment in *S v Manamela*[6] that received the approval of the majority,[7] as follows:

'The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose.'

[11] In determining the extent to which the full exercise of one right or the other or both of them might need to be curtailed in order to reconcile them what needs to be compared with one another are the 'extent of the limitation' that is placed upon the particular right, on the one hand, and the 'purpose, importance and effect of the intrusion', on the other hand. To the extent that anything needs to be weighed in making that evaluation it is not the relative values of the rights themselves that are weighed (I have said that all protected rights have equal value) but it is rather the benefit that flows from allowing the intrusion that is to be weighed against the loss that the intrusion will entail. It is only if the particular loss is outweighed by the particular benefit, to an extent that meets the standard that is set by s 36, that the law will recognise the validity of the intrusion.

[12] It is an established rule of the common law that the proper administration of justice may not be prejudiced or interfered with and that to do so constitutes the offence of contempt of court. That is now reinforced by the constitutional right of every person to have disputes resolved by a court in a fair hearing[8] and by the constitutional protection that is afforded to a fair criminal trial.[9] It is not contentious in all open and democratic societies – and it was not contentious before us – that the

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[6] *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 66.
[7] See the majority in paras 33 and 34.
[8] Section 34.
[9] Section 35(3).

purpose that is served by those principles of law provides a proper basis for limiting the protection of press freedom, and the reason for that is self-evident. The integrity of the judicial process is an essential component of the rule of law. If the rule of law is itself eroded through compromising the integrity of the judicial process then all constitutional rights and freedoms – including the freedom of the press – are also compromised.

[13] The exercise of press freedom has the potential to cause prejudice to the administration of justice in various ways – it is prejudicial to prejudge issues that are under judicial consideration, it is prejudicial if trials are conducted through the media, it is prejudicial to bring improper pressure to bear on witnesses or judicial officers – and it is not possible to describe exhaustively how prejudice might occur. What is more relevant in all cases where there is the potential for prejudice is to determine when the risk of prejudice will be sufficient to constitute an interference with the administration of justice that justifies a corresponding limitation being placed on press freedom. For the administration of justice does not take place in private, completely shielded from public scrutiny and comment, and there is always the potential for some element of prejudice when the media report or comment on judicial proceedings. What must be guarded against, as pointed out by McLachlin J in a concurring opinion in *Dagenais v Canadian Broadcasting Corporation*[10] (I will return to that decision), is the 'facile assumption that if there is any risk of prejudice to a fair trial, however speculative, [a ban on publication] should be ordered.'

[14] I do not think that guidance[11] is to be had in that regard from decisions of the United States Supreme Court in cases like *Near v Minnesota,*[12] and *New York Times Co. v United States.*[13] The extensive

[10] (1995) 25 CRR. (2d) 1 at 47.
[11] Cf *Mandela v Falati* 1995 (1) SA 251 (W); *Government of the Republic of South Africa v 'Sunday Times' Newspaper* 1995 (2) SA 221 (T).
[12] 283 US 697.

protection that is afforded to the press in that country is dictated by the text and the historical setting of the First Amendment, which is not consonant with our Constitution. As pointed out by Kriegler J in *Mamabolo*:[14]

'[O]ur Constitution ranks the right to freedom of expression differently [to the First Amendment]. With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The First Amendment declaims a unequivocal and sweeping commandment; section 16(1), the corresponding provision in our Constitution, is wholly different in style and significantly different in content.'

[15] Nonetheless, even in jurisdictions that do not recognise the degree of protection that is afforded by the First Amendment, the test to be overcome before publication will be susceptible to prior restraint has always been considerable. In England, before the introduction of the Contempt of Court Act 1981, Lord Scarman said in *Attorney-General v British Broadcasting Corporation*[15] that

'[t]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice.'

Similarly in *Attorney-General v Times Newspapers Ltd*[16] it was said that a ban on publication to protect the administration of justice would be allowed only if there was 'a real risk [of prejudice], as opposed to a remote possibility',[17] or a risk of prejudice that was 'serious or real or substantial'.[18] In Canada, before the decision of the Supreme Court in *Dagenais*,[19] a publication ban could be ordered only if a 'real and substantial risk of interference with the right to a fair trial' could be demonstrated.[20] The Australian High Court held in *Hinch and Macquire*

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[13] 403 US 713.
[14] *S v Mamabolo (E-tv, Business Day and the Freedom of Expression Institute intervening)* 2001 (3) SA 409 (CC) para 41.
[15] (1981) AC 303 (CA) at 362.
[16] 1974 AC 273 (HL).
[17] Lord Reid at 299A.
[18] Lord Morris of Borth-y-Gest at 303B-C.
[19] Cited above.
[20] *Dagenais*, above, at 27-28.

Broadcasting Holdings Ltd v Attorney General for the State of Victoria[21] that a publication constituted contempt only if there was a 'substantial risk of serious interference with the trial'.

[16] What is required by all those tests (implicitly, even if not always expressed) before a ban on publication will be considered is a demonstrable relationship between the publication and the prejudice that it might cause to the administration of justice, substantial prejudice if it occurs, and a real risk that the prejudice will occur. In my view nothing less is required in this country and to the extent that the pre-constitutional decisions of this court in *Van Niekerk*[22] and *Harber*[23] might suggest otherwise[24] I do not think they are consistent with what is to be expected in contemporary democracies. But merely to ask whether there is indeed a risk of prejudice that meets those criteria does not end the enquiry. For as I indicated earlier, the limitation must not only be directed towards a permitted end, but must also be no more than is necessary to achieve its permitted purpose.

[17] In England, where s 4 of the Contempt of Court Act 1981 permits a ban on publication only where it is 'necessary' for avoiding a substantial risk of prejudice to the administration of justice, the Court of Appeal in *R v Sherwood, ex parte Telegraph Group*[25] expressed the proper approach to the enquiry as follows:

'[Would a publication ban eliminate the risk?] If not, obviously there could be no necessity to impose such a ban…. On the other hand, even if the judge is satisfied that an order would achieve the objective, he or she would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so, it could not be said to be 'necessary' to take the more drastic approach…. Suppose that the judge concludes that there is indeed no other way of eliminating the perceived risk of

[21] (1987) 164 CLR 15.
[22] S v *Van Niekerk* 1972 (3) SA 711 (A) at 724H.
[23] *S v Harber* 1988 (3) SA 396 (A) at 422H-I.
[24] In both cases it was held that a publication is capable of sustaining a charge of contempt if it 'tends' to prejudice the administration of justice.
[25] (2001) 1 WLR 1983 at 1991G-1992A.

prejudice; it still does not follow necessarily that an order has to be made. The judge may still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being "the lesser of two evils". It is at this stage that value judgments may have to be made as to the priority between "competing public interests".'

[18] That approach replicates the material elements of the analysis that was adopted by the Supreme Court of Canada in *Dagenais*,[26] which in my view also reflects what is required by s 36 of our Constitution. In that case the Chief Justice, writing for the majority, said the following:

'The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.'

[19] In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its

[26] Cited above, at p 39.

advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

[20] Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right. And where a temporary interdict is sought, as pointed out by this court in *Hix Networking Technologies*,[27] the ordinary rules, applied with those principles in mind, are also capable of ensuring that the freedom of the press is not unduly abridged. Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose. Where there is a risk to rights that are not capable of subsequent vindication a narrow ban might be all that is required if any ban is called for at all.[28] It should not be assumed, in other words, that once an infringement of rights is threatened, a ban should immediately ensue, least of all a ban that goes beyond the minimum that is required to protect the threatened right.

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[27] *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) at 401D-G.

[28] Cf *Cream Holdings Ltd v Banerjee* [2004] 4 All ER 617 (HL), interpreting s 12(3) of the Human Rights Act 1998, which allows for a interim restraint on publication only if the court is satisfied that at trial the applicant is 'likely to establish that publication should not be allowed'.

[21] Turning to the present case the papers reflect a curious game of cat-and-mouse between the DPP and e-tv concerning the contents of the documentary: the DPP surmises what the documentary might contain, e-tv responds that he is wrong, the DPP challenges e-tv to demonstrate that he is wrong by producing the documentary, e-tv responds that it is not obliged to do so, and so it goes round in circles. I do not think we can become caught up in that. We cannot attach any weight to fragments of secondary evidence as to what the document might or might not contain. On the evidence that is before us the documentary is related to the crime and it contains interviews with at least two people who allege that they witnessed it, but beyond that we are in the dark as to its contents and the appeal must be considered on that basis. (The documentary has been broadcast since the order in this case was made but we cannot take account of that for purposes of this appeal.)

[22] The DPP did not ask for an outright ban on publication and the reason for that is obvious: he did not know what the documentary contained and so he could not say that the administration of justice would be prejudiced if it was broadcast. All he could say was that the documentary might possibly have that effect, depending upon its contents, and he pointed to how that might occur. He suggested, for example, that in their interviews the witnesses might have given accounts that differed from what they told the police, with the result that the discrepancies might be used to discredit their evidence. It was also suggested that the safety of witnesses might be at risk if their identities were revealed to the public. As to the DPP's first concern I would have thought that if witnesses have indeed given discrepant accounts of what they observed it would be more conducive to the interests of justice and of a fair trial that the discrepant accounts be exposed rather than that they be hidden. And bearing in mind the wide exposure that had been given to the identity of the witnesses by

the time the documentary was to be broadcast the prospect that their safety would be further endangered by the broadcast seems to me to be remote. In any event those possibilities exist as no more than conjecture that falls altogether short of justifying an outright ban on publication and that is no doubt why such a ban was not sought.

[23] But what the DPP sought instead was an order prohibiting e-tv from broadcasting the documentary until it provided a copy to the DPP and allowed him sufficient time to apply for a further order if he considered it to be necessary. In effect what he sought, and was granted, was an order compelling e-tv to disclose the documentary as a precondition to exercising its ordinary right to broadcast, which had the effect of banning publication unless e-tv submitted to the condition.

[24] The learned judge in the court below was alive to the importance of protecting press freedom and referred extensively to cases to that effect both in this country and abroad. Against that he said that the right of the state to mount an effective prosecution must be balanced and he concluded as follows:

'In my view in the interest of the administration of justice and the public, the right to freedom of expression should give way to a right to a fair trial. It is in the interest of the public that the [state] should effectively prosecute cases so that its safety and security is ensured. It will accordingly not be for the public good that information upon which the [state] will rely in prosecuting a case is used in a manner which undermines its obligation to fight crime'.

To the extent that he meant that the conduct of a fair trial could not be permitted to be compromised by the exercise of press freedom the observation that he made is unexceptionable. But without a reasonable apprehension that the conduct of the trial would indeed be compromised by the broadcast of the documentary, that in itself provided no grounds for prohibiting the broadcast. If the documentary is broadcast and it is indeed

unlawful then e-tv will be liable to prosecution but it cannot be prohibited without grounds for apprehending that it will be unlawful. The judge went on to express his reasons for granting the relief as follows:

'In this matter the [DPP] does not seek to arbitrarily interfere with [e-tv's] editorial independence. All that it seeks is to have access to the broadcast material in order to satisfy itself that its right to a fair trial is protected. The limitation to [e-tv's] right to freedom of expression claim is in the circumstances reasonable. It is reasonable in relation to the interest that is sought to be protected and does not go beyond that interest. The restriction is not only rationally connected to a legitimate objective that is sought to be protected and does not go beyond that interest'.

[25] The basis upon which the order was made, as appears from the passage that I referred to above, was to allow the DPP to satisfy himself that the administration of justice would *not* be prejudiced if the broadcast took place, and in that respect the learned judge erred. What was before the learned judge was an application for a final interdict (albeit that the duration of the interdict was limited to the period that e-tv resisted submitting to the condition) and it fell to be determined in accordance with ordinary principles.[29] The question to considered was whether any law obliged e-tv to furnish a copy of the documentary to the DPP before it was broadcast, and not whether it was reasonable to require e-tv to do so. I have already pointed out that the law prohibits e-tv from broadcasting material that prejudices the administration of justice. But there is no general principle of our law, whether in the common law, or in a statute, or to be extracted from the Constitution, that obliged e-tv to furnish its material to the DPP before it was broadcast,[30] and least of all a law that prohibited it from broadcasting the material unless it could first demonstrate that the publication would not be unlawful. The law generally allows freedom to publish and freedom is not subject to permission. In the

[29] *Setlogelo v Setlogelo* 1914 AD 222 at 227.
[30] Cf the Films and Publications Act 1996, which is not applicable in the present case.

absence of a valid law that restricts that freedom a court is not entitled to impose a restriction of its own.

[26] Counsel for the DPP submitted that the Promotion of Access to Information Act 2000 entitles the DPP to have access to the documentary, and that the effect of the order was merely to grant him such access. Perhaps the Act does entitle him to have access to the documentary, but access to information in terms of that Act is subject to compliance with a comprehensive process that contains its own checks and balances. There was no compliance in this case and the Act does not authorise a court to simply bypass those procedures. But even if the DPP were to be entitled to a copy of the documentary in terms of the Act it would not follow that he is entitled to a prohibition on publication until it is furnished. It was also submitted on his behalf that his request for disclosure of the documentary was eminently reasonable and again, perhaps it was, but that misses the point. The question is not whether it might have been reasonable for e-tv to have submitted to the request but rather whether it was obliged to do so in law. It was not. In the absence of a law obliging e-tv to furnish the documentary to the DPP before it was broadcast the first requirement for the grant of a final interdict – a clear right – was not met and the interdict ought to have been refused.

[27] Counsel for the DPP asked what the DPP could be expected to have done to ensure that an imminent publication did not compromise an impending trial. I fear that he must do what any person must do in similar circumstances: he must expect that freedom will not be abused until he has adequate grounds for believing the contrary. But he may not require the press to demonstrate that it will act lawfully as a precondition to the exercise of the freedom to publish in the absence of a valid law that accords him that right.

[28] The appeal is upheld with costs that include the costs of two counsel. The order of the court below is set aside and the following order is substituted:

> 'The application is refused with costs that include the costs of two counsel.'

R W NUGENT
JUDGE OF APPEAL

CONCUR:
HOWIE P)
CLOETE JA)
LEWIS JA)
SNYDERS AJA)