REFORMULATION OF *SUB JUDICE* RULE AND PRIOR RESTRAINT OF PUBLICATIONS RESOLVED: A VICTORY FOR PRESS FREEDOM

Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape) 2007 9 BCLR 958 (SCA)

1 Introduction

In order to ensure the integrity and accountability of an emerging constitutional democracy, a free and open press is of critical importance. Lately, there has been a growing judicial distrust in the media, with a discernible trend towards "the erosion of free press rights" in South Africa (Danay and Foster "The Sins of the Media: The SABC Decision and the Erosion of Free Press Rights" 2006 *SAJHR* 563). It is submitted that the decision by the Supreme Court of Appeal in *Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape)* is a victory for the protection of press and media freedom, which will stem the descent into legal censorship. The issue for decision by the court was the extent to which freedom of expression (s 16(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution")) may be limited to protect the preservation of the administration of justice and the right to a fair trial (s 34 of the Constitution). In his determination of this issue, Nugent JA reformulated the *sub judice* rule and dealt with the prior restraint of allegedly defamatory statements by the press. The aim of this note is to evaluate the judgment and the potential ramifications for freedom of the press and the media.

2 Facts

Following the murder of Baby Jordan Norton in May 2005, the appellant, *Midi Television (Pty) Ltd*, trading as "e-TV", prepared a documentary on the crime for broadcast on a weekly current affairs programme, 3rd Degree. The documentary contained interviews with Ms Norton's brother and her domestic worker, both of whom had witnessed the crime and given statements to the police for the purposes of trial. After five suspects had been arrested and charged, e-TV scheduled its broadcast of the documentary. The respondent, the Director for Public Prosecutions for the Western Cape (the DPP), became aware of the broadcast, and requested e-TV to allow it to preview the documentary to determine whether it would prejudice the intended prosecution of the suspects. E-TV refused. The DPP

then sought an order in the Cape of Good Hope Provincial Division interdicting and restraining e-TV from broadcasting the documentary until such time as it had been given a copy of the programme and had been afforded 24 hours to institute further proceedings for an appropriate order as it might deem fit. E-TV agreed to suspend its broadcast, pending the outcome of the order sought. The DPP therefore sought an order compelling e-TV to disclose the documentary as a pre-condition to e-TV's right to broadcast, in essence banning the broadcast unless e-TV agreed to disclosure.

3 Judgment of the court *a quo* – *Director of Public Prosecutions (WC) v Midi Television (Pty) Ltd t/a E-TV* 2006 6 BCLR 751 (C)

The DPP contended that it, as a prosecuting authority, has a constitutional duty to institute and conduct effective criminal proceedings and that it is therefore obliged to minimise threats to a fair trial. The persons who featured in e-TV's documentary had given statements to the police and would be called as state witnesses. Any discrepancies between the police statements and statements made in the e-TV interviews could be held against the witnesses and as such prejudice their evidence and the State's case. In addition, if the identity of the witnesses was exposed, their safety might be at risk (par 37).

E-TV opposed the order sought, relying on its constitutional right to freedom of expression, and alleging that it was entitled to broadcast the documentary without prior restraint or providing the DPP with a copy of the programme prior to the broadcast thereof (par 16). It argued that the DPP had failed to prove the requirements for the granting of an interdict, and that given the extensive media coverage of the murder of Baby Jordan, the information contained in the documentary was already in the public domain. The relief sought by the DPP amounted to pre-censorship and would unreasonably interfere with e-TV's right to freedom of expression and the public's corresponding right to view the programme (par 16-17 and19).

The court *per* Zondi AJ, whilst recognising the importance of media freedom (par 21-24), held that the DPP had met the requirements for an interdict (par 34), and that the right to freedom of expression should be limited in terms of section 36(1) of the Constitution in favour of the right to a fair trial, it being in the public's interest that the DPP should be placed in a position to prosecute trials effectively (par 46). The court held further that there was a real risk that the interviews conducted by e-TV could prejudice the State's case and that the DPP did not seek to interfere with e-TV's editorial independence on an arbitrary basis. The DPP merely sought access to the programme to determine whether its right to a fair trial would be infringed. The limitation to e-TV's right to freedom of expression was therefore reasonable and justifiable in light of the interest sought to be protected.

The order sought by the DPP was accordingly granted, but e-TV took the decision on appeal to the Supreme Court of Appeal.

4 Judgment of the Supreme Court of Appeal

The court, *per* Nugent JA, recognised both the right to freedom of expression, particularly freedom of the press and other media, and the right to a fair trial. The court emphasised the important link between the rule of law and the integrity of the judicial process, noting further that should the rule of law be undermined all constitutional rights and freedoms will be compromised (par 12). The administration of justice, however, does not occur in an insular manner and there is always the possibility of prejudice when the media report on judicial proceedings. Freedom of the media has the potential to prejudice the administration of justice in numerous ways, but the court highlighted that prejudice could occur by prejudging issues that are subject to judicial consideration, placing improper pressure on the various role-players (witnesses and judicial officers) and conducting a trial through the media. The court was accordingly required to determine when the threat of prejudice to the interference of the administration of justice was sufficient to limit press freedom.

Relying on foreign case law (par 13-15 and 17-18), the court held that a publication or broadcast will be unlawful and subject to censorship only if the prejudice that it might cause to the administration of justice is substantial and constitutes a real risk of harm. The court must be satisfied that the disadvantage of limiting press freedom outweighs the advantage it seeks to protect. In the determination, the media and the public interest in gaining access to information must be considered. A publication ban, limited in scope and duration, is permissible only if a grave risk is established and if there are not less restrictive means available to limit the risk of prejudice to the administration of justice (par 19). The court therefore amended the *sub judice* rule. Publications concerning pending court proceedings will now be unlawful only if there is a grave risk to the administration of justice as opposed to the previous test of a mere tendency to prejudice. The onus of proving a grave risk to the integrity of justice is borne by the party seeking to limit press freedom.

On the facts, the court dismissed the DPP's reasons for the potential for prejudice, that is, the discrepancies between the witnesses' statements and the possibility of the risk to their safety. The court held that it is in the interest of justice that such discrepancies should be exposed, and that the identity of the witnesses was already common knowledge because of the wide exposure given to the case. The court held that these reasons constituted mere speculation and not grounds for a grave risk justifying a publication ban (par 22). Furthermore, the court *a quo* erred by granting an order permitting the DPP to view the documentary as a pre-condition to the broadcast thereof and to satisfy himself that the administration of justice would not be prejudiced. The case amounted to an application for a final interdict. The requirements therefore had not been met. Firstly, there were no laws requiring e-TV to give a copy of the documentary to the DPP before it was broadcast, and secondly e-TV was not prohibited from broadcasting the material unless it could prove that the publication would not be unlawful (par 25). The appeal was accordingly upheld.

5 The *obiter dictum*

Of further importance is that part of Nugent JA's judgment wherein he dealt with the censorship of publications generally. He held that the same principles (*inter alia* the grave-risk test) should be applied with appropriate adaptation whenever freedom of expression on the part of the media and the press is sought to be limited in the protection of other rights. So, for example, when it is alleged that a publication contains defamatory statements, but it has not as yet been established that the publication is unlawful, an award of damages is usually sufficient to protect the right to reputation, if it is later determined that such right has indeed been infringed. A ban on publication by way of a temporary interdict will seldom be necessary. Should there be a risk of infringement, not capable of subsequent vindication, then, if a ban is necessary, the ban should be narrow and not extend beyond the minimum required to protect the threatened right. A threatened infringement does not automatically entitle prior restraint (par 20).

6 Discussion

There are many issues arising from Nugent JA's judgment which are worthy of discussion. These include the importance of media freedom, the threats thereto, the development of the *sub judice* rule and the gagging of the press in defamation-type cases. Each shall be considered in turn.

6 1 The importance of media freedom and threats thereto

Freedom of the press and other media is specifically recognized in s 16(1)(a) of the Constitution. Over the years, the Constitutional Court has acknowledged that freedom of expression is fundamental for a constitutional democracy (*South African National Defence Force Union v Minister of Defence* 1999 4 SA 469 (C) par 7; *S v Mamabolo (ETV Intervening)* 2001 3 SA 409 (CC) par 29-31; *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) par 26-28; *Laugh it Off Promotions CC v SAB International Finance BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC) par 45–46; and *SABC v National Director of Public Prosecutions* 2007 1 SA 523 (CC) par 23-24).

The significance of a free media in a democracy was highlighted in *Khumalo v Holomisa* (2002 5 SA 401 (CC)), the court holding that the media play an influential role in a democracy as they have a constitutional obligation to inform citizens and provide a platform for the exchange of ideas. The manner in which the media perform their constitutional duties will impact on the development of our emerging democracy. Should the media act responsibly and with fortitude, there will be a positive spin-off for society and our "fledgling democracy"; but if they "vacillate" in their duties, our constitutional democracy will be endangered (*supra* par 22-24). The freedom of expression provision in the Constitution therefore empowers the media to

report on issues vital to open, responsive and transparent government in a democracy. These sentiments are supported by the decision in *Holomisa v Argus Newspapers Limited* (1996 2 SA 588 (W)) where Cameron J held that (608-609):

> "The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed, if those criticisms are to be effectively voiced, and if they are to be informed of the factual content and critical perspectives that investigative journalism may provide …"

These objectives are critical in the pursuit to advance the freedom of the media, specifically in so far as the value of investigative journalism is concerned. It is submitted that responsible journalism is supported by the Constitution and should be endorsed and encouraged by society and government institutions, including the judiciary. In South Africa, where there is a dominant one-party system, with weak opposition, the potential for political corruption and subterfuge is rife. An independent and enquiring media is a key agent for the maintenance of democracy. Prior to the decision in *Midi Television*, a disturbing trend towards media suppression in South Africa was emerging and the ideal of a free media was under threat, often exacerbated by the antiquated pre-constitutional *sub judice* rule. To the extent that the decision in *Midi Television* has developed the *sub judice* rule in favour of expression and the media, it is to be welcomed as a victory for press freedom, the entrenchment of constitutional principles and the promotion of an open and accountable democracy.

The *Midi Television* judgment is particularly important in light of recent decisions which have undermined and threatened press freedom. One of the most recent of these decisions is that of *SABC Ltd v National Director of Public Prosecutions* (2007 1 SA 523 (CC)), where the Constitutional Court dismissed an appeal from the Supreme Court of Appeal, refusing the media permission to broadcast the appeal proceedings against Shabir Shaik on television and radio. It is submitted that this decision revealed mistrust in the ability and integrity of the media to fulfil their mandate, highlighting issues such as distortion of the facts and sensationalism (see Danay and Foster 2006 *SAJHR* 563-565). For example, when dealing with the issue of delayed highlight packages, Langa CJ for the majority held that "similar sound bites carry the real risk of trivialising complex issues and converting what should be public education into public entertainment" (par 69), and that there is "the potential for editing of Court proceedings to convey an inaccurate reflection of what actually happened … it may arise from the manner in which cover can be manipulated, often unwillingly …" (par 68). With respect, the learned Chief Justice allowed the sensationalist character of some aspects of journalism to cloud the importance of a free press, for it is not in the interests of democracy that the effectiveness of good investigative journalism be undermined.

In addition, many applications for interdicts have been launched in our high courts to censor news reports. For example, in July 2007 an interim interdict was granted against the Mail and Guardian newspaper restraining it from publishing the details of alleged corruption, abuse of power and

intimidation at the SABC (Freedom of Expression Institute website "FXI outraged by gag on M and G newspaper" http://www.fxi.org.za/content/view/124/51 accessed 19 August 2007). A final interdict was not granted, the court holding that newspapers are obliged to disseminate news of corruption at public entities, but the Mail and Guardian was prevented from reporting on breaking news and was required to defend the application, at considerable expense (South African National Editor's Forum website "SANEF welcomes lifting of legal ban on Mail and Guardian" http://www.sanef.org.za/press_statements/319903.htm accessed 19 August 2007). Another case is *Majali v M and G Ltd* (WLD Case No. 9236/05 26 May 05 unreported), where an interdict was granted restraining the Mail and Guardian from writing an expose on the "Oilgate" scandal. The court held that the article was potentially defamatory, that the investigation was unlawful and that it was not satisfied that the newspaper had acted responsibly. The Mail and Guardian alone has faced application for interdicts from the SABC (from reporting on the blacklisting of certain political commentators at the SABC), former MTN boss Maanda Manyatshe, the Scorpions, the CEO of the Post Office and the Jamiat-ul-Ulama and the Muslim Judicial Council (the Mohammed cartoon case). Most recently, Health Minister Manto Tshabalala-Msimang applied for an interdict in the Witwatersrand Local Division of the High Court to prevent the Sunday Times from publishing information concerning her medical records, alleging that the records were illegally obtained. Many of these applications were instituted despite the fact that there is authority to the effect that a prior restraint order will only be granted if there are compelling reasons to do so, taking into account the drastic nature of the remedy (*Government of the Republic of South Africa v Sunday Times Newspaper* 1995 2 SA 221 (T) 229D; *Khumalo v Holomisa supra*). Even though some of the interdicts were not granted, they indicate a disquieting trend towards the potential for discrediting and gagging of the media. Our courts have all too frequently failed to recognise that freedom of expression requires constitutional protection even when the expression complained of hurts or is offensive (*S v Mamabolo (E-tv Intervening) supra* par 67). The impact of the decision in *Midi Television* on these threats is discussed below when reference is made to the publication of allegedly defamatory statements.

6 2 The development of the sub judice rule

The *sub judice* rule is part of the common law doctrine of contempt. Its purpose is to maintain the administration of justice (Stuart *The Newspaperman's Guide to the Law* (1977) 79). Prior to the enactment of the Constitution, statements that tended to prejudice or interfere with the due administration of justice in pending proceedings were prohibited (*S v Van Niekerk* 1972 3 SA 711 (A) 724; and *S v Harber* 1998 3 SA 396 (A)). This test required a mere tendency to prejudice the integrity of justice, as opposed to the more vigorous test of a real and substantial risk to the administration of justice (Hill "Sub Judice in South Africa: Time for a Change" 2001 *SAJHR* 563 564-565). The approach was so stringent that it undermined the administration of justice (Hill 2001 *SAJHR* 588).

In *S v Mamabolo* the Constitutional Court dealt with contempt in the form of scandalising the court. Kriegler J held that in light of constitutional values and the emphasis on open and transparent government, the scope for conviction must be narrowly defined in order to protect freedom of expression. He held that the test for conviction is "whether the offending conduct, viewed contextually, really was likely to damage the administration of justice" (*supra* par 45). In a separate judgment, Sachs J held that in order to pass constitutional muster, prosecutions for contempt should not be based on a likelihood test. Real prejudice is required. The expression "must be likely to have an impact of a sufficiently serious and substantial nature as to pose a real and direct threat to the administration of justice" (*supra* par 75).

Prior to *Midi Television*, apart from the instructive judgment in *Mamabolo* on the related contempt offence of scandalising the court, the *sub judice* rule caused much confusion and was often used to curb the free flow of information and to withhold information from both the legislature and the media. The time to reformulate the rule in line with the international approach (where the test to be applied before publication will be susceptible to prior restraint was stringent) was long overdue. The new test of a grave risk to the administration of justice as applied in *Midi Television*, is similar to that of the Canadian approach in *Dagenais v Canadian Broadcasting Corporation* (1995 25 CRR. (2d) 1 47), where the Canadian Supreme Court held that a publication ban should be ordered only if it is necessary to prevent a real and substantial risk to the fairness of a trial because reasonable alternative measures will not prevent the risk. It also ties in with both the Australian approach in *Hinch and Macquire Broadcasting Holdings Ltd v Attorney-General for the State of Victoria* (1987 164 CLR 15), where the High Court held that a publication will constitute contempt "only if there was a substantial risk of serious interference with the trial", and the British approach to be found in section 2(2) of the Contempt of Court Act 1981, where the general test is whether "there is a substantial risk that the course of justice in the proceedings will be seriously impeded or prejudiced". The position in the United States of America is not apposite because the First Amendment guarantees extensive protection to freedom of expression and the press (par 14).

It is arguable that the judgment did not go far enough and that the court should have abandoned the *sub judice* rule entirely as the potential for misuse of the rule outweighs the possibility of a risk to the administration of justice (Hill 2001 *SAJHR* 588-589). This approach, however, is extreme and one that fails to give value to the right to a fair trial. Furthermore, it is not in accordance with international practice.

The development and reformulation of the *sub judice* rule by Nugent JA in accordance with the approach adopted in other democratic countries is to be heralded as a victory for constitutionalism and the subsequent positive spin-offs for freedom of expression and investigative journalism. The flimsy and unsubstantiated pre-constitutional *sub judice* excuse will now not be tolerated, which is of substantial benefit to the protection of our constitutional democracy.

6 3 Prior restraint of defamatory material

Nugent JA's *obiter* statements concerning the approach to be adopted in respect of the prior censorship of allegedly defamatory statements are most welcome in light of the threats to media freedom. There is little doubt that the quality of government is substantially improved when criticism is free and without threat of prior restraint (Hoctor "The Right to Freedom of Expression and the Criminal Law – The Journey thus far" 2005 *Obiter* 459 462). It was held, for example, in *S v Mamabolo* that (par 37):

> "Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed."

It is submitted that the grave risk of prejudice test as proposed in *Midi Television*, although *obiter*, should arrest the drift towards prior restraint and thought control. In light of the persuasive value of the judgment, it should now become more onerous to obtain an interdict restraining the media from publishing allegedly defamatory and inflammatory statements. Indeed, it is possible that many of the interdicts mentioned in this article would not have been granted or contemplated *post Midi Television*, particularly if regard is had to the decision in *National Media Ltd v Bogoshi* (1998 4 SA 1196 (SCA); and see, too, *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC)), where Hefer JA held that "it is the right, and indeed a vital function of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity" (*supra* 1209-1210).

7 Conclusion

In South Africa's emerging democracy, attempts to undermine press and media freedom are rife. These must be stifled to protect freedom of expression and the constitutional values of open and accountable government. It is submitted that the reformulation of the *sub judice* rule and the instructive *obiter* comments concerning the limitation of freedom of expression on the part of the media and the press in the protection of other rights in *Midi Television* reinforce these objectives. The case is welcomed as a landmark victory for constitutionalism, the protection of freedom of expression and the subsequent entrenchment of democratic principles.

Joanna Stevenson
Nelson Mandela Metropolitan University, Port Elizabeth