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SOUTH GAUTENG HIGH COURT

DATE: 31/03/2009

CASE NO: 13712/09  
13647/09

In the matter between

eTV (PTY) LTD; esat (PTY) LTD;  
AVUSA MEDIA LTD;  
INDEPENDENT NEWSPAPERS (PTY) LTD;  
MAIL AND GUARDIAN LTD;  
FREEDOM OF EXPRESSION INSTITUTE;  
MEDIA24 (PTY) LTD;  
THE CENTRE FOR APPLIED LEGAL STUDIES Applicants

and

JUDICIAL SERVICE COMMISSION AND 15 OTHERS Respondents

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J U D G M E N T

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WILLIS J: I have before me several urgent applications. They all relate to an order in which it is sought to set aside the decision by the Judicial Services Commission (“the JSC”), taken on 28 March 2009, and communicated to various of the applicants on 30 March 2009, that the hearing in the matter of the justices of the Constitutional Court and Judge President Hlophe of the

Western Cape High Court ("the hearing") would not be open to the public or the media.

An order is sought in all of the matters that the court directs that the hearing be open to the public and the media.

A specific order has been sought by eTV (Pty) Limited relating to the sound recordings of the proceedings.

There has been an application by the Centre for Applied Legal Studies to be joined as *amicus curiae* in this matter. That application was not opposed and by agreement, The Centre for Applied Legal Studies was joined as a party. The *amicus curiae* joins in the application on the basis that it represents the general public rather than the other applicants who, in the view of The Centre for Applied Legal Studies, represent the media, and the specific interests of the media in this particular matter. The point has been made (and indeed taken by the court) that this is not a matter of mere "media interest", if such interest can be described as "mere".

Counsel for all the parties agreed that it would be sensible that all these separate applications be heard as one, and that one particular judgment be given.

The first respondent in all the matters is the JSC. The second respondent is the Acting Chair of the hearing who is the Judge President of the Supreme Court of Appeal, Judge Lex Mpati. The third respondent is the Judge President of the Western Cape, John Hlophe. The remaining respondents are the

justices of the Constitutional Court, the complainants in the case against the third respondent.

The second respondent has taken no stance in this application as to whether the hearing should be open to the public or not.

The third respondent, Judge John Hlophe has, through his counsel indicated that he will abide the decision of this court.

None of the justices of the Constitutional Court have opposed this particular application and it therefore seems to me to be fair to assume that they are content also to abide the decision of this Court.

Interestingly, in the answering Affidavit prepared on behalf of the JSC, no allegation was made that the Chief Justice, the Deputy Chief Justice, other judges of the Constitutional Court or the Judge President of the Western Cape vigorously opposed the question of the hearing being held public.

It seems from submissions that were made from the Bar on behalf of the third respondent that the third respondent did indicate to the JSC that he would prefer that the hearing was not public but nevertheless, as I have already indicated, the third respondent has indicated that he will abide the decision of this Court.

The matter has been brought as one of urgency, precisely because it is common cause that the hearing of Judge President Hlophe is due to commence tomorrow, that is 1 April 2009.

By reason of the pressing urgency in the matter it is necessary that I should deliver a judgment *ex tempore*, more particularly as the parties may well wish to know my reasons for the order which I make before the hearing commences tomorrow. I mention this not in any spirit of arrogance: reasons, whether good or bad, matter. In a case such as this they may matter very much indeed.

Regrettably this means that one cannot do full justice to the matter and to all the very able and well prepared arguments that have been presented by counsel for all parties.

It should be observed that the applicants represent all the major media houses in South Africa, and all the major newspapers, and almost all the public broadcast entities in South Africa. Affidavits have been filed by the editors of such well known newspapers as *The Sunday Times*, *The Star*, *Beeld*, *The Mail and Guardian*, and well known television presenters such as Debora Patta for eTV.

The Freedom of Expression Institute has also been a party to these proceedings. It is clear that the matter is one of considerable public interest, and indeed, if I understood *Mr Maleka*, who appears for the JSC, correctly he does not contend that the matter is not one of considerable public interest.

As long ago as 14 July 2008 the JSC called for interested parties to make submissions on whether the pending hearing into complaints by the justice of the Constitutional Court in relation to

Judge President Hlophe (and *vice versa*) should be public, and if they were to be public what media coverage should be allowed.

Annexed to the papers on behalf of the applicants is, if I may say so, impressive documentation, including memoranda submitted by interested parties, supporting an open hearing. These memoranda allude to case law from around the world, case law from South Africa and ringing statements concerning the importance of open proceedings made by philosophers and commentators, some of whom have had a reputation enduring for several hundred years. I refer, for example, to Jeremy Bentham.

As I have already indicated, it is not possible while giving an *ex tempore* judgment to do true justice to the submissions. Suffice to say that they were impressive, and it is quite clear that the thrust thereof is that it is of fundamental importance, and an issue of fundamental constitutional and human rights that matters of great public importance should be determined in public rather than behind closed doors, save in very special circumstances which may relate, for example, to questions of national security.

Over and over again in this impressive documentation put before me is stressed the importance of judges being subject to public scrutiny in enquiries of the nature that has been envisaged in this particular case. I commend the reading of the memoranda therein contained to all who take an interest in these matters.

The JSC, having received these representations, which it

called for as long ago as July 2008, made a decision on 28 March 2009 not to hold the hearing in respect of the complaint by the justices of the Constitutional Court, and the counter complaint by the Judge President in public.

This decision was publicised in a media statement on the same date. Reasons were called for and the Judicial Services Commission issued the following reasons:-

- "3. All 21 submissions, including those on behalf of the justices of the Constitutional Court and Judge President Hlophe were fully considered by the Commission, but the Commission will not give reasons in respect of each individual application.
4. The commission had regard to the submissions and the kind of allegations that had been made concerning the motives and alleged impropriety of senior members of the judiciary. The commission weighed the public interest and the need for transparency of the proceedings, and considered that good cause exists for the exclusion of the public and the media from the hearing.
5. Whilst the respective, extraordinary and unprecedented complaints are against individual judges, the JSC considers it imperative to protect the dignity and stature of

the office of the Chief Justice and the Deputy Chief Justice, and that of the Judge President (of the Cape of Good Hope Division). Irrespective of the outcome of the inquiry a public hearing involving the allegations mentioned in paragraph 4 above would damage the dignity and stature of the office of the said judicial officers, and in turn that of the entire judiciary.

6. At the end of the inquiry the JSC will publically furnish reasons for whatever decision it would have reached.
7. For these reasons the applications to have the hearing in public with the media in attendance were not acceded to."

The section in the Promotion of Administrative Justice Act, No. 3 of 2000 which has loomed large in this application is section 6(2)(i) thereof which provides that a court may review an administrative action if "the action is otherwise unconstitutional or unlawful". PAJA is the term widely, if somewhat esoterically, employed by lawyers to abbreviate the Promotion of Administrative Justice Act.

A decision to hold a hearing of the JSC behind closed doors cannot, *per se*, be unconstitutional: as counsel for the applicants conceded, there may be instances where it will be justified. Counsel for the applicants submitted, however, that the decision

of the JSC was, in the circumstances, unconstitutional. It is not necessary to decide the point. Unless compelled to do so, it would also seem unwise (see, *S v Vermaas*; *S v Du Plessis* 1995 (3) SA 292 (CC); *S v Mlungu and Others* 1995 (3) SA 867 (CC); *Zantsi v Council of State Ciskei and Others* 1995 (4) SA 615 (CC)).

As mentioned earlier, section 6(3)(i) of PAJA, in addition to providing that a court may review administrative action if “the action is otherwise unconstitutional” provides, it would seem, for review if the action is *otherwise unlawful*. In other words, a court may review administrative action if it is in some respect not otherwise provided for in PAJA, found to have been unlawful. The alternative interpretation would entail the construction that after “unconstitutional” is to be read “or a court may review an administrative action if the action is unlawful”. That would be tautological.

Nevertheless, before dealing with the question of whether the decision of the JSC to hold the hearing behind closed doors is “otherwise unlawful”, it must be emphasised that the spirit of the Constitution must infuse all that the courts may do. The Constitution provides as much. Section 39 thereof reads as follows:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

This principle has been affirmed by the Constitutional Court and other courts in cases too innumerable to mention. The principle is now trite.

Much debate during the course of argument this afternoon and evening was concerned with clause 5.6 of the JSC's own rules governing complaints and inquiries in terms of Section 177(1)(A) of the Constitution. This clause reads as follows:-

"The JSC shall be entitled to permit the media and public, subject to such restrictions as may be considered appropriate, to attend any inquiry unless good cause is shown for their exclusion."

That the JSC considered that this was the test which applied to it seems, in my respectful view, to be apparent from the very wording that it employed in clause 4 of the media statement issued on 31 March 2009, namely that:-

"The commission weighed the public interest and the need for transparency of the proceedings, and considered that good cause exists for the inclusion of the public and the media from the hearing."

At the outset it should be noted that the test in this matter is different from that which ordinarily applies to reviews in terms of the PAJA. In other words for reasons that I shall develop later, the court does not have to consider the tests such as applied in the case of *Sidumo v Rustenburg Platinum Mines* 2008 (2) SA 24 (CC) or the case in *Bato Star Fishing (Pty) Limited v the Minister of*

*Environmental Affairs* 2004 (4) SA 490 (CC) or even the rationality test that may apply in terms of PAJA. In the *Sidumo* and *Bato Star* matters the Constitutional Court, as a general rule, set its face firmly against the second-guessing by the courts of administrative decisions. The Constitutional Court was, of course, dealing with the principle, as a general rule, rather than as an absolute one.

The reason why the *Sidumo* and *Bato Star* cases do not apply is precisely because the JSC has itself set a standard, and the standard is that proceedings in the hearings which it convenes are to be held in public unless good cause is shown.

I accept, therefore, the argument of counsel for the various applicants that the JSC having set this standard, this is the standard which must apply to the JSC and the standard by which this application has to be tested. I have already alluded in this judgment to the outstanding memoranda that were submitted on behalf of the various applicants to the JSC relating to the importance of public access to hearings of this nature.

I should mention that these views are in general entirely supported by the Constitutional Court itself in the well known case of *SABC Limited v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) and also the judgment of *Dotcom Trading 121 t/a Live Africa Network News v King* NO 2000 (4) SA 973 (C) in which a judgment was given by the full bench of the then Cape Provincial Division. Interestingly the three judges included not

only Brand J, as he then was, (who now serves on the Supreme Court of Appeal), Traverso J, as she then was (who is now the Deputy Judge President of the Western Cape)) but also Hlophe JP how is the third respondent in this application. These two judgments give ringing endorsement to the principle of free public access to hearings of this nature.

Counsel for the applicants have submitted, somewhat delicately, that clause 5.6 of the JSC's own rules has, perhaps, not been a model of clarity. Without in any way intending any disrespect to whoever was responsible for the draftsmanship, I am inclined to agree. In any event, it bears the hallmarks of having been drafted by a committee, rather than any single person. Nevertheless, as Lord Steyn said in *R v Secretary for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at 447 a, "In law, context is everything". This was approved by the Supreme Court of Appeal in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) at para [1]. It hardly needs be said that the words "The JSC shall be entitled to permit the media and the public..." constitute a preface. (See *The Oxford Dictionary*.) In context, this preface cannot constitute anything more than a preamble or the "giving of notice" or a warning to all who may care to know that hearings of the JSC are likely to be conducted in the open. In other words, the clause conveys the message that hearings of the JSC will be open to the public unless good cause shown.

In this case it was, correctly, not even debated whether the interpretation of “good cause shown” was to be made against a subjective or an objective test: it was accepted that the test had to be objective. In other words, it is not sufficient that “good cause” should exist purely in the mind of the decision-maker: the decision must, in addition, be objectively justifiable or survive objective scrutiny. Put differently, “good cause” in the mind of the decision-maker alone is simply not “good” enough. If questions such as the one in issue were to be interpreted purely against a subjective test, we might as well begin to put out the lights for any role for the courts as protectors and defenders of our constitutional order. “Justifiable” is not, however, synonymous with “agreeable to the court”.

An example of the distinction between the subjective and the objective test which springs to mind is that which occurs in the situation where a police officer in terms of section 40(1)(b) of the Criminal Procedure Act, No. 51 of 1977, as amended, effects an arrest of a person whom he or she suspects, on reasonable grounds, to have committed a scheduled offence. It is not sufficient that the reasonable grounds should exist in the mind of the police officer. In addition, there must, on an objective test, be reasonable grounds for the suspicion. (See, *Duncan v Minister of Law and Order* 1986 (2) SA 895 (A) at 814D-E; See, also: *Minister of Law and Order v Hurley and Others* 1986 (3) SA 568 (A) at 579F - G and *Minister of Law and Order and Others v Pavlicevic* 1989 (3)

SA 679 (A) at 684G which related to not dissimilar provisions in section 29(1) of the now repealed Internal Security Act, No. 74 of 1982.)

“Good cause” forms part of the repertoire of lawyers’ favourite phrases. Although omnibus in nature, it is not nebulous. Every lawyer who has ever struggled to resist an application for summary judgment will be familiar with the case of *Breitenbach v Fiat* 1976 (2) SA 226 (T) in which it was made plain that would be difficult indeed to show good cause why such judgments should not be granted where the defence had been set out “baldly, vaguely or laconically” (at 229A). (See, also *Standard Bank of SA Ltd v El-Naddaf and Another* 1994 (4) SA 779 (W) in which Marais J applied the same principles to an application for rescission of a default judgment in terms of Rule 31(2) (b) of the Rules of the High Court, which specifically requires “good cause” to be shown.)

Although the applicants in the case now before the court do not, of course, rely upon a liquid document they nevertheless rely on something which has a similarly self-evident character: the need for transparency in a matter of public interest. A bald and threadbare explanation for why there should be a departure therefrom cannot be good enough.

Furthermore, it has long been part of our substantive law - indeed it is part of our inheritance from Roman Law and appears in the *Corpus Juris Civilis* - that “*Semper necessitas probandi*

*incumbit illi qui agit*” - the need to prove always rests on the person who acts. “Prove” in this text has a meaning which is not confined to the furnishing of proof as required by the law of evidence but also entails a wider concept such as “demonstrate”, “show”, “justify” or “convince”. This concept has been expressed in different ways in the old authorities. Another version is: “*Ei incumbit probatio qui dicit, non qui negat*” - the burden of satisfying a court that a litigant is entitled to succeed in the claim or defence, as the case may be, rests on the one who asserts, not on the one who denies. (See, *Digest* 22.3.21 and 22.3.2; *Pillay v Krishna and Another* 1946 AD 946 at 951-4; *Tregea and another v Godart and Another* 1939 AD 16 at 32). It is the JSC that asserts there is good cause for the hearing to be behind closed doors: it must satisfy the court that this is indeed the case.

Even if I am wrong in holding the JSC to its own standard, it seems the combined might and majesty of the Constitution and the common law, working together in a catalytic relationship, would, in any event, set such a standard.

The principle of openness in my respectful opinion clearly finds endorsement in our Constitution. I refer, in particular, to Section 16, which enshrines the right to freedom of expression and defines it as including the freedom “to receive ... ideas ...”.

In the submissions to the JSC which were prepared by Dr Dario Milo, Ms Pamela Stein, and Ms Okyerebea Ampofo-Anto

from Webber Wentzel, reference was made to a decision of the House of Lords in England in the case of *Scott v Scott* [1913] AC 417 (HL) at 447 where quoting Jeremy Bentham, the well known philosopher to whom I referred earlier, their Lordships observe with approval:-

"Publicity is the very soul of justice. It is the keenest spur to exertion and the surety of all guards against improbity."

In other words the fundamental principle clearly is that proceedings of this nature should be held in public, that the public should have the right of access thereto, and this principle, save in exceptional circumstances, should ordinarily be upheld.

Counsel for the applicants submitted that transforming and openness is an underlying constitutional principle. I agree that the decision of the JSC offends against the underlying principle.

It therefore seems to me that the simple inquiry with which I am faced is whether the JSC has shown good cause why the public should not be allowed to have access to the hearings relating to the third respondent Judge President Hlophe.

Essentially, and after careful perusal of the Affidavit filed on behalf of the JSC, it appears the reason that is provided for not holding the hearing in public is that it "considers it imperative to protect the dignity and stature of the office of Chief Justice and Deputy Chief Justice, and that of the Judge President".

*Mr Maleka*, who appears for the JSC, submitted, almost disarmingly, that his client had merely been concise. Conciseness is a virtue notoriously rare among lawyers. Where it occurs it should, without doubt, be encouraged. Mere economy with words is not, however, sufficient to earn the plaudits of conciseness: there must, in addition, be a quality of comprehensiveness. (See, *The Oxford Dictionary*.) That, I am afraid, is lacking.

Counsel for all the applicants argued vigorously, and in my view convincingly, that ultimately the dignity and stature of the office of the Chief Justice, the Deputy Chief Justice, the Judge President of the Cape and indeed of the entire judiciary will be enhanced rather than diminished by there being an open and public hearing. I entirely agree with this view. Moreover, in the absence of further explanation, I consider that good cause has not been shown for the hearing to be closed to the public.

Indeed, it is my view that if the inquiry proceeds behind closed doors we will end up in South Africa having what is known in Afrikaans as 'bespiegeling'. In other words, there will be all sort of undue and unfortunate speculations regardless of the outcome. There will be suspicion. There will be an erosion of public confidence in the judiciary, all of which I would consider to be most unfortunate. It seems to me that the dignity of our entire bench will be done a favour by these proceedings being public, and by the public having access thereto.

This is all the more reason why I am accordingly persuaded

by counsel for the applicants that the JSC has failed to show good cause why the media and the public generally should be excluded from the hearing.

In addition, it is principle of our law that, in relying upon the exercise of a discretion (as the JSC has done in this case), a person must not have acted for insubstantial reasons (See, *Ex Parte Neethling and Others* 1951 (4) SA 331 (A)) at 335A-E; *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A) at 605G; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 537F-G). Put differently, and in plain English, the reasons for exercising the discretion must not be “flimsy”. (See, for example: *Tejani and Others v Official Receiver* [1963] 1 All ER 429 (PC)).

Of course, protecting the dignity of the judiciary is an important consideration but we have all been left in the dark as to why the holding of this particular hearing behind closed doors will protect the dignity the persons sought to be protected. Mere say-so, a vague and laconic statement to this effect, is not good enough. I have already said, in the absence of anything more, I am compelled to disagree, and not only do I disagree, but also I am compelled to conclude that good cause has not been shown.

In coming to this conclusion the court is not unmindful of the fact that the hearing will be concerned with an extraordinary case: it is not every day that the justices of the Constitutional Court collectively lodge a complaint against a fellow judge, more especially one who occupies one of the more eminent seats in the

South African judiciary. It is, however, precisely the extraordinary nature of the hearing which makes it imperative that the public has an informed sense not only of what actually happened but also that, consequent upon its findings as to the facts, the JSC makes the decision that is both fair and appropriate.

I wish to emphasise by reason of the very narrow test which has been applied by this court in this matter that certainly there is no suggestion on the part of the applicants, or any finding by this court of impropriety or bad faith, irrationality or anything else that may seriously be criticised in the reasoning of the JSC. It is not found, for example, that the JSC acted outside the parameters of reasonableness. I fully accept that the JSC sought to act in a fair manner, that it did in fact apply its mind to the matter, and that no criticism relating to any impropriety or irrationality can be levelled at it. All that has happened in my judgment is that the JSC has failed to establish good cause for the exclusion of the public, and as I have already indicated that is the standard which it has set for itself, and that is the standard to which it shall be held.

It is important to bear in mind that the electronic media do not seek permission to broadcast television footage in which there will be images portrayed on television of any of the witnesses while giving evidence or any of the proceedings in question.

In the Constitutional Court's judgment in the *SABC Limited*

*v The NDPP* case, that Court expressed reservations relating to the use of television, which reservations I share. For obvious reasons, television can create very distorted images of what transpired at a particular hearing by giving so-called “sound bites” or brief glimpses of some fractional moment in important proceedings.

Although the court has been persuaded that the hearing should be open to the media and the public, the court nevertheless intends, insofar as this is reasonably possible, to be non-intrusive upon the conduct of the hearing. The final paragraph of the order, prepared after some consultation with counsel, is an attempt to reflect this. It is also designed to cater for unforeseen contingencies. It may be, for example, that more people wish to attend the hearing than there are seats reasonably available.

There was some debate concerning the question of costs. Clearly in my view this is not a matter where it is appropriate to make a costs order. The court will simply remain silent as to the order as to costs. I need hardly point out that a matter of considerable public importance such as this requires that parties should feel free to present their respective arguments and that the Court should have the benefit of these arguments. It hardly seems appropriate to me in all the circumstances, to penalise the JSC with an order for costs.

The following order is made:

- (i) The decision by the Judicial Services Commission

taken on 28 March 2009, that the hearing in the matter of the Justices of the Constitutional Court and Judge-President Hlophe of the Cape Provincial Division (“the hearing”) would not be open to the public or the media is set aside;

- (ii) The hearing is to be open to the public and the media;
- (iii). The second respondent (as chairperson of the hearing) is to permit the applicants to set up such equipment as is necessary in order to obtain a sound recording of the hearing for the purpose of broadcasting such hearing in the form of live or delayed broadcasts, and broadcasts on news and/or current affairs programmes;
- (vi) The second respondent (as chairperson of the hearing) shall retain his ordinary powers to make appropriate rulings in the hearing upon good cause shown to him.

May I thank counsel on all sides for their valiant efforts at such short notice, and their very well prepared arguments. Thank you.

Counsel for eTV (Pty) Limited and ESAT (Pty) Ltd: Adv Andrew Redding. (With him, Adv Steven Budlender)

Attorneys for eTV (Pty) Ltd and ESAT (Pty) Ltd: Rosin, Wright, Rosengarten.

Counsel for the other applicants, apart from the Centre for

Applied Legal Studies: Adv Paul Kennedy, (with him Kate Hofmeyer and Kirsty McClain).

Attorneys for the other applicants, apart from the Centre for Applied Legal Studies: Webber Wentzel.

Counsel for the Centre for Applied Legal Studies: Adv Alan Dodson.

Counsel for first respondent: Adv I V Maleka, (with him, Ms Matseleng Lekoane).

The attorney for the first respondent is the State Attorney in Cape Town.

Counsel for the third respondent: Adv N Ngalwana.

The attorneys for the third respondent: Xulu and Liversage.

Date of hearing 31 March 2009.

Date of judgment 31 March 2009