IN THE HIGH COURT OF SOUTH AFRICA

~~(TRANSVAAL PROVINCIAL PROVISION)~~

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED.

DATE 25-05-2007 SIGNATURE

CASE NO: CC 332/2005

In the matter between:

THE STATE	Applicant
and	
DANIEL GEIGES	Accused 1
GERHARD WISSER	Accused 2
KIRSCH ENGINEERING CO (PROPRIETARY) LIMITED	Accused 3
AND	
M & G MEDIA LIMITED	First Intervening Party
THE FREEDOM OF EXPRESSION INSTITUTE	Second Intervening Party
THE SOUTH AFRICAN NATIONAL ENDITORS' FORUM THE SOUTH AFRICAN CHAPTER OF THE MEDIA	Third Intervening Party
INSTITUTE OF SOUTHERN AFRICA	Fourth Intervening Party

JUDGMENT

LABUSCHAGNE, J:

[1] In this application the State seeks an order converting the trial of seven of the ten counts in the indictment (the non proliferation charges) against the accused into a closed or *in camera* proceeding that would:

1.1 exclude all members of the public or media from the trial,

1.2 prohibit disclosure of the evidentiary record adduced at the trial, and

1.3 prevent disclosure of the identities and or identifying information regarding technical expert witnesses.

[2] The order for *in camera* proceedings and the prohibition of publication of information is sought in terms of section 152(1) and (2) and 154(1) of the Criminal Procedure Act 51 of 1977 (the CPA); section 52(1) of the Nuclear Energy Act 46 of 1999 (the NEA) and section 21(2)(b) of the Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993 (the NPWMDA).

[3] The application also seeks to:

(i) limit the people permitted to attend the closed proceedings,

(ii) restrict access to both the transcript of the closed proceedings and the physical and documentary evidence introduced during the course of the trial, and

(iii) prevent publication or disclosure of the names, identities and other identifying materials, such as photographic or other images, of all witnesses who's names and addresses have been withheld in terms of section 144(3)(a)(ii) of the CPA.

This is therefore an application of extraordinarily wide scope and raises fundamental questions regarding the rights to open justice under the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) and its application in particular proceedings.

[4] Mr Trengrove on behalf of the State submitted that the State has made an overwhelming case on the papers for the preservation of the confidentiality of parts of the trial to avoid the risk of proliferation.

[5] The accused in this case acquiesce in the State's application for a partial hearing behind close doors.

[6] The intervening parties opposing the State's application are first, The M & G Media Limited, the Freedom of Expression Institute, third, the South African National Editor's Forum and, fourth, The South African Chapter of the Media Institute of South Africa. Each of these intervening parties represents the South African media's interest in public court proceedings for the purposes of reporting on and publication of matters that are in the public interest and of interest to the public. The State does not contest the standing of any of the intervening parties in these proceedings.

[7] Mr Marcus on behalf of the intervening parties opposed the granting of the order sought on the following grounds:

1. The order sought is overbroad.

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2. The order sought in the State's application is insufficiently narrowly tailored.

3. The State has demonstrated no attempt to consider or present less intrusive means to protect the legitimate State objectives of secrecy in respect of certain evidence to be presented or alternatively to explain why a less drastic infringement of the right to open justice is impossible.

4. The application infringes the constitutional guarantees of access to court proceedings by the public and media.

5. The relief sought in the State's application is contrary to international practice in comparable jurisdictions.

A SYNOPSIS OF THE FACTS ALLEGED BY THE STATE

[8] In the early 1970's, accused 3 became the South African agent for Leybold Heraeus GMBH, a German company and one of the world's leading designers and manufacturers of uranium enrichment technology.

[9] By virtue of this agency, the 3 accused became suppliers of uranium enrichment technology to the South African Nuclear programme and acquired extensive nuclear technology. They recruited engineers to execute certain of their contracts. They interacted with expert employees of the South African programme. The Nuclear Energy Counsel of South Africa has made available technical documentation relating to this scope of activities in order to assist the State in proving

the knowledge of uranium enrichment principals by the three accused. In addition, the South African Police Service has seized documentation at the premises of accused 3, containing similar technical information. Both sets of documentation have been assessed by nuclear experts to confirm that they relate to nuclear activities.

[10] As a result of theses activities, accused 2 became acquainted with German citizen, Gotthard Lerch, who was a nuclear expert and the head of Leybold's vacuum division. In the mid-1980's, Lerch left Leybold and established a company in Switzerland. He then supplied the accused with extensive plans and other technical data relating to Leybold's uranium enrichment designs.

[11] From the mid-1980's to the mid-1990's, the 3 accused manufactured major gas centrifuge uranium enrichment components commissioned by Lerch. These components were all shipped via a clandestine route form South Africa to Pakistan where they became integrated into the Pakistani uranium enrichment activities. At that time, Pakistan was in the process of developing a nuclear weapons programme in contravention of the non-proliferation treaty. The head of the Pakistani programme was Dr AQ Kahn and a key role player in his procurement activities was Mr BSA Tahir.

[12] In order to execute these engineering projects, the accused made use of engineers and persons with nuclear engineering experience who had previously been employed in the South African nuclear programme. They also sub-contracted the design and manufacture of sub-components of the systems they produced to local people and entities with nuclear engineering experience.

[13] All the components produced by the accused had left the country before their activities were detected by the authorities. However, the State relies on the following evidence:

13.1 The designs and other technical data relating to the systems the accused manufactured.

13.2 Evidence from persons with nuclear engineering skills and experience who played a key role in manufacturing the components upon the instructions of the accused.

13.3 The evidence of all the sub-contractors, some of whom are also State witnesses.

13.4 Confirmation by highly qualified nuclear experts that the documentation and components in fact relate to gas centrifuge uranium enrichment technology.

[14] In order to enhance Pakistan's gas centrifuge uranium enrichment capabilities, the accused, Lerch and Tahir were involved in an attempt to recruit an employee of the South African program to go to Pakistan and establish production facilities. A Pakistani scientist was actively involved in these efforts. The State relies on the evidence of the person whom they sought to recruit as well as documentary evidence relating to their recruitment effort.

[15] In the same period the accused were involved in the manufacture of key components for the Indian nuclear program. At that time, India was not a signatory of the non-proliferation treaty. The State relies on the evidence of the engineer who acted on the instructions of the accused and the technical material which he retained relating to the product.

[16] The essence of counts 1 to 5 and their alternatives, is a conspiracy by Khan, Lerch, Tahir the accused, and other persons to supply Libya with a gas centrifuge uranium enrichment plant, dedicated to the production of weapons grade uranium for the ultimate purpose of creating nuclear weapons. More specifically, the State alleges that the accused were appointed to manufacture key components of the plant in South Africa.

[17] The commission of the offences only became known in December 2003 when Libya declared the existents of the programme which it had undertaken in contravention of the non-proliferation treaty and its safeguards agreement with the International Atomic Energy Agency (the IAEA). Key components of the programme were surrendered to the US government. They included the flow-forming machine referred to in count 1 and other components relating to count 2.

[18] The components referred to in counts 2 and 4 and the technology referred to in count 5 were all seized by the South African Police Services. The police also seized extensive technical data relating to those components. The components used in the construction of the equipment referred to in count 2 where not only designed, manufactured or purchased in South Africa, but were also clandestinely acquired

from abroad. Finally the police also ceased technical documentation relating to the construction of nuclear war heads and the manufacture of other sensitive centrifuge components.

[19] All the components and technical documentation have been evaluated by highly qualified nuclear experts who have confirmed that they relate to a gas centrifuge plant dedicated to the production of weapons grade uranium and the construction of nuclear weapons.

THE RISK OF NUCLEAR PROLIFERATION

THE NON-PROLIFERATION TREATY

[20] The treaty on the non-proliferation of nuclear weapons first entered into force in March 1970. South Africa only became a party to the treaty in July 1991. In terms of article 3(1) South Africa was obliged to enter into an agreement with the IAEA with safeguards for the verification of the fulfilment of its obligations assumed under the treaty "*with a view to preventing diversion of nuclear energy from peaceful users to nuclear weapons or other nuclear explosive devices*".

NON-PROLIFERATION TREATY B127

THE SAFEGUARDS AGREEMENT

[21] South Africa entered into a safeguards agreement with the IAEA on 16 September 1991. In terms of article 7(a) of this agreement South Africa is obliged to

"*established and maintain a system of accounting for and control of all nuclear material subject to the safeguards under this agreement*".

SAFEGUARDS AGREEMENT C132

THE PELINDABA TREATY

[22] South Africa is also a party to the African Nuclear Weapon-free Zone Treaty also known as the Pelindaba Treaty. It provides for the entire continent of Africa to remain a nuclear-weapon-free zone. It imposes the following obligations on State parties which are germane to this application.

1. In terms of article 3(c) each State party undertakes not to take any action "*to assist or encourage the research on, development, manufacture, stock piling or acquisition, or possession of any nuclear action device*".

2. In terms of article 10 each State party undertakes "*to maintain the highest standards of security and effective physical protection of nuclear materials facilities and equipment to prevent theft or unauthorised use and handling*" of it.

PELINDABA TREATY E210

THE IAEA TRIGGER LIST

[23] The IAEA publishes guidelines for nuclear transfers which it updates from time to time. The guidelines include "a trigger list" of nuclear materials and facilities which

are subject to the guidelines. The latest addition to the guidelines was published on 15 March 2000.

[24] Paragraph 3(A) of the guidelines provides that all the nuclear materials and facilities identifies in the trigger list "*should be placed under effective physical protection to prevent unauthorised use and handling*".

IAEA TRIGGER LIST L316, 323

[25] The trigger list itself makes it clear that the guidelines apply not only to the items in the trigger list but also to the technology associated with them. The transfer of any technology of this kind is "*subject to as great a degree of scrutiny and control as ... the item itself*".

THE IAEA DUAL–USE LIST

[26] The IAEA also publishes guidelines for transfers of nuclear-related dual-use equipment, materials software and related technology. The guidelines are applicable to nuclear-related equipment, materials, software and related technology which can make a major contribution to "*nuclear explosive activity*" or an "*unsafe guarded nuclear fuel-cycle activity*" but also have other uses.

[27] The basic principle of the guidelines laid down by paragraph 2, is that suppliers should not authorised transfers of any dual-use items or the technology related to them "*when there is an unacceptable risk of diversion*" to a non-nuclear-weapons state for use in a nuclear explosive activity or in an unsafe guarded nuclear

fuel-cycle activity or when the transfer is contrary to the objective of averting the proliferation of nuclear weapons. The State alleges that it would be a flagrant violation of this principle to release the technology relating to dual-use items in the public domain.

[28] Paragraph 4 of the guidelines obliges suppliers to establish export licensing procedures for the transfer of equipment, materials, software "*and related technology*" identified in the list of dual-use items. These procedures must include enforcement measures for violations. The State again submitted that the release of dual-use technology would be a flagrant breech of this obligation.

[29] The Dual-Use List itself again makes it clear that it applies not only to the items listed but also to the technology directly associated with any item on the list. This technology is "*subject to as great a degree of scrutiny and control as ... the item itself*".

IAEA DUAL-USE LIST H235

SECURITY COUNCIL RESOLUTION 1540

[30] The UN Security Council adopted resolution 1540 on 28 April 2004 by which it imposed duties by member states under Chapter VII of the UN charter to prevent the proliferation of weapons of mass destruction including nuclear weapons. The resolution included the following directives:

"(1) decides that all states shall refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, posses, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;

(2) decides also that all states, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non- state actor to manufacture, acquire, posses, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes as well as attempts to engage in any of the foregoing activities ,participate in them as an accomplice, assist or finance them;

(3) decides also that all states shall take and enforce affective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall

(a) develop and maintain appropriate and effective measures to account for and secure such items in production, use, storage or transport;

(b) develop and maintain appropriate effective physical protection measures."

SECURITY COUNCIL RESOLUTION 1540 F225/6

THE NUCLEAR ACT

[31] South Africa gave effect to its international obligation to establish and maintain a system of national control over nuclear-related equipment and technology, by two Acts of Parliament enacted in 1993. One of them was the 1993 Nuclear Act. It has subsequently been succeeded by the 1999 Nuclear Act. Both these Acts create a system for the control of items on the IAEA Trigger List. Most of the charges in this case are for contraventions of these controls. Counts 2 to 5, 7 and 8 alleges that the accused contravened the controls in varies ways.

[32] In terms of section 50 of the 1999 Nuclear Act the Minister of Minerals and Energy is responsible for South Africa's institutional nuclear obligations which are defined in section 1.

[33] Section 33(1) of this Act provides more particularly that the Minister acts as the national authority of South Africa for purposes of the implementation of its safeguards agreement with the IAEA. In order to fulfil this responsibility, the Minister is required in terms of section 33(2)(a) to liaise with the IAEA on an ongoing basis and is empowered in terms of section 33(2)(b) to issue wide-ranging instructions.

[34] In terms of section 2(f) of the 1999 Nuclear Act the Minister may declare equipment and material specially designed or prepared for the processing, use or production of nuclear material to be "*nuclear-related equipment and material*".

[35] The Minister proclaimed a list of items to be "*nuclear-related material and equipment*" under the 1993 Nuclear Act. Although this list was proclaimed under the 1993 Nuclear Act it has been perpetuated by section 60(2)(b) of the 1999 Nuclear Act.

[36] Sections 34(1)(b)(v), (r) and (u) and section 35(1) read with section 56(1)(d) and (e) section 56(2)(c) of the 1999 Nuclear Act make it a crime for anybody without the written authority of the Minister:

(1) to be in possession of nuclear related equipment and material;

(2) to manufacturer otherwise produce, import, acquire, use or dispose of nuclear-related equipment and material;

(3) to dispose of any technology relating to any nuclear-related equipment and material; and

(4) to export any nuclear-related equipment and material.

[37] The State's case is that all the equipment and material described in counts 2 to 5, 7 and 8 and all the technology relating to that equipment and material are nuclear-related equipment and material listed in the South African trigger list and subject to these controls.

SOUTH AFRICAN TRIGGER LIST G227 AT 228 PARA (4) AND 229 SCHEDULE 4

THE NON-PROLIFERATION ACT

[38] The second Act enacted by South Africa in 1993 towards implementation of its international obligations was the Non-Proliferation Act. According to the long title of the Act its main purposes are to provide for "*control over weapons of mass destruction*" and "*the establishment of a council to control and manage matters relating to the proliferation of such weapons in the Republic*".

[39] The definitions in section 1 make it clear that when the non-proliferation Act speaks of "*non-proliferation*" it means "*the non-proliferation of weapons of mass*

destruction" which in turn is defined to include "*any weapon designed to kill, harm or infect people, animals or plants through the effects of a nuclear explosion*".

[40] Section 4 established the South African Council for non-proliferation of weapons of mass destruction. It is the body of which Mr Minty is the chair. Section 6 lists its functions. Section 6(1) obliges it to protect the interests, carry out the responsibilities and fulfil the obligations of the State with regard to the non-proliferation of weapons of mass destruction. The Council is inter alia empowered by section 6(3) to control and manage all activities relating to non-proliferation, and provide guidance instructions and information in connection with it.

[41] The non-proliferation Act creates a system by which control is exercised over all the items listed in the IAEA Dual-Use List.

(1) In terms of section 13(1) the Minister may, on the recommendation of the Council declare any goods which may contribute to the design, development, production, deployment, maintenance or use of weapons of mass destruction, to be "*controlled goods*". In terms of section 13(2) the Minister may also impose a variety of controls over those goods.

(2) Acting under these powers the Minister proclaimed all the items in the IAEA Dual-Use List to be "*controlled goods*" and determined that the import, export, re-export and transit of these goods could only take place under permit issued by the Council.

(3) The Minister replaced the first South African Dual-Use List with a second South African Dual-Use List published on 10 April 2002. I was advised that the papers are incomplete in that they only include the schedule to the proclamation because the first South African Dual-Use List was enforced when the offence in count 1 was committed. But the declaration of the second South African Dual-Use List was in identical terms to the one in the first South African Dual-Use List. It declared all the items in the IAEA Dual-Use List to be "*controlled goods*" and determined that their import, export, re-export and transit could only take place under permit issued by the Council.

(4) Both the South African Dual-Use Lists make it clear that they control not only the equipment in the list but also the technology relating thereto. They define technology to mean "*specific information required for the development, production or use of any item contained in the list*" which "*may take the form of technical data or technical assistance*".

(5) Section 26(1)(c) read with section 26(1)(iii) criminalises any contravention or failure to comply with any of the controls imposed by the Minister on controlled goods. Count 1 is a charge of a contravention of these provisions.

THE COURT'S STATUTORY DISCRETION TO CLOSE PROCEEDINGS

[42] Section 52 of the Nuclear Energy Act 46 of 1999 provides:

> *"(1) In the case of any civil or criminal proceedings before a court of law, or any proceedings before an arbitration tribunal, arising from the application or administration of this act, the court or arbitral tribunal (as the case may be) may direct that the proceedings before it be held in camera if the interest of the security of the Republic so require.*
>
> *(2) For that purpose, the court or tribunal (as the case may be) must assess the matters raised and the evidence, statements and addresses that have been or may be tendered, made or given in the proceedings concerned, as well as other developments in the proceedings, on an ongoing basis for potential danger or harm to the security of the Republic."*

[43] Similarly section 21(1)(d) of the NPWMDA provides that any person who is concerned in the performance of any function in terms of that Act shall not "*disclose, transmit or make known*" to any person, *except "(d) where it is required in terms of any law or as evidence in any court of law;*". Section 21(2)(b) of the same legislation provides as follows:

> *"(b) if any court is of opinion that the disclosure of certain information may compromise the functions of the council, or the interests of the industry, it may direct that any proceedings before it be held in camera."*

[44] Lastly the State also relies on the provisions of sections 153(1) and (2) and 154(1) of the CPA in support of the orders sought. Section 153(1) provides as follows:

> *"(1) If it appears to any court that it would, in any criminal proceedings pending before that court be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind close doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.*
>
> *(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct:*
>
> *(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorised by the court;*
>
> *(b) that the identity of such person shall not be revealed or that it shall not be revealed for any period specified by the court."*

[45] Section 154 of the CPA permits a court to prohibit publication of certain information relating to criminal proceedings.

[46] It is clear from these provisions that the court has, in certain circumstances, a discretion to direct that proceedings should be held *in camera* which discretion must be exercised judicially.

THE PRINCIPLE OF OPEN JUSTICE

[47] It has long been a fundamental principle of our common law that judicial proceedings must ordinarily take place in open court. The principle relates to both civil and criminal matters.

[48] The principle is codified in section 152 of the CPA which reads as follows:

> "*Except where otherwise expressly provided by this act or any other law, criminal proceedings in any court shall take place in open court, and may take place on any day.*"

[49] The principle is now also constitutionally entrenched in section 35(3)(c) of the Constitution. It provides that every accused person has a right to a fair trial which includes the right "*to a public trial before an ordinary court*".

[50] Mr Trengove submitted that the principle of open justice is first and foremost an element of the right to a fair trial which vests in every "*accused person*". Because the accused in this matter acquiesce in the application for a partial hearing behind closed doors it was contended that it was not open to the intervenors to rely on the right to a fair trial for its purpose was not to protect them but accused persons only.

[51] I have some doubt about the correctness of this proposition but it is not necessary to consider it in any detail as it is clear in my view, that the intervenors have *locus standi* in terms of the provisions of section 16(1)(a) and (b) of the Constitution. It provides in relevant part that:

> "*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.*"

The *locus standi* of the intervening parties in terms of this section was in fact conceded by the State.

[52] In my view, the public has a legitimate interest in all criminal trials and are entitled to be kept informed in that regard. I am inclined to agree with the State's submission that section 16(1)(a) and (b) of the Constitution recognise and protect a broader element of the principle of open justice which focuses not on the accused's right to a fair trial, but on the public's right to be informed of the conduct of all criminal proceedings and the importance for the administration of justice that they be so informed.

[53] The principle of open justice is therefore normally based on two main considerations. The first is the fair trial consideration because open justice is regarded as an important component of a fair trial The second is the publicity consideration because members of society are entitled to be informed of the conduct of criminal proceedings and the administration of justice benefits from the publicity given to them. The second consideration is important and need to be considered in more detail in this application.

[54] The most comprehensive review of the open justice principle and the exceptions to it before the advent of the Constitution was undertaken by Ackermann J (as he then was) in the *Leepile* line of cases. See *S v Leepile and Others (1)* 1986 (2) SA 333 (W); *S v Leepile and Others* (2) 1986 (2) SA 346 (W); *S v Leepile and Others (4)* 1986 (3) SA 661 (W) and *S v Leepile and Others (5)* 1986 (4) SA 187 (W). In the first of these cases the court quoted Lord Shaw *in Scott v Scott* (1913) AC 417 and Lord Diplock in *Harman v Home Office* 1983 AC 280 who had in turn quoted Bentham as saying that:

> *"Publicity is the very sole of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."*

S v Leepile supra at 339B-C.

[55] The leading pre-constitutional case on the interpretation of the test "*that there is a likelihood that harm might result to any person*" in section 153(2) of the CPA is *S v Madlavu and Others* 1978 (4) SA 218 (E) where Cloete JP said the following at 222G-223A:

> *"I have come to the conclusion after a careful consideration of the section and the authorities to which I have referred that in making an order in the terms contemplated in section 153(2) the prerequisite is that the harm to any person who testifies in these proceedings as envisaged by the section must be a reasonable possibility and not a remote far-fetched or fantastic one. The requirement is not to be set so highly that a probability must exist that harm will result. ... The application of the section requires an assessment of the surrounding circumstances of each particular case. In assessing these the court, in my view, is not bound to consider and evaluate only the factual evidence placed before it in direct proof of the likelihood of harm resulting. That of course is, and always will be, an important and possibly one of the most important aspects to be considered in judging an issue of this nature. There is such evidence before this court but in my view the court can travel beyond the mere facts of this case and draw upon its own judicial experience in other cases of a like nature, and consider the nature of the act alleged in the indictment; the atmosphere of the case itself; the type of case which we have to deal; the prevailing circumstances as a matter of common knowledge in which the crimes alleged in the indictment were alleged to have been committed and similar considerations. I do not pretend to give an exhaustive list of all these factors."*

[56] Further instances in which the courts, even before the Constitution, refused to grant blanket orders suppressing the identification of witnesses in criminal trials in terms of section 153 of the CPA are:

56.1 *S v Sekete and Others* 1980 (1) SA 171 (N). In this case the court had to deal with the threat to the safety of State witnesses in so-called "*terrorism trials*". Considerable evidence was led in which it was accepted by the court that State witnesses were threatened and targeted for assassination. The court itself referred to a letter which was sent directly to the court which could be interpreted as threatening. Notwithstanding the evidence the court refused to exercise its discretion to grant "*blanket protection to all 'black non-police witnesses*".

56.2 *S v Leepile (4)* 1986 (3) SA 661 (W). The State in this case applied to protect the identity and identifying information of a State witness who, according to the prosecution, was faced with a high likelihood of harm to her or her family if her identification were to be disclosed. Notwithstanding evidence of such risk to the witness the court declined to make an order excluding the press although the witness was allowed to testify in regulated proceedings.

56.3 In *S v Pastoors* 1986 (4) SA 222 (W) Spoelstra J excluded members of the general public from observing testimony of a certain witness during trial proceedings but, *inter alia*, allowed accredited members of the press to attend and report the proceedings.

[57] These cases were decided before the Constitution. It is trite that all legislation must now be interpreted in light of the Constitution.

[58] Although in a somewhat different context the Constitutional Court considered and discussed the principle of open justice at some length in *S v Mamabolo* 2001 (3) SA 409 (CC) where Kriegler J said the following:

> *"Moreover, as a matter of general policy, judicial proceedings of any significance are conducted in open court, to which everybody has free access and can assess the merits of the dispute and can witness the process of its resolution. ... This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die."*

Paras [18] and [19].

A little later on in the judgment the learned judge returned to this issue by saying:

> *"Since time immemorial and in many divergent cultures, it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see it. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: So that the people can discuss, endorse, criticize, applaud or castigate the conduct of their courts. And, ultimately, such free and frank debate about judicial proceedings serves more than one vital public purpose. Self-evidently such informed and focal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important espirational attributes prescribed for the judiciary by the Constitution. However, such focal public scrutiny performs another important constitutional function. It constitutes a democratic check on the judiciary. ... Ideally, also, robust and informed public debate about judicial affairs promotes peace and stability by convincing those who have been wronged that the legal process is preferable to vengeance; by assuring the meek and humble that might is not right; by satisfying businesspeople that commercial undertakings can be efficiently enforced; and ultimately, as far as they all are concerned, that there exists a set of just norms and a trustworthy mechanism for their enforcement."*

Paras [29] to [31].

[59] The principle of open justice was again considered by the Constitutional Court in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC). The majority judgment was delivered by Chief Justice Langa and six other justices of the court. In this judgment the court emphasised the following factors which are germane to the present enquiry:

1. Freedom of expression lies at the heart of democracy. It recognises that the public are entitled to hear, form and express opinions and views freely on a wide range of matters. Para [23].

2. The media play an important part in fulfilling this function. Everyone has the right to freedom of expression and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. Para [24].

3. Public participation on a continuous basis provides vitality to democracy. The proper functioning of a modern participatory democracy "*requires that the media be free, active, professional and inquiring*". Para [28].

4. The media's access to the courts concern the right of South Africans to know and understand the manner in which the judiciary functions. It is a strong constitutional consideration. It presupposes that courts are open and accessible. Open justice is an important part of the right to a fair trial and serves as a great bulwark against abuse. The courts in

principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. Paras [29] to [32].

5. The principle of open justice has however never been absolute. Trials and parts of trials may be, and often are, held behind closed doors. Para [50].

6. In terms of section 173 of the Constitution, all the superior courts have the inherent power to protect and regulate their own process. They exercise a discretion in the determination of public access to their proceedings. In the exercise of this discretion, their primary obligation is to ensure that the proceedings before them are fair to all the parties concerned. Para [55].

[60]

60.1 The inherent danger to constitutional democracy of closed judicial proceedings was again recognised by the Constitutional Court in the case of *Shinga v The State* 2007 (5) BCLR 474 (CC) at para [25] wherein Yacoob J noted that:

> *"Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based."*

60.2 The Constitutional interest in open justice was explained in this case at para [26] on the basis that:

> *"Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open court rooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal matters to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy."*

60.3 In the *Shinga* matter the court affirmed its earlier reasoning in *South African Broadcasting Corporation Ltd supra*.

[61] It therefore seems clear that the Constitution:

61.1 requires courts to observe the principal of open justice in the conduct of their proceedings;

61.2 recognises the central role of the media, in particular, in ensuring open justice; and

61.3 permits only the narrowest demonstrably justifiable infringement of the right of access to open court proceedings.

[62] The Supreme Court of Canada has also frequently considered the appropriate balance to be struck between the general desirability of open justice on the one hand and the need to protect more compelling interests in exceptional cases on the other. The leading cases are:

Vickery v Nova Scotia Supreme Court (Prothonotary) (1991) 1 SCR 671 (SCC);

Dagenais v Canadian Broadcasting Corporation (1994) 3 SCR 835 (SCC);

Canadian Broadcasting Corporation v New Brunswick (Attorney General) (1996) 3 SCR 480 (SCC);

R v Mentuck (2001) 3 SCR 442 (SCC);

Sierra Club of Canada v Canada (Minister of Finance) (2002) 2 SCR 522 (SCC); and

Toronto Star Newspapers v Ontario (2005) 2 SCR 188 (SCC).

In the last of these cases the court summarises its approach to the application of the open justice principle as follows:

> "*In any constitutional climate, the administration of justice thrives on exposure to light ... and withers under a cloud of secrecy. The lesson of history is enshrined in the Canadian Charter of Rights and Freedoms. Section 2(b) of the Charter guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians. The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted. Competing claims related to court proceedings necessarily involved an exercise in judicial discretion. It is now well-established that court proceedings are presumptively 'open' in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration. This criterion has come to be known*

as the dagenais/mentuck test, after the decisions of this court in which the governing principles were established and refined."

THE APPLICATION

[63] The State requests an order in prayer 1 for a hearing *in camera* of all the proceedings relating to counts 1 to 5, 7 and 8 including the background events described in paragraph 5 of the substantial facts. The remaining prayers 2 to 5 are designed to reinforce and regulate the primary order sought in prayer 1.

[64] It was argued on behalf of the State that it has made out a strong case for the primary and ancillary relief sought on the grounds that it was in the interests of the security of the State; and in the interests of good order and in the interests of the administration of justice in terms of the provisions of section 153(1) of the CPA and that the relief was also justified in terms of the provisions of section 21(2)(b) of the Non-Proliferation Act and section 52(1) of the Nuclear Act.

[65] In support of this argument the State referred to the evidence of Mr Tillwick, a highly qualified and experienced nuclear scientist to the effect that the materials and technology in the indictment are listed in the IAEA and SA Trigger and Dual-Use Lists which are subject to controls under the Nuclear Act of 1999 and the Non-Proliferation Act; that the equipment and technology is valuable for States or entities wishing to develop nuclear weapons; that the public exposure of this material and technology will constitute a breach of South Africa's duty under international law; and that the

release in the public domain will create a real security risk. Tillwick's assessment is confirmed by Mr Tobey, an expert from the United States. Mr Minty is the chair of the S A Council for the NPWMDA and a member of the Board of Governors of the IAEA. He in turn confirms that the views of Tillwick and Tobey are shared by the IAEA.

[66] The intervening parties do not seriously challenge this evidence. They do however criticise the State's categorical claims on secrecy as being overbroad and insufficiently narrowly tailored.

[67] The State naturally bears the *onus* of proving the jurisdictional facts in support of the application in order to justify the limitations sought. This is of particular importance in view of the fact that the relief in this case would involve significant incursions into the rights to open justice. *Midi Television (Pty) Ltd v Director of Public Prosecutions* (2007) SCA 56 RSA.

[68] The thrust of the State case in the founding affidavit and the order sought, is that there is no non-sensitive evidence in respect of the non-proliferation charges and that it was not possible to run the trial in respect of these charges other than in accordance with the order sought.

[69] The intervening parties criticised this stance in the opposing affidavits by stating that there was no attempt whatsoever in the founding papers to analyse proposed evidence into sensitive and non-sensitive categories.

[70] The State was forced to make a number of concessions in this regard in its replying affidavits. In his replying affidavit (page 541 para 10) Naudé says the following:

> *"In this regard, I submit that it would be appropriate for the court, at a stage when the court so deems appropriate, that such non-sensitive documentation and evidence be publicly released. Since such non-sensitive information and evidence is interwoven with the sensitive information and evidence, some editing of the information and evidence to be disclosed would have to be done before such public disclosure."*

This concession is important as it indicates that non-sensitive evidence will be led also in respect of the non-proliferation charges which is clearly different to the facts relied on by the State in the founding papers.

[71] The further concession is that, the court may, when it deems appropriate release such non-sensitive documentation and evidence, if necessary, with editing. I would add that the court's role, according to this concession is somewhat understated. In my view the court is entitled to release such non-sensitive evidence and probably obliged to do so in view of the fundamental principle of open justice.

[72] The State furthermore concedes that insofar as evidence may be led at the trial which was led during the bail application, such evidence could have no claim on secrecy because the bail hearings were held in open court.

[73] Furthermore, it remains unclear in what respect any, or even some, of the evidence identified by Naudé in para 2.1, namely the testimony of police officers that certain "*sensitive information*" was either seized or handed over during investigation can itself be regarded as sensitive evidence and that it would be in the interests of the security of the State or of good order or of the administration of justice not to disclose such evidence to the public and/or the media.

[74] Included in the order sought by the applicant is a ban on the disclosure of any information concerning the witnesses including their names, identities and any other particulars. The basis for the protection requested by the State is the general apprehension of recruitment of the witnesses by elicit nuclear proliferation networks and not that the non-disclosure of such information is a requirement of the Republic's non-proliferation obligations. The allegation is simply to the effect that the State must exercise caution in placing in the public domain details of its employees or its national laboratory employees.

[75] The State also seeks a blanket ban on the identification of all "*nuclear experts*" and any witnesses who are not "*nuclear experts*" but who have had access to the sensitive technology, either by virtue of their experience, qualifications or work

environments. This in my view is precisely the kind of witness identification ban that was rejected by the courts even before the Constitution.

[76] Insofar as the recruitment of witnesses by elicit entities are concerned only a single example of an unsuccessful attempt to recruit a "*nuclear expert*" is referred to in the papers filed by the State.

[77] In this regard the State faces another problem in that it has failed to allege any causal link between the act of testifying and the harm to the witnesses. *S v Leepile and Others (1) supra* at 336G.

[78] On the papers before me there are further difficulties in the way of issuing a blanket order for instance in respect of all dual-use items that have been declared "*controlled goods*". The effect of the listing of these dual-use items as controlled goods was that all activities listed in section 13 of the NPWMDA were restricted or prohibited. As the intervening parties pointed out which was acknowledged by the State dual-use items have both nuclear and non-nuclear applications. The result is that many such items will be commercially available and will be marketed even though trade and other dealing in such items is prohibited in terms of section 13 of the said Act. Accordingly the non-proliferation legislation does not prohibit the mere identification of such dual-use items in the course of legal proceedings. The State for example accepts that public advertising of such items is allowed and it seems as if

such dual-use items are not subject to the same secrecy constraints as those items that are listed on the "*trigger lists*".

[79] A further point taken by the intervening parties is that the State failed properly to distinguish between witnesses whose identity is already known and those that are not. It is common cause that the name of the witness Meyer is known and need not be suppressed. Notwithstanding all these facts the State seeks an order that the identities of all witnesses should be suppressed. Such an order would for instance include even the relatives and friends of the accused (emphasis added).

[80] In order to overcome some of the difficulties the State argued that any order that I might make will be of a purely interlocutory nature. This much seems clear. See *S v Leepile and Others (2) supra* at 351F-G. The court will accordingly, according to the argument, be entitled and indeed obliged in the public interest to reconsider its order from time to time in the light of the unfolding evidence before it. If it should then transpire that the order was either not warranted at all or that it was broader in scope than was necessary the court will set aside or amend the order and direct that all or any of the evidence given under it be publicly released. I cannot agree with this argument simply because the point of departure is wrong. The open justice principle is a fundamental principle of our law. The starting-point should therefore be that trial proceedings should be held in open court unless there are compelling reasons to close the doors of the court to the media and/or the public. If it then transpires that in the interests of the State or of good order or of the

administration of justice that such proceedings be held behind closed doors the court may make an appropriate order in the exercise of its discretion.

[81] It is clear, on the facts before me, that the court will have to be cleared at certain stages. This much was acknowledged by counsel for the intervenors in argument. In view of the fact that any order made by this Court will be of any interlocutory nature the State will be entitled to renew its application on the same papers amplified by such evidence as may be necessary at any stage during the proceedings and I will then have to consider or reconsider and assess the matters raised and the evidence placed before me on an ongoing basis before exercising my discretion to close the proceedings to the media and/or the public. This may be done in open court, but should counsel for the State feel that it cannot be done without disclosing sensitive information or the identity of a particular witness or witnesses I require to be advised accordingly. In that event I will have the court cleared In order to receive the necessary information and argument by all the parties concerned before making any decision.

[82] On a proper consideration of the totality of the facts, evidence and arguments before me I am, at this stage of the proceedings, not prepared to grant the blanket protection set out in the applicant's Notice of Motion.

[83] The application is accordingly dismissed.

J C LABUSCHAGNE

JUDGE OF THE HIGH COURT

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DATE OF HEARING	22 MAY 2007
DATE OF JUDGMENT	25 MAY 2007