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DATE 29.04.2011 SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case number: 55656/10

29/4/2011

In the matter between:

Media 24 Limited	**First Applicant**
The South African Editors Forum	**Second Applicant**
e.tv (Pty) Limited	**Third Applicant**
e. sat TV (Pty) Limited	**Fourth Applicant**
Media Monitoring Africa	**Amicus Curiae**
Terre'blanche family	**Intervening party**
and	
The National Prosecuting Authority	**First Respondent**
Chris Mahlangu	**Second Respondent**
Minor X	**Third Respondent**
In re:	
The State	
Vs	
Chris Mahlangu and Minor X	**First and Second Accused**

JUDGMENT

RAULINGA J,

INTRODUCTION

[1] This application is premised on the provisions of Section 63 (5) of the Child Justice Act 75 of 2008 (the Act) which concerns the trial of an adult accused and a minor accused, on a charge of murder. The alleged victim is the late Mr Eugene Terre'blance (Terre'blanche) the leader of the political organisation, the Afrikaner Weerstandsbeweging ("AWB") .

The Applicants seek the opportunity to have journalists employed by them attend the proceedings, in order to report on the evidence and issues as they emerge. The amicus curiae (amicus) however, wishes to deal with the special status accorded under South African and International law to the protection of children's rights, the interpretation of Section 63(5) of the Act, and the order that was proposed by the Applicants.

Section 63 (5) of the Act, provides, as the default position, that proceedings in a trial of a minor accused are to be held in the absence of any member of the public barring the necessary parties.

On the 2nd December 2010, when the court reconvened, for a judgment, I handed down an order only and indicated that my reasons will follow. I now deal with those reasons in this judgment.

[2] All the Respondents did not oppose the application, and have elected instead to abide by the order of the court. Initially the 1st and 2nd Applicants were the only parties who moved the original application. Prior to the hearing of the application e.tv (Pty) Limited and e. sat (Pty) Limited launched an application to intervene. Since the application to intervene was not opposed they were accordingly joined as third and fourth Applicants. When the matter was called on the 22nd

November 2010, Media Monitoring Africa, moved an application in terms of Rule 16 A of this court for leave to be admitted as amicus in the matter.

The said application was not opposed and as a consequence Media Monitoring Africa was granted leave and admitted as amicus. When the matter was argued the Applicants submitted one set of heads of argument although two Counsel appeared on their behalf. The amicus submitted separate heads of argument. I am indebted to the three Counsel for their well prepared and precise heads.

FACTUAL BACKGROUND

[3] Mr Eugene Terre'blanche who was the leader of the "AWB" was found dead on the 3rd April 2010 on the outskirts of Ventersdorp - on his farm. The National Prosecuting Authority alleges that Terre'blanche was murdered by the second and the third Respondents ("the accused") both of whom were workers on Terre'blanche farm. The death of Terre'blanche was widely reported in the print and electronic media. Some reports allege that Terre'blanche was killed following a dispute over unpaid wages. Other reports also alluded to the close proximity in time between the death of Terre'blanche and the singing of a struggle song entitled " Dubula ibhunu" or "kill a Boer" by the President of the African National Congress Youth League, Julius Malema("Malema") and reported the views of a number of AWB supporters to the effect that the killing of Terre'blanche was linked to Malema's singing of the song.

[4] It was also reported that Terre'blanche's alleged killing might have been part of a broader campaign to kill farmers. There are also published reports by various newspaper articles suggesting that Terre'blanche's death was a sex killing. These reports have received

extensive publicity in the print and electronic media both in South Africa and abroad.

I will only refer to a few of those reports in order to avoid burdening this judgment.

[5] The Star of the 16th April 2010 reflects the following: "Terre'blanche's murder came at a time when racial tensions were already heightened by the comments of ANC Youth League leader Julius Malema. Already, there are some in Afrikaner right wing circles who have sought to link Malema's singing of the "shoot the Boer" song to the murder of the Afrikaner Weerstandsbeweging leader".

On the other hand; The New York Times reported as follows: "Mr Terre'blanche, who was sentenced to six years in prison in 1997 for beating one of his black workers and setting his dogs on a gas station attendant, was beaten to death by workers on his farm on Saturday, who said they had argued with him over unpaid wages, the police told the South African Press Association".

The headline appearing on the Business Week of the 6th April 2010 reads as follows:" South African Court Delays Case of National Leader's Murder".

An article in the News 24 reads: "The National Prosecuting Authority (NPA) will oppose the legal bid by media houses to win access to the trial of Eugene Terre'blanche's alleged killers, National director of Public Prosecutions, Menzi Simelane said on Tuesday."

A very emotive article apparently sourced from, the Sunday Argus by The SA Media – the University of the Free State, of the 28th April 2010

carries the following headline "SA family seeks 'repatriation' to Netherlands".

[6] On the sex allegation The Times of the 11th April 2010 carries the headlines "Hawks take over ET case as sex claims fly" whereas the SA Media - University of the Free State dated 18 April 2010 and sourced from the City Press has a headline in bold letters, reading: "Cele confirms ET sex links".

The media was informed that the crimen injuria charge related to the fact that Terre'blanche had been found with his trousers pulled down and that the State alleged that this had been done by the accused in order to humiliate him. What exacerbated the anger is said to be the release of the second Respondent on bail on the 14th April 2010. The said bail has since been cancelled and the second respondent remains in custody and as matters stand his status has not changed. The Applicants are of the view that as a result of this rumours they should be allowed access to sit in court during the trial of the second and third Respondents despite the fact that Section 63 (5) restricts such access. They insist that the myth created around this case should be demystified.

[7] **ARGUMENTS BY THE PARTIES**

The Applicants argued that the court ought to permit journalists employed by them to be present during the trial of the second and third Respondents, one of whom is a minor because:

1. the trial is in respect of an alleged murder, and concerns issues, of profound public interest;
2. the holding of a trial completely closed to the media will significantly limit the right of freedom to receive information of

members of the public and undermine the principle of open justice; and

3. there is a simple mechanism available to protect the best interests of a minor accused while preserving the right of members of the public to have knowledge of the proceedings.

[8] Section 63 (5) of the Act provides that:

"No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present".

As the default position the section provides that proceedings in a trial of a minor accused person are to be held in the absence of any member of the public barring the necessary parties. The Section also makes it expressly clear that the presiding officer in any such proceedings may give permission to any person to attend the trial.

It is under this second part of the section that Applicants seek the opportunity to have journalists employed by them attend the proceedings, in order to report on the evidence and issues as they emerge.

[9] The first and second Applicants request, in the alternative, that two journalists employed by the first Applicant and ten journalists from the print and broadcast media nominated by the second Applicant be present in the court room for the duration of the trial. Whereas the third and fourth Applicants request, in the alternative, that at least two journalists employed by one or either of them, are permitted into the court room to observe and report on criminal trial of the first and second accused.

[10] The amicus curiae submits that by raising manifest public interest in the criminal trial, the Applicants correctly emphasise the importance of the right to freedom of expression and the vital function that the media fulfil in protecting the public's right to receive or impart information, protecting the principle of open justice and enhancing the constitutional values of openness, responsiveness and accountability. However, the amicus argues that these are not the only relevant considerations in a section 63(5) enquiry. Equally important is the protection of the child's best interest in all matters concerning him or her as well as his or her rights to privacy, dignity and fair trial.

Further those important questions are therefore raised by the section 63(5) application procedure: whether "the public interest" should be the standard to which the section 63 (5) Applicants should be held and the manner in which the presiding officer's discretion should be exercised in light of various constitutional imperatives.

[11] **EVALUATION AND ANALYSIS**

The Child Justice Act 75 of 2008 came into operation on the 1st April 2010. It amends several sections in the Criminal Procedure Act 51 of 1977. Section 153 (4) has been repealed by schedule 4 of the Act (item (i) under amendments to the Criminal Procedure Act. Subsection (i) amended by schedule 4 of the Act). This therefore means that Section 63(5) remains the only provision that governs the presence or not of persons at a sitting of a child justice court.

The interpretation of the Act in general, and in particular Section 63 (5) should be interpreted within the context of the dictum in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and**

Tourism 2004 (7) BCLR (CC) at paras 72, 80 and 90. The interpretation that is placed upon a statute must advance the values underlying the Bill of Rights. Notable also, is the observation by Bertelsmann J in **S v Mokoena; S v Phaswane 2008 (2) SACR 216 (T)** that one of the basic tenets of criminal justice is that a trial should be held in public. It is a principle enshrined in the Constitution in Section 35 (3) (C) and is of indisputable importance to ensure the public's trust in the independence and functioning of the courts - See **also S v Du toit en ander 2005 (1) SACR 47 (T)**.

When interpreting Section 63(5) of the Act, the court is bound to prefer any reasonable interpretation of legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law – **Progress Offices Machines CC V South African Revenue Services and others 2008 (2) SA 13 (SCA).**

[12] It is also trite that vulnerable witnesses must be protected from public exposure, either because disclosure of their identity may endanger their lives or safety or because of discomfort or embarrassment at having to testify before an audience. Of paramount importance is that the witness may be exposed to emotional or psychological harm. Similar considerations apply to youthful accused persons. Section 63 (5) of the Act, therefore, is a recognition of the need to afford utmost protection to such witnesses. – **See Du Toit et al 22 – 6 D Service 44 –2010**.

It has been submitted by the amicus that, Section 63(5) of the Act raises important questions regarding the standard to which Applicants should be held and the manner in which the presiding officers' discretion should be exercised in light of various constitutional imperatives. It therefore means that such an application in favour of

the Applicants can only be granted under extraordinary and exceptional circumstances.

[13] I must immediately mention that it is difficult to discern between extraordinary and exceptional, but for the purposes of this judgment, the two terms will be dealt with conjunctively for a better understanding in this context. It simply means something out of the ordinary or unusual. Within the meaning of Section 63(5) the fundamental principle of "best interest of the child" does not automatically trump the principle of "public's interest" irrespective of the circumstances of the individual case. The principle of "the best interest of the child" which underpins the holding of criminal proceedings in camera remains an extraordinary and exceptional step. It is therefore necessary to establish if exceptional circumstances do exist on a case by case basis. This approach will permeate all the discussions which are going to be dealt with herein below.

[14] I am in agreement with the amicus that the best interests principle, coupled with the law's requirements that the child accused' s dignity, privacy and fair trial interest be protected, require that, as a general rule, Section 63(5) of the Act must be understood to exclude public attendance at child justice court proceedings. However, this should be interpreted with the understanding that the legislature foresaw a possibility of exceptions.

It is for that reason that the first part of the Section; "no person may be present....." should be interpreted as prohibiting the presiding officer from opening the child justice court room to a class of persons, such as "the media" or "the public". The second part of the Section "or the presiding officer has granted him or her permission to be present" allows access to the criminal proceedings within the discretion of the court which must be exercised with reference to the values of the

Constitution, including the right to freedom of expression and the right to receive information. In doing so the court must strike a balance between "fair trial interest" and "public interest".

In comparing Section 153 (4) to various other sections of the Criminal Procedure Act, which is the predecessor of Section 63(5) of the Act, the Constitutional Court in **Director of Public Prosecutions v Minister of Justice and Constitutional Development** and others 2009(4) SA 222(CC) para 131 said the following: "What distinguishes the child accused from the child complainant is that the child accused must remain in court throughout the proceedings. The child accused is entitled to hear all the evidence against him or her so as to confront it. Indeed one of the fair trial rights of an accused is the right to be present when being tried. To the extent that the child accused is obliged to remain in court throughout the entire proceedings, the proceedings must be in camera.....in these circumstances, the differentiation that the subsections make between, on the one hand, child complainants in sexual offence cases and, on the other hand, the child accused, is rationally related to the duration of that time that each is required to spend in the proceedings".

[15] This dictum should be read together with the other parts of the judgment. In the same judgment paragraphs 145 and 146 at 27 4 (F-J), the court also held that; "Given the wide-ranging nature of the evidence that child witnesses in general could be called upon to give, and the wide ranging ages of the child witnesses, it was desirable that the question whether proceedings should be held in camera should be answered on case by case basis. Indeed, it was desirable that courts should have discretion in each case to assess whether, having regard to the nature of the evidence to be given and the age of the child, the proceedings should be held in camera or whether the child should testify in camera?" It is my considered view that by sanctioning

discretion, the court envisaged the possibility of exceptional circumstances.

I agree with the judgment in **S v Staggie and Another 2003 (1) BCLR 43 (C)** in which it was held that "there are well recognised exceptions in our criminal procedure to the general rule that criminal proceedings are to be conducted in open court". In the instant case, the discretion exercised and the exceptions which are found to be present must be such that we don't open the floodgates to abuse the provisions of Section 63 (5).

[16] Corbett JA (as he then was) in the case of **Financial Mall (Pty) Ltd and others V Sage Holdings Ltd and Another 1993 (2) SA 451 (A)**, quoting from the English case of **Lion Laboratories Ltd v Evans and others [1984] 2 ALL ER 417 (CA)**, stated, *inter alia*, at 464C:

"(1) There is a wide difference between what is interesting to the public and what is in the public interest to make known.

(2) The media have private interests of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest..."See also **SABC v Avusa Ltd and Another 2010 (1) SA 280 (GSJ) para 4**.

One should bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press.... The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to

abridge the rights of all citizens and not merely the rights of the press itself.

I agree with the amicus that the default position should not be shifted to an "open to the media" position simply because the proceedings are newsworthy or controversial. Accordingly, each application to enter child justice court proceedings should always be assessed on its own merits and with the best interests of the child at the forefront of the presiding officer's mind.

In the same vein, one is persuaded to yield to the argument by the Applicants that it is now well-accepted that a discretion of the court pertaining to issues such as section 63 (5) of the Act, must be exercised with reference to the values of the Constitution, including the right to freedom of expression and the right to receive information. Indeed if the application is refused, it will have the effect of substantially limiting the right to receive information of members of the public and, therefore the right to freedom of expression. The public will not know the circumstances of the killing. In the converse, if the media is allowed access into the court-room, this may prejudice the right of the minor accused to be tried in camera. The minor accused may suffer emotional trauma and he may feel intimidated by the presence of the media.

A choice will therefore have to made between limiting the rights of the accused to a trial by hearing the matter behind closed doors, and by that limit the rights of the public or to limit the rights of the accused in terms of section 36 of the Constitution and yield to the rights of freedom to receive information. It is important to observe that the unusual circumstances in this case may justify the exception to the general rule.

[17] The Constitutional court has made it clear that, children's rights may be limited like all other rights.

In **De Reuck v Director of Public Prosecutions Witwatersrand Local Division and others 2004 (1) SA 406 (CC) para 55 at 429 (B-C)** the court held that... Constitutional rights were mutually interrelated and interdependent and formed a single constitutional value system. Section 28(2) of the Constitution, like the other rights enshrined in the Bill of Rights, was subject to limitations that were reasonable and justifiable in compliance with Section 36.

In **Giddey NO V JC Barnard and Partners 2007 (5) SA 525 CC** at paragraph 16, the court was of the view that the Uniform Rules of Court may well contemplate that at times the right of access to court will be limited.....very often the interpretation and application of the Rule will require consideration of the provisions of the Constitution, as section 39 (2) of the Constitution instructs. A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the Rules at all...See also **Dotcom Trading v King and others 2000 (4) SA 973 (C)**.

Against the background of this reasoning would be the following factors, that:

(a) public interest in knowing what transpires during the trial is acute;
(b) the order that must be made by the court must prohibit the disclosure of the identity of the minor accused;
(c) the order must also protect the best interest of the child;
(d) the details of the trial must be subjected to public scrutiny, to vindicate the principles underpinning the right of every accused person to a public trial and the principles of open justice.

This should be done mindful of the fact that the media are agents of the public. There exists a tacit contract between the public and the media, that the media are the ears of the public. In view of the fact that the media are the messengers, the public will always prevail over the media. However, the media should be allowed to carry out its mandate on behalf of the public.

[18] Where a court's exercise of discretion implicates constitutional rights, it must be interpreted and applied with appropriate regard to the spirit, purport and objects of the Bill of Rights. - **Mpange and others v Sithole 2007 (6) SA 578 (W).**

In **eTV (Pty) Ltd and others v Judicial Service Commission and others 2010 (1) SA 537 (GSJ) and Mail and Guardian Ltd and others v Judicial Service Commission and others 2010 (6) BCLR 615 GSJ**, the court held that the JSC had exercised its discretion for insubstantial reasons and without giving proper account to freedom of expression and the public interest in the matters concerned.

The Constitution is the supreme law of the Republic, and therefore the court must have due regard to the requirements of the Constitution by promoting the spirit, purport and object of the Bill of Rights. This should therefore be interpreted to mean that the meaning of the second part of section 63 (5) of the Act, can be interpreted in a manner that its application can be limited to the extent that the trial be heard in an open court.

[19] Whether a trial is held in camera or in an open court, the right to a fair trial still applies. Children have the right to adduce and challenge evidence. It is indeed true that the trial court environment is an

intimidating and frightening one. The fair trial standard associated with trying adult accused cannot be equated to a fair trial context of a child accused. It is always important to create a more sensitive court room environment for children. In doing so, the objectives of the Act regarding the protection of the rights of children are paramount.

The issue of right to privacy and dignity also arises. Children are particularly susceptible to stigmatization. South African domestic law and international law seek to protect children from the adverse effects that may result from publication in the media and public attendance at trial.

In addition to the requirements of Section 63 (5) of the Act, Section 63 (6) incorporates section154 (3) of the Criminal Procedure Act which prohibits the publication of any information which reveals the identity of the accused under the age of eighteen years. The underlying principle is therefore that criminal proceedings involving children accused, should be that the court room should be closed from the public and entry should only be permitted by the presiding officer in very exceptional circumstances. The invasion of the child accused's privacy and dignity should be avoided at all costs.

To this end, Section 63 (4) of the Act states: a child justice court must during the proceedings, ensure that the best interest of the child are upheld, and to this end.....must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child. This principle is also articulated in Article 40 of the Convention on the Rights of the Child as well as in Article 4 of the African Charter on the Rights and Welfare of the Child. Section 28 of the Constitution confers to children the rights under

Sections 12 and 35 of the Constitution. Section 35 includes the right to a fair trial – that includes the right to be represented when being tried, adduce and challenge evidence. These rights were elucidated in **Centre for Child Law v Minister of Justice and Constitutional Development and Others 2009 (6) SA 632 (CC).**

[20] The test of a fair trial environment involving children was presented in TV United Kingdom [2000] 30 E.H.R.R 121, which concerned two children accused, both aged 11, who had been found guilty of murder and abduction. The European Court of Human Rights took notice of the fact that the trial had been accompanied by massive national and international publicity and a hostile crowd had been present throughout the criminal proceedings. The court remarked that it was "essential to deal with a child in a way which took full account of his age and level of intellectual capabilities". My view is that the court a quo went to the extreme by allowing the trial to be heard in an open courtroom.

The amicus is correct in arguing that the security of the alleged criminal acts and the political and racial tensions surrounding the accused are erroneous and that the court should be guided by the ECHR's interpretation of the right to a fair trial.

The gist of the matter is that although the ECHR made adverse remarks about the plight of the two minor accused, the trial court had tried the matter in an open courtroom. This therefore entails that although the best interest of the child is paramount, in certain instances such a right may be limited. In the instant case Section 36 of the Constitution may apply.

[21] The right of a fair trial should also be balanced against the right to free flow of information and open justice. The rights enshrined in Section

16 of the Constitution include: the freedom of the press and other media and the freedom to receive or impart information and ideas. Freedom of expression lies at the heart of democracy and individuals in society need to be able to hear, form and express opinions and views freely on a wide range of matters.

In the case of **South African Broadcasting Corp Ltd V National Director of Public Prosecutions and others 2007 (1) SA 523 (CC)** the Constitutional Court dealt with a number of Constitutional issues encompassing, free –flow of information, open justice, fair trial and public interest.

On freedom of expression the court expressed itself as follows: "Freedom of expression had an instrumental function as a quantum of democracy. The media were key agents in this regard, being both bearers of rights and constitutional obligations relating to freedom of expression.... The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it." Para 24 at 536 (A-C).

In articulating the concept of open justice and fair trial the court remarked as follows: "courts should in principle welcome public exposure of their work in the court room, subject of course, to their obligations to ensure that proceedings are fair. The fundamental constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to the other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (i.e the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of

the law according to time honoured standards of independence, integrity, impartiality and fairness". – para 32 at 538 -539 (H-A).

I cannot agree more with this statement, justice must be seen to be done. Courts cannot only order other branches of government to apply the principle of openness in the performance of their duties, whereas the courts themselves carry out their duties behind closed doors.

[22] The media are recognised as role players in any democratic society as was espoused by the court in **Khumalo and others v Holomisa 2002 (5) SA 401 (CC) para 22 -24 at 417 (E –G)** – In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility..... The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of Section 16".

I have no doubt that the media have always carried out their mandate responsibly and in an accountable manner. We should also be mindful of the fact that, because the media are run and managed by human beings, there will always be some mistakes made - "to err is human" 'If they vacillate in the performance of their duties, their constitutional goals will be imperilled':

However there will be instances in which a measure of caution will have to be applied. Such limitation of rights of the media must be carried out in compliance with Section 36 of the Constitution; which

must be proportional to the purpose which the limitation seeks – it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors. In casu, such factors would be the public interest right and the right to free flow of information including the right to freedom of expression.

[23] I have already alluded to the principle of the public interest and how it should be linked to the fair trial interest. As argued by the Applicants, the two are interrelated.
First the democracy enhancing goal of ensuring that the public has access to information which engages the public interest; and
Secondly, the need, both in the interest of public confidence in the courts and fairness to the accused, to allow security of the judicial process.

It is indeed true that the alleged killing of Terre'blanche sparked a public debate on race relations in South Africa. There are also questions whether his alleged killing was politically motivated. There have been speculations and assumptions on this issue. The media linked this speculation to the role of the singing of the "kill the Boer" song, by Malema and the ANCYL. Such speculation has attracted media and public interest in the alleged killing, both in South Africa and abroad.

I must however caution that, when one speculates, the temptation to exaggerate cannot be excluded. Based on the facts before me there is no iota of evidence that links the utterances and the singing of the song "kill the Boer" by Malema to the alleged acts of the two accused. There is no nexus that penetrates into the time from which the song was sung and the time when the events of the alleged killing of

Terre'blanche emerged. One can only think that some of the conclusions are based on assumption and speculation.

However, the majority of the perceptions by the public still remain covered with clouds. This is something that one cannot unfold from the surface of the hearts of the people and bring it to the open for everyone to understand. It is these perceptions which may create the myth. It is this myth that has gravitated the presence of exceptional circumstances, which may justify a need for the court to grant the relief sought.

[24] In my view, the following factors have attracted public interest in this matter:

- the status of Terre'blanche as a leader of a political organisation.
- the fact that the Hawks took over the investigation into the alleged murder because of Terre'blanche's status in this regard.
- the fact that around the time of the death, there was a degree of racial tension and suggestions that the AWB would attempt to avenge Terre'blanche's death.
- there were also speculations that the death was linked to sexual activities.
- there were also perceptions that the singing of the song "kill the boer" is linked to the alleged killing of Terre'blanche, (although this might be remote).

One must accept that the alleged murder of such a notorious figure who was the leader of a political organisation would raise a wide range of speculation. It is therefore not suprising that the public is curious to know what the trial would reveal. The public is therefore entitled to know through the media or on their own as to what information is

contained in the case. The trial should to an extent be allowed to be heard in the public domain.

It is worth remembering that we came from a past in which the freedom of expression and media independence were almost devoured by the apartheid repression. We therefore, have a duty to hoist media freedom to the level of international standards and practices. One should however be mindful of the fact that depending on circumstances, the media may sometimes adopt a subjective or objective approach in order to defend themselves. Since we live in a society in transition, we should all congregate in an effort to promote a vigorous democracy, which is enshrined in our Constitution. There can be no holy cows in an endeavour to achieve equality for all, even for the feeble and weak of our society.

CONCLUSION

[25] The fundamental nature of the rights of children under our Constitution, including the rights in terms of Section 28 (2) of the Constitution provides that the best interests of a child shall be of paramount importance in all matters concerning that child. Therefore, any permission for a trial to be heard in an open court room should be granted on a case by case basis, so that it does not militate against the proper consideration of exceptional circumstances.

[26] While I agree with the Applicants that given the degree of protection of speech implicated in this case, based on the discussion above, it has been shown that the minor accused rights would be limited by granting media access to the trial, I am of the view that, that right must still be balanced against the competing rights of the child.

However, I don't agree with the Applicants that an order along the lines suggested by them will not likely limit the minor accused's rights at all. While the Applicants have not proposed a totally open hearing, they seek a total of 14 journalists to be able to attend the proceedings in an open court. I also don't agree with the amicus that the court should assign a maximum of one third of the court room space usually allocated to the public gallery to accommodate members of the news media and allocate available seats to the Applicants, in the open courtroom.

[27] While I am inclined to grant the Applicants permission to attend the proceedings, I am of the view that such permission must be more restrictive. One cannot open a pandora's box. I have already stated that such permission can only be granted under exceptional circumstances, which I agree exist in this case.

Instead of granting permission to the media and the public to sit in an open court where the child accused will be sitting, I am of the view that the media and the public can only be allowed to sit in a close circuit tv room from which they will view the trial.

In terms of Section 63 (5) of the Child Justice Act 75 of 2008 it is ordered that:

1. Two journalists nominated by the first Applicant, two journalists nominated by the third and fourth Applicants and ten journalists nominated by the second Applicant can attend the proceedings for the duration of the trial. Each of the Applicants shall supply the names of the journalists nominated by them, in writing, to the Registrar of the High Court.

2. The Registrar of the High Court or the Court Manager assign specific seats to members of the news media in a room in which they will be able to view and hear the child's testimony on closed circuit television;

3. The Registrar of the High Court or the Court Manager makes available, with the assistance of the Department of Justice and Constitutional Development to members of the news media and the general public necessary equipment with which the child's accused testimony can be viewed and heard by members of the news media and the general public.

4. The Registrar of the High Court or the Court Manager assigns a maximum of four (4) specific seats to the members of the Terre'blanche's family (deceased's family) in the closed circuit television room where they will be able to view the child accused's testimony. Each of the members of the Terre'blanche's family shall supply their names to the Registrar of the High Court.

5. The Registrar of the High Court or the Court Manager assigns a maximum of sixteen (16) seats to the members of the general public on a first come first serve basis, in the close circuit television room where they will be able to view the child accused's testimony. Each of the members of the general public shall supply their names in writing to the Registrar of the High Court.

6. The remaining four (4) seats and other standing places will be utilised by officials of the court including police officers.

7. In the event that it becomes apparent that the presence of the media or anyone else in the close circuit television room is impeding the child accused's right to privacy, dignity and/or his rights to a fair trial, that they be directed to leave the court room; and

8. Members of the news media and including members of the general public are prohibited from publishing in any manner any information which reveals or may reveal the identity of the child accused.

[28] **The rescission and variation application**

On the 24th January 2011, the amicus sought a date for the hearing of an application for rescission and/or variation of the above order. In view of the fact that during February and March 2011 I was on circuit, this application could not be heard timeously.

On the 7th April 2011 when the court sat to hear the application the Terre'blanche family appeared and moved an application to be joined as intervening party. This was in view of the fact that in its application for rescission, the amicus was of the view that members of the Terre'blanche family should be prohibited from attending the trial.

Having joined the Terre'blanche family as intervening party, the matter was then adjourned to the 21st April 2011 to allow them to file their papers and also to allow the amicus to file theirs.

[29] On the 21st April 2011 when the matter was called, the parties informed the court, that the matter had been settled. This was to the extent that members of the Terre'blanche family would be allowed to sit at the trial. However, the parties agreed that the general public should be prohibited from attending the trial.

In the course of the submissions, Counsel for Media 24 indicated that there was a misunderstanding of paragraph 1 of the order in that Media 24 was of the view that the media would be allowed to sit in the court room where the child will appear, whereas, the NPA was of the

view that the media would be allowed to sit in the close circuit television room. The court then clarified the matter by emphatically stating that it was never its intention that the media would sit in an open court room where the child will appear. It was always the intention of the court that the media will sit in the close television room.

The parties then agreed to prepare a draft order. This then dispensed with any further submissions on the application for rescission and/or variation of the order.

[30] However, I need to mention that in view of the misunderstanding by the Applicants of paragraph 1 of the order it is important to elaborate on the rescission and/or variation application.

A clear interpretation of Rule 42 appears in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)** in which the court stated the following –

" the question is whether in these circumstances the judgment can be rescinded in terms of Rule 42(1) (a) of the Uniform Rules of Court. Rule 42 (1) (a) provides that the High Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.....the guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment **(Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306 F – G)** that is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have

been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, justus error (**Children Estates Stores v Standard Bank of SA Ltd 1924 OPD 163, De Wet and Others v Western Bank Ltd 1979(2) SA 1031 (A) at 1040**. And see Harms Civil Procedure in the Supreme Court at B42 – 10 and the authorities collected in fns 3, 4 and 5. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. There are also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order. These are for the most part conveniently summarised in the headnote of Firestone SA (Pty) Ltd v Genticuro AG (supra) (The headnote is an accurate summary of the passage in the judgment appearing at 306H – 308A) as follows:

1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the Court overlooked or inadvertently omitted to grant.
2. The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.
3. The Court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extent to altering its intended sense or substance.

In varying paragraph 1 of the order I rely on paragraph 2 of the Firestone judgment, that "the court may clarify its judgment or order, if

on a proper interpretation the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention" I therefore would insert the words "in the closed circuit television room" to give effect to my true intention.

On the rescission of paragraph 5 of the order I rely on Rule 42 and the decision in Colbyn supra, in particular justus error.

[31] **The order is therefore rescinded and varied and the following order is made in its stead:**

1. Two journalists nominated by the first Applicant, two journalists nominated by the third and fourth Applicants, and 10 journalists nominated by the second Applicant can attend the proceedings for the duration of the trial in the closed circuit television room. Each of the Applicants shall supply the names of the journalists nominated by them in writing to the Registrar of the High Court.

2. The Registrar of the High Court or the Court Manager shall assign seats to members of the news media in a room in which they will be able to view and hear the trial on closed circuit television.

3. The Registrar of the High Court or the Court Manager shall make available, with the assistance of the Department of Justice and Constitutional Development to members of the news media, necessary equipment with which the trial can be viewed and heard by members of the news media.

4. The Registrar of the High Court or the Court Manager shall assign a maximum of four (4) seats to the members of the Terre'blanche's family (deceased's family) in the closed circuit television room where they will be able to view and hear the trial. The names of the four (4)

family members shall be provided to the Registrar of the High Court prior to the commencement of the trial.

5. The identity of the minor accused on CCTV screen shall be obscured through either the placing of the camera, blurring of the image or other means.

6. The remaining seats in the closed circuit television room may only be utilised by officials of the court, including police officers.

7. In the event that it becomes apparent that the presence of the media or anyone else in the close circuit television room is impeding the minor accused's rights to privacy, dignity and/or his rights to a fair trial, that they be directed to leave the closed circuit television room.

8. Members of the news media and members of the Terre'Blanche family are prohibited from publishing in any manner any information which reveals or may reveal the identity of the minor accused.

TJ RAULINGA
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