THE OSCAR BROADCAST JUDGMENT: WHY THE COURT GOT IT JUST RIGHT

Category: Administrative and Procurement Law,Commercial Law,Media and OTT,Privacy Law, Infosec, and POPIA
written by Lucien Pierce | February 25, 2014

The North Gauteng High Court today handed down judgment in the application by various media houses to broadcast Oscar Pistorius' trial live.

The essence of the ruling is that:

- Television and radio broadcast media houses may broadcast elements of the trial live;
- Restrictions have been placed on where the cameras may be located in the court and the fact that they need to be remotely controlled;
- Restrictions have been placed on filming certain witnesses, such as those called to give evidence on Pistrorius' behalf;
- Restrictions have been placed on how the cameras may focus on anyone giving evidence together with the fact that the whole courtroom needs to be shown; and
- Restrictions have been placed on how recorded footage may be repackaged.

Judge Dunstan Mlambo's ruling is essentially based on the fact that South Africa's justice system is one which supports open justice. This means that an accused person has the right to a public, but fair trial.

At the same time, the public must be given the opportunity to see how the courts work and how justice is handed down. So, apart from trials which, for justifiable reasons, are held in private, South Africans are entitled to attend any court and observe any proceedings.

South African courts have in recent years become more accommodating as far as televised and radio broadcasts of trials are concerned. Television and radio broadcasting permission is granted on a case by case basis. The main factor that a court takes into account, is the public's right to receive and distribute information in the light of the accused person's right to a fair trial.

The courts have, in the past, considered the effect of the following issues when deciding whether to grant broadcasting permission and to what extent:

- Whether the judges and lawyers representing the parties would be "stressed" to the extent that their interaction would be inhibited. The thinking behind this being that the lawyers and judges may not perform as well under the glare of the cameras;
- Whether the broadcast would cover the evidence and cross-examination of witnesses. In this regard it is usually argued that witnesses may feel intimidated and secondly other witnesses watching elsewhere may be able to tailor their evidence based on what earlier witnesses have said; and
- The privacy of witnesses.

Where the courts have granted permission, this has usually been subject to extensive limitations. These limitations would typically include not filming witnesses, not permitting recorded footage to be repackaged or not broadcasting any sound.

There is, in my view, some merit in these limitations. But I do not believe that they should be the

default position. I say this because of the very principle of open justice. Judges, far wiser than me, have expressed the view that our courts need to start experimenting with live televised broadcasts.

Constitutional Court Judge Moseneke, in a minority judgment in the case of the SABC v NDPP, took the view that court proceedings should be broadcast as widely as possible to allow the public to see how the courts function. Judges Mokogoro and Sachs echoed these views.

Judge Mokogoro's rationale was essentially that, if the State were able to build courts big enough to accommodate everyone, it would. Given that the State cannot do this, then the media should step into the breach to take the courts to the public.

In granting the orders that he did this afternoon, Judge Mlambo has taken the open justice principle forward in leaps and bounds. The public will be educated as to how the justice system operates and will have a first-hand account of the proceedings, as opposed to someone give their potentially skewed perspective on it.

Someone sitting in a remote part of South Africa will now be able to follow how justice works and will learn that no matter whether a person is rich or poor, justice will be applied evenly and fairly.

As much as Judge Mlambo's ruling goes further than any prior broadcasting related ruling, has also respected and reinforced Pistrorius' right to a fair trial by way of the well thought out restrictions he has imposed.

Welcome to a new and exciting age for freedom of expression and open justice.