IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 61790/2012

11/3/2016

In the matter between:

COMBINED ARTISTIC PRODUCTIONS CC	First Applicant
ELECTRONIC MEDIA NETWORK LIMITED	Second Applicant

and

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

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

11/03/16
DATE

SIGNATURE

JENNIFER GRAHAM	First Respondent
MATTHEW GRAHAM	Second Respondent
LAW SOCIETY OF THE NORTHERN PROVINCES	Third Respondent
RONALD BOBROFF & PARTNERS INC	Fourth Respondent
RONALD BOBROFF	Fifth Respondent
DARREN BOBROFF	Sixth Respondent

JUDGMENT

Tuchten J:

1 The applicants apply urgently for orders permitting them to film the proceedings in this court set down before two judges of this Division

for hearing on 14 to 16 March 2016 in which the first and second respondents (the Grahams) apply in what I shall call the main application for orders striking the fifth and sixth respondents (together and, where the context so indicates collectively with their firm, the fourth respondent, the RBP respondents) from the roll of attorneys.

2 Urgency was in issue. Clearly, the applicants will not be able to secure relief in the normal course. The urgency is not self-created. The practice in this court allows parties to make requests through the Registrar for permission to film 24 hours before the anticipated hearing. In this instance the applicants began the process of obtaining permission a month or so ago. The attorneys for the applicant and the attorneys for the RBP respondents both corresponded with the Deputy Judge President putting their respective contentions. The Deputy Judge President directed that the matter come before me as an urgent special motion on 10 March 2016. Both sides delivederd affidavits and submitted heads of argument. I am satisfied that the RBP respondents were not prejudiced in the conduct of their case by the procedure adopted. I hold that the matter is urgent.

3 The main application has a lengthy history but it is not necessary for present purposes to recite it. The RBP respondents are personal injury litigation specialists. Usually it is the Law Society operating in

the province concerned which applies for an allegedly errant attorney to be disciplined by the court. But in the present case, the Grahams are asking the court to exercise its disciplinary powers in relation to the RBP respondents. This arose because the Grahams were once clients of the RBP respondents. They believe that they and many other RBP clients were egregiously overcharged by the RBP respondents. They complained to the third respondent, the law society having jurisdiction (the Law Society), but believe that the Law Society has not dealt properly with their complaint.

4 The main application concerns, but may not be limited to, alleged systemic overcharging (called in this context overreaching[1]) by the RBP respondents of clients who successfully brought claims in the courts for damages for bodily injury. Our system makes it easy for an unscrupulous attorney so to overreach such a client. For one thing, the almost invariable rule is that the award, agreed or mandated by order of court, is paid into the trust account of the practitioner. A lay client, relieved at the prospect of compensation and ignorant of the rules which govern his attorney's remuneration, is an easy target for this misconduct. The attorney simply deducts the fee the attorney has decided to charge from the money paid into his trust account and then

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1 Shorter Oxford Dictionary: a circumvention of someone by cunning or artifice

either does not account to the client at all or does so in an unacceptably cursory manner.

5 I do not say this because I believe that the RBP respondents have made themselves guilty of this kind of misconduct. I have not even seen the papers in the main application. But the ventilation of the Grahams' claim that there has been such misconduct on the part of the RBP respondents is a matter of legitimate public interest. The broad issue is whether the RBP respondents are fit to continue to practise as attorneys or should otherwise be sanctioned by the court. An allegation that an attorney has made himself guilty of grave impropriety in the conduct of his practice is a matter of substantial public importance. Practitioners in our courts must display absolute personal integrity and scrupulous honesty. The protection of the good name and reputation of the attorneys' profession in the eyes of the public and the confidence which the public have in that good name are of great importance.

6 None of this was disputed by the RBP respondents. But they oppose this application on a ground I shall deal with below. The other respondents abide.

7 The first applicant is a production house. It is the production entity that produces the television program Carte Blanche, which is broadcast on Sunday evenings at 19h00 on a television channel called the M-Net channel. Carte Blanche has been broadcast since 1988. The second applicant provides certain subscription television channels including the M-Net channel.

8 Carte Blanche specialises in investigative journalism. It routinely covers matters of public importance including alleged abuses of public and private power and corruption. It primarily engages in what it calls second phase journalism. This means that it does not simply convey news to the public but also tries to interpret and bring meaning to current affairs in a way which not only informs but also educates the public. This inevitably means that Carte Blanche develops and communicates its own opinions on the subjects with which it deals.

9 The applicants want to film the proceedings in the main application so that they can, at a later date, use excerpts from the proceedings in a program which they are considering producing for broadcasting in Carte Blanche. Consistent with the practice of this court, the applicants offer to submit to an order directing them to share the material so filmed with other media organisations who request it. So although the applicants themselves will not broadcast the material live,

the possibility exists that another media organisation may decide to do so.

10 The RBP respondents' objection to the application by the applicants to film proceedings in the main application is that they fear:[2]

> ... that [the applicants] will splice and dice excerpts from the court proceedings unfairly so as to present the respondents in an unjustifiably poor light, thus infringing on our constitutional rights to human dignity.

11 The RBP respondents have this fear because of two things: firstly, a program broadcast on the M-Net channel on 22 March 2015, which they say quoted the fifth respondent selectively, distorted what he had to say and generally showed him and the RBP respondents in a poor light; and, secondly, because one of the applicants' investigators, a Mr Beamish, has demonstrated himself to be a person who has firmly taken sides against the RBP respondents generally and the fifth respondent in particular.

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2 Para 17 of the answering affidavit a p210 of the record

12 The background to the broadcast was the decision by the Constitutional Court[3] affirming the position uniformly taken by the High Court and the Supreme Court of Appeal through which the case in question progressed to our apex court, that the so-called common law contingency fee agreement was illegal.

13 The broadcast of 22 March 2015 was made available to me on an electronic medium as part of the papers in this application. I watched it for the first time in preparation for this case. In my view Carte Blanche, through its presenter, Ms Govender, and otherwise firmly took sides against the RBP respondents. It gave a platform to an attorney, Mr Millar, who was at the time acting for the Grahams and firmly, indeed stridently, took sides with his clients against the RBP respondents. The tone of the program was, I think deliberately, indignant in relation to the conduct of the RBP respondents.

14 But against that, it portrayed the suffering of certain former clients of the RBP respondents with compassion and sensitivity and made a contribution to the public debate on this important subject, The fifth respondent volunteered to be interviewed. His views were given considerable prominence, as was Ms Govender's skepticism when the fifth respondent advanced these views. The crux of the fifth

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3 *Ronald Bobroff & Partners Inc v De La Guerre* 2014 3 SA 134 CC

respondent's defence was asserted in the program by the fifth respondent himself. The fifth respondent's defence was that the RBP respondents charged the fees they did because they believed in the legitimacy of the common law contingency fee agreement and, moreover, were entitled to conduct themselves professionally in accordance with that belief until the Constitutional Court had finally pronounced,

15 The RBP respondents do not suggest that they ever brought any proceedings against the applicants for allegedly splicing and dicing excerpts from the interview conducted with him by Ms Govender. The transcript of the interview was put up in the present case by the RBP respondents. I can find no justification in that transcript for the accusation of splicing and dicing.

16 Counsel for the RBP respondents submitted that the applicants had not quoted the fifth respondent as fully as they might have when he set out his side of the story. Two points in this regard were made by counsel in argument. The first is that while the program included the fifth respondent's assertion that the Law Society had stated publicly that in its view common law contingency fee agreements were legitimate, it omitted the fifth respondent's assertion that the Law Society had done so on more than one occasion, including in

correspondence with the Deputy Judge President of this Division. I do not think this omission constituted a distortion of the facts. The second such point was that the applicants left out of the program assertions by the fifth respondent during the interview with Ms Govender that on his reading of the judgment of the Constitutional Court in *De La Guerre, supra,* what the court said in paragraph 2 of its judgment[4] supported his case that attorneys who had used common law contingency fee agreements had acted reasonably. I think that it may well be that the program omitted a point made by the fifth respondent in his favour but I do not think that it can be taken further than that. The main point made by the fifth respondent in this regard was that he and other attorneys had reasonably believed that they was entitled to charge fees based on common law contingency fee agreements. That point came through in the program.

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4 "At issue are contingency fees. Under the common law, legal practitioners were not allowed to charge their clients a fee calculated as a percentage of the proceeds the clients might be awarded in litigation. The Act changed this. It makes provision for these fees to be charged in regulated instances and at set percentages. Certain Law Societies made rulings allowing their members to charge in excess of the percentages set in the Act. Uncertainty reigned in the attorneys' profession about the correct legal position in relation to contingency fees. Could these fees be charged only under the Act, or also outside its provisions?" Again, I have omitted all footnotes.

17 In the result, I cannot accept that there is any substance in the contention that the applicants were guilty in the production of the Carte Blanche program of a distortion of the facts or the position adopted by the RBP respondents.

18 As to the second ground of complaint: it is clear that Mr Beamish has taken sides against the RBP respondents. For the purpose of the present application I shall assume to be correct the version of the RBP respondents that Mr Beamish also put into the public domain material regarding the RBP respondents which many would regard as hurtful and gloating, even scurrilous. But on the facts, Mr Beamish has no say in determining the nature of any program regarding the RBP respondents which may be broadcast after the main application has been heard and determined. It is not suggested by the RBP respondents that those within the applicants who have the actual power to produce a distorted television program are likely to do so.

19 Counsel accepted that the raw material to be harvested from any filming of the proceedings in the main application will consist of no more than the words of counsel and the members of the court, together with visual images of the same persons. But counsel submitted that the influence of Mr Beamish in the production process in regard to any potential new program is likely to be such that those

whose actual task is to produce the program may take parts of the record so obtained and quote them out of context in any new program. I cannot see that there is any basis for this submission. In my view, I may safely discount as speculative the suggestion that Mr Beamish's animus against the RBP respondents will translate into a distorted program being broadcast on Carte Blanche.

20 But even were there such a risk, I would rule in favour of the applicants. It is now settled law that an application to film court proceedings must be considered under the inherent power of the court to regulate its own process, taking into account the interest of justice. Primarily, two groups of rights are engaged. On the part of the applicant, the right to freedom of expression and the right of the public to have access to court proceedings; on the part of the RBP respondents, the right to a fair hearing and to dignity during that hearing.[5]

21 When this approach to questions such as these was articulated in September 2006, the issue could perhaps have been described as novel and the approach adopted a departure from the way courts had previously done business. But the experiment, if such it was, has been successful. It cannot be doubted that the starting point must be that,

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5 *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SA 512 CC.

leaving aside cases in which the most intimate personal spheres of the litigants and witnesses are implicated, it is generally in the public interest that television broadcasting of court proceedings, when conducted in a responsible manner, be allowed so that persons who choose to view the proceedings through electronic media and, by extension media participants who wish to use audio-visual depictions of such proceedings in their publications, are empowered to do so. Of course, each case must be decided on its own facts.

22 In this Division, an order of Mlambo JP[6] permitting the filming and live broadcast of a murder trial by the second applicant and others did not result in any interference with the administration of justice and enabled a very large electronic audience to view the way in which justice is administered in this country. That was a case in which the personal lives and passions of those involved in the case were put into the public domain and the testimony of witnesses was heard by the electronic audience unmediated by the opinions and prejudices of those who reported on the case. I have no doubt that events proved that the order of the Judge President advanced the interests of justice.

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6 Case number 10193/2014, in a judgment delivered on 25 February 2014

23 The main application is far removed from that situation. No witnesses will testify. Only counsel and the members of the court will speak during the proceedings. The personal lives of the RBP respondents are not in issue. What is very much in issue, though, is the probity with which they conducted their professional lives. The learned judges before whom the main application will serve, will see to it, as judges of this Division do in all cases, that no counsel succumbs to any temptation to behave improperly during argument.[7]

24 So, on analysis and as counsel for the respondents submitted, the RBP respondents' case is not that they will suffer harm (except for the risk that counsel may say something unkind about them) during the proceedings themselves but that they fear that the proceedings themselves might form the raw material for a distorted television program which might be produced in the future.

25 This translates to the argument that the interests of the public directly to be informed on this matter of considerable public interest should be subordinated to the risk, as the RBP respondents see it, of harm to them at some later stage. I think that the RBP respondents have

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7 I only mention this because the RBP respondents asserted in their answering affidavit that counsel would in the course of their arguments describe the RBP respondents "in insulting and defamatory language as is common in argument". I need say no more than that this eccentric view is wholly without substance.

misconceived their remedy. The appropriate attack should be made when there is a real risk that a distorted and unfair representation of the court proceedings may be broadcast.

26 Counsel for the respondents submitted that in the light of authority, the RBP respondents would, regardless of the strength of their case, not succeed in interdicting the publication of such a program because that would amount to pre-censorship. Counsel argued that this was the effect of *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*.[8] Thus, said counsel, the RBP respondents' only remedy was to prevent the harvesting of material which could be used in the contemplated program, if and when it was produced. I do not agree with this submission. *Midi* involved an application by the respondent to interdict the broadcast of a television documentary which dealt with a dreadful crime. The alleged perpetrators were due to come before the Cape High Court. The respondent feared that the broadcast of the documentary might adversely affect the state's prospects of success in the trial.

27 Dealing with the test for publication bans in other jurisdictions, the court held at para 16:[9]

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8 2007 5 SA 540 SCA

9 In this quotation and those that follow, I have omitted all the footnotes.

> What is required by all those tests (implicitly, even if not always expressed) before a ban on publication will be considered is a demonstrable relationship between the publication and the prejudice that it might cause to the administration of justice; substantial prejudice if it occurs; and a real risk that the prejudice will occur. In my view nothing less is required in this country ...

28 And at paras 19 and 20:

> In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.
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> Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice,

> whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right. And where a temporary interdict is sought, as pointed out by this Court in *Hix Networking Technologies* the ordinary rules, applied with those principles in mind, are also capable of ensuring that the freedom of the press is not unduly abridged. Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose. Where there is a risk to rights that are not capable of subsequent vindication a narrow ban might be all that is required if any ban is called for at all. It should not be assumed, in other words, that once an infringement of rights is threatened, a ban should immediately ensue, least of all a ban that goes beyond the minimum that is required to protect the threatened right.

29 In my view, the harm suggested by the RBP respondents is merely speculative. The effect of a ban on filming in the present case would not even achieve the status of pre-censorship, a description given to the relief sought in *Midi.* In that case the program had already been produced. In the present case, there is only the possibility that a program might be produced in which the raw material harvested by filming the proceedings in the main application might be used. Not only would the RBP respondents potentially be able, if they met the

legal requirements, to obtain an interdict against publication but they would have actions for damages as envisaged in *Midi* para 20.

30 Ultimately, this case requires that I balance the rights I have identified. I have no hesitation in concluding that in this case the RBP respondents' rights to dignity must be limited and the rights of the public to be informed must be given their full effect.[10] The result is that the latter rights must in this instance prevail over the former. Counsel were agreed that costs should follow the result.

31 I make the following order:

1 To the extent necessary, the Rules in relation to time limits and service are dispensed with and, in accordance with the provisions of Rule 6 (12), any such non-compliance with the as there may have been on the part of the applicants is condoned.

2 Two authorised representatives of the first applicant are permitted to film the proceedings (which film includes audio recordings) in the main application under case no 61790/12 held on 14, 15 and 16 March 2016 and any such proceedings subsequent thereto that may be necessitated by the matter not being finalised on those dates ("the proceedings").

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10 See the analysis in *Midi Television* para 9

3 The applicants are permitted to broadcast the film of the proceedings, portions of such film and edited versions of the film.

4 The filming and broadcasting shall comply with the following requirements:

4.1 Two cameras may be used in the process of the filming of the proceedings;

4.2 The locations of the cameras shall not change while the court is in session;

4.3 The cameras will be in position at least 15 minutes before the start of proceedings and may be moved or removed only when the court is not in session. Cameras, cables and the like will not interfere with the free movement within the court;

4.4 No movie lights, flash attachments or artificial lighting devises will be used during the court proceedings;

4.5 No visible or audible light or signal shall be used on any equipment;

4.6 Static microphones shall be placed before each of the Judges hearing the matter and counsel appearing in the application. The applicants may install such audio recording equipment as may be necessary to record

audibly the proceedings, subject to the applicable terms of this order;

4.7 The applicants shall operate an open and impartial distribution scheme, in terms of which the film will be distributed in a clean form, with no visible logos and the like, to any other media organisation requesting it and it would be archived in such a manner that it remains freely available to other media;

4.8 Representatives of the applicants will conduct themselves consistent with the decorum and dignity of the court;

4.9 The applicants shall not use on their equipment or clothing of their representatives any identifying names, marks, logos or symbols;

4.10 Representatives of the applicants, including their camera crew, will be appropriately dressed;

4.11 The equipment used by the applicant will be positioned and operated to minimise any distraction whilst the court is in session;

4.12 Whilst the court is in session:

4.12.1 equipment will not be placed in or removed from the court room;

4.12.2 any audio – recording system will be unobtrusive, will not interfere with the proceedings and cassettes will not be changed while the court is in session;

4.12.3 no film will be changed.

4.13 There shall be no:

4.13.1 audio-recordings or close-up photography of bench discussions;

4.13.2 audio-recordings or close-up photography of communication between legal representatives or between clients and their legal representative;

4.13.3 close-up photographs or filming of judges, lawyers or parties in court;

4.13.4 recordings, regardless of the form, being used for commercial or political advertising purposes thereafter.

4.14 Extracts from recorded proceedings may be used.

5 The court shall at all times retain the discretion to reconsider this order in whole or in part on good cause shown.

6 The judges presiding over the proceedings shall be entitled to call upon the applicants, if deemed necessary, to produce the broadcast(s) and/or raw footage in order for the judges to determine that the footage and/or authorised recording and/or

broadcast adhere to the provisions of this order and the restrictions imposed hereby.

7 The fourth to sixth respondents are to make payment, jointly and severally, of the costs of the application, including the costs of both senior and junior counsel.

NB Tuchten
Judge of the High Court
11 March 2016

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