

A TRIUMPH FOR THE RIGHT TO AN OPEN AND TRANSPARENT PARLIAMENT: *PRIMEDIA BROADCASTING V THE SPEAKER*

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The importance of public participation in a representative democracy was highlighted in the recent Supreme Court of Appeal (SCA) judgment of *Primedia Broadcasting v The Speaker* (Primedia appeal) on 29 September 2016.

The crux of the Primedia appeal essentially concerned the manner in which the President's State of the Nation address (SONA) was officially broadcasted on 12 February 2015 and whether the public's constitutional right to access and involvement in Parliamentary proceedings was unreasonably limited.

During the SONA a violent confrontation between the Economic Freedom Fighters (EFF), Members of Parliament (MPs) and security services of Parliament occurred. This was brought on by the EFF members demanding that the President answer questions as to when he would pay back the money spent on his private homestead in Nkandla. The Speaker of the National Assembly refused the questions and the EFF MPs were ordered by the Speaker to leave the Chamber, which they refused to do. The Speaker then requested the Sergeant-at-Arms remove them and called on additional parliamentary services to assist. During this violent dispute, the official broadcasting feed from Parliament was only focused on the Speaker and the Chairperson of the National Council of Provinces (NCOP). The outcome being that people outside the Chamber, the public at large, did not witness this altercation on the official broadcast.

Some reporters, however, were able to take videos and photographs on their cellphones of the incident, which reached the public through social media. These unofficial snippets of broadcasting however, were in clear violation of section 21 of the *Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act* (Powers Act) and constituted a serious offence. At the same time a telecommunication jamming device, which was installed inside the Chamber by the State Security Agency for security measures, was still activated and precluded MPs and journalists inside the Chamber from communicating with people outside. The signal was restored once the Speaker became aware of it, and Parliament alleged it was a *bona fide* mistake.

In the Western Cape High Court and on appeal in the SCA, three main issues were raised. First, whether clause 8.3.3.1 of Parliament's Policy on Broadcasting and Rule 2 of Parliament's Television Broadcasting Rules of Coverage headed 'Disorder on the Floor of the House' (collectively described as the "*disruption provisions*") are reasonably justifiable. The disruption provisions read together state that the director of the Sound and Vision Unit of Parliament has to focus on the occupant of the Chair on occasions of "grave disorder" or "unparliamentary behavior". Second, whether the manner in which the SONA was broadcast was unconstitutional and unlawful, and last whether the use of the jamming

device, despite being an alleged *bona fide* mistake, was lawful in the first place in terms of section 4(1) of the Powers Act.

The SCA examined the content of the right of the public to participate in Parliamentary proceedings as provided for in sections 59 and 72 of the Constitution and stated that transparency in law-making is vital. Accurate broadcasting by Parliament is an essential tool to ensure that these constitutional rights are given effect as the public at large is not sitting in Chamber. These constitutional rights are however not absolute and public access may be justifiably limited by reasonable measures implemented by Parliament as it has the constitutional prerogative to regulate its own procedures.

A careful analysis of the grounds of justification by the SCA followed. The SCA differed greatly from the majority in the Court *a quo* on Parliament's first ground of justification, which drew an analogy between a Court's power to limit broadcasting of certain evidence or proceedings to Parliament's decision to not broadcast incidents of grave disorder. It was argued that this replay of bad behaviour will only further encourage this kind of behaviour and Parliament should not become a reality television show. The SCA found that a Court's power to limit access to the public is exercised in order to ensure that the constitutional right to a fair trial is guaranteed and is therefore fundamentally different to the power of Parliament, who are elected by the public to represent their views during the law-making process. The Court also dismissed the argument that the disruption provisions are necessary to protect the dignity of Parliament and stated "*it is not the broadcast that may impair Parliament's dignity but the behaviour of MP's and parliamentary officials that do so.*"

The SCA also agreed with the appellants that by broadcasting the incident the public will not only get an accurate and true reflection of the events that occurred but will also be in the position to decide for themselves whether the Speaker or Chairperson acted lawfully in the circumstances.

Parliament also argued that disorderly conduct by MP's does not constitute legitimate business of Parliament and therefore Parliament does not need to broadcast such conduct. The Court however found broadcasting is only limited to sittings and found that the "*fact that MPs or the Speaker or Chairperson may act in an unacceptable manner does not mean that the business of Parliament becomes illegitimate.*" Lastly the Court found that this is not a minor limitation as maintained by Parliament since other forms of reporting will never be able to give a true reflection of the actual events and by limiting broadcasting in this manner the right to freedom of expression will have no real value.

The SCA lastly considered whether the use of the jamming device, which was allegedly a *bona fide* mistake, remains unlawful in terms of section 4(1) of the Powers Act as it was used without the permission of the Speaker or Chairperson of the NCOP. The SCA disagreed with the majority of the Court *a quo* in finding that the issue is moot and relied on *Buthlezi and another v Minister of Home Affairs and others* which stated that "*whether or not the authorities had acted lawfully was and remains a live issue*". The Court held that as the

device had the potential to interfere with the communication in Parliament, the Speaker and the Chairperson of the NCOP needed to be informed of the details of the security measures and this could not be left to the discretion of the State Security Agency.

In conclusion the SCA found the disruption provisions to be unconstitutional and unlawful and the manner in which the SONA was broadcasted was declared unconstitutional. The use of the jamming device was also declared unlawful.

This case emphasised that accurate broadcasting of a sitting in Chamber not only gives meaning to the public's right to see and hear what their elected representatives are doing in Parliament but also encourages constitutional accountability of state officials and promotes freedom of expression. Parliament is currently considering the judgment and in light of the recent Constitutional Court judgment of *EFF v The Speaker (Nkandla)* on the importance of ensuring accountability of state officials it appears to be unlikely that this judgment, which indirectly ensures accountability of state officials, will be successful on appeal to the Constitutional Court.