

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

CASE NO: 55656/10

In the application of:-

MEDIA MONITORING AFRICA

In the matter between:

MEDIA 24 LTD

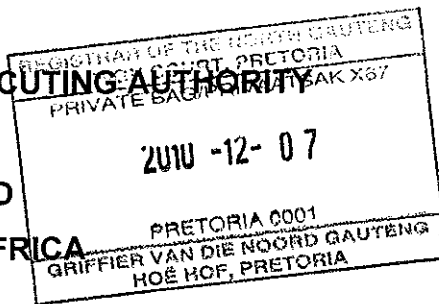
First Applicant

THE SOUTH AFRICAN NATIONAL EDITOR'S FORUM

Second Applicant

And

THE NATIONAL PROSECUTING AUTHORITY



First Respondent

CHRIS MAHLANGU

Second Respondent

THE SECOND ACCUSED

Third Respondent

MEDIA MONITORING AFRICA

Amicus Curiae

In re:

THE STATE

v

MAHLANGU AND ANOTHER

NOTICE OF MOTION

TAKE NOTICE THAT MEDIA MONITORING AFRICA hereby makes application in terms of Rule 42 of this Honourable Court for an order in the following terms in respect of the order of Raulinga J dated 2 November 2010 (“the order”):

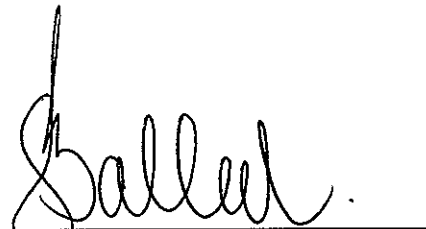
1. Rescinding paragraph 4 of the order;
2. Rescinding paragraph 5 of the order;
3. Varying paragraph 3 of the order by striking out the following words:
The Registrar of the High Court or the Court Manager makes available, with the assistance of the Department of Justice and Constitutional Development to members of the news media **and the general public** necessary equipment with which the child accused testimony can be viewed and heard by members of the news media **and the general public**;
4. Varying paragraph 7 of the order by striking out the following words:
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 rights to privacy, dignity and/or his rights to a fair trial, that they directed to leave **the court room**²
5. Varying paragraph 8 of the order by striking out the following words:

Members of the news media, ~~members of the general public and members of the Terre'blanche's family~~ are prohibited from publishing in any manner any information which reveals or may reveal the identity of the child accused;

6. Further and/or alternative relief.

TAKE FURTHER NOTICE that the affidavits of **WILLIAM ROBERT BIRD** and **CLARE BALLARD** will be used in support of this application.

SIGNED AND DATED AT PRETORIA ON THIS 6 DAY OF DECEMBER 2010.



CLARE BALLARD
CENTRE FOR CHILD LAW
Room 4-31 Law Building
University of Pretoria
PRETORIA
Tel: 012 420 4502
Fax: 012 420 4499
Ref: C Ballard

TO: The Registrar of the above Honourable Court

AND TO: The First and Second Applicants
C/O Webber Wentzel
10 Fricker Road
Illovo, Johannesburg
Fax: (011) 530 5111
Ref: D Milo/O Ampofo-Anti

AND TO: The Third and Fourth Applicants
C/O Rosin Wright Rosengarten
45 Oxford Road
Johannesburg
Fax: (011) 646 1706
Ref: Mr D Rosengarten

AND TO: The First Respondent
The National Prosecuting Authority
28 Church Street
Pretoria
Fax: (012) 323 0866
Ref: Mr G Baloyi

AND TO: The Second Respondent
C/O Mr Puna Moroko
2nd Floor Allied building
66 OR Tambo Street, Klerksdorp
E-mail: punamoroko@telkomsa.net

AND TO: The Third Respondent
C/O Majavu Inc
8th Floor, Atrium Building
41 Stanley Avenue
Johannesburg
Fax: (012) 482 5583
Ref: Mr Z Majavu

AND TO: Mr G Basson
Attorney for the Terre'blanche family and the AWB
Krugersdorp
Fax: 0866 146 830

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MEDIA MONITORING AFRICA

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In re:

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v

MAHLANGU AND ANOTHER

FOUNDING AFFIDAVIT

ML
wb

I, the undersigned,

WILLIAM ROBERT BIRD

state under oath the following:

1. I am an adult male employed as the Director of the Media Monitoring Africa ("the MMA") which is located at Suite 2, Arts Centre, cnr 4th Avenue and 6th Street, Parkhurst, Johannesburg.
2. I am duly authorised to depose to this affidavit and to bring this application on behalf of the applicant.
3. The facts contained herein are to the best of my knowledge true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.

NATURE OF THIS APPLICATION

4. The MMA brings this application in terms of rule 42 of the Uniform Rules of Court for a rescission of certain aspects of an order handed down by the

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honourable Raulinga J on 2 December 2010, and consequential variations of other aspects of the same order.

5. This order arose from an application brought by Media 24 Limited, The South African National Editors' Forum, E.TV and E.SAT TV, who were the first to fourth applicants in that application, which shall be referred to in this affidavit as the main application.
6. The main application concerned an application brought pursuant to section 63(5) of the Child Justice Act 75 of 2008, asking for permission for a specified number of representatives of the media to sit in during the trial of Chris Mahlangu and his co-accused who is a 15 year old male and is therefore protected by the general 'in camera' rule provided by section 63(5).
7. The MMA brought an application to enter as *amicus curiae* in the main application, there was no opposition to that application and it was granted by the Court. The MMA set out the basis of its interest in the matter in paragraphs 14 to 22 of its founding affidavit supporting the application to be admitted as *amicus curiae*.
8. In essence, the MMA sought to ensure that the integrity of the general rules pertaining to privacy and fair trial rights of a child accused were upheld. It accordingly asked that the Court use its discretion narrowly, if the media were to be permitted to attend the trial, they should be required to leave the room if and when the child accused testified, and to watch the proceedings via CCTV in another room.

9. The purpose of this affidavit is to set out the basis of this application for rescission and variation of aspects of the order.

10. This application has been served on all the parties that were involved in the main application, and a copy of the papers has also been served on the legal representatives of the Terre'Blanche family due to their obvious interest in this matter. This is in keeping with Rule 42(3) which requires a court rescinding or varying its order to be satisfied that all parties whose interests may be affected have notice of the order proposed.

WHY MMA IS AFFECTED BY THE ORDER

11. I am advised by my legal representatives that a court may, in terms of Rule 42(1) of the Uniform Rules of Court, rescind or vary its order if such order was erroneously granted in the absence of any party affected thereby. Such an application may be brought by any party affected.

12. MMA is affected by the order because the position of MMA from the outset was that the privacy and fair trial rights of the child offender are of central importance. Whilst the MMA conceded in its submissions that the presence of media representatives was justifiable due to the exceptional public interest in this case (provided that they would not be present in the court room whilst the child offender testified) it was always our view that the

public interest argument was limited to the issue of media attendance at the trial. In MMA's view, the media's presence is underpinned by a clear democratic function related to freedom of expression. Their role, and thus their presence, is profoundly different to the presence of parties with a personal interest. There was no opportunity to canvass these issues with the court.

13. The MMA, due to its public interest orientation, is also mindful of the fact that the Child Justice Act is newly promulgated. Further, we are mindful that this is the first application in terms of section 63(5) of that Act, and that the decisions in this case will thus set a major precedent for future cases in which child offenders are tried. It is therefore important that the issues be fully aired.
14. A few days before the hearing of the main application in Ventersdorp on 22 November 2010 I was informed by my attorney, Clare Ballard, that she had heard from the Prosecutor, Mr Baloyi, that the family of the deceased in the criminal trial against Mahlangu and his minor co-accused, Eugene Terre'Blanche, may be bringing an application to also sit in on the trial. She said she had also spoken to the attorney representing the family who had confirmed that such an application would be brought and had indicated that papers might be sent over the weekend prior to the hearing.
15. I travelled to the North West Province the day before the hearing and had a pre-arranged consultation with my attorney and counsel on the evening of

21 November 2010 in Potchefstroom. During this consultation we specifically discussed the possible application by the Terre'Blanche family members. We discussed the fact that the 'public interest' arguments covered in our papers do not apply to family members of the deceased wishing to sit in on a trial of a child accused.

16. My legal representatives informed me that as no application had been served on the parties by the legal representatives of the Terre'Blanche family it was highly unlikely that the application by the family could be heard together with the main application the following day. Furthermore, if an application was to be brought we would have some time to discuss the legal issues and other implications.
17. My instructions to my legal representatives were that MMA would be interested in providing submissions in relation to any application by the family, and my legal representatives assured me that there would be an opportunity to draft such submissions.
18. The following day, on 22 October 2010 I attended the hearing of the main application in Ventersdorp, and sat in court throughout the proceedings. I was also informed by my attorney and counsel of certain new developments.
19. They informed me that counsel for the Terre'Blanche family, Advocate Frans Van Schalkwyk SC, had indeed been briefed and was present at

Court. Furthermore, he had informed my legal representatives that he had instructions not only to bring an application on behalf of the family, but also that the Afrikaner Weerstand Beweging (AWB) wanted to apply to have sixteen of its members present at the hearing.

20. I discussed this new development with my legal representatives outside the court room, and conveyed my concern that this was turning into a very different scenario from the one argued in the papers, and that MMA would certainly want to make submissions relating to this intended application by the AWB. I was informed that because of the fact that no formal application had been filed and served, the application would still have to be formally brought and that we could consult during the coming days to discuss the further submissions.

21. I was aware that there was an attempt, during the lunch adjournment to see if expedited time frames could be organised to hear the intended application by the Terre'Blanche family and the AWB prior to the commencement of the trial, which at that time was going to be set down for the week of 6th December 2010. My legal representatives and I were amenable to the very short time frames proposed, despite the pressure it would put us under, as we did not want to be the cause of the delay of the trial, especially as a child offender, who remains in custody, was involved.

22. I was informed by my legal representatives that this attempt to agree on shortened time frames was not achieved as the legal representative of the

child accused indicated that he would oppose any application brought by the family or by the AWB, and that such applications should be brought in the ordinary course, and that the trial should not be delayed.

23. The arguments by counsel for the Applicants in the main application, as well as the argument by counsel for the MMA were confined to the issue of the media being present during the trial and aspects directly related thereto. Counsel for the MMA indicated, without naming anyone specifically, that if there were further applications by other parties in terms of section 63(5), that would change the situation.
24. This was reiterated during the hearing by the attorney for the child offender, who also indicated that any such applications would be opposed.
25. In reply, counsel for the First and Second Applicants in the main application made the point that the Court would have to make its decision based on the application before it, and should disregard other possible applications that may or may not be brought.

ASPECTS OF THE ORDER GRANTED ERRONEOUSLY AND THE REQUEST FOR RESCISSION AND CONSEQUENTIAL VARIATIONS

26. It is respectfully submitted that certain aspects of the order handed down by Raulinga J on 2 December 2010, namely paragraphs 4 and 5 of the order, were granted erroneously because the parties affected by them were

not granted an opportunity to hear arguments or to be heard, amounting to a decision being made in their absence. Paragraphs 3, 7 and 8 also need to be varied in so far as they refer to the family and the 'general public'.

27. I will now deal with each of the affected aspects of the order in turn.

28. Paragraph 4 of the order

28.1 directs as follows:

'The Registrar of the High Court or the Court Manager **assigns 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 **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.' (Emphasis added)

28.2 It is submitted that paragraph 4 of the order should be rescinded because the issue of whether the family should be permitted to watch any part of the trial was not argued before the court, and several parties were affected by this order, including the MMA which would have like to make arguments in relation to this matter.

28.3 Of particular concern is the fact that as the order stands there is no order that the family members may sit in the trial, but the only part of the trial that they are permitted to observe via CCTV is the child offender's testimony which, in the view of MMA, is the part of the trial that it is least appropriate for them to watch, if indeed they should be permitted to watch any part of the trial, which we do not concede.

28.4 It is submitted further that a variation of the order to deal with the problems raised in para 28.3 above will be insufficient to resolve the problem. MMA thus seeks to have para 4 of the judgment rescinded in its entirety. If a substantive application is then brought on the part of the family, full argument may be made by all affected parties and an appropriate order can subsequently be made.

29. Paragraph 5 of the order

29.1 directs as follows:

'The Registrar of the High Court or the Court Manager assigns a **maximum of sixteen 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.'

29.2 It is submitted that this paragraph of the order should be rescinded because the issue of whether the general public should be permitted to watch any part of the trial was not argued before the court, and several parties were affected by this order, including the MMA which would have liked to make arguments in relation to this matter. The MMA has particular views on the inclusion of 'the general public' in addition to media representatives (who represent the public) and had it known the court was going to make such an order, would have made arguments in this regard.

29.3 The MMA's concern about the fact that this paragraph of the order allows specifically for the viewing of the child accused's testimony (and no other part of the trial) is reiterated. With regard to the 'general public' the MMA has increased concern, as there is a risk of the child offender being identified by members of the public (possibly including members of the AWB, should they qualify on a first come first served basis) who may be hostile to him. This is quintessentially different from him being viewed by representatives of the media who have no personal interest in the case beyond the professional task of reporting on the matter.

29.4 It is submitted that, as with paragraph 4, this paragraph must be rescinded rather than varied.

30. Paragraph 3 of the order:

30.1 Paragraph 3 of the order directs that

'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 accused testimony can be viewed and heard by members of the news media **and the general public.**' (emphasis added).

30.2 It is submitted that paragraph 3 should be varied by the striking out of the words emphasised in bold in paragraph 30(1) above.

30.3 Further variations may be required to deal with the lack of specificity about how many cameras there will be and whether the camera(s) will be focused on the face of the child or on the back of his head. Journalists sitting in court would usually only see the back of an offender and not his face. If persons other than journalists are going to be viewing the child's testimony the question of whether the child's face is to be shown is obviously crucial. In line with children's participation rules the child offender should know whether his face is being shown, and to whom. The child offender's legal representative should be given an opportunity to take instructions from the child on this question.

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31. Paragraph 7 of the Order

31.1 directs as follows:

31.2 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 rights to privacy, dignity and/or his rights to a fair trial, that they directed to leave **the court room**'.

31.3 This paragraph of the order should be varied by removing the words 'or anyone else in the close circuit television room' which would also cure an ambiguity that the inclusion of those words has caused when juxtaposed with the words 'be directed to leave the court room'. Those in the CCTV room cannot be required to leave the court room.

32. Paragraph 8 of the order

32.1 directs as follows:

'Members of the news media, **members of the general public and members of the Terre'blanche's family** are prohibited from publishing in any manner any information which reveals or may reveal the identity of the child accused.'

32.2 Paragraph 8 should be varied by the striking out of the words that are highlighted in bold in para 32.1 above.

32.3 Journalists have a statutory duty under the Criminal Procedure Act, as well as a professional and ethical interest to respect the order of the court. The same cannot be said for ordinary members of the public and there is a very real threat of the child's identity being revealed.

CONCLUSION

33. I am advised that applications in terms of Rule 42 of the Uniform Rules of Court must be brought expeditiously, hence the filing of this application in less than one week of the order being brought. The application is, however, brought in the ordinary course; as the other parties affected will need time to respond, and as the criminal trial date pertaining to Mahlangu and the child co-accused is now set for May 2011, there will be no further prejudice suffered. An approach will be made to this honourable Court for a date for this application to be heard once all the relevant papers have been exchanged.

34. On the basis of the reasons set out above in this affidavit, the MMA respectfully seeks a finding that paragraphs 4 and 5 of the order were erroneously granted. It further seeks the rescission of paragraphs 4 and 5 as well as the variations to paragraphs 3, 7 and 8, as set out in the notice of motion.



DEPONENT

SIGNED and SWORN to before me at JOHANNESBURG on the 6th day of December 2010, after the deponent stated that he is aware of the content of this statement and considers the oath to be binding on his conscience. I certify that the regulations provided for in the Government Gazette Notice R. 1258 of 21 July 1972 have been complied with.



COMMISSIONER OF OATHS

FULL NAMES:

UPKAAR ROYHEATH MUNGAR

DESIGNATION:

ATTORNEY/PROKUREUR

ADDRESS:

COMMISSIONER OF OATHS/KOMMISSARIS VAN EDE
LEGAL DEVELOPMENT SPECIAL PROJECTS PRACTITIONER
LEGAL AID BOARD

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CONFIRMATORY AFFIDAVIT

[Faint signature]

wb *[Signature]* *[Signature]*

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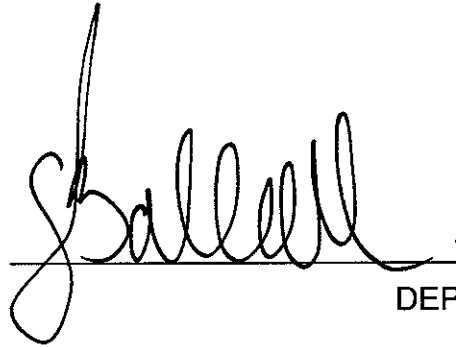
CLARE BALLARD

state under oath the following:

1. I am an adult female employed as an attorney at the Centre for Child Law, University of Pretoria which is a law clinic registered with the Law Society of the Northern Provinces, and which acts as attorneys for the MMA in this application, and also acted for the MMA in the main application.
2. I am duly authorised to depose to this affidavit.
3. The facts contained herein are to the best of my knowledge true and correct and are within my personal knowledge.
4. I have read the founding affidavit of William Robert Bird in this application for rescission and variation of the Court's order dated 2 December 2010.
5. I confirm that the aspects that relate to me are true and correct. Where William Robert Bird refers to MMA's 'legal representatives', that includes myself and I was present at all material times and in all the discussions and

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consultations to which he refers. I confirm the correctness of these discussions and consultations.


DEPONENT

SIGNED and SWORN to before me at PRETORIA on the 05th day of December 2010, after the deponent stated that he is aware of the content of this statement and considers the oath to be binding on his conscience. I certify that the regulations provided for in the Government Gazette Notice R. 1258 of 21 July 1972 have been complied with.


COMMISSIONER OF OATHS

FULL NAMES: MUSENWA HUMBULANI
DESIGNATION: S/CST
ADDRESS: 119 Duxbury Road, Hillcrest

SUID-AFRIKAANSE POLISIEDIENS
GEMEENSKAPSDIENSSENTRUM BROOKLYN
2010 -12- 0 5
COMMUNITY SERVICE CENTRE BROOKLYN
SOUTH AFRICAN POLICE SERVICE

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