IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU NATAL DIVISION, DURBAN

AR NO 131/21
MAGISTRATE COURT CASE NO. 41/394/2019

In the application of:

MEDIA MONITORING AFRICA	Applicant for admission as an *amicus curiae*

In the matter between:

SOUTH AFRICAN NATIONAL EDITORS FORUM	Appellant

and

ROBERT ABBU	1st Respondent
SANDILE NGCOBO	2nd Respondent
ILANGA LAMAHLASE PROJECTS (PTY) LTD	3rd Respondent
MZWANDILE DLUDLA	4th Respondent
HLENGA SIBISI	5th Respondent
UZUZINEKELA TRADING 31 CC	6th Respondent
ZITHULELE A MKHIZE	7th Respondent
OMPHILETHABABG CC	8th Respondent
BONGANI P DLOMO	9th Respondent
KHOBOSO J DLOMO	10th Respondent
ELSHADDAI HOLDING GROUP CC	11th Respondent
PRABAGARAN PARIAH	12th Respondent

SINTHAMONE PONNAN	13th Respondent
GRAIG PONNAN	14th Respondent
MONDLI MICHAEL MTHEMBU	15th Respondent
ZANDILE RUTH THELMA GUMEDE	16th Respondent
SIPHO CYRIL NZUZA	17th Respondent
BAGCINELE CYNTHIA NZUZA	18th Respondent
UMVUYO HOLDINGS CC	19th Respondent

In re:

THE STATE

and:

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FILING SHEET

Document filed herewith:

1. the *amicus curiae's* note for oral submissions.

Dated at **Johannesburg** on **9 November 2021**.

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AMICUS CURIAE – NOTE FOR ORAL SUBMISSIONS

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INTRODUCTION AND THE CORE QUESTION IN THIS APPEAL

1 Media Monitoring Africa has applied to be admitted as an *amicus curiae* in this matter in terms of Rule 16A(5) of the Uniform Rules of Court. None of the parties oppose Media Monitoring Africa's admission.

2 The Magistrates' Court concluded that SANEF's application for broadcast access should be refused. The Magistrates' Court found that the potential uncertainty and endless possibilities that *could* arise in pre-trial processes meant that there should not be *any* live (or even delayed) broadcast of the proceedings.

3 Only once there is certainty (on the court a quo's reasoning) can a court decide whether or not to grant broadcast access. It was not known (said the court) how the parties would run the pre-trial processes and what potential variables might arise.

4 Media Monitoring Africa respectfully submits that the Magistrates' Court reached the incorrect conclusion because the court asked the wrong question.

5 The question the court was called on to decide was not whether the media would be permitted to film and broadcast every discussion and debate that took place in court during the pre-trial process. The court was also not required to set out a regime intended to bind the judge hearing any pre-trial applications or the presiding judge.

6 The correct question raised in the appeal is this: should the media have been granted default access to film and broadcast pre-trial proceedings?

7 Pre-trial processes, like a criminal or civil trial, are entirely unpredictable. That is the nature of all court proceedings. In pre-trial proceedings – like in the criminal trial itself – parties may in certain rare instances have sensitive topics that may require courts to be cleared of the public and the media.

8 But the law has a clear mechanism for dealing with this. The possibility that something *might* arise that could require a court, *at some stage*, to restrict media and broadcast access is no basis to order a blanket ban of broadcasting court proceedings. If, and only if, a deserving situation arises and an application is made out – on the basis of clear factual evidence that is properly pleaded – then a court should consider closing the court proceedings, or restricting a broadcast temporarily.[1]

9 The Magistrate also feared committing to media access, in advance, on the basis that then the presiding officer's hands would be tied if such an exceptional circumstance arose.

10 But that is not so. The presiding judge has the discretion to regulate the court process before it. It would always be open to the presiding judge to revisit the broadcast order, and to adapt based on whatever unforeseen scenario might arise.

11 The court a quo's judgment rested on three key pillars.

11.1 First, as set out above, and critically, the Magistrate reversed the test for open court proceedings and broadcast access.

[1] *Midi Television t/a eTV v Director of Public Prosecutions* 2007 (5) SA 540 (SCA) at para 19.

11.2 Second, the court a quo relied on a narrow reading of the ***Van Breda***[2] decision.

11.3 Third, the Magistrate referred to the absence of any precedent for pre-trial proceedings being broadcast.

12 Each of these three pillars is incorrect and fundamentally at odds with the clear findings of our courts.

13 In these submissions Media Monitoring Africa deals with the following topics:

13.1 MMA's interest in these proceedings;

13.2 Open justice permits default broadcast access;

13.3 Open justice applies to pre-trial proceedings in open court;

13.4 The public interest in broadcasting pre-trial proceedings;

13.5 The media should be able to bring a single application;

13.6 Concerns regarding the covid-19 pandemic and space constraints;

13.7 The importance of this Court's decision.

MMA'S INTEREST IN THESE PROCEEDINGS

14 MMA wishes to participate in this matter as it did in the ***Van Breda*** matter, the leading case on broadcast access from the Supreme Court of Appeal, in order to assist this Court.

[2] *Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others* 2017 (3) All SA 622 SCA

15 MMA is well placed to assist this Court regarding the proper application of the ***Van Breda*** case, in particular, as well as the principles of open justice more generally.

16 MMA as a well-respected independent non-governmental organisation has acted to ensure that the right to freedom of expression is balanced with the rights of vulnerable members of the community (children in particular) and open justice. In this regard MMA was admitted as an amicus in the ***Van Breda*** matter. In addition to that MMA was also admitted as an amicus in the Eugène Terre'Blanche murder trial where MMA was able to help balance the rights of the child with those of the principle of open justice. In both matters MMA was able to bring unique and important legal considerations.

17 This case is significant. The matter itself has generated significant public interest, and for good reason.

17.1 The criminal proceedings at issue in this case involve allegations of corruption and irregular tender processes at the highest levels of local and provincial government.

17.2 One of the accused is the former mayor of eThekwini Municipality, Ms Zandile Gumede, the City Manager as well as other officials employed by the Municipality.[3] The charges relate to tender corruption relating to waste removal contracts, which were awarded during her time as Mayor.[4]

[3] Judgment p 78 line 27

[4] Judgment p 79 lines 1 to 2

18 But even more important that this particular application for broadcast access, the Magistrate's decision sets out a concerning precedent which undermines the right to open justice.

OPEN JUSTICE PERMITS DEFAULT BROADCAST ACCESS

19 Justice must not only be done, it must be seen to be done. This is the essence of the principle of open justice. Put differently, court proceedings are public, and the ***public*** – not just the litigants before the court – has a right to have access to court proceedings, and to observe and discern how matters are decided.

20 Kriegler J of the South African Constitutional Court ably captured this sentiment in *S v Mamabolo*:[5]

> "Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see". (Emphasis added)

21 The court a quo's judgment correctly recognised this. It held that the principle of open justice is not simply for the benefit of the media, but for the benefit of:[6]

21.1 The public as a whole, who have the right to access court proceedings; and

21.2 The accused – who are all entitled to have their trial conducted in public, which guarantees fairness.

22 Openness protects the litigants involved in the particular proceedings. Public

[5] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC)

[6] Judgment p 79 lines 20 to 23

adjudication ensures the accountability of the court system.[7]

23 The past few years have seen numerous significant developments in the area of open justice in South African law. In particular, the Supreme Court of Appeal clarified that the public has a right to obtain court documents relating to court cases the moment they are filed rather than merely at the time of the hearing,[8] and the Constitutional Court held that even hearings that might be presumptively closed – such as refugee appeal board hearings – can, and indeed should be, open to the press in certain circumstances.[9]

24 But the most significant development of all was the decision of the South African High Court to permit the live broadcast of the criminal trial of former Paralympian and Olympian runner Oscar Pistorius.

25 In a speech at a public press event, former Deputy Chief Justice of the South African Constitutional Court, Dikgang Moseneke (in which he spoke positively about the televised coverage of the Oscar Pistorius trial) said this:

> *"this was made possible because, before the trial even began, Judge [President Dunstan] Mlambo did what no South African court had before dared to do: media organisations were given permission to broadcast, live and in full Technicolor, a criminal trial".*

26 As Moseneke DCJ put it, the transparency of the judicial process is fundamental to developing public trust in the judiciary.

27 In what became the leading case after the Oscar Pistorius case, ***Van Breda***, the Supreme Court of Appeal endorsed the general principle of open justice:

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[7] *Van Breda* at para 47

[8] *City of Cape Town v South African National Roads Authority Limited and Others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA)

[9] *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* [2013] ZACC 32; 2013 (6) SA 367 (CC).

that media access and permitting the broadcast should be the default position.

28 The Magistrate started from the premise that: only once it is known how the pre-trial proceedings are going to be run then decisions could be made regarding how those proceedings can be covered.

29 The correct starting point is that – unless a party brings an application to close the proceedings or limit media access – then media broadcast access should be permitted.

30 The key test relating to the right to freedom of expression was set out by the Supreme Court of Appeal in the *Midi Television* case.[10] The SCA found (at paragraph 19):

> "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." (emphasis added)

31 Importantly even if a particular aspect of the pre-trial proceedings involved some form of sensitive testimony by vulnerable witnesses (there is no indication that this were so on the papers), that would not justify the absolutist stance taken by the court a quo.

32 The SCA in ***Van Breda*** explained:

> "[A]n individualised enquiry is more finely attuned to reconciling the competing rights at play than is a blanket ban on the presence of cameras from the whole proceeding when only one participant objects. Under this approach cameras are permitted to film or televise all non-objecting witnesses. Spurious objections can also be dealt with."[11] (Emphasis added)

[10] *Midi Television t/a eTV v Director of Public Prosecutions* 2007 (5) SA 540 (SCA) at para 19.

[11] *Van Breda* at para 72.

33 Even where a witness objects to the cameras and has a valid objection this does not mean that all recording should necessarily be barred. Instead the SCA held as follows:

> "[A]lternatives to regular photographic or television coverage could be explored that might assuage the witness' fears. For example, television journalists are often able to disguise the identity of a person being interviewed by means of special lighting techniques and electronic voice alteration, or merely by shielding the witness from the camera. In other instances, broadcast of testimony of an objecting witness could be delayed until after the trial is over. If such techniques were used in covering trials, the public would have more complete access to the testimony via television, and yet the witness could maintain some degree of privacy and security."[12]

34 For example, in the ***Dewani***[13] case the accused allegedly suffered from various mental ailments (and this claim was supported by evidence from medical professionals); this justified a restriction on recording the evidence Nothing of the sort had been put up by the accused or the NPA in the ***Van Breda*** case or in the current matter.

OPEN JUSTICE APPLIES TO PRE-TRIAL PROCEEDINGS IN OPEN COURT

35 MMA submits that the principle of open justice applies as much to all pre-trial processes and preliminary applications (that take place with a court hearing) as it does to the final trial. The public interest is best served by comprehensive 'gavel-to-gavel' coverage of the proceedings.

36 The core proposition underpinning the Magistrate's judgment was this: the Van Breda test is only triggered once a trial has begun. That is not so, and would be an impoverished understanding of open justice.

37 The Regional Court should have held the principles in ***Van Breda*** are equally

[12] *Van Breda* at para 73.

[13] *S v Dewani* (CC15/2014) [2014] ZAWCHC 188 (8 December 2014).

applicable in both trial and pre-trial proceedings because the default principle of open justice is applicable in all court proceedings.

38 In ***Van Breda***, the Supreme Court of Appeal held:[14]

> "In permitting the televising of court proceedings this Court is doing no more than recognising the appropriate starting point. It will always remain open to a trial court to direct that some or all of the proceedings before it may not be broadcast at all or may only be broadcast in (for example) audio form."

39 It is true that the Supreme Court of Appeal used the term "*the trial court*". The court a quo found that it shall only "be for the trial court to exercise a proper discretion having regard to the circumstances of each case".[15]

40 Two points are significant.

41 First, it is not correct that the Supreme Court of Appeal did not deal with pre-trial proceedings and applications. The SCA just did not expressly refer to the applications as pre-trial proceedings. The SCA held that there can be no objection in principle to the media recording and broadcasting counsel's address and all rulings and judgments.[16]

41.1 The Magistrate correctly accepted that "[t]he pre-trial proceedings are of such a nature that they consist of various applications which are largely done on paper as opposed to viva voce evidence being led." (Emphasis added)

42 Second, the Magistrate found that the court "is bound to follow the guidelines

[14] *Van Breda* at para 70

[15] Judgment p 86 lines 2 to 10

[16] Van Breda at para 72

in Van Breda's case". The court – incorrectly in our submission – found that "it is abundantly clear that reference is to the trial court and not a court that is dealing with pre-trial issues".[17]

42.1 MMA respectfully submits that the Regional Court erred in its restrictive interpretation of the judgment and ought to have held that the dicta and legal test in *Van Breda* apply to all court proceedings, irrespective of a criminal or civil nature, or whether pertaining to pre-trial, trial or application proceedings.

42.2 The Magistrate held that the judgment in *Van Breda* made no express reference to cases where the entire pre-trial processes and procedures were covered by the media. It is well established that judgments should not be read like statutes:

> "Judgments should not be read as though they are statutes where every word is presumed to have a precise and special meaning. What matters is the reasoning that lies at the heart of the decision and that, as a matter of legal logic, leads to the order made".[18]

42.3 Indeed, if the Magistrate's construction of ***Van Breda*** were correct then the Supreme Court of Appeal would have overturned the Pistorius matter since Mlambo JP made an order before the presiding judge had been appointed. The ***Van Breda*** court took no issue with the approach followed in the ***Pistorius*** matter. Quite the opposite, the Supreme Court of Appeal described Mlambo JP's decision in glowing terms:

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[17] Judgment p 90 lines 4 to 5.

[18] *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) at para 33

"Undoubtedly, the most significant case of the use of cameras in the South Africa courtroom was the Pistorius matter".

42.4 Ponnan JA, in ***Van Breda***, went on to celebrate the Pistorius judgment. The ***Pistorius*** case endorsed a regime whereby, even if a witness objected to the broadcast, "the presiding judge would from time to time have the power to make rulings in respect of a specific witness as and when required". The SCA held: "Such an approach adequately balances the rights of open justice and free speech, with legitimate objections from lay witnesses and the need for a fair trial."[19]

42.5 The ***Van Breda*** court did not discount the possibility that a prior judge might be called upon to rule on an access application. The ***Van Breda*** judgment needs to be read in context: in that particular case the SCA was dealing with an appeal against the manner in which the trial judge had exercised his discretion. But the implication of the SCA's findings are far broader.

THE PUBLIC INTEREST IN BROADCASTING PRE-TRIAL PROCEEDINGS

(i) The public needs further education on pre-trial proceedings

43 The Magistrate found that there were no examples of pre-trial proceedings being broadcast.

44 First, Media Monitoring Africa accepts that it may well be that there are less broadcasts of pre-trial proceedings than there are of criminal trials.

[19] *Van Breda* at para 62

44.1 But the fact that broadcasts of pre-trial proceedings are less common than broadcasting trials cuts against the Magistrates' court decision. It is more important, not less, that the media comprehensively cover and broadcast pre-trial proceedings which are not aspects that are generally broadcast.

44.2 Our courts have made clear that a broadcast can perform a valuable educational purpose by demystifying the manner in which the court process functions, as well as giving the public confidence in the judiciary.

44.3 To date, the public has received its 'broadcast education' mainly from criminal and civil trials and appeals, as well as high-profile hearings in the Supreme Court of Appeal and Constitutional Court. What the public needs more of is detailed comprehensive coverage of the pre-trial processes that occur before the trial can take place. A deeper understanding of those processes is important for the citizenry as it shows the public why criminal matters often take a year or more before the trial can actually begin. Understanding the various intricacies of all of the processes that need to be finalised in order to protect the fair trial rights of the accused (in particular), as well as the state, will give the public confidence in the court process. That is the very purpose of open justice.

(ii) There a various examples of pre-trial proceedings being broadcast in our courts and abroad

45 Second, there are in fact numerous examples both here and abroad in which

pre-trial proceedings have been broadcast.

46 In December 2015, pending the hearing of the application for leave to appeal, the bail hearing of Mr Pistorius after he was convicted and sentenced was broadcast.[20] While that application took place after the first trial there is essentially no material difference between the features of that bail hearing and those that occur before a trial. That application was heard by Ledwaba DJP – not Mlambo JP (who heard the broadcast application) and not Masipa J (who was the trial judge). The broadcast has approximately 13 000 views.

47 In November 2016, the bail hearing of Mr Mcebo Dlamini, leader of the student movement #FeesMustFall, was broadcast from the Palm Ridge Magistrate's Court.[21] The broadcast has approximately 23 000 views.

48 In March 2019, certain pre-trial applications were broadcast in the trial of Mr Timothy Omotoso.[22] Mr Omotoso is facing charges of human trafficking, rape and racketeering. The broadcast has approximately 6000 views.

49 In May 2019, a pre-trial application to have charges quashed brought by former President Jacob Zuma was broadcast and streamed live.[23] The broadcast has approximately 60 000 views.

50 In November 2019, a pre-trial hearing was broadcast and streamed live in Mr Luyanda Botha.[24] The broadcast has approximately 16 000 views.

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[20] The link to the recording is available at: https://www.youtube.com/watch?v=MqDNrDyXFYE

[21] The link to the recording is available at: https://www.youtube.com/watch?v=OFTPQ7Ex2Jw&t=8289s

[22] The link to the recording is available at: https://www.youtube.com/watch?v=7xxkhSEUgdc

[23] The link to the recording is available at : https://www.youtube.com/watch?v=KtJ3cR0XaMI&t=23s

[24] The link to the recording is available at: https://www.youtube.com/watch?v=RGtWERFo0aA

51 In September 2020, the bail application of three police officers accused of killing 16-year old Nathaniel Julies was broadcast and streamed live.[25] The broadcast has approximately 9000 views.

52 Most recently, various pre-trial proceedings were broadcast in the trial of Mr Ace Magashule.[26] The broadcast has approximately 19 000 views.

53 In interpreting the principle of open justice (which forms part of section 16 of the Constitution) the court a quo, and this Court, must have regard to international law, and may have regard to foreign law.

53.1 On this score, MMA submits that various courts in the United States permit broadcast of pre-trial proceedings.

53.2 The same is so in the Philippines. For instance, the Regional Trial Court has permitted all of the pre-trial proceedings to be televised in relation to a motor vehicle theft case.[27]

THE MEDIA SHOULD BE ABLE TO BRING A SINGLE APPLICATION

54 The Magistrate's decision was premised on a notion that SANEF would, *in time*, be able to bring individual applications as and when individual substantive applications would be heard in these criminal proceedings.

55 In doing so the Regional Court overlooked three critical considerations.

56 First, the Supreme Court of Appeal in ***Van Breda*** made it clear that "complete

[25] The link to the recording is available at: https://www.youtube.com/watch?v=kL6_ltXYDoo

[26] The link to the recording is available at: https://www.youtube.com/watch?v=q-exDeZMChw

[27] The link to the recording is available at: https://www.youtube.com/watch?v=594boNrA2p0

broadcast coverage of the trial is important to achieve the valuable ends served by increasing public access to judicial proceedings".[28] The SCA held that 'gavel to gavel' coverage "may be preferable to no (or limited) coverage".[29] Broadcasting from the pre-trial proceedings gives the public an even more complete account of the entire court process. This is plainly preferable.

57 Second, the Regional Court ignored the practical realities of broadcast applications. Even before a matter gets to court the media often need to spend money on attorneys to get legal advice on how to gain access to broadcast the proceedings. In some instances a letter may suffice. Even at that stage there has often been significant expenditure on legal fees (expenditure that many media organisations can ill afford).

57.1 In instances where broadcast access is opposed it will involve court applications. Court applications are prohibitively expensive and that may well dissuade the media from applying to broadcast the proceedings. Ultimately it is the public that suffers. As the Supreme Court of Appeal made clear in ***SANRAL***[30] in the context of getting access to court papers:

> "[A]n application for access to papers is an additional cost in time and money. In many cases, people who otherwise have an interest in the matter may be unable to afford an application for access. While the high court attempts to paint this option as enhancing access, in reality, it may prove an insuperable barrier to many, particularly litigants with limited funds."

[28] *Van Breda* at para 51

[29] *Van Breda* at para 51

[30] *City of Cape Town v South African National Roads Authority Limited and Others* 2015 (3) SA 386 (SCA)

57.2 The Regional Court's approach exponentially amplifies the costs to the media. It suggests that the media should bring applications on a case-by-case instance where a particular application of a pre-trial process is being conducted. Those negative consequences can easily be avoided where the media house brings a single application for 'gavel-to-gavel' coverage in the matter. The Regional Court took the view that this was neither appropriate nor possible. That is not so.

58 Third, relatedly the principle of open justice has an inherent manner of dealing with the concerns raised by the Regional Court. It is this: open justice means that access must be the default position and any secrecy or closed proceedings the exception.

58.1 Where there is any application being heard in open court then, whatever the stage of the proceedings, the media and the public have an interest in the proceedings being covered as comprehensively as possible. In the modern day that means broadcast coverage.

58.2 If some particular point of the pre-trial process required the broadcast to stop, or the media or public to be removed from the court room then that could easily be catered for. Indeed, the coverage of the Oscar Pistorius trial back in 2013/2014 demonstrated the range of options open to the sitting judge (whether the trial judge or a judge hearing a preliminary application).

58.3 That is precisely what is already built into the Magistrates' Court Act 32 of 1944. Section 5 provides:

> "Courts to be open to the public, with exceptions
>
> (1) Except where otherwise provided by law, the proceedings in every court in all criminal cases and the trial of all defended civil actions shall be carried on in open court, and recorded by the presiding officer or other officer appointed to record such proceedings.
>
> (2) The court may in any case, in the interests of good order or public morals, direct that a civil trial shall be held with closed doors, or that (with such exceptions as the court may direct) minors or the public generally shall not be permitted to be present thereat."

58.4 Section 5 applies to the proceedings in every court – there is no textual suggestion that it is limited in any way. The trial process (like the preliminary stage) may also be fluid, that is the nature of the court process. And notwithstanding that fluidity section 5 has been promulgated by Parliament to deal with any eventualities.

CONCERNS REGARDING THE COVID-19 PANDEMIC AND SPACE CONSTRAINTS

59 The Magistrate found that there were other concerns in permitting a broadcast, related to the Covid-19 pandemic. These included a shortage of space, overcrowding in court, lack of proper air conditioning, consideration of other vulnerable groups who attend court.

60 First, issues relating to shortage of space and overcrowding are solved – not aggravated – by the presence of full broadcast coverage. In ***Van Breda***, the Supreme Court of Appeal discounted the apparent deleterious effect of the cameras:

> "[T]he courtroom is already a public place with a physical public presence – proceedings are transcribed and members of the press and public are free to be present. Television broadcasts provide members of the public with a virtual presence in the courtroom. If the physical presence of members of the public cannot be said to inhibit or distract counsel, the judges and witnesses, it has to be open to debate that a virtual presence will have that effect."[31]

61 The SCA held:

> "It means that court proceedings must where possible be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings. Broadcasting of court proceedings enables this to occur."[32]

62 The SCA emphasised that more recent results from studies in the United States were unanimous in demonstrating that:

> "[T]he impact of electronic media coverage of courtroom proceedings, whether civil or criminal, show minimal side effects on witnesses and the few studies that did lacked rigorous design. Most importantly, all jurisdictions agreed that those effects could be addressed through appropriate policy design."[33]

63 The SCA held:

> "There simply can be no logic in a court permitting journalists to utilise the reporting techniques of the print media but not permitting a television journalist to utilise his or her technology and method of communication, being the broadcasting and recording of proceedings, despite the fact that 'live camera footage will be more accurate than a reporter's after-the-fact summary'."[34]

64 Second, the submissions regarding space constraints and allegations of "significant heat" generated by cameras are based on outdated notions of

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[31] *Van Breda* at para 52.

[32] *Van Breda* at para 46

[33] *Van Breda* at para 53.

[34] *Van Breda* at para 44.

technology. Commercial television adverts are now sometimes filmed with Canon 5D digital cameras, slightly bigger than the average person's hand. The *Ketsekele*[35] matter was filmed with an iPad streaming the proceedings. And the *Pistorius* matter was filmed with cameras slightly bigger than an ordinary (small) iPad – that were operated by remote without any media personnel in the courtroom operating them.

64.1 The SCA held in ***Van Breda*** (at para 49) "*modern technology has advanced significantly, with the result that cameras are now neither obtrusive, nor disruptive*".[36]

64.2 In any event, even if some witnesses were able to place facts before the court to warrant their testimony not being televised – the effect on some witnesses would not warrant a blanket ban on broadcasting all of the other witnesses and other portions of the trial. This follows the well-established principle in constitutional law that a sledgehammer should not be used to crack a nut.[37]

THE IMPORTANCE OF THIS COURT'S DECISION

65 It might be suggested that this Court need not determine the appeal because the proceedings that SANEF sought to broadcast have come and gone.

66 But that is not so. This application is of critical importance for future proceedings before Magistrates' courts and pre-trial proceedings. Indeed,

[35] *Ketsekele v Road Accident Fund* [2015] ZAGPPHC 308; 2015 (4) SA 178 (GP) (8 May 2015)

[36] *Van Breda* at para 49

[37] *Manamela* at para 34

where there is a refusal to permit broadcast access – it is almost inevitable that by the time any appeal is heard the subject of the broadcast will have moved on.

67 The Constitutional Court has made it clear on numerous occasions that the courts have a discretion to decide issues on appeal "*even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require*."[38] In ***Shuttleworth***, the court found that mootness does not, in itself, bar our courts from hearing a dispute – it is only "*the interests of justice that dictate whether [the Court] should hear the matter*."

68 The Constitutional Court has explained that the interests of justice include a scenario where there is a need for certainty in relation to the legal position.[39]

69 The Magistrate's decision has importance far beyond the current matter. It is critical that this Court clarifies the findings in the ***Van Breda*** case otherwise the significant strides that our courts made for media access and open justice in ***Pistorius*** and ***Van Breda*** have been significantly limited.

CONCLUSION

70 For the reasons set out above, MMA submits that its admission as an amicus curiae can assist this Court. Moreover, it is manifestly in the public interest for this Court to clarify the legal position set out in the ***Van Breda*** case (even though the actual broadcast no longer needs to take place).

[38] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11

[39] *President of the Republic of South Africa v Democratic Alliance and Others* [2019] ZACC 35 at para 21

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