IN THE SUPREME COURT OF APPEAL

CASE NOS: 397/17 & 380/17

In the matters between:

HENRI VAN BREDA Appellant

and

MEDIA 24 LIMITED AND TWO OTHERS Respondents

And in the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

MEDIA 24 LIMITED AND TWO OTHERS Respondents

MEDIA MONITORING AFRICA Amicus Curiae

HEADS OF ARGUMENT FOR MEDIA MONITORING AFRICA

INTRODUCTION AND OVERVIEW OF SUBMISSIONS

1 This appeal concerns a successful application to broadcast a criminal trial. These are the written submissions of Media Monitoring Africa ("**MMA**"). MMA has been admitted as an amicus curiae by the consent of the parties.

2 MMA is not a broadcaster, still less a corporate broadcaster. Instead, it is a highly respected NGO which has an established track record of acting in the public interest in matters relating to media issues.[1]

3 MMA seeks to protect the constitutional right to freedom of expression and the media, but does so from the perspective of a watchdog that seeks to promote ethical and fair journalism that supports constitutional rights.

4 MMA therefore does not adopt an absolutist stance on freedom of expression and the media. On the contrary, it frequently contends that freedom of expression ought to be limited in appropriate circumstances when this is necessary to protect the rights of vulnerable persons, especially children.[2]

5 The submissions made by MMA must be understood in this light. MMA does <u>not</u> contend that the media have an absolute or unfettered right to broadcast criminal trials. Rather, its position is as follows:

5.1 First, the starting point and default position is that the media have a right to broadcast all court proceedings to the public. This right flows from section

[1] See, for example: *eTV (Pty) Ltd and Others v Minister of Communications and Others* 2016 (6) SA 356 (SCA); and *Motsepe v S* 2015 (5) SA 126 (GP).

[2] See, for example, the amicus interventions of MMA in *Johncom Media Investments Limited v M and Others* 2009 (4) SA 7 (CC) and *Media 24 Ltd v National Prosecuting Authority: In Re S v Mahlangu* 2011 (2) SACR 321 (GNP)

16 of the Constitution and the related principle of open justice which has been repeatedly endorsed by our highest courts.

5.2 Second, that right can, however, be limited in appropriate circumstances by a court on a case-by-case basis. The courts have the power to do so in the exercise of their inherent powers in the interests of justice in terms of section 173 of the Constitution.

5.3 Third, in determining whether to limit the broadcast right in a given case, the courts will not preclude broadcasts unless it is shown that the harm is demonstrable and substantial and there is a real risk that it will occur. Harm which is speculative, hypothetical or based on conjecture will not suffice.

5.4 Fourth, even where a court determines that it should limit the broadcast right in a given case, the courts should seek to avoid a "blanket ban" on broadcast coverage or a "one size fits all" approach.

6 MMA respectfully submits that this Court should lay down these principles as a means of guiding future decisions by trial courts on this issue.

7 In keeping with its role as amicus, MMA limits itself to the principles to be applied to a case of this sort, rather than focusing on the facts of the case at hand.

THE RIGHT TO BROADCAST COURT PROCEEDINGS

8 The NDPP claims that Desai J's ruling is flawed, inter alia, because Desai J accepted that the right to freedom of expression in terms of section 16 of the Constitution "*extended to the audio and audio-visual broadcast*".[3] And that "*Desai J assumed that the constitutionally protected right to free expression was implicated*

[3] NDPP's heads of argument p 4 para 5(i).

in the application of Media 24 to broadcast the trial. But our highest courts have not accepted this is so."[4]

9 We submit, however, that the NDPP's approach is incorrect. The media does indeed have a right to broadcast all court proceedings on matters of public interest to the public – whether those are trials, applications or appeals.

10 While that right can be limited in appropriate circumstances on a case-by-case basis (as we explain below) the right certainly exists. The right flows both from section 16 of the Constitution and the open justice principle.

Section 16 of the Constitution

11 Section 16(1) of the Constitution provides that "*everyone has the right to freedom of expression*" including the "*freedom of the press and other media*" and "*the right to receive or impart information or ideas*". While section 16(2) carves out a number of categories of expression to which the right does not apply, none are applicable here.

12 The Constitutional Court has emphasised the role of the media in giving effect to the public's rights in terms of section 16 of the Constitution:

> *"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected. …"* [5]

13 The Constitutional Court had made plain the approach to be adopted in interpreting section 16 of the Constitution:

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[4] NDPP's heads of argument p 15 para 43.

[5] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 22;

> *"We are obliged to delineate the bounds of the constitutional guarantee of free expression generously. … [U]nless an expressive act is excluded by s 16(2) it is protected expression."*

14 Once this is so, it is difficult to understand how the NDPP can seriously argue that section 16 of the Constitution is not engaged here. There can be no question that the broadcasting of court proceedings is an "*expressive act*". It involves the use by the media of the video camera and sound recordings to communicate events directly to the public. This is plainly an expressive act.

15 This was rightly recognised by the Full Bench in *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v Kind NO and Others* ("***Dotcom Trading***"). There, Brand J (as he then was) held:

> *"It is almost self-evident in my view that the prohibition of the direct radio transmission of proceedings by a radio broadcaster constitutes a limitation on what is essential to the activities of that medium of communication. I have heard no argument and I can see no reason in logic why a limitation on what constitutes the very essence and distinguishing feature of the radio broadcaster's medium of communication does not constitute an infringement of the radio broadcaster's freedom which is enshrined by s 16(1)(a). It is not without reason, so it appears to me, that s 16(1)(a) of the Constitution does not limit its guarantee to the freedom of the press, but specifically extends this freedom to other media of communication and expression as well. In modern times there are many forms of communication. Each of these media of communication and expression has its own distinguishing features and each of them can be limited in a different way. The video camera most probably provides the ultimate means of communication. But radio also has its advantages over the print media. Not only the words spoken, but the emphasis, the tone of voice, the hesitations, etcetera can be recorded and communicated. To prevent the radio broadcaster from recording the evidence is to deprive him of that advantage over the print media."*[6]

16 This principle that the "*video camera most probably provides the ultimate means of communication*"[7] has been referred to with apparent approval by this Court in

[6] *Dotcom Trading* 2000 (4) SA 973 (C) at para 43

[7] Ibid.

Primedia[8] and by the minority judgment of Moseneke DCJ in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* ("***SABC***").[9] It is plainly correct. There is no reason or basis for this Court to depart from it.

17 But once that is so, there is then no basis for suggesting that a bar on broadcasting of judicial proceedings does not at least limit the section 16 right. As the Constitutional Court has explained, even where expression is regulated this limits the right concerned:

> *"Because freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the right amounts to limiting it. The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless…."*[10]

18 Moreover, the right to freedom of expression confers on the media itself the discretion to determine what means of communication would be most effective in relation to engaging the public and communicating and relaying information and events to it. Where the courts, regulators or government determine that one form of communication would be more permissible or effective than another, this produces a limitation of the right to freedom of expression. In a 2014 speech, the former Deputy Chief Justice Moseneke stated (in response to an overturned ruling in which the North Gauteng High Court prohibited reporters from tweeting or blogging about a witness' evidence in a the Oscar Pistorius trial) that "*delayed information is as good as denied information. There is no reason not to, as a default position, permit live tweeting and whatever else from the courtroom. There*

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[8] *Primedia Broadcasting and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 (SCA) at paras 34 and 36

[9] *SABC* 2007 (1) SA 523 (CC) at para 101.

[10] Print Media at para 51

is no logic in asking the media to step outside of the courtroom to press 'send'".[11] Similarly, there is no logic in a court permitting journalists to utilise the reporting techniques of the print media but not permitting a television journalist to utilise its technology and method of communication, being the broadcasting and recording of proceedings.

19 In fact, the former Deputy Chief Justice has stated that

"*live camera footage will be more accurate than a reporter's after-the-fact summary. Whatever account they give after they leave the courtroom will inevitably be a second-hand account, their interpretation bleeding into their report. More so, mischievously selected sound bites may indeed undermine accuracy and the important context within which the words were uttered*".[12] In the present case, the appellants contend that there should be a complete bar on all video or audio broadcasting of the trial itself. This self-evidently limits the section 16(1) right of the media and the public and thus demands an enquiry as to whether such limitation of rights is permissible in the circumstances of the case.

The open justice principle

20 Even if, for the sake of argument, the appellants were correct that section 16 did not on its own give rise to the right to broadcast court proceedings, this would not assist them. This is because the right to broadcast court proceedings flows also from the constitutional principle of open justice – which includes a cluster of rights.

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[11] Dikgang Moseneke *The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice* available at http://constitutionallyspeaking.co.za/dcj-dikgang-moseneke-the-media-courts-and-technology-remarks-on-the-media-coverage-of-the-oscar-pistorius-trial-and-open-justice/

[12] Ibid.

21 In *Independent Newspapers*,[13] where a newspaper sought access to portions of a court record that had been kept confidential on the grounds of national security, the Constitutional Court held that open justice had essentially become a right of its own:[14]

> *"There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice. The constitutional imperative of dispensing justice in the open is captured in several provisions of the Bill of Rights. First, section 16(1)(a) and (b) provides in relevant part that everyone has the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas. Section 34 does not only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in section 35(3)(c) which entitles every accused person to a public trial before an ordinary court.*
>
> *…*
>
> *From the right to open justice flows the media's right to gain access to, observe and report on the administration of justice…*

22 In *MultiChoice*,[15] where members of the media sought permission to broadcast live audiovisual footage of the Pistorius trial, Mlambo JP explained the rationale for the principle of open justice in the following terms:[16]

> *"Our Constitution is underpinned by a number of values and for purposes of this case I refer to openness and accountability. In this regard it is also important to take cognisance of the fact that sections 34 and 35(3)(c) make it very clear that even criminal proceedings in this country are to be public. The basis for this is that courts of law exercise public power over citizens and for this it is important that proceedings be open, as this encourages public understanding, as well as accountability."*

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[13] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC).

[14] Ibid paras 39-41.

[15] *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another: In re S v Pistorius* 2014 (1) SACR 589 (GP).

[16] Ibid para 23.

23 The right to public courts does not belong only to litigants, but also to the public at large. The idea that South African courts should be open to the public goes back to 1813.[17] The principle of open courtrooms is now constitutionally entrenched.[18]

24 Open justice is also supported by the Constitution's general endorsement of openness and transparency in all public affairs,[19] and the requirement of judicial independence. Open justice is, moreover, required by section 32 of the Superior Courts Act 10 of 2013.[20]

25 It is important to emphasise, however, that open justice means more than merely keeping the courtroom doors unlocked. It means that court proceedings must be meaningfully accessible - visible and audible - to any members of the nationwide public who wish to be timeously and accurately apprised of such proceedings.

26 This vital rationale was recognised by the Constitutional Court in *Mamabolo*:[21]

> *"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****. Of course this*

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[17] See: *Financial Mail (Pty) Ltd v Registrar of Insurance and Others* 1966 (2) SA 219 (W) at 220F-G: "*Until 1813, in consonance with the then universal practice in Holland … whilst judgments and orders of the Cape courts had to be pronounced in public, evidence and argument in trial cases were heard in camera, with only the parties and their lawyers in attendance. The British Governor of the Cape, in 1813, issued a proclamation requiring all judicial proceedings in future to be carried on with open doors as a matter of 'essential utility, as well as the dignity of the administration of justice'; it would imprint on the minds of the inhabitants of the Colony the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner*."

[18] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC) at para 39.

[19] Constitution s 1(d) reads: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: … (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." See also Independent Newspapers at para 40.

[20] The Act provides: "*Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court*."

[21] *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC) para 29 (emphasis added). See also *Shinga v The State and Another* [2007] ZACC 3 at para 25: "*Closed court proceedings carry within them the seeds for serious potential damage to ever pillar on which ever constitutional democracy is based.*"

> *openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts."*

27 Most recently, in *SANRAL*,[22] concerning public access to records filed in court, this Court emphasised:[23]

> *"[I]t may be said that the right to public courts, which is one of long standing, does not belong only to the litigants in any given matter, but to the public at large….."*

28 The publicity of the judicial proceedings guarantees that the case will be determined fairly, independently, and impartially. The glare of public scrutiny makes it far less likely that courts will act unfairly or unprofessionally towards those who appear before them.

29 Once it is accepted (as it must be) that the courts are to be open, it follows that South Africans have a right to see and hear for themselves what happens in the courts.

29.1 As this Court explained in *Primedia* in the context of the right to an open Parliament:

> *"The Constitution thus affords all South Africans the right to see and hear what happens in Parliament….*
>
> *Of course not all members of the public are able to attend sittings of Parliament. But the media is able to bring to their attention what happens in sittings by virtue of radio and television broadcasts, through newspapers and now also through social media such as Twitter…."*[24]

29.2 This Court went on:

> *"The public has a right to witness [incidents in Parliament]. And the public has a right to know not only what the Speaker or the Chairperson says during moments of disorderly behaviour, but also to see how MPs*

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

[23] Ibid paras 18-19.

[24] *Primedia* at paras 1- 2.

> *are treated by security staff who forcibly evict them from the Chamber. The public has a right to know how the legislative arm of government operates."*[25]

29.3 While Primedia concerned the right to an open parliament, rather than the right to open justice, the same conclusion applies in both contexts. The public has a right to see for itself what transpires in Parliament and in the courts and broadcasting allows this occur.

THE POWER OF THE COURTS TO LIMIT THE RIGHT TO BROADCAST

30 We have explained above why the media and the public have the right to have judicial proceedings broadcast – whether they are trials, applications or appeals.

31 However, as with all rights under our constitutional scheme, this right is not absolute. Rather, it can be limited in appropriate circumstances.

The power to limit the right to broadcast

32 Where there is a debate about whether given court proceedings should be broadcast, a court is vested with the power to limit the broadcast right where this is necessary to ensure the fairness of the proceedings before it. The power of the court to do so is an inherent power flowing from section 173 of the Constitution and must be exercised in the interests of justice.

33 This was made clear by the decision of the majority of the Constitutional Court in SABC.[26] It held:

> *"… The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts the inherent power to regulate and protect their own process. A primary*

[25] Primedia at para 38.

[26] *SABC* 2007 (1) SA 523 (CC).

> *purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power must take into account the interests of justice.*
>
> *When Courts exercise the power to regulate their own process it is inevitable that that power will affect rights entrenched in ch 2 of the Constitution. A Court must regulate the way proceedings are conducted and this will inevitably affect both the right to a fair trial (s 35 of the Constitution) and the right to have disputes resolved by Courts (s 34). Courts are bound by the provisions of the Bill of Rights and therefore bear a duty to respect those rights. In exercising the power, therefore, they must take care to ensure that those rights are not unjustifiably attenuated."*[27]

34 Thus in confirming a constitutional right to broadcast court proceedings flowing from section 16 and the open justice principle, this Court would be doing no more than recognizing the appropriate starting point. It will always remain open to a 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. The court will have the power to do so under section 173 of the Constitution.

35 In what follows, we deal with certain further issues related to how the 173 power is to be exercised in the present case.

The test for harm to the fair trial right

36 It is important to emphasise that an allegation by a party that his or its fair trial rights will be harmed is not to be accepted merely at face value. Rather, what is required is a proper and sustainable showing that this is likely to be the case.

37 This is made clear by the decision of this Court in *Midi Television*.[28]

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[27] At paras 36 - 37

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

37.1 In that case, e.tv had made a television programme about a murder that had attracted a great deal of public attention in Cape Town. The DPP asked to see the television programme so as to satisfy himself that it would not prejudice the murder trial. e.tv refused to do so. The DPP then successfully applied to the Cape High Court for an interdict to prohibit the broadcast.

37.2 This Court disagreed and upheld e.tv's appeal. In doing so it laid down the test to be applied when a Court is asked to restrict freedom of expression in order to protect the administration of justice or to protect some other right:

> *"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."*[29]

37.3 It emphasised that it is "*not merely the interests of those associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information.*"[30]

37.4 Lastly, and significantly, this Court emphasised the broad reach of the principles it had laid down:

> *"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*

[29] At para 19 (emphasis added)

[30] *Midi Television* at para 19

> *adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right."*[31]

38 A decision on whether to restrict the right to broadcast court proceedings raises the same set of rights at issue in *Midi* – expression rights, open justice, fair trial rights and the administration of justice. We submit that the same approach should apply – namely that the courts will not restrict the broadcast right unless the prejudice is demonstrable and substantial and there is a real risk that it will occur. Mere conjecture or speculation that prejudice might occur will not be enough.[32]

A one-size-fits-all approach is impermissible

39 The appellants impermissibly adopt a blanket, one-size-fits-all approach. They claim that there should be no broadcast whatsoever of the evidence during the trial. No television coverage. No audio of any witnesses. They extend the blanket ban even to expert witnesses – despite the fact any claims of harm that would apply regarding lay witnesses could have no currency for such witnesses.

40 This approach is impermissible and cannot amount to the proper exercise of a section 173 power to limit the right to broadcast.

41 This is made clear by the decision of this Court in *Primedia*. There this Court dealt with restrictions on the right to broadcast Parliamentary proceedings and held:

> *"The right to see and hear what happens in Parliament is not unlimited. … Any measure adopted by Parliament must be objectively reasonable.*
>
> *The test to be applied is not only whether the limitation is proportionate to the end sought to be achieved, but also whether other measures would better achieve the end, or would do so without limiting others' rights. This is the test in the limitations provision in the Constitution (less restrictive means to achieve the purpose – s 36(1)(e)). In S v Manamela*

[31] *Midi Television* at para 20

[32] See also: *S v Mamabolo* 2001 (3) SA 409 (CC) at para 45 and *Laugh It Off Promotions CC v SAB Intl (Finance) BV t/a Sabmark Intl* 2006 (1) SA 144 (CC) at para 59

> *& another (Director-General of Justice Intervening … O'Regan J and Cameron J said (para 66) in a dissenting judgment, but the particular passage was approved by the majority of the court):*
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> > *'The approach to limitation is, therefore to determine the proportionality between the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose.'"*[33]

42 This precludes a rigid one-size-fits-all approach. The fact that witness X might be severely intimidated by having to testify on camera, does not justify prohibiting the broadcast of witness Y, who has not expressed the same concern. Nor does it justify prohibiting the audio broadcast of witness X.

43 This possibility of audio recording – as opposed to video recording – is especially important. For example, while the NDPP relies extensively on the judgment of Sachs J in the *SABC* case, it fails to mention that the very thrust of Sachs J's argument was that while televising might create difficulties, audio broadcasts would not. As he explained:

> *"Complete coverage would have met many of my objections and, if it were possible, I would wish to see the question of full radio coverage's being explored even at this late stage."*[34]

44 It is, with respect, fanciful to suggest an audio broadcast can have any such distressing or embarrassing effects. The psychological effects discussed by Squires J in *Downer* were squarely concerned with being "*captured on film*" and "*televised*", not with having the testimony recorded and broadcast in audio. This was also the clear subject of the obiter statement of the majority in the Constitutional Court in *SABC*, that "ordinarily" it would not be in the interests of

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[33] *Primedia Broadcasting and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 (SCA) at para 30 - 31.

[34] *SABC* 2007 (1) SA 523 (CC) at para 152.

justice to have live broadcasts of testimony in criminal trials – referring specifically in this regard to the emphasis in *Downer* on television, not audio.[35]

45 The proper approach is made clear by the Pistorius case. There, Mlambo JP held:

> *"My views to the objections raised by Pistorius find support in the open justice principle. Acceding to the objection in their entirety will surely abandon the noble objectives of the principle of open justice when one takes cognizance of our development in the democratic path. At this day and age I cannot countenance a stance that seeks to entrench the workings of the justice system away from the public domain. Court proceedings are in fact public and this objective must be recognized."*

46 Put differently, a blanket ban on broadcasting the trial would have undermined the principle of open justice. Thus Mlambo JP endorsed a regime whereby:

46.1 The evidence of all expert witnesses would be broadcast using visual and sound broadcasts.

46.2 Any lay witness who objected to having their evidence televised would have these wishes respected and no video coverage of that witness would be allowed. However, full audio of the evidence would be broadcast, as well as audio-visuals of the legal practitioners and the judge and assessors, even where objecting witnesses give evidence.

46.3 Even then, the presiding judge would have the power to make rulings on any specific witness that were required.

47 This approach adequately balances the rights of open justice and free speech, with legitimate objections from lay witnesses and the need for a fair trial. A blanket ban on all broadcasting, adopting a one-size-fits-all approach, does not.

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[35] Ibid para 33.

Putting the SABC case in context

48 The appellants seek to make much of the decisions of this Court and the Constitutional Court in the *SABC* case. But it is necessary to view that case in its proper context if the section 173 power is to be properly exercised.

49 The SABC cases were decided more than ten years ago, in 2006. At the time that they were decided, the live broadcasting of court proceedings was (with rare exceptions) virtually unknown in this country. This applied even to appeals and applications.

50 While the majority of the Constitutional Court dismissed the appeal – on the basis that there was no basis to interfere with this Court's exercise of its discretion – it held tellingly that "*the time has come for courts to embrace the principle of open justice and all it implies*".[36] It went onto explain that changes would likely be required in relation to the approach towards broadcasting of court proceedings:[37]

> *"In this connection reference was made to an agreement entered into between the media and the Judiciary in 1993. It would seem that the advent of a democratic Constitution, technological advances and growing acceptance throughout the world of the power and impact of the electronic media may require this agreement to be reconsidered. The answer, however, is not to treat it as non-existent but rather to renovate and update it. It would be inappropriate for this Court at this stage to prejudge such a process. It is for the Judiciary to work out the modalities, working in co-operation with the media. The objective will be to get fair and balanced reporting of legal proceedings while maintaining the fairness and integrity of those proceedings."*

51 In 2017, we are now indeed in the "future" foreshadowed by the SABC judgments. The position has changed fundamentally since those judgments.

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[36] Ibid para 68.

[37] Ibid para 71.

51.1 In 2009, three years after the *SABC* cases, this Court issued a practice direction allowing as a default position full audio-visual broadcasting of all of its proceedings.

51.2 Other courts, including the Constitutional Court and the Gauteng High Court, have followed the same approach.

51.3 Thus, far from the broadcasting of court proceedings being a rarity, they are now common place. Very substantial numbers of high-profile matters are broadcast live to the public.

51.4 While this occurs far more frequently for applications and appeals than trials, the broadcasting of trials is also no longer unprecedented in this country. Notable examples include the Equality Court trial between Afriforum and Julius Malema, the Pistorius trial, the trial of Mr Radovan Krejcir, and the Betty Katane trial.[38]

51.5 The extensive reliance by the appellants on the *SABC* judgments must therefore be treated with great caution. For example, while it could be accepted in 2006 that counsel might be overawed by having to appear on television, it can scarcely be accepted now. It has become common-place and simply part of the job.

52 Moreover, it is notable that despite these developments there has been no showing at all that the fair trial rights of litigants have been infringed. While the appellants seek to make much of the Pistorius case, they overlook one critical aspects.

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[38] *South African Broadcasting Corporation Limited v Director of Public Prosecutions, South Gauteng High Courts, Johannesburg and Others; In re: S v Krejcir and Others* [2014] ZAGPJHC 241.

52.1 No party or judge contended (still less concluded) that the broadcast of Mr Pistorius's trial rendered his trial unfair.

52.2 This is noteworthy since Mr Pistorius appealed all the way up to the Constitutional Court and raised a multitude of different points. He did not say one word about the broadcast rendering his trial unfair.

53 These developments must weigh heavily when a court decides whether to restrict broadcast rights in the exercise of its section 173 powers.

The trend towards allowing television broadcasting of criminal proceedings

54 Lastly, we point out that a reading of the heads of argument of the appellants might suggest that the broadcasting of criminal trials is virtually unprecedented. This is simply not correct.

55 Apart from the *Pistorius* and *Krejcir* trials to which we have referred, there is a growing trend of openness and permitting the broadcast of evidence in international and foreign criminal tribunals.

56 The International Criminal Court (ICC) Regulations provide for the recording and broadcast of ICC proceedings, including witness testimony. Where necessary for the protection of a witness, the image or voice of the person is distorted and rendered unrecognizable in the audiovisual feed. In addition, the Court retains the discretion to exclude certain testimony from broadcast.[39]

57 The full proceedings of the International Criminal Tribunal for the former Yugoslavia (ICTY) are recorded and broadcast using court equipment. Footage is

[39] International Criminal Court Regulations, Regulation 21 and ICC Regulations of the Registry, Regulation 94.

made available to carriers like the BBC and CNN.[40] Voice and image distortion is employed in the same way as is done in the ICC.

58 Video of both ICTY and ICC trials is posted on the Courts' websites and can be streamed in full, subject to a 30 minute delay.[41]

59 In New Zealand, criminal trials at first instance may be filmed and broadcast provided that certain conditions are met, including that any witness who objects must be made "not recognisable" in the broadcast.[42]

60 In the United States, a number of state courts allow the broadcast of both civil and criminal trials at first instance, subject to the discretion of the judge.[43]

61 Scotland allows filmed witness testimony to be used for educational purposes, such as in documentaries.[44]

CONCLUSION AND REQUEST TO MAKE ORAL SUBMISSIONS

62 We therefore submit that the stance of the appellants is unsustainable.

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[40] International Criminal Tribunal for the Former Yugoslavia Rules of Court, Rule 81(d). See website announcements regarding broadcasts: 'Courtroom Broadcast' available online at <http://www.icty.org/sid/252>; 'Courtroom Technology' available online at < http://www.icty.org/sid/167>; 'Broadcast of Proceedings at the ICTY through the Internet' 15 February 2002, available online at <http://www.icty.org/sid/8122>.

[41] For ICC broadcasts see ICC Regulation 21(2) and 'Video Streaming' at <http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx> and 'Hearing Schedule' at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/hearing%20schedule/Pages/next%20week.aspx>; For ICTY broadcasts see 'Courtroom Broadcast' available online at <http://www.icty.org/sid/252>.

[42] New Zealand Ministry of Justice 'In-Court Media Coverage Guidelines' 2012, available online at <http://www.justice.govt.nz/media/media-information/in-court-media-coverage-guidelines>.

[43] Eg: *California:* Rule 1.150. 'Photographing, Recording, and Broadcasting in Court', 2014 California Rules of Court; *Massachusetts*: Massachusetts Supreme Judicial Court Rule 1:19 'Electronic Access to the Courts'; *Missouri*: Missouri Supreme Court Operating Rule 16; *New Jersey*: Code of Judicial Conduct Canon 3A(9) and 'Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey'; *Tennessee*: Tennessee Supreme Court Rule 30; *Utah*: Judicial Council Rules of Judicial Administration, Rule 4-401.01; *Virginia*: Va. Code 19.2-266.

[44] The conditions governing the broadcast of proceedings in Scottish courts are set out in Lord Hope's Practice Direction (1992), which are quoted in *X v British Broadcasting Corporation and Lion Television Limited* [2005] CSOH 80 at para 4.

62.1 There is indeed a right to broadcast courts proceedings, flowing from both section 16 of the Constitution and the open justice principle.

62.2 While courts are able to limit that right on a case-by-case basis in terms of section 173 of the Constitution, they may do so only on a proper showing of harm. In this regard the harm must be demonstrable and substantial and there must be a real risk that it will occur - mere conjecture or speculation that prejudice might occur will not be enough.

62.3 Even where a restriction on broadcasting is to be granted, a blanket ban or one-size-fits-all approach is not permissible.

63 MMA respectfully requests permission from this Court to make oral submissions during the appeal for twenty minutes.[45] In this regard, we emphasise that:

63.1 The submissions made by MMA are different from those made by any party and come from a different perspective.

63.2 Moreover, this appeal has the potential to affect not merely the parties, but also the public, and not merely the present case, but also future cases. It is therefore necessary and appropriate that this Court receives submissions from an entity other than the parties themselves.

[45] See *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) at paragraph 26.