IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ***YES***
(2) OF INTEREST TO OTHER JUDGES: ***YES***
(3) REVISED: ***YES***

Date: ***11th July 2019*** Signature: _____

APPEAL CASE NUMBERS: A641/2017 & A133/2018

COURT *A QUO* CASE NO: 2011/58664

DATE: 11th JULY 2019

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Appellant
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Appellant
MINISTER OF HEALTH	Third Appellant
MINISTER OF SOCIAL DEVELOPMENT	Fourth Appellant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth Appellant
MINISTER OF TRADE & INDUSTRY	Sixth Appellant
MINISTER OF POLICE	Seventh Appellant

And

FIELDS OF GREEN FOR ALL NPC	First Respondent
STOBBS, JULIAN CHRISTOPHER	Second Respondent
CLARKE, KATHLEEN (MYRTLE)	Third Respondent
THORP, CLIFFORD ALAN NEALE	Fourth Respondent
DOCTORS FOR LIFE INERNATIONAL INCORPORATED	Fifth Respondent

And, in the matter of:

DOCTORS FOR LIFE INTERNATIONAL INCORPORATED	Appellant
and	
FIELDS OF GREEN FOR ALL NPC	First Respondent
STOBBS, JULIAN CHRISTOPHER	Second Respondent
CLARKE, KATHLEEN (MYRTLE)	Third Respondent
THORP, CLIFFORD ALAN NEALE	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Sixth Respondent
MINISTER OF HEALTH	Seventh Respondent
MINISTER OF SOCIAL DEVELOPMENT	Eighth Respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Ninth Respondent
MINISTER OF TRADE & INDUSTRY	Tenth Respondent
MINISTER OF POLICE	Eleventh Respondent

Coram:	Molopa – Sethosa, Louw *et* Adams JJ
Heard:	27 February 2019
Delivered:	11 July 2019

Summary: Constitutional law – application by entity closely related to plaintiffs, which is not a media house or part of conventional media, to broadcast civil proceedings – principles relating to the right to freedom of expression, open justice and the right to a fair trial, as enunciated in *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); 2017 (2) SACR 491 (SCA), apply equally – court must exercise a proper discretion under s 173 of the Constitution in each case by balancing the degree of risk involved in allowing the cameras into the court room against the degree of risk that a fair trial might not ensue – courts ought not to restrict the nature and scope of the broadcast unless prejudice is demonstrable and there is a real risk that such

prejudice will occur – mere conjecture or speculation that prejudice might occur ought not to be enough.

Procedure – Gauteng Division's Practice Manual, following the *Practice Note* of the SCA, 2009 (3) SA 1 (SCA), endorsed – prescribes a cost effective and efficient mechanism for the Court to hear a request to broadcast Court proceedings – it is undesirable for any Court to lay down any rigid rules as to how such requests to broadcast should be considered – a formal substantive application not required

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ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Ranchod J sitting as Court of first instance):

(1) Under case number: A641/2017, the appeal of the state appellants is dismissed with costs.

(2) The State Appellants in appeal court case Number: A641/2017 shall pay the first respondent's cost of the appeal, including the costs of the applications in the High Court and the SCA for leave to appeal, and the cost consequent upon the employment of two Counsel, where applicable.

(3) Under case number: A133/2018, the appeal of the appellant (DFL) is dismissed with costs.

(4) The appellant (DLF) in case number: A133/2018 shall pay the first respondent's cost of the appeal, including the cost of the applications in the High Court and the SCA for leave to appeal, and the cost consequent upon the employment of two Counsel, where applicable.

JUDGMENT

Adams J (Molopa – Sethosa & Louw JJ concurring):

[1]. We have before us two almost identical appeals, one by Doctors for Life ('DFL') and the other by the National Director of Public Prosecutions ('the NDPP') and six other National Government departments ('the State appellants'), against a ruling by the Gauteng Division of the High Court in Pretoria (Ranchod J, sitting in Chambers) on the 28th of July 2017. The ruling by Ranchod J dated the 28th of July 2017 was communicated by his registrar to the parties by way of an e-mail as follows:

> 'That Judge Ranchod took notice of all correspondence exchanged between the parties with regard to the live stream broadcasting of the proceedings. Judge Ranchod will allow the live stream broadcasting which will be subject to certain conditions. Those conditions will be discussed on Monday morning at the commencement of the trial'.

[2]. The ruling was made on Friday, the 28th of July 2017, and the trial was scheduled to commence the very next Monday, the 31st of July 2017. The ruling was made pursuant to a written request by the first respondent in both appeals, namely Fields of Green for All ('FOGFA'), which is closely associated with and related to the second and the third respondents in the appeals. The second and third respondents are the first and second plaintiffs in the main action. The decision by Ranchod J, as he indicated in his 'order', only followed after a long line of communications exchanged between the parties in this appeal, most of which was perused and considered by him before making his decision. It appears that the ruling was made by Ranchod J in terms of the provisions of chapter 12 of the *Practice Manual* of this Division, read with the SCA *Practice*

Notice, 2009 (3) SA 1 (SCA), dated the 9th of February 2009, which relates to the procedure to be followed when a party wishes to film or electronically record judicial proceedings.

[3]. The appellants were aggrieved by the ruling itself as well as by the manner in which the High Court arrived at its decision and the procedure followed prior to the ruling being issued. These appeals are before us with the leave of the Supreme Court of Appeal ('the SCA'), leave to appeal having been refused by the court *a quo*. The appeals by the appellants are against the whole of the ruling made by Ranchod J on the 28th of July 2017 as well as against the written reasons subsequently furnished by him on the 31st of July 2017.

[4]. A question central to these appeals relates to whether, notwithstanding clear opposition from interested parties, a litigant who is a not a member of the broader public media or is not a recognised media house should be granted the rights to broadcast its own proceedings. A corollary of and closely related to this issue is whether or not a party to the proceedings should be allowed to broadcast by live streaming those proceedings in which he is a litigant. The High Court had found that FOGFA was entitled to live stream and broadcast the proceedings despite it not being a part of the press or conventional media.

[5]. In the trial action the second, third and fourth respondents in both appeals ('the respondents') challenged the constitutionality of the criminal prohibition of cannabis as provided for in sections 4(b), 5(b) and part III of schedule 2 of the Drugs and Drug Trafficking Act, 140 of 1992.

[6]. As I indicated above, the appellants' appeal against the ruling is on the basis that the court *a quo* erred in the exercise of its discretion in that the decision on a fundamental issue was made without hearing the parties beyond

the correspondence. DFL, for example, submits that the trial court erred in not allowing for full ventilation of the contentious issues raised in the correspondence and in not calling for a formal substantive application whether with or without argument in open court.

[7]. It requires emphasising that the objection by DFL and the State Appellants was not an objection to a recognised conventional media house requesting broadcasting permission on appropriate unobjectionable terms. The objection was that FOGFA, as the *alter ego* of the second and third respondents (the first and second plaintiffs in the main action), represented their personal interests and common objectives, which formed the subject matter of the trial. This, in effect meant, according to the appellants, that the plaintiffs themselves were in fact the ones who applied to broadcast *via* live streaming the proceedings in which they were parties.

The Factual Background

[8]. During August 2010 the second and the third respondents were arrested during a raid at their residence by the South African Police Service and charged with being in possession of and dealing in cannabis. The police found them in possession of approximately 1.87 kilograms of cannabis, and they were subsequently charged in the Krugersdorp Magistrate Court with possession of and dealing in cannabis, and the criminal trial in which they are accused is still pending.

[9]. The aforesaid criminal trial was stayed by an order of this Court (Bertelsmann J), which order reads as follows:

> '1. That the matter in the Krugersdorp Magistrate Court, in which the applicants are the accused on charges of possession of and dealing in

cannabis (dagga), be stayed, pending the outcome of the proceedings to be instituted by the applicants in the High Court of South Africa, in which proceedings the applicants will challenge the constitutionality of section 4(b), 5(b) and Part III of schedule 2 of the Drugs and Drug Trafficking Act, 140 of 1992, in as far as it relates to the possession of, and dealing with cannabis.

2. Should the applicants fail to institute the proceedings aforesaid within 60 days of the granting of this order, the suspension referred to in the preceding paragraph will *ipso facto* lapse.'

[10]. The second, third and fourth respondents complied with this order by proceeding with the issue of a summons out of this Court, citing *inter alia* the NDPP, the National Minister of Justice and Constitutional Development and the National Minister of Health as defendants. In this action, the second to fourth respondents challenge the constitutionality of the legislation that regulates cannabis possession, use and sale in South Africa. They are out on bail and their criminal prosecution has been stayed until the constitutional challenge has been finalised. The action is defended by the State Appellants and DFL, and the trial was scheduled to proceed for nineteen days before Ranchod J, commencing on Monday, the 31st of July 2017.

[11]. It is this trial which FOGFA wished to broadcast by live streaming, hence the application for leave to the High Court to be allowed media access.

[12]. This request was in the form of an informal application addressed to Ranchod J by email from the attorneys for FOGFA. The request was initiated by a letter from FOGFA's attorneys addressed to the attorneys for the appellants dated the 6th of June 2017, requesting their consent to FOGFA broadcasting the trial. This letter was preceded by a missive dated the 5th of June 2017 addressed by FOGFA's attorneys to the office of the Deputy Judge President,

indicating that FOGFA intended requesting permission to broadcast via livestream the trial. These initial communications were followed by an exchange of communiqués between the attorneys representing the interested parties, notably FOGFA and the appellants in the appeals before us. The *communiqués* exchanged between the parties spanned the period from the 6th of June 2017 until the 28th of July 2017, when Ranchod J ruled on the request by FOGFA and communicated, by email, his decision to the parties.

[13]. The second and third respondents are founding members of FOGFA, a non – profit organisation, which has as its primary objectives the advocating for the implementation of rational cannabis law and policy in South Africa. In the end, FOGFA's endeavours to persuade the appellants to consent to them broadcasting the proceedings were fruitless. On the 14th of July 2017 the State Appellants informed FOGFA that they (the State Appellants) object to the broadcasting of the proceedings by it. DFL followed suit and on the 24th of July 2017 their attorneys informed FOGFA's attorneys that DFL does not consent to FOGFA broadcasting by livestreaming the court proceedings during the trial.

[14]. The reasons for the objection, so the State Appellants advised the respondents, were that the relationship between the second and third respondents and FOGFA was such that it meant that FOGFA was in fact the *alter ego* of these respondents, who were litigants in the trial action. This in turn meant that the litigants, being the second and third respondents, were in fact applying to broadcast, by live streaming, legal proceedings in a court of law to which they were parties.

[15]. FOGFA takes issue with the appellants in that regard. They contend that FOGFA is a registered non – profit company which advocates for the implementation of rational cannabis law and policy in South Africa. Whilst it is so that the second and third respondents, who are the first and second plaintiffs

in the main action, are founding members of FOGFA, it (FOGFA) is not a party to the civil action. It is therefore incorrect to claim, so the respondents contend, that FOGFA, which is not a party to the proceedings, is seeking permission to live – stream broadcast its own proceedings, as claimed by the appellants.

[16]. On the 31st of July 2017 the appellants' legal representatives appeared before Ranchod J and made submissions aimed at persuading the Court to recall his order. The appellants restated their objection to the live stream broadcast of the trial and the proceedings in Court, and submitted that the directive should not have been issued in the absence of a formal application by FOGFA for leave to live stream broadcast the proceedings. This application, so the Court was advised, would have been opposed by the appellants, who would have made their own submissions, as they were entitled to do, in open Court for a full ventilation of the issues.

[17]. Ranchod J refused the request by the respondents that he recalls his ruling. His view was that he was precluded from doing so as he, having made a final decision, had become *functus officio*. Thereafter, on a request by the appellants, Ranchod J on the same day, that being Monday, the 31st of July 2017, furnished his written reasons for the decision.

[18]. In his written reasons Ranchod J held that section 173 of the Constitution empowers the Court to protect and regulate its own processes, and to develop the common law, taking into account the interest of justice. He also indicated that in reaching his conclusion he was guided by the principles enunciated by the SCA in *NDPP v Media 24 Limited & Others and HC Van Breda v Media 24 Limited & Others*, 2017 ZASCA 97, as well as by the guidelines as per an SCA Practice Note and the Practice Directives of this Division with reference to media coverage of proceedings in court. He was also of the view that the appellants did not demonstrate that they would suffer any prejudice or that there

was a real risk that such prejudice would occur in the event that the proceedings were broadcasted. FOGFA, so the Court found, had given the task of live stream broadcasting to an entity called Antfarm (Pty) Ltd, which managed the audio recording and transmission of the well known criminal trial of Oscar Pistorius, which probably meant that the broadcaster had a certain degree of credibility.

[19]. The appellants' right to a fair trial, so Ranchod J concluded, would not have been affected by the live stream broadcasting. The right of the public to access, view and hear the proceedings in court through the medium of live stream broadcasting is in harmony with the right to freedom of expression and the open justice principle.

[20]. In par [11] of his reasons for his order Ranchod J held that the rights of the appellants would not have been affected by the live stream broadcasting of the proceedings. In par [12] he continues as follows:

> '(12) I was of the view that the right of the public to access, view and hear the proceedings in Court through the medium of live stream broadcasting is in harmony with the right to freedom of expression and the open justice principle and as I said, that it is not a criminal trial'.

The contentions by the Appellants

[21]. It was contended on behalf of DFL that FOGFA's application for consent was unique and distinguishable on the facts, from any of the recent authorities, most notably *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); 2017 (2) SACR 491 (SCA) ('the *Van Breda* case'). The guidelines provided in the practice note of the SCA and the Practice Directive of this division regarding

media coverage of proceedings, is not a rigid rule, so DFL contended, on how requests are to be considered and was never intended to be a rule at all, but a guideline.

[22]. In the circumstances that prevailed, the request by FOGFA was vociferously opposed on the basis that competing interests and constitutional rights required proper ventilation in open court of the request. DFL was therefore of the view that the High Court ought to have required FOGFA to bring a formal and substantive application for leave to broadcast, by live streaming, the trial. Alternatively, DFL contends that the trial Judge ought, at the very least, to have required the parties to fully argue the request before him in open court.

[23]. FOGFA has a social media presence both locally and internationally, which is spread over most, if not all, common social media networks, namely Facebook, Twitter and Instagram. According to FOGFA, its following is growing on a daily basis. They have their own non – traditional media platform for developments newsworthy to the general public. FOGFA is a voluntary organisation with members required to pay a subscription, presumably determined by its founding members. According to their website, any member of the public is welcome to join their 'network' subject to a compulsory 'donation' of R150 per month. In other words, to have access to the website of FOGFA, and any publications, video clips and live broadcasts thereon, any member of the public would be required to pay R150 per month.

[24]. It is the case of the appellants that the request by FOGFA should be treated on a different footing than a request to broadcast proceedings by traditional broadcasters and media houses. This is so because traditional and recognised media houses are regulated by codes of conduct and are overseen by Regulatory Bodies such as the Broadcasting Complaints Commission of

South Africa ('BCCSA') and the Press Council. They are accountable to their regulatory bodies, which is not the case with FOGFA.

[25]. It is the case of appellants that, as regards the request by FOGFA to broadcast the proceedings, they (the appellants) are simply contending for their rights to be heard as envisaged in section 34 of the Constitution, which provides as follows:

> **'34. Access to courts**
>
> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[26]. One of the central principles in media matters like this is that of open justice. FOGFA relied on their rights in that regard when requesting permission to broadcast the proceedings. By the same token, so the appellants contend, in adjudicating this aspect of the matter, the High Court should have been cognisant of their right to have that issue decided in a fair public hearing. In the circumstances of this matter, the court *a quo*, so the appellants submit, had denied them their right to fully and properly put their case before the court. The correspondence exchanged between the parties was not sufficient to ensure that they get a fair hearing, so the appellants submitted.

[27]. DFL accordingly concluded that a proper exercise of the Court's discretion would have entailed a formal and substantive application, which would have been ideal, but at the least full argument and submission on the request in open court.

[28]. The State appellants submit that this Court has a discretion, in upholding the appeal, to consider the merits of the matter or to remit it to the trial Court as

the SCA did in the *Van Breda* case. They furthermore submit that the High Court erred in holding that the right to broadcast proceedings may be extended to a non – media house which is unregulated and not accountable to any international or national broadcasting and publishing press codes and standards.

[29]. They also contend that when the alleged right to broadcast is contested a formal application is required for a proper ventilation of the issues.

[30]. The State Appellants contend that the relationship between FOGFA and the second and third respondents blurs the obligation that rest on an applicant for access, more specifically a media house, to report accurately and fairly on legal proceedings and judgments. The Constitutional Court has noted that the media has a duty to report accurately, because the consequence of inaccurate reporting may be devastating. The above is empirical as it serves an invaluable contribution to public confidence in the judiciary and thus to the rule of law itself. To simply marry this right off to a non – media organisation which is not bound by a constitutional duty or broadcasting standards, so it was submitted on behalf of the State Appellants, could have devastating consequences on open justice and procedural fairness.

[31]. The appellants also challenged the Court *a quo's* reliance on the SCA judgement in *Van Brenda vs Media 24 Ltd and Others* (supra), which, according to the appellants, is distinguishable from the present case.

The Applicable Legal Principles

[32]. The legal principles applicable to the broadcasting of court proceedings are set out extensively and in detail by Ponnan JA in the *Van Breda* judgment,

in which a comprehensive international comparative study was conducted by the SCA. The philosophy behind the recent developments in this field is also traversed and considered by Ponnan JA in a well – reasoned judgment. The parties appear to be *ad idem* that the applicable legal principles and the underlying philosophy are as enunciated by the SCA in this case. Those principles can best be stated by quoting from the judgment at par [72], where the SCA has this to say:

> '[72] The default position has to be that there can be no objection in principle to the media recording and broadcasting counsel's address and all rulings and judgments (in respect of both conviction and sentence) delivered in open court. When a witness objects to coverage of his or her testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effects he or she asserts such coverage would have upon his or her testimony. This approach entails a witness – by – witness determination and recognises as well that a distinction may have to be drawn between expert, professional (such as police officers) and lay witnesses. Such an 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. It is for the court concerned to ensure that in balancing the public's interest in coverage of criminal proceedings against those of objecting participants, the trial process, already time consuming and expensive, must not be allowed to become further unnecessarily protracted. Every objection should not represent an unneeded incursion into the trial court's discretion in managing a fair trial.'

[33]. Also, at par [71] the SCA states the following:

> '[71] It remains the duty of the trial court to examine with care each application. That court should exercise a proper discretion in such cases by balancing the degree of risk involved in allowing the cameras into the court room against the degree of risk that a fair trial might not ensue. In acceding to the request, the judge may issue such directions as may be necessary to:

(a) control the conduct of proceedings before the court;

(b) ensure the decorum of the court and prevent distractions; and

(c) ensure the fair administration of justice in the pending case.

In making that decision, the judge may consider whether there is a reasonable likelihood that such coverage would: (i) interfere with the rights of the parties to a fair trial; or (ii) unduly detract from the solemnity, decorum and dignity of the court. There shall be no coverage of: (a) communications between counsel and client or co-counsel; (b) bench discussions; and (c) in camera hearings. A judge may terminate coverage at any time upon a finding that the rules imposed by the judge have been violated or the substantial rights of individual participants or the rights to a fair trial will be prejudiced by such coverage if it is allowed to continue.

[34]. The SCA furthermore emphasised that 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. It remains for that court, in the exercise of its discretion under s 173 of the Constitution to do so. It shall be for the media to request access from the presiding judge on a case – by – case basis. Importantly, the SCA held that it is undesirable for that Court to lay down any rigid rules as to how such requests should be considered. It shall be for the trial court to exercise a proper discretion having regard to the circumstances of each case.

[35]. The important point made by the SCA is this: giving effect to the principle of open justice and its underlying aims now means more than merely keeping the courtroom doors open. 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. Television presents the complete picture instantaneously. Television cameras do so by creating a comprehensive and instantaneous feedback loop between the trial participants and the television

audience. In contrast, the print media simply does not operate with the same kind of interactive speed or attract so wide and responsive an audience.

[36]. As I indicated above, the appellants agree that these are the principles applicable to the broadcasting of court proceedings. They therefore accept that the trial court should have regard to all the relevant circumstances in identifying whether the right to a fair trial in a particular case is likely to be prejudiced. Courts will not restrict the nature and scope of the broadcast unless the prejudice is demonstrable and there is a real risk that such prejudice will occur. Mere conjecture or speculation that prejudice might occur ought not to be enough.

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[37]. But for the fact that FOGFA, according to the appellants, is not a conventional media house or broadcaster, they (the appellants) would not have had an objection to it (FOGFA) live streaming the court proceedings. In my judgment the distinction drawn by the appellants is a distinction without a difference. It loses sight of the underlying aim of broadcasting court proceedings, that being open justice.

[38]. The point is this: the media is entitled to broadcast the court proceedings to give effect to the principle that any and / or all members of the public should have access to the court proceedings. How would that be different if the broadcasting is done by an entity other than a recognised media house? In my judgment, there simply can be no logic in a court permitting a television journalist to utilise his or her technology and method of communication, being the broadcasting and recording of proceedings, but not permitting any other entity, including a party to the proceedings, from broadcasting the proceedings. A party, like any other person in court, is in any event entitled and able to report on the proceedings by for example posting on Twitter, so why prohibit him from broadcasting by live streaming when the live camera footage will be more

accurate than his tweets or reporting afterwards. As pointed out by Ponnan JA in *Van Breda*, the reality of court reporting today is that even without any form of audio or audio – visual reportage, a litigant can provide live text – based communications through various social media platforms such as Twitter and Facebook from inside the courtroom. In truth therefore there is no reason why a party should not be allowed to live stream.

[39]. Accordingly, the objection by the appellants based on the ground that FOGFA is for all intents and purposes a party to the proceedings should fail.

[40]. Secondly, the appellants are aggrieved by the fact that the court *a quo* did not 'give them a hearing' on the issue of the live streaming. In that regard, I can do no better than refer to what was said by the SCA in the *Van Breda* matter. It is undesirable for any Court to lay down any rigid rules as to how such requests should be considered. It shall be for the trial court to exercise a proper discretion having regard to the circumstances of each case. *In casu*, Ranchod J had regard to correspondence exchanged between the parties. In this correspondence, the issues, by all accounts, were properly and thoroughly ventilated.

[41]. As was said in *Van Breda*, 'spurious objections can also be dealt with'. It is for the court concerned to ensure that in balancing the public's interest in coverage of proceedings against those of objecting participants, the trial process, already time consuming and expensive, must not be allowed to become further unnecessarily protracted. Every objection should not represent an unneeded incursion into the trial court's discretion in managing a fair trial. In other words, whilst the trial court was under an obligation to ensure that the appellants receive a fair trial, this does not necessarily mean that the trial court could not rule on the issue of the broadcasting without entertaining a substantive application. Provided that the court is appraised of all the relevant

facts, there is also no need for it to hear submissions on behalf of the parties before ruling on the access to the trial by FOGFA.

[42]. Whilst it may be desirable that, when there is an objection by an interested party, the request to broadcast should be made in a substantive application for media access, this, in our judgment, is not a strict requirement. As I indicated above, the Court *a quo* was duty bound to ensure that the appellants' right to a fair trial was not infringed by FOGFA broadcasting the proceedings. It cannot be a hard and fast rule that there should be a formal application to be filed within a certain period of time. By the same token, I do not believe that it will always be necessary for the trial court to specifically hear submissions from the applying party and the objecting parties before granting leave to a requestor to broadcast the proceedings.

[43]. *In casu*, with the benefit of having read the complete appeal record, which included the application for leave to appeal before Ranchod J, the notices of appeal of the appellants and their heads of argument filed in this appeal, I am of the view that the High Court, when deciding FOGFA's request for media access, had before it all of the relevant facts which would have enabled it to rule on the matter. Importantly, the sum total of the submissions by the appellants in relation to the very important aspect of the prejudice which they would suffer if FOGFA is allowed to broadcast the court proceedings, is to the effect that the public may be misled because FOGFA is not a registered broadcaster. However one looks at this matter, the appellants fall way short of demonstrating prejudice or the risk of their rights to a fair trial being prejudiced. There is just no prejudice.

[44]. In sum, I am in agreement with the submissions made on behalf of FOGFA. Proceedings in our courts take place in the open and any and every member of the public is entitled to sit in and take notes. In the digital world of

social media and electronic gadgets, the notes can be transmitted to the world by twitter, Facebook and the like instantaneously. However, if one wants to set up cameras and live stream the proceedings, you must be a media or at least regulated statutorily or by an impartial body. There is no logic in this reasoning. The press does not require permission of Court to sit in Court and record the proceedings with their laptops, smartphones or Dictaphones. So the notion of open justice is already been served by the advent of technology and social media platforms which remain largely unregulated.

[45]. During the hearing of the application for leave to appeal Ranchod J made the point that in truth there is no difference between the supporters of the second and third respondents sitting in court listening to the proceedings and them watching the live streaming on the web. When addressed by Counsel for the State Appellants, he puts his view forward as follows:

> 'That is the same as a person sitting in this court, watching these proceedings, but now not doing it in court, because for whatever reason he is unable to get to the court and now he is able to access that on the internet, via live stream broadcast. So, if a person can come into this court and sit here and watch the proceedings and another person watches the exact same proceedings, except that he is not sitting in this court, but sitting in his or her, as I said, office or home or anywhere else, what is it that makes that objectionable, as opposed to persons who sit in court and watch the proceedings?'

[46]. This extract, in my view, sums up the position. The rationale in the *Van Breda* judgment and the underlying basis for allowing access to the courts by the media, that being open justice, find as much application in this matter as it did in the *Van Breda* matter. As I indicated above, in my judgment the distinction drawn by appellants between *Van Breda* and this matter is more imagined than real.

[47]. We are therefore of the view that the court *a quo* did not misdirect itself in granting FOGFA leave to broadcast the proceedings. We are also of the opinion that the procedure followed by Ranchod J in coming to this conclusion cannot be faulted. There was no need for him to decide the issue after hearing a substantive application by FOGFA or after taking further written or oral submissions by the objecting parties. Through the informal process during which all of the relevant facts were brought to his attention, he was able to ensure that he has regard to all relevant considerations, notably the fact that the appellants would not have suffered a demonstrable prejudice by FOGFA being allowed to broadcast the proceedings. He was also correct in his approach that he would have dealt with the terms and conditions to be imposed by him as regards the broadcasting. The court never got to that stage and those issues need to be dealt with by him.

[48]. Ranchod J acted in accordance with the principles enunciated by the SCA in *Van Breda*, with which the provisions of the Practice Manual of this division accord. He did exactly what is envisaged by the Practice Manual, which, in our judgment, finds support and justification in the *ratio decidendi* of *Van Breda*.

[49]. Importantly, Ranchod J exercised a discretion conferred on him by s 173 of our Constitution, which provides that our Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice. S 173 is key for courts to ensure their own independence and impartiality. A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair.

[50]. Accordingly, a Court has the inherent power to make any order in relation to the publishing of the proceedings. However, such order must be consistent with constitutional requirements and should always be in the interest of justice.

In our judgment, this Court's Practice Manual, following the *Practice Note* of the SCA, as reported at 2009 (3) SA 1 (SCA), meet these requirements and constitutional prescripts. It prescribes a cost effective and efficient mechanism for the Court to hear a request to broadcast Court proceedings, whilst at the same time ensuring that the interest of justice is served. Importantly, it has built – in safeguards to ensure that in balancing the public's interest in coverage of proceedings against those of objecting participants, the trial process, already time consuming and expensive, must not be allowed to become further unnecessarily protracted. Every objection should not represent an unneeded incursion into the trial court's discretion in managing a fair trial.

[51]. I reiterate that the procedure followed by the court *a quo* accorded with the procedures prescribed by the Chapter 12 of this division's Practice Manual, which provides as follows:

> '1. Any party who wishes to film or record proceedings must notify the registrar of its intention at least 24 hours beforehand. The registrar will then establish from the presiding judge whether there is any particular objection to the request.
>
> 2. Any party who wishes to object to any filming or recording must raise its objections in writing.
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> 3. The court may on good cause in any particular case withdraw the leave or change the conditions.
>
> 4. Failure to comply with these instructions may lead to contempt of court proceedings.'

[52]. As alluded to above, we had before us a full record of the correspondence exchanged between the parties and Ranchod J. The correspondence enabled the court *a quo* to consider and have regard to all relevant information relating to considerations relative to a fair trial, prejudice to

any of the parties and other considerations referred to in the *Van Breda* judgment. Those relate to whether there is a reasonable likelihood that such coverage would: (i) interfere with the rights of the parties to a fair trial; or (ii) unduly detract from the solemnity, decorum and dignity of the court.

[53]. In the papers before us and during the hearing of the appeal, the appellants did not draw our attention to any additional considerations which would have had a bearing on Ranchod J's ruling. I daresay that even if they tried, they would not have been able to do so as none, in our view, exist. There can be no doubt that Ranchod J considered all the material objections which the appellants raised and could possibly raise. His approach cannot be faulted and his conclusion, in our judgment, was the correct one. FOGFA should be allowed to broadcast *via* live streaming the court proceedings on terms and conditions to be imposed by the trial Judge.

[54]. The appellants failed to demonstrate before Ranchod J and before us that their rights to a fair trial would be prejudiced. No prejudice was raised and none of the appellants' witnesses raised any objection to the live – stream broadcast of the civil trial. It is crystal clear to us that appellants are not able to demonstrate in what manner their fair trial rights in the civil trial would be prejudiced especially where they had no objection to the broadcasting of the proceedings by traditional media.

[55]. In all the circumstances, the appeals stand to be dismissed with costs.

[56]. The matter should be referred back to Ranchod J only for him to impose terms and conditions applicable to the live stream broadcast and for the trial to continue without any further delay.

Order

In the result, the following order is made:-

(1) Under case number: A641/2017, the appeal of the state appellants is dismissed with costs.

(2) The State Appellants in appeal court case number: A641/2017 shall pay the first respondent's cost of the appeal, including the cost of the applications in the High Court and the SCA for leave to appeal, and the cost consequent upon the employment of two Counsel, where applicable.

(3) Under case number: A133/2018, the appeal of the appellant (DFL) is dismissed with costs.

(4) The appellant (DLF) in case number: A133/2018 shall pay the first respondent's cost of the appeal, including the cost of the applications in the High Court and the SCA for leave to appeal, and the cost consequent upon the employment of two Counsel, where applicable.

L R ADAMS
Judge of the High Court
Gauteng Division, Pretoria

I agree

L M MOLOPA – SETHOSA
Judge of the High Court
Gauteng Division, Pretoria

I agree,

PP

J W LOUW

Judge of the High Court

Gauteng Division, Pretoria

HEARD ON:	27th February 2019
JUDGMENT DATE:	11th July 2019
FOR THE APPELLANT IN FIRST APPEAL (DOCTORS FOR LIFE):	Advocate Reg Willis, together with Advocate J A Harwood
INSTRUCTED BY:	The University of Pretoria Law Clinic
FOR THE STATE APPELLANTS IN SECOND APPEAL:	Adv W R Mokhare SC, together with Adv K Van Heerden
INSTRUCTED BY:	The State Attorney, Pretoria
FOR THE FIRST RESPONDENT (FIELDS OF GREEN & THREE OTHERS)	Advocate Don Mahon, together with Adv Christopher Carelse
INTRUCTED BY:	Boqwana Burns Attorneys