IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D7737/2022

In the matter between:

e.sat (PTY) LIMITED	**1ST APPLICANT**
e.tv (PTY) LIMITED	**2ND APPLICANT**
NEWZROOM AFRIKA (PTY) LTD	**3RD APPLICANT**
SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	**4TH APPLICANT**

and

SENIOR PROSECUTOR ALISHA LUCKEN N.O.	**1ST RESPONDENT**
ZANDILE RUTH THELMA GUMEDE & 21 OTHERS	**2ND TO 23rd RESPONDENTS**

In re:

THE STATE

and

ZANDILE RUTH THELMA GUMEDE & 21 OTHERS

ORDER

The application is dismissed with costs.

JUDGMENT

BALTON J:

Introduction

[1] The applicants lodged an urgent application on 17 August 2023, against a ruling issued by this court on 28 July 2023,[1] seeking the following relief:

'1. . . .

2. Reviewing, varying, rescinding and/or setting aside the decision of this Court reflected in the letter of Madam Justice Balton issued on 28 July 2023 . . . alternatively declaring the letter to be *pro non scripto*.

3. Costs are to be paid by any party who opposes the application, such costs to include the costs of two counsel...'[2]

[2] The applicants were represented by Mr *Du Plessis SC* and the first respondent by Mr *Naidu*. The second to twenty-third respondents did not oppose the application.

[3] The first applicant is e.sat (Pty) Limited ('e.sat') which runs a television station called eNews Channel Africa ('eNCA') and broadcasts 24 hours a day on the DStv premium and compact bouquets. E.sat has an eNCA website which hosts articles, news clips, and live streaming of news on public events, including civil and criminal proceedings. It also makes certain articles and news clips available via eNCA's social media accounts on YouTube, Twitter, and Facebook.

[4] The second applicant is e.tv (Pty) Limited which conducts a free-to-air television business and broadcasts 24 hours a day on news and regular current affairs.

[5] The third applicant is Newzroom Afrika (Pty) Ltd which, through its channel, Newzroom Afrika, broadcasts 24 hours a day on DStv on both its premium and compact bouquets. It also operates a website and various social media accounts, including YouTube, Facebook, and Twitter where it streams or re-broadcasts newsworthy items.

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[1] Pages 41-42 of the Indexed Papers.
[2] Page 2 of the Indexed Papers.

[6] The fourth applicant is the South African Broadcasting Corporation SOC Ltd ('SABC'), a state-owned company with limited liability. SABC is the sole public free-to-air terrestrial television broadcaster for SABC 1, 2 and 3. SABC produces the SABC news channel, which is broadcast on DStv on its bouquets and operates numerous free-to-air radio stations which are broadcast throughout South Africa. SABC operates a news website and social media accounts on YouTube, Facebook, and Twitter.

[7] The first respondent is the Senior Public Prosecutor ('Ms Lucken') in the criminal trial and one of three prosecutors prosecuting the accused on behalf of the State.

[8] The second respondent is Ms Zandile Gumede, a politician. The third to twenty-third respondents are Ms Gumede's co-accused in the proceedings (they will be collectively referred to as 'the accused').

[9] Ms Vimbani-Shuma, the Regional Head of the Specialised Commercial Crimes Unit in KwaZulu-Natal ('KZN') in the office of the Director of Public Prosecutions in KZN, deposed to the answering affidavit. She correctly points out that Ms Lucken has been incorrectly cited as the first respondent and that the applicants ought to have cited the Director of Public Prosecutions ('the DPP') as representing the State, and not one of the prosecutors. Where necessary, the first respondent will reflect the DPP and not Ms Lucken. There is however no need to deal with this point any further.

Background: S v Gumede & 21 others, case number CCD 31/2021

[10] It is necessary to set out the background to the criminal proceedings to place the current application in perspective:[3]

(a) The accused were initially charged as follows:

(i) Counts 1–4: racketeering.

(ii) Counts 5–141: fraud, corruption, and conspiracy to corruption.

(iii) Counts 142–154: contravening the Local Government: Municipal Finance

[3] The dates and information have been obtained from the court file and the indictment.

Management Act 56 of 2003.

(iv) Counts 155–2793: money laundering.

(b) At the hearing on 23 August 2022, the State withdrew counts 2432–2585. The accused accordingly stand indicted on 2640 counts.

(c) All the accused are charged on counts 1, 3, 4, 5–112, and 129 and individually charged on various counts and there is no need to set them out.

(d) The indictment indicates that there are 55 witnesses and that the names of certain witnesses have been withheld in terms of s 144(3)*(a)*(ii) of the Criminal Procedure Act 51 of 1977 ('the CPA'). It has repeatedly been placed on record that witnesses' names have been withheld to protect their identity.

(e) On 28 July 2022, this court issued an instruction to the court manager, which reads as follows:

'Kindly note that upon discussion with counsel and the legal representatives in court on 27 July 2022, it was agreed that cameras and television recording will not be allowed in court during the proceedings.

Accordingly, no cameras and television recordings will be allowed during the proceedings.'[4]

(f) On 1 August 2022, the South African National Editors' Forum ('SANEF') brought an urgent application, seeking relief in the form of, inter alia, the review and/or variation of this court's ruling dated 28 July 2022.

(g) The proceedings commenced on 22 August 2022, with the indictment being read and all the accused pleaded not guilty to the charges against them.

[11] By agreement between the parties, the court allowed the criminal proceedings on 22 and 23 August 2022 to be televised and audio to be recorded. The trial was adjourned on 23 August 2022 to 28 February 2023 for trial.

[12] The application launched by SANEF on 1 August 2022 was adjourned to 11 November 2022, on which day the court granted the following order ('the November order'), which order was taken by consent between the parties:

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[4] Page 47 of the Indexed Papers.

'1. The applicants, or any one or more of them, are permitted to set up equipment in accordance with the specifications below to film and broadcast this criminal trial ("the trial") via any means, in whole or in part, on a live or delayed basis.

2. **The following equipment limitations shall apply**:

2.1. Video: only two[5] cameras may be used at a time and the location of the cameras are not to change while the court is in session.

2.2. Audio: the media may install their own audio recording system provided this is unobtrusive and does not interfere with proceedings or the official recording of the proceedings. Individual journalists may bring tape recorders into the court room for the purposes of recording the proceedings but the changing of cassettes in the court room is not permitted while the court is in session.

2.3. Still cameras: only one photographer will be allowed, and the location of the camera is not to change, and no changing of lenses or film is permitted in the court while the court is in session.

2.4. All cameras, video and audio equipment must be in position at least 15 minutes before the start of proceedings and may be moved or removed only when the court is not in session. Cameras, cables and the like are not to interfere with the free movement within the court.

2.5. Lighting: no movie lights, flash attachments or artificial lighting devices are permitted during court proceedings.

2.6. Operating signals: no visible or audible light or signal may be used on any equipment.

3. **The following pooling arrangements shall apply**:

3.1. Only one media representative may conduct each of the audio, video and still photography activities.

3.2. This media representative is to be determined by the media themselves and is to operate an open and impartial distribution scheme, in terms of which the footage, sound, or photographs are to be distributed in a "clean" form, that is, with no visible logos etc to any other media organization requesting same, on a cost sharing basis, and must be archived in such a manner that it remains freely available to other media.

3.3. If no agreement can be reached on these arrangements, no expanded media coverage may take place.

4. **Media representatives shall be subject to the following rules**:

4.1. Conduct must always be consistent with the decorum and dignity of the court.

4.2. No identifying names, marks, logos or symbols should be used on any equipment or clothing worn by media representatives.

4.3. All representatives (including camera crew) must be appropriately dressed.

4.4. Equipment must be positioned and operated to minimize any distraction while the court is In session.

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[5] The consent order which allowed for two cameras was amended by the court to allow one camera only, as per annexure 'X', dated 11 November 2022 in the court file.

5. **There shall be an absolute bar on**:

5.1. Audio recordings or close up photography of bench discussions;

5.2. Audio recordings or close up photography of communications between legal representatives or between clients and their legal representatives;

5.3. Close-up photographs or filming of judges, lawyers, or parties in court;

5.4. Recordings (whether video or audio) being used for commercial or political advertising purposes thereafter;

5.5. Use of sound bites without the prior consent of the presiding judge (this does not apply to extracts from judgments or order).

6. There shall be no order as to costs.'[6]

[13] On 6 March 2023, the State addressed the court in terms of s 150 of the CPA and the first witness commenced testifying. The matter proceeded until 24 March 2023, and was adjourned to 17 July 2023.

[14] On Monday, 24 July 2023, Ms Lucken placed on record that the witness who was scheduled to testify had a shot fired into her home on Saturday, 22 July 2023, and although the witness was unharmed, she was afraid to testify and to have her evidence aired on television or social media.

[15] The matter was rolled over to 25 July 2023 to enable the State to secure other witnesses; however, Ms Lucken again placed on record that witnesses were afraid to testify as a consequence of the shooting incident. On 26 July 2023, Ms Lucken once again advised the court that witnesses were concerned about their safety and that more time was needed to investigate the situation.

[16] On 28 July 2023, counsel for the accused and the State, after having considered various options, held a meeting with the court to find the best way forward, as it seemed that all efforts by the State to secure witnesses were unsuccessful and the accused were desirous of the matter proceeding. The parties unanimously agreed that in order for the trial to proceed, the ruling, as set out in the letter dated 28 July 2023, be issued ('the July

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[6] Pages 51-53 of the Indexed Papers.

ruling'). This was emailed by the court's registrar to Mr Rosengarten, SANEF's attorney, the accuseds' legal representatives, and Ms Lucken. The letter reads as follows:

'Re: S v ZRT GUMEDE & 21 OTHERS – CASE NO. CCD 31/2021

Kindly note that in light of a shooting incident on 22 July 2023, the witness who was due to testify on 24 July 2023 and other witnesses in that chain of evidence are afraid to testify.

It was agreed between the State and the legal representatives for the accused that an (sic) order to avoid the trial being delayed, the State will commence on 31 July 2023 with a new thread of evidence. The witnesses in this thread have agreed to testify, provided:

(a) There are no televised recordings of the proceedings.

(b) The media and television stations shall not identify the names and details of the witnesses.

(c) Only accredited media personnel will be allowed into the court.

(d) No cellular phones and recording devices will be allowed into court. Media personnel are advised to leave their cellular phones in their cars as they will be searched prior to entering the court to ensure compliance. Cellular phones will be removed if this order is not complied with.

(e) The current audio recording in court may continue but must not be shared electronically or aired on any radio or television channel until all the witnesses in that thread of evidence have testified.

(f) Only the following persons will be allowed into court:

(i) The accused and their representatives

(ii) Accredited media personnel

(iii) Court staff

Should you wish to discuss any aspect hereof, you are requested to urgently notify my registrar and a virtual meeting can be arranged this weekend to clarify any issues.'[7]

[17] Ms Lucken advised the court that the State would commence with a new thread of evidence, being the procurement processes by Durban Solid Waste ('DSW') to renew 27 contracts.

[18] The trial proceeded from 1 to 18 August 2023, from 2 October 2023 to 22 November 2023, and commenced again on 26 February 2024.

Urgent Application

[19] The applicants launched this application as an urgent application on 17 August 2023 for hearing on 26 September 2023. This date was not arranged with the court and

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[7] Pages 41-42 of the Indexed Papers.

as a result of correspondence between the parties, the State delivered its answering affidavit on 13 September 2023 and the applicants filed their replying affidavit on 20 September 2023. The application was heard on 31 October 2023.

[20] After the hearing of the matter, the applicants handed in a draft order and the parties requested time to discuss same. For various reasons, the discussions did not reach fruition and the court was not advised thereof until February 2024. This caused a further delay in the handing down of this judgment.

Issues

[21] The applicants contend that the July ruling effectively rescinds and/or varies the November order, which granted the applicants permission to film, record, broadcast, and stream the full proceedings. Effectively, the applicants contend that the November order cannot be varied and that the following issues arise regarding the July ruling:

(a) It infringes on the right to freedom of expression and the open justice principle.

(b) There is no real evidence of a threat to witnesses.

(c) The *audi alteram partem* rule has not been complied with.

Nature of the July ruling

[22] Before dealing with the issues raised by the applicants, it is necessary to deal with the nature of the July ruling. The DPP contends that the applicants have not made out a case to have the July ruling 'reviewed, varied and/or rescinded and/or set aside or treated as *pro non scripto*'.

[23] In *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 3A-D, the court held that:

'The order made by me that the applicant give security for the costs of the respondent on appeal does not bear directly upon the issue to be decided in the appeal. It cannot affect that decision. It is therefore a simple interlocutory order. It is open to reconsideration, variation or rescission on good cause shown. Examples of the exercise by a Court of the power to vary interlocutory orders made by it when the facts on which the orders were based have changed are *Meyer v Meyer* 1948 (1) SA 484 (T) and *Sandell and Others v Jacobs and Another* 1970 (4) SA 630 (SWA). In *Bell v Bell* 1908 TS 887 at 894 INNES CJ stated that

Courts will not lightly vary their own orders even though they may be of a merely interlocutory character. On the other hand, the words of Damhouder *Practijcke in Civile Saken* 146.2 and 4 are apposite. It is not dishonourable to come from error to the light of the truth and he who corrects himself needs not be corrected by another.'

[24] The author, Derek Harms, in *Civil Procedure in the Superior Courts* SI 78 (2023) para B42.2 states:

'Orders in the nature of rulings are subject to variation. These are orders that are preparatory or procedural and do not dispose of an issue in the case.'

And

'Parties may also, by agreement, request the court to add something to the order and such agreement may then be made part of the court order.'

[25] In *Brown and others v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D), the court stated:

'[24] . . . Generally speaking, once an order is pronounced the court is *functus officio*. . . .

[25] . . .

[26] The most notable exception which is relevant for purposes of this case is the statement in various authorities that the rule that a court may not alter or vary its own judgment does not apply to interlocutory orders. The principle dates back to *Bell v Bell* 1908 TS 887. The headnote which in my view correctly reflects the ratio of the case states:

> "A purely interlocutory order, that is, one not having the effect of a final decree, may at any time before final judgment in the suit be varied or set aside by the judge who made it or by any other judge sitting in the same court and exercising the same jurisdiction."

[27] *Bell*'s case was followed by Squires J in *Sayprint Textiles (Pvt) Ltd and Another v Girdlestone* 1984 (2) SA 572 (ZH). See also *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 2.

[28] In the instant case I have concluded that the above court order was indeed of an interlocutory nature. I am satisfied that in the circumstances of this case applicants were entitled to move for a variation of this order.' (My emphasis.)

[26] In *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262J-263G the court stated:

'It is plain that the order referring the matter for the hearing of oral evidence was an interlocutory order and that it was a simple interlocutory order of the kind referred to in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870A. Furthermore this is not a case where

". . . the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed . . ."

as in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 585F-G. The "order" given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided in this Court and in the Provincial Divisions. . . .'

[27] In applying the cases, it is clear that the July ruling is an interlocutory order, as it does not dispose of the issues in the criminal trial. It was merely a means of ensuring that the trial proceeded, which is in the interests of justice. Furthermore, this court does have the power to reconsider, vary or rescind its November order. However, the question is whether there was merit in doing so, which will be answered with reference to the three main issues raised by the applicants.

The right to freedom of expression and the open justice principle

[28] The applicants submit that:

(a) There is no evidence to suggest that the security threat arose from anything done or reported on by the media; or that the media's reporting on the trial has exposed any person to any threat; or that the shooting is related to the proceedings; or that it is not merely a random act of violence entirely unconnected to it.

(b) Journalists cannot type and record the proceedings without their laptops and are arbitrarily required to write notes. The recordings by journalists ensure the accurate recording of what transpires in the proceedings for the purposes of accurately reporting on them.

(c) Imposing a ban on cell phones and other recording devices denies members of the media the use of their 'tools of the trade' which they use for the benefit of the public.

(d) There are other means of securing witnesses' safety and security which are less destructive to the right to open justice. This might include restricted video recordings of the proceedings and could even go as far as voice masking by way of digital manipulation to obscure witnesses' identities. Also, cameras could be

permitted in court in order to televise the proceedings without showing the faces of the witnesses or identifying them through the use of pseudonyms.

[29] The DPP contends that:

(a) There is no justification for the media to be afforded more privileges than any other person or party in circumstances where taking handwritten notes is a fundamental occupational requirement of journalists who apply their trade as court reporters.

(b) The ruling concerning devices was necessary as a security measure to ensure that no audio-visual recordings were made unlawfully. Furthermore, cell phone signals were interfering with the court's recording devices.

(c) Audio recordings are done by eNCA and the only restriction placed on the media is that audio broadcasting must be delayed until the thread of evidence is concluded. There is no bar to the applicants' journalists transcribing their manuscript notes, redacting the names of witnesses and thereafter reporting the evidence on social media and other modern modes of electronic communication.

Evaluation

[30] The court's power to restrict access to the media stems from s 173 of the Constitution which reads as follows

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common-law, taking into account the interests of justice.'

[31] In *Multichoice (Pty) Ltd and others v National Prosecuting Authority and another: In re S v Pistorius; Media 24 Ltd and others v Director of Public Prosecutions, North Gauteng and others* 2014 (1) SACR 589 (GP), the court stated the following regarding s 173:

'[15] It is inevitable therefore that, as any court goes about in exercising its power in terms of s 173, it must engage in a balancing exercise, especially as we have here, where it deals with a number of competing rights, to ensure that the interests of justice are safeguarded.'

[32] The oft-quoted case of *Van Breda v Media 24 Ltd and others* [2017] ZASCA 97; 2017 (2) SACR 491 (SCA) ('*Van Breda*') has been referred to in many recent decisions, including decisions from the Constitutional Court and Supreme Court of Appeal and is apposite in the circumstances of this matter. *Van Breda* emphasised that it remains the duty of the trial court, in the exercise of its discretion under s 173 of the Constitution, to examine with care the approach to be taken with regard to each application. The following paragraph in *Van Breda* is relevant:

'[59] Where there is a debate about whether given court proceedings should be broadcast, a court is vested with the power to limit the nature and scope of the broadcast where necessary to ensure the fairness of the proceedings before it. The power of the court to do so is an inherent one flowing from s 173 of the Constitution...'

[33] A court is placed in an invidious position of ensuring the safety of witnesses, while trying to 'balance the rights of open justice and free speech, with legitimate objections from lay witnesses and the need for a fair trial' (*Van Breda* para 62). The only assurance that the court could provide to the witnesses in the circumstances of this case was to consider their request not to reveal their names or to have the audio recordings of their evidence aired until the specific thread of evidence is completed. The July ruling was as a result of the agreement reached between counsel for the accused and the prosecution team as being the best way forward, failing which, the trial would not have been able to proceed in that session. The accused, through their counsel, had already objected to the various delays in the matter and agreed to the July ruling.

[34] It must be noted that in terms of the July ruling, audio is still being recorded, subject to the proviso that the audio recordings may only be broadcast upon the conclusion of the evidence relating to the procurement processes of the 27 DSW tender contracts. As regards the televised recordings, prior to the July ruling, certain portions of the evidence were televised live, subject to each witness being given the option of having the evidence televised live. Each witness who testified indicated their option, which the court respected.

[35] As to witnesses' concerns about testifying, the court in *Van Breda* stated:

'[61] . . . Moreover, the fact that witness X might be severely intimidated by having to testify on camera, does not justify prohibiting the broadcast of witness Y's testimony, who has not raised the same concern. Nor would it, without more, justify prohibiting the audio broadcasts of witness X's testimony. Such an approach does afford appropriate appreciation for the different types of witnesses, who would testify in the course of criminal proceedings. What warrant can there be, it must be asked, for treating expert witnesses, lay witnesses and professional witnesses (such as police officers) on the same footing? I venture that it may be fanciful to suggest that an audio broadcast can have the same distressing or embarrassing effects as an audiovisual broadcast.

[62] *Multichoice* endorsed a regime whereby —

(a) the evidence of all expert witnesses was to be broadcast using visual and sound broadcasts;

(b) 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;

(c) however, a full audio of the evidence would be broadcast, as well as audiovisuals of the legal practitioners and the judge and assessors, even where objecting witnesses give evidence; and

(d) even then, the presiding judge would from time to time have the power to make rulings in respect of a specific witness as and when required.

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. A blanket ban on all broadcasting or adopting a one-size-fits-all approach, does not.'

[36] This court has not swayed from the default position set out in *Van Breda* at para 70, which is that 'permitting the televising of court proceedings . . . is recognising the appropriate starting point'. The court went on to say in the same paragraph 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. In that regard it is undesirable for this 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.'

[37] The court in *Van Breda*, also stated the following:

'[73] If the judge determines that the witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness's 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.

[74] Whenever an accused person in a criminal trial objects to the presence of cameras in the courtroom, the objection should be carefully considered. If the court determines that the accused's objection to cameras is valid, that may require that cameras be excluded. By framing the inquiry in these terms, courts will be better able to strike a constitutionally appropriate balance between policies favouring public access to legal proceedings and the accused's right to a fair trial. The court would accordingly 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.'

[38] This court was advised that none of the other witnesses in that particular thread of evidence who were supposed to testify on 24 July 2023 were willing to testify after the shooting incident. The prosecution team managed to secure some witnesses, however, only under the conditions which the court imposed. eNCA was allowed to audio record the proceedings and due to the safety concerns of the witnesses in that thread of evidence, it was ordered that no audio recordings may be aired until the thread of evidence is completed. This did not prevent accredited media personnel from reporting on the matter on radio, or television or newspapers, provided that the names of witnesses were not mentioned. This was the only safety assurance that the court could provide to the witnesses in that thread of evidence.

[39] The applicants contend that the July ruling imposes significant and unjustifiable constraints on the exercise of the right to open justice, which is rooted in the right to freedom of expression in s 16 of the Constitution and the right to access to court in s 34 of the Constitution. The applicants further contend that the July ruling is not appropriately balanced and fails to recognise the default position of open justice or to appreciate and apply the onus which had to be met in order to depart from the default position.

[40] In considering whether the July ruling imposes significant and unjustifiable constraints on the exercise of the right to open justice, the judgment of the Constitutional in *Centre for Child Law and others v Media 24 Ltd and others* [2019] ZACC 46; 2020 (1) SACR 469 (CC) is apposite. The court dealt with the concept of open justice principle as follows:

'[92] The starting point is the principle of open justice, which is an incident of the values of openness, accountability and the rule of law, as well as participatory democracy. This court in *Masetlha* adequately captured the essence of open justice as —

> "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".

[93] The principle of open justice is given rich expression by our courts. Symbolically and practically, the physical space of our own courtroom, which encourages public access and has the ever important media box with the media watching over us, allowing hearings to be transmitted to the nation, is also a testament to the importance of open justice.

[94] I endorse the principle of open justice and appreciate its importance in ensuring that justice is transparent and that it promotes the accountability of courts and the administration of justice. Open justice contributes towards the retention of public confidence in the judiciary and it lies at the heart of the oft-quoted principle "that justice should both be done and manifestly seen to be done". It is recognised by international law and in foreign jurisdictions.

[95] The Supreme Court of Appeal notes the importance of the media's "vital watchdog role in respect of the court process". The Supreme Court of Appeal has recently held:

> "It is thus important to emphasise that 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."

[96] There is an interrelated aspect of this principle that requires further interrogation, the distinction between what is in the public interest and what is merely interesting to the public.

[97] The principle of open justice serves the public interest. It protects accused persons and those who participate in legal proceedings. How courts treat those involved is an essential component of the proper administration of justice, ensuring that those who enter the criminal-justice system are treated with due respect and that due process is followed.' (Footnotes omitted.)

[41] The Constitutional Court then proceeded to deal with the following default position:

'[107] A default position of ongoing protection neither disregards the principle of open justice nor prevents the media from accurately reporting on a matter. There are three points to make on this leg:

(a) The story can still be told;

(b) the protection is not necessarily permanent; and

(c) this is not a novel approach to the issue.

[108] As explained above, the public will still be informed and will be in a position to assess whether justice is being properly administered. The stories of child participants in criminal proceedings will still be published; it is only their identity that is protected. Sometimes, disclosing the identity of the individual often serves to satisfy the curiosity of the public. There may be a temptation to feed public titillation with

scandalous and sordid details, but there are also stories of consequence and impact which concern the public, that ought to be reported. The introduction of the default position neither diminishes the right of the public to be informed, nor reduces the ability of the media to report. This is a subtle intrusion into the domain of freedom of expression and open justice.

[109] It is important to emphasise that these protections are the default position — not a blanket ban — which can be departed from through the exercise of agency in the form of consent or if consent is refused, through permission by a competent court. The default position does not create a permanent, lifelong prohibition on identity publication.' (Footnote omitted.)

[42] There are 55 identified witnesses, with many names being withheld in terms of s 144(3)*(a)*(ii) of the CPA. The evidence of each witness in each thread of evidence will need to be dealt with on a witness-by-witness basis.

[43] The applicants incorrectly contend that journalists have stopped attending the proceedings and have undertaken only to return once a rule is in place that is conducive to journalists doing their work and that this has impacted on the public's right to know and to be informed of newsworthy events which are clearly in the public's interest. The journalists have been present throughout the trial, including prior to and after the July ruling.

[44] The applicants will always have access to the audio recordings. The only difference is that, in relation to the thread of evidence pertaining to the DSW tenders and processes, the audio recordings may only be broadcast after the thread of evidence is finalised. The applicants are not permanently prevented from reporting and broadcasting audio recordings.

[45] There is no merit to the applicants' contention that it is not clear if the July ruling is intended to operate for the remainder of the trial or whether it will operate only in respect of the present 'evidence thread'. The ambit and effect of the July ruling is clearly intended to operate only in respect of the present thread of evidence. I pause to mention that during the current session in March 2024, the State indicated that it intends to bring an application in terms of the CPA and that it will commence in the interim with a new thread

of evidence. The court instructed the prosecution team to inform the applicants' legal representatives about this and that the November order will apply in respect of the next thread of evidence to be led.

[46] The applicants contend that journalists have been compelled to hand over all devices (cell phones, laptops, recording devices and iPads) to court security before they enter the courtroom and that they are only permitted to access their devices during tea or lunch breaks or when they specifically request the devices back from security while they are outside the courtroom. The applicants further contend that:

'48. Journalists are finding it extremely difficult to work and to report the news without these devices, which are the tools of our trade. We need to, but cannot, live-tweet, update our editors, and communicate with our teams regarding crossings tweets.

49. The confiscation of our device stops the trial from being reported "live", delays the publication of the news, dilutes the accuracy of our reportage, and deprives us of a means by which to conduct our journalistic endeavours.

50. This has had an appreciable and obvious impact on the reporting of the trial.

50.1. It has become very hard to report on the trial, in particular without any phones inside the courtroom to record or to communicate. Radio reporting in particular should take place "live", but this is impossible without access to our devices. No "live crossings" are possible at all during the trial.'[8]

[47] The journalists complain that they are not allowed to use their cell phones in court. Nothing prevents them from leaving the court and reporting on the proceedings while it is happening. The ruling concerning cell phones applies to everyone in the court. This rule has repeatedly been ignored since the beginning of the trial, resulting in the court threatening to confiscate cell phones. On one occasion, a journalist played back a recording while the court was in session. The court has repeatedly warned people in the court, including journalists and counsel for the accused, to switch off their cell phones. It is exceptionally aggravating when cell phones are used during court proceedings, which not only affects the court's recording system but also disrupts the proceedings.

[48] The journalists complain that they are being deprived of using the tools of their

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[8] Pages 21-22 of the Indexed Papers.

trade. The pen is a tool of any journalist's trade. No one besides eNCA is allowed to audio record the proceedings. This includes the bench, the prosecution team, and defence counsel. Journalists do not have any greater rights than any other person or official in court. The court has to operate with the knowledge that persons who testify are safe and are assured that they will be safe.

[49] The DPP contends that a media bus and satellite dish were stationed outside the courthouse and the court security administrator, upon inspection, found some journalists/media representatives in the bus listening to the proceedings that had just taken place. This was forbidden because the footage was not meant to be transmitted anywhere outside of the courtroom. It had to be digitally stored and could only be released after the entire thread of evidence had been concluded.

[50] The applicants contend that although the members of the media in the media bus were listening to the live proceedings, the proceedings were not being broadcast. The media bus was being used as a listening station by media personnel only and this does not amount to sharing it electronically or airing the audio recording and was not a contravention of the July ruling.

[51] The journalists in question were in breach of the July ruling as the audio recording was not allowed to be aired outside of the courtroom. Further the court would not be able to observe whether the journalists/media personnel are recording the evidence on their devices. This was a strict requirement in terms of the July ruling. This issue was however resolved, and the journalists returned to court.

[52] As to the basis upon which a court may restrict media access, the court in *Van Breda* made it clear that courts will only restrict the nature and scope of access by the media where prejudice is demonstrable. The court stated in paragraph 75:

'It follows that the same approach should apply; namely that 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.'

[53] In this case the open justice principle has not been violated. The public can still be informed through newspapers, social media, and television stations of the evidence in court. The only restrictions imposed are that the identities of the witnesses are not allowed to be disclosed, and that the audio recording of the evidence is not permitted to be aired until the conclusion of the thread of evidence. This, in my view, is reasonable and in the interests of justice. The public will still be informed of the proceedings in court, and the identities of the witnesses will not be made public.

[54] The July ruling does not affect the media's reporting on the matter. Accredited media personnel are the only people, beside the accused and the various legal teams, who are allowed into court. The media has not been excluded. Some limitations have been put in place which apply to everyone in court.

[55] It must be noted that there are 22 accused, nine legal counsel representing the accused and many attorneys present in court. A judge must be in control of the court and often sits with a 360-degree vision because he/she has to hear the evidence, prevent people from talking in court or being disrespectful of proceedings and enforce the necessary court decorum. The record of the trial will reveal the many disruptions in this regard.

[56] One of the major disruptions in the trial has been cell phones constantly ringing or vibrating in court. The cell phones' signals have been interfering with the court's recording system. Journalists and all persons present in court have been requested from day one to switch off their cell phones, hence the barring of cell phones should not come as a surprise. The court afforded the media an opportunity to clarify any concerns about the July ruling.

[57] At the commencement of each sitting, the court repeats the July ruling, particularly regarding the names of the witnesses being disclosed in the media.

[58] I am of the view that the threat to the specific witness and the concerns of the other witnesses in the thread of evidence to which the July ruling applies, cannot be brushed aside as mere speculation. The court has the discretion to decide on the further conduct of the proceedings after all considerations are taken into account. This court is vested with the power in terms of s 173 of the Constitution to make the July ruling, after weighing up the interests of the witnesses and those of the accused in the criminal trial. In the circumstances of this case, the ruling was granted in the interest of the matter proceeding. I am accordingly of the view that the right to freedom of expression and the open justice principle have not been infringed.

The threat to witnesses

[59] The applicants allege that:

(a) The July ruling was granted based on hearsay averments made by Ms Lucken from the bar and is based on speculation.

(b) To the extent that witnesses may be fearful of testifying if the evidence is broadcast due to possible repercussions, the identities of these witnesses would still be known to the accused.

(c) Speculating that such a security risk may exist and that it is connected to the trial is not sufficient to justify the restriction. Had the concerns been properly identified with reference to what the media is doing to exacerbate or cause any danger to the witnesses, more focused solutions could have been proposed. The process followed by the court disallowed that opportunity.

(d) It does not follow that all the witnesses in the thread of evidence should be covered by the July ruling, simply because of the experience of one witness. Each witness in the thread of evidence should have explained why they individually feared giving evidence.

[60] The DPP contends that:

(a) The evidence in the thread includes procurement and administrative processes and relate to the operations of the various units within the eThekwini Municipality

relating to the new DSW tenders for refuse removal.

(b) The witnesses are fearful of testifying and even more fearful of having their testimony aired on television and social media and seek to have their identities protected during the thread of evidence related to the tender processes and the awarding thereof.

(c) The media places its glare upon a witness who has suffered the trauma of a shooting and potentially other witnesses whose lives are in danger. It is highly probable that the witnesses' fear and trauma will be substantially eased if their evidence is not broadcast live. The potential prejudice that witnesses could suffer, is palpable in this case. It is in the interests of justice that the witnesses give evidence in a setting that does not impose impediments on them or that endangers their lives or diminishes the quality of their evidence due to subjective fear.

(d) The witnesses giving evidence for the State are in an invidious position as their lives and reputations are in danger. It could result in delays in the trial if each witness's individual session is to be assessed before they give evidence. The identities of the witnesses in the thread of evidence cannot be disclosed to the media for fear of their identities being revealed to the public before they give evidence. There is no other way of protecting their identities.

(e) The ruling serves as a mechanism to protect witnesses from any further harm that may eventuate, including the psychological trauma of having their evidence broadcast live.

Evaluation

[61] As previously stated, the July ruling applies only to a particular thread of evidence, and not to the entire trial.

[62] The DPP attached emails received by Colonel Mphaki concerning witnesses' fears for their safety and their reluctance to testify[9] and Colonel Mphaki, in a verifying affidavit, confirmed the allegations in the answering affidavit relating to him.[10] Paragraph 16 of the

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[9] Pages 105-109 of the Indexed Papers.
[10] Pages 110-112 of the Indexed Papers.

answering affidavit reads:

'It is denied that the ruling rescinds or varies the earlier Order of this Court. The ruling was granted pursuant to an application by the State for the witnesses involved in the thread to give evidence by being afforded the protection contained in the ruling. These witnesses pertain specifically to the DSW tender process. The witnesses feared for their safety and lives and requested that their evidence be heard "*in camera*". Copies of the emails and a medical certificate evincing psychological trauma are annexed hereto marked **"VBS2"**.'[11]

[63] As the attached emails may be regarded as hearsay, this court had to consider whether it can be accepted as evidence in these proceedings.

[64] Section 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 ('LEAA') provides as follows:

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

. . .

(c) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

Section 3(4) of the LEAA defines 'hearsay evidence' as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. As a general principle, hearsay evidence is inadmissible unless the court is of the view that it is in the interests of justice for it to be admitted, taking into account the factors referred to in s 3(1)*(c)*(i) to (vii).

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[11] Page 90 of the Indexed Papers.

[65] The Constitutional Court in *Kapa v S* [2023] ZACC 1; 2023 (4) BCLR 370 (CC) ('*Kapa*') para 77 held that the 'factors listed in section 3(1)(c) must be viewed holistically and weighed collectively in determining whether it is in the interests of justice to admit the hearsay evidence'.

[66] The DPP submits that the prejudice is real, and not merely conjecture or speculation. It sets this out in paragraph 20 of its answering affidavit, in which it relays the incident where a witness was shot at in his/her own home and submits that '[t]he timing of the shooting lends itself to the probabilities that it was related to this case'.[12]

[67] The DPP contends in the answering affidavit that it is alarming for the media to contend that there is no evidence from the State or the witnesses that the threats are related to the proceedings when the probabilities suggest otherwise. The DPP further contends that in light of the heinous killings and intimidation of whistle-blowers in this country, it is overwhelmingly probable that the shooting is related to an attempt to eliminate or intimidate the witness. A docket has been opened in relation to the shooting incident and the investigation is ongoing. The content of the docket and the names of the witnesses cannot be disclosed because this will then reveal the identity of the protected witness.

[68] This court accepts that in the interest of the witnesses' safety, their identities have correctly been redacted from the emails. There is no need for the court to decide on the veracity of the emails, save to find that they prima facie set out concerns and fears of potential witnesses. This court cannot reject such emails or concerns as mere speculation. People are afraid to testify. This was also evident during the trial proceedings when a witness broke down crying as she was about to enter the court to testify. The matter had to be adjourned and fortunately in that situation, the accused made various admissions which the State accepted thus obviating the need to call witnesses on the issue at hand. The court was not called upon to make any ruling in respect of witnesses at that stage.

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[12] Paras 20 of the answering affidavit, pages 91-92 of the Indexed Papers.

[69] In *Kapa* the court held that:

'[101] The Supreme Court of Appeal in *Ndhlovu* considered whether the admission of hearsay evidence in itself violates the constitutional right to challenge evidence as entrenched in section 35(3)(i) of the Constitution and, consequently, the right to a fair trial. The court held that the criteria in section 3(1)(c) – which must be "interpreted in accordance with the values of the Constitution and the 'norms of the objective value system' it embodies" – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of an accused.47 The Supreme Court of Appeal emphasised:

> "The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed."

[102] It bears emphasis that the fact that the evidence in question evidently strengthens the prosecution's case does not render the evidence prejudicial to an accused. In this regard, the Supreme Court of Appeal in *Ndhlovu* held:

> "The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded it's just evidential weight once admitted must however be discountenanced. *A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'* . . . Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice"49 (emphasis added and footnotes omitted).

[103] There can hardly be any doubt that the applicant is being substantially prejudiced by the admission of the statement as he is deprived of the opportunity to cross-examine the deponent. But that is not the only consideration – the court must also consider the fact that the witness is deceased, and the overriding consideration of the interests of justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence.' (Footnote omitted.)

[70] The prejudice in not admitting the email evidence is the resultant delay of the criminal trial proceeding with no indication as to when the witnesses will be prepared to

testify. The real prejudice is suffered by the many stakeholders in this case, namely the accused who continue to pay their legal representatives, the public coffers that funds these proceedings, and the general public who are interested in the outcome of this case. There are many interests to balance and the July ruling does not prejudice the applicants in this regard.

[71] During argument, reference was made by Mr *Naidu* to the killing of a whistle-blower, Ms Babita Deokaran. This matter was widely aired on television, radio, and print media and it was contended that whistle-blowers or witnesses are afraid to testify in criminal proceedings.

[72] It was also placed on record by one of the witnesses, Mr Hitler, who is from the eThekwini Municipality's Criminal Integrity and Investigation Unit, that a witness involved in the initial investigation was killed and that witnesses are afraid to testify for fear of their safety. The court observed that Mr Hitler himself appeared to be nervous when testifying and the court had to repeatedly assure him that he was safe within the precincts of the courtroom. This court cannot ignore the concerns of the witnesses. The least that a court can do is to offer some sort of assurance that protective measures are in place. A television in a courtroom can be intimidating to a lay witness who is already fearful of testifying.

[73] Courts are repeatedly presented with applications for live broadcasting of court proceedings. Clearly each application must be decided on a case-by-case basis and there can be no hard-and-fast rule in this regard. Each application will present a different set of facts to be considered by the presiding officer. In the current application, the safety of witnesses is an issue. Witnesses are afraid to testify, and these fears may be real or even speculative, however, it is difficult for a judge to allay the fears of a witness. Unfortunately, a court cannot guarantee the safety of any witness, save to request that the State take the necessary precautionary steps.

[74] Judges are not soothsayers, nor do they have the benefit of crystal balls to predict whether the fears are real or well grounded. Of course, caution must be exercised not to fall prey to mere speculation. This court cannot accept the applicants' contention that the circumstances of the witnesses, as presented to this court, are mere speculation.

[75] The media has not been blamed for the shooting and this court cannot dismiss the shooting as a random act of violence, entirely unconnected to the trial. I choose rather to err on the side of caution and accept the email evidence in light of the circumstances referred to. The hearsay evidence is accordingly admitted in terms of s 3(1)(c) of the LEAA. This court cannot guarantee the safety of the witnesses beyond the measures put in place by the July ruling.

***Audi alteram partem* rule**

[76] The applicants contend that the July ruling is directed against the media and was granted contrary to the *audi alteram partem* rule as they were not present when the discussions were held or when an agreement was reached. They were not afforded an opportunity to be heard or to provide any input prior to the ruling being made. The July ruling reflects an agreement reached between the parties, which excluded the media, and varies the terms of the November order, which was granted in favour of the applicants.

[77] The DPP contends that:

(a) It is incorrect for the applicants to allege that the media is a representative of the public and that the public was excluded when the agreement was reached. The State is the representative of the public. Thus, the public was represented in these proceedings and in concluding the agreement, which ultimately led to the July ruling.

(b) The restrictions placed on the media are not severe. The proceedings are still being recorded by audio equipment which is permanently stationed in the courtroom during the trial. The audio recordings will only be allowed to be aired to the public after all the witnesses in the thread of evidence have given their evidence.

(c) The assertion by Mr Thathiah, the deponent of the founding affidavit, that for the duration of the thread of evidence, the identities of the witnesses are not known to him, is untrue. The names of the witnesses are disclosed in court when they testify. The media may record their names, but they are disallowed from revealing their identities to the public. Mr Thathiah's averment evokes a sense of entitlement by the applicants that they have an automatic right to publish this information. The media is not automatically entitled to this information.

(d) On 31 July 2023, journalists who were in court were called into chambers and informed of the July ruling. They did not challenge the ruling and it was placed on record in court that the media representatives agreed to abide by the July ruling. The media representatives were afforded the right to be heard, and they chose to abide.

(e) The media was afforded an opportunity to make representations after the July ruling was made, and, through their compliance, had acquiesced with the order. By agreeing to abide by the July ruling on 31 July 2023, the *audi alteram partem* rule was not infringed.

Evaluation

[78] The applicants contend that while they are not parties to the criminal proceedings, they were the subject of the order in the July ruling. They therefore had the right to be heard before that ruling was made. In my view, the media is not a party to the criminal proceedings, and it was a trial-related application that did not warrant the attendance of the media.

[79] The court in *Premier Foods (Pty) Ltd v Manoim NO and others* [2015] ZASCA 159; 2016 (1) SA 445 (SCA) para 34 held that the failure to cite a party against whom an order is granted, is a nullity:

'These authorities confirm two bases for nullity: lack of jurisdiction to make an order and non-citation of a person against whom an order is granted. This further underscores the approach mentioned above in *National Union of Metalworkers of South Africa v Intervalve* that citation is a necessary prelude to an order granted against an entity.'

This dicta demonstrates the importance of the party, against whom an order is granted, being notified of the relief sought, so that they can exercise their right to be heard. However, in casu, the applicants have not contended that the July ruling is null and void due to lack of citation. It is specifically stated in the applicants' heads of argument that, despite the applicants not having been heard, 'the media have fastidiously observed the impugned ruling'.[13] The court further offered the media or any interested person an opportunity to urgently contact the court's registrar if they wished to discuss any aspect of the ruling.

[80] In the circumstances of this case, the parties in the criminal trial, after much discussion in a meeting with the court, decided on the best way forward. The court cannot be faulted for sending the letter dated 28 July 2023 to the applicants' attorneys.

[81] In *Nortje en 'n ander v Minister van Korrektiewe Dienste en andere* 2001 (3) SA 472 (SCA) the following was held:

'[18] . . . as a point of departure for determining what constitutes a fair opportunity for hearing, reference may be made to the guidelines laid out in the following dictum of Lord Mustill in *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) at 106d - h, quoted with concurrence in *Du Preez and Another v Truth and Reconciliation Commission* (*supra* at 232B - C):

> "(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[19] With reference to point (5) in the cited dictum, this Court has also held that, depending on the circumstances, the *audi* rule can be observed by providing the disadvantaged person with an opportunity for hearing only after the decision has already been taken (see *Visagie v State President and Others* 1989 (3) SA 859 (A) at 865B – C). However, in my opinion, this should be the exception rather than the rule. For reasons presented by, the person who is heard only after the decision has already been made is significantly weaker off than he would be at a hearing before making the decision. As a rule, therefore, hearing after the

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[13] Applicants' heads of argument, para 19.

decree will only suffice if hearing could not be done ahead of time (see e.g. Wade and Forsyth *Administrative Law* 7th ed at 549 - 50).'[14]

[82] In *Visagie v State President and others* 1989 (3) SA 859 (A) at 865A-D the court stated:

'The *audi alteram partem* principle is a malleable one. As has been stressed by H Corder "The content of the *audi alteram partem* rule in South African administrative law" 1980 *THRHR* 156 at 159:

> "... (I)t is well-nigh impossible to lay down any rigid rules as regards the content of *audi alteram partem*, as practical circumstances vary so much from case to case."

[83] In practice our courts have recognised that in certain situations the precepts of natural justice may have to be accommodated by giving an affected party a hearing only after the prejudicial order has already been made. In *Everett v Minister of The Interior* 1981 (2) SA 453 (C) at 458D-H the following was stated:

'The more usual application of the rule in quasi- judicial decisions is for a hearing to take place, or representations to be received prior to the decision being arrived at. But that is not always the position. Where expedition is required, it might be necessary not to give the affected person the opportunity of presenting his case prior to the decision, but only after. He thus obtains the opportunity of persuading the official to change his mind.

In *Cape Town Municipality v Abdulla* 1974 (4) SA 428 (C) at 439E - H Baker F J stated the position: "*S v Shangase* 1962 (1) SA 543 (N) lays down that, in circumstances in which the maxim *audi alteram partem* applies, the rule has been observed where the person affected by an order of an administrative body has been given sufficient time between the issue of the order and the date upon which it is to be complied with to make such representations to the authority concerned as he might wish to make. Where the order issued has immediate effect, eg, to vacate premises at once, to demolish a structure immediately, and so forth, the very issue of the order automatically denies the person affected the right to make representations, and the failure of the authority concerned to give such person an opportunity to make representations before the issue of the notice or order would be fatal to its validity. But where an order is issued which does not take effect until some time in the future, the order will be valid if the interval between its issue and the date upon which it is to come into operation is sufficient to give the person affected adequate time to make representations (see at 550).'

[84] The *audi alteram partem* principle may, as shown above, in certain circumstances be given effect to after the decision has already been made. As stated, the July ruling was

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[14] This is an English translation of the judgment.

made with the consent of the parties in the criminal trial. The effect thereof was to bar televised recordings, cell phones, and recording devices in court. The court advised the applicants' legal representatives of the July ruling and offered the media an opportunity to clarify the ruling. This offer was not taken up by Monday, 31 July 2023, and the court advised the media in chambers and in court of the ruling.

[85] The media, as correctly contended by the DPP, does not represent the public; they report to the public and are reliant on the public for their survival. In balancing the interests of the parties in the trial, the witnesses, and the media, I am of the view that the July ruling does not, in the circumstances of the case, derogate from the *audi alteram partem* rule. The court had to act expeditiously to find a way forward in a stalemate situation and the July ruling, as agreed to by the parties, was appropriate in the circumstances.

Conclusion

[86] In terms of *Van Breda,* this court can exercise its discretion to limit the media's access to some of the evidence that will be led, should the court find that a basis has been laid that real prejudice, which is demonstrable, has been shown to exist. In my view, such real prejudice has been shown to exist, especially when the proceedings in the trial are holistically considered.

[87] This court is empowered to reconsider, vary or rescind its ruling in which it restricts media access. The November order is capable of variation and has been varied by the July ruling as set out in paragraph 17 above. There was merit in doing so. The extent of that variation, however, does not amount to a rescission of the November order. The July ruling relates to a particular thread of evidence only, with the default position in the November order otherwise applying; it does not replace the November order.

[88] This court has fully considered the issues raised by the applicants and finds that there has been no infringement on the right to freedom of expression and the open justice principle; there is a potential threat to witnesses; and the *audi alteram partem* rule has been complied with.

Costs

[89] The submissions by the DPP that media houses are private corporate entities that rely on public audiences to attract revenue for their coffers and survival, and are not representative of the public, are relevant to the consideration of costs. It is correct that the State is the representative of the public and that in the circumstances of this case, the applicants do not represent the public but their own interests. The applicants sought costs of the application in the event of being successful, with such costs to include the costs of senior counsel. Taking into account the facts of this case and everything that has transpired, costs should follow the result and the applicants should pay the costs of this application.

Order

[90] The following order is granted:

1. The application is dismissed with costs.

[redacted]

BALTON J

[redacted]

Date of Hearing:	31 October 2024
Date of Judgment:	3 May 2024
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