

**IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU NATAL LOCAL DIVISION, PIETERMARITZBURG**

Appeal Case Number:

Magistrates Court Case Number: 41/394/2019

In the matter between:

**SOUTH AFRICAN NATIONAL EDITORS
FORUM (SANEF)**

Appellant

and

ROBERT ABBU AND 18 OTHS
(Further respondents on the filing sheet)

First Respondent

(1st Accused in the Court a quo)

In re:

STATE

and

ROBERT ABBU

1st Defendant

SANDILE NGCOBO

2nd Defendant

ILANGA LAMAHLASE PROJECTS (PTY) LTD

3rd Defendant

MZWANDILE DLUDLA

4th Defendant

HLENGA SIBISI

5th Defendant

UZUZINEKELA TRADING 31 CC

6th Defendant

ZITHULELE A MKHIZE	7 th Defendant
OMPHILETHABABG CC	8 th Defendant
BONGANI P DLOMO	9 th Defendant
KHOBOSO J DLOMO	10 th Defendant
ELSHADDAI HOLDING GROUP CC	11 th Defendant
PRABAGARAN PARIAH	12 th Defendant
SINTHAMONE PONNAN	13 th Defendant
GRAIG PONNAN	14 th Defendant
MONDLI MICHAEL MTHEMBU	15 th Defendant
ZANDILE RUTH THELMA GUMEDE	16 th Defendant
SIPHO CYRIL NZUZA	17 th Defendant
BAGCINELE CYNTHIA NZUZA	18 th Defendant
UMVUYO HOLDINGS CC	19 th Defendant

SANEF'S HEADS OF ARGUMENT

INTRODUCTION

- 1 This is an application seeking leave to appeal the judgment and order of Magistrate Soomaroo dated 8 December 2020¹ in which media access to the interlocutory proceedings in the magistrates court was restricted in the criminal case of *S v Abbu and 18 Others* under case number 41/394/19.

¹¹ Record: 76 *SANEF v Abbu & 18 Oths* Case no. 41/394/1029 Regional Division of Kwa-Zulu Natal, held at Durban (unreported judgment dd 8 December 2020). ("Judgment")

- 2 The criminal case at the centre of the appeal has since been referred to the high court for trial proceedings and this is set down for 14 June 2021. As such, the merits of the appeal are academic because the interlocutory criminal proceedings including discovery and the finalisation of the indictment have concluded. The SANEF is compelled to proceed to pursue the appeal based on the importance of obtaining legal certainty on:
 - 2.1 The correct approach to the test set out by the Supreme Court of Appeal in *Van Breda v Media 24*;²
 - 2.2 The application of the *Van Breda* test to interlocutory criminal proceedings in the magistrates court.
- 3 The application is of great importance to SANEF and its members, including editors and senior journalists employed in all the large and reputed media houses in the country.
- 4 At present the magistrates courts apply the Guidelines Regarding Access of Representatives of the Media During Court Proceedings and Applications for Permission to Photograph, Film or Record Such Proceedings published by the Magistrates Commission dated July 2020 (“**the Guidelines**”).³ The Guidelines follow the SCA’s approach in *Van Breda* and it is important to the SANEF that its members understand the

² *Van Breda v Media 24* 2017 (3) ALL SA 622 SCA

³ A copy of the Guidelines is filed together with these heads of argument

ambit of the test in Van Breda, on whom the burden rests in an application for media access and the nature of the demonstrable prejudice that parties opposing an application for media access are to meet.

- 5 The appeal is not one in which media access was denied but rather one in which the magistrate, fully cognisant of the Van Breda test, applied the test in a manner that inverted the inquiry set out by the SCA. A judgment on appeal is therefore necessary to explain the approach magistrates are to adopt when faced with competing considerations and to correct the error that certain types of court proceedings may be insulated or excised from full media access, including television broadcasting, based solely on the nature of the proceedings.
- 6 The appeal is based on 6 grounds of appeal, the first based on a factual error and the remaining five grounds, based on errors of law.⁴ Before setting out the grounds of appeal, I give a brief background of the relevant facts.

FACTUAL BACKGROUND

- 7 The criminal case concerns the former mayor of the Ethekwini Metropolitan Municipality and former member of the Kwa-Zulu Natal Provincial Legislature, Ms Gumede, the former City Manager Mr Nzuza, and 17 others, all of whom are charged in relation to irregularities during a tender for waste removal that was awarded by the Ethekwini

⁴ Notice of Appeal dd 19 February 2021, Record: 97

municipality.⁵ A number of the accused are public officials within the municipality and SANEF applied for media access (“**the access application**”) on the basis that the proceedings in the magistrates court were in the public interest in that it involved corruption and the misuse of public funds.

8 At the time of the access application in the magistrates court on 3 December 2020, the State had not issued an indictment against the accused, a request was made for access to contents of the docket and a forensic report remained outstanding.⁶

9 The access application sought media access to the magistrate court preliminary proceedings in the form of (i) live television broadcasting of all court proceedings; (ii) audio recordings for purposes of radio broadcasts and (iii) still photographs for 15 minutes after resumption of proceedings immediately after the lunch adjournment each day.⁷

10 This is in addition to what is accepted as “standard media access”, contained in paragraph 1.5 of the Guidelines, which comprise still photographs and/or video footage:

10.1 for 15 minutes before the commencement of the proceedings
each day;

⁵ Record: 7 line 18-25

⁶ Record: 8 line 5-6; Judgment Record: 89, line 7-13

⁷ Record: 5 line 24-25, 27 line 24

- 10.2 during any adjournment of proceedings;
- 10.3 any argument presented to the court where no evidence is led, including but not limited to opening and closing argument and sentencing; and
- 10.4 judgment and/or any other judicial sitting.
- 11 On 8 December 2020, the magistrates court issued an order to permit still photographs and video footage recording during court proceedings, in the following circumstances, unless the Court otherwise directs:
- “i. Court activities for fifteen minutes before the commencement of proceedings each day;*
 - ii. During any adjournment of proceedings or at the end of proceedings;*
 - iii. No Live video feed will be allowed.*
 - iv. No photographs or recordings will be made outside the courtroom in the corridors or common space shared by the commercial crimes court with other courts on the same floor out of respect for members of the public who will be frequenting these courts for various reasons. This includes especially the sexual offences court where minors are complainants and are accompanied by their parents or members of their family. Their privacy in this regard needs to be respected and the identity of the children protected.*
 - v. A complete list of persons who will be attending court on the days that the matter is adjourned is required from the following parties namely :*
 - The accused who may be accompanied by a family member\’s or friends,*

- *The prosecution team,*
 - *The investigating team,*
 - *Members of the media.*
 - *The list must be submitted at least 5 days before the court appearances to the Court manager Mr S Mchunu at the following email address: SiMchunu@justice.gov.za*
- vi. *A courtroom will be made available by the court manager for members of the media to occupy.*
- vii. *In keeping with Corvid 19 restrictions there will be a maximum of 6 members of the media allowed into court provided that all safety protocols are complied with including social distancing as well as the capacity of the court to hold persons for indoor gatherings under the said Corvid restrictions.*
- viii. *These orders are to be in place only for purposes of pre-trial proceedings.* [underlining added]

12 Orders i. and ii. reflect the Guidelines and are not controversial. Orders iv, v, vi, vii. and viii. were fully ventilated by the parties legal representatives at the hearing of the access application and are not contested. The order set out in Order iii., and the basis therefor set out in the judgment, are the subject of the appeal.

THE ERROR OF FACT

13 The magistrate erred in considering the application before her as one for media access to trial proceedings.⁸ The judgment states *inter alia* that:

13.1 “Their [SANEF] motivation for the application was centred on the principle of public interest which she said will be best served by comprehensive media coverage of the trial.”⁹

13.2 “The applicant's argument was centred around the trial and the trial court and the court agrees with the defendant's argument that the application was premature in this regard.”¹⁰

13.3 “The applicant’s application was largely based on the right to broadcast the trial until it was pointed out to Ms Anti that in all probability the matter will be heard in the High court. The applicant still wanted this court to consider same despite knowing this and insisted that this court follow the decision in Van Breda.”¹¹

13.4 “In applying what the court stated in this paragraph it is abundantly clear that reference is to the trial court and not a court that is dealing with pre-trial issues”¹²

⁸ Judgment, Record: 89 line 14, 20; 91 line 9-10, 13-20 and 27-30; 92 line 7-8 and 29-31

⁹ Judgment, Record: 78 line 24-27

¹⁰ Judgment, Record: 89 line 20-22

¹¹ Judgment, Record: 90 line 10-13

¹² Judgment, Record: 90 line 4-5

14 The inescapable conclusion from particularly pages 90 and 91 of the judgment is that the magistrate found that *Van Breda* did not deal with preliminary (or pre-trial) proceedings and that the access application was one for trial proceedings. This finding resulted in the court placing repeated emphasis on the difference between proceedings before a trial court and the situation of pre-trial proceedings over which she presided. On page 91, line 17 of the Judgment, she distinguishes pre-trial proceedings as “[T]he situation is far more fluid at this stage as opposed to where one is dealing with an Indictment which sets the tone for the trial” and at line 27:

”It therefore becomes imperative that should the court grant the media access in so far as televising is concerned it must know exactly what are the issues that it will be dealing with in order to apply its mind to granting such access. It cannot do so without having such important information which will only happen as the matter progresses.”

15 It is on this basis that the court concluded on page 93, line 29 to 94, line 3:

“The court does not believe that at this stage of the proceedings and taking into account the nature of the proceedings that the application by the media is appropriate in the format that they have requested. Their application will be relevant when the court deals with substantive applications the format of which will only be known at that stage.

In the event of their being such applications the court will revisit the media's application and consider allowing certain aspects of the proceedings to be recorded... ”

- 16 In light of the factual finding that the access application was aimed at the trial proceedings and that *Van Breda* was authority for the admission of media access in trial proceedings only, it paved the way for the errors of law that followed in the judgment. These errors of law are set out in the second to fifth grounds of the appeal in the SANEF notice of appeal.
- 17 Had the court recognised that the access application made no distinction between the pretrial and trial proceedings and the application submitted to the magistrate concerned all the preliminary aspects of the proceedings that would be dealt with before the magistrates court, and over which the magistrate was the presiding officer – it is far less likely that the error of law in the application of *Van Breda* would have occurred.

THE ERRORS OF LAW

The failure to apply the correct test

- 18 The test to be applied when considering the media's request for access to court proceedings is set out in paragraphs 71-72 of *Van Breda* as:

“[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.

[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 ...” [underlining added]

- 19 In arriving at this conclusion the SCA considered previous dicta in *Midi Television* and emphasised 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".¹³ Three criteria ought to therefore be top of mind in a media access application:

19.1 First, both the nature (type of media) and scope (extent of media coverage) should not be restricted.

19.2 Second, both the nature and scope of media access may be restricted where the prejudice is demonstrable by any of the parties to the litigation.

19.3 Third, the parties should show that there is a real risk that the prejudice will (not may) occur.

20 The magistrate referred to paragraph 70 of *Van Breda* as clearly indicating that the SCA was not concerned with pre-trial issues. It appears that the court relied on the last sentence of paragraph 70 for this finding, "... It shall be for the trial court to exercise a proper discretion having regard to the circumstances of each case".¹⁴ The magistrate therefore conducted herself on the basis that the above approach and the test set out did not apply to the access application before her.

21 This is a technical and overly literal interpretation of the term, trial court.

21.1 First, the guidelines in *Van Breda* have been applied in both criminal and civil law proceedings and it is therefore wholly artificial

¹³ *Van Breda* (above) par 75

¹⁴ Judgment Record: 90 line 4-5

to limit the application of the Van Breda principles to only criminal trial proceedings.

21.2 Second, there is no basis for purposes of media access to distinguish between trial and pre-trial proceedings. If there were a basis for such an approach, and this is disputed, conceivably this would require a more stringent test for the trial proceedings, which consists mainly of witness testimony, and a more lenient test for pre-trial proceeding that deal largely with applications on paper and oral argument concerning bail, the contents of the docket, etc.

21.3 Third, the importance and purpose behind the media access applications are to give effect to the rights of freedom of expression, and access to courts and the concomitant values of open justice and the public interest as may be reasonably limited under section 36 of the Constitution. These rights and values are equally applicable to all open court proceedings irrespective of the nature of the proceedings, whether civil, criminal, pre-trial or interlocutory.

22 The very basis for the court distinguishing between court proceedings is therefore flawed. The *Van Breda* test is therefore applicable to the access application before the court. The court committed an appealable error in failing to apply the correct test.

23 In the alternative to the above, it may be argued that rather than failing to apply the correct test in *Van Breda*, the magistrates court merely applied what she erroneously believed to be the test. On this more generous

interpretation of the judgment, the court interpreted paragraph 70 of *Van Breda* as limiting the application of the judgment to trial proceedings only.¹⁵

- 24 For the reasons outlined in paragraph 21 above, this approach of the court is wrong in law, the magistrates court was bound by the dicta of *Van Breda* and the restrictive interpretation adopted by the magistrates court renders the judgment subject to a successful appeal.

Erroneous finding that the media have different rights of access at pre-trial hearings

- 25 Having made the finding on the applicability of the *Van Breda* test, the court considered the following factors when faced with the access application:

25.1 whether the media would be prejudiced if full media access (i.e. live video streaming) was not granted;

25.2 the nature of pre-trial proceedings as distinguishable because they are mostly done on paper and do not involve witness testimony through viva voca evidence;¹⁶

25.3 the nature of pre-trial proceedings mean that different applications may be brought by different accused persons at different times and

¹⁵ Judgment Record: 90 line 4-5

¹⁶ Judgment Record: 91 line 13-15

that the content of the applications cannot be predicted at the time of determining the access application;¹⁷ and

25.4 a presiding officer is not able to assess questions of prejudice to the accused in the pre-trial procedures, given that the various possible substantive applications that may be brought are unknown at the time the access application is determined.¹⁸

26 This new test alters the legal position in two fundamental ways: first, it changed the inquiry to place the evidentiary burden on the media to explain whether it would be prejudiced if full access was not granted. In contrast, the *Van Breda* approach is to accept the constitutional rights of access and the importance of open justice and to place the evidentiary burden on the parties to the litigation to explain why full media access ought to be restricted in the particular circumstances of the case.

27 Second, the test introduces the requirement that the media on each substantive pre-trial application, make an application for access even if the application is made on 24 hours' notice.¹⁹ This inverts the *Van Breda* test as the access to pre-trial court proceedings are restricted in all circumstances unless permitted for a specific substantive application.

¹⁷ Judgment Record: 91 line 17-20

¹⁸ Judgment Record: 91 line 27-21; 92 line 29-33 and 93 line 8-10

¹⁹ Judgment, Record: 93 line 13-16

28 For such permission to be granted the media is under the obligation to file a number of subsequent individual access applications on 24 hours' notice. Such a procedure:

28.1 is convoluted, bureaucratic and unnecessarily cumbersome for all parties to the litigation because not only does SANEF (or each individual media house) have to apply conceivably for every day the case is set down for hearing in court, but each time all parties to the proceedings need to file answering papers to the access application. This entirely defeats the purpose of bringing the substantive access application at the commencement of the proceedings in the magistrates court.

28.2 is internally inconsistent and in conflict with the court's order, which provides at paragraph v, that five days before the court proceedings the media must submit to the court manager the names of all persons who will be attending court on the day. Given that an application for full media access (television and a live feed) may be submitted only 24 hours before the hearing, it would be impossible for the media to know five days in advance the six media representatives who will be in court the following week.

29 The practical aspect of this ground of appeal is moot as the matter has now been referred to the high court for trial proceedings to commence. The legal error in which the prejudice test as set out in Van Breda was inverted is not moot and, it is submitted is not academic.

- 30 The magistrates courts are constantly seized with criminal cases of significant public interest in which the trial has not started and the trial may be referred to the high court for hearing.
- 31 The correct approach that magistrates courts are to adopt, however, is of critical importance to the SANEF and the media more broadly so that they know the procedural expectations and the legal burden placed on them when they wish to request full media access to magistrates court proceedings.
- 32 The error of law falls to be corrected because both the magistrates courts and the media require certainty on the legal approach.

Erroneously failing to apply the Magistrates Court Guidelines to televised proceedings

- 33 The magistrates court took into account the considerations set out in paragraphs 25.1 to 25.4 above. The court ought to have applied the considerations in paragraphs 1.1 to 1.3 read with paragraph 2 of the Guidelines. Paragraphs 1.1 to 1.3 set out the importance of the competing constitutional rights and values as reflected in *Van Breda*²⁰ and paragraph 2 explains the access application process and the importance of the court observing *audi alterem partem* on receipt of an application for media access:

²⁰ *Van Breda* (above) par 46-48

“1.1 When considering an application by the media to cover, broadcast and publish court proceedings the court should be mindful of the tension between the right to freedom of expression and the open justice principle, on the one hand and the right to a fair trial, as well other competing constitutional rights such as the privacy of the witnesses and other interested or affected parties, on the other hand.

1.2. These competing constitutional rights should as far as possible be harmonized with one another. The court must exercise a proper discretion in each case by balancing the degree of risk involved in allowing the coverage, broadcasting and publication of the court proceedings into the court room against the degree of risk that a fair trial might not ensue.

1.3. Courts ought not to restrict the nature and scope of the coverage, broadcasting and publication 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.”

34 The starting point ought to have been to allow the photographing, televising and radio broadcast of proceedings in the least restrictive manner taking into account the importance of the competing constitutional rights and values identified and any prejudice identified by the parties opposing the application (if such prejudice was demonstrable and held a real risk of occurring).

35 In the present case the submissions opposing the full access live television broadcast included:

35.1 in relation to accused 2, they were opposed only to live broadcast because of Covid precautions and the limited number of people permitted in the courtroom.²¹ They also argued that the SANEF had not made out a case that the public was not sufficiently informed based on the measures already in place (i.e. print media coverage).²²

35.2 In relation to accused 3, 4 and 5 that the SANEF had “jumped the gun”, that “in the greater scheme of things ... nothing much is really going to happen in this court” and that, taking into account the space constraints in the court and existing media coverage, it would “not serve much purpose to allow TV cameras”.²³

35.3 In relation to accused 11,12,13 and 14, the congestion in the courtroom and resultant overheating and concerns about the impact that the possible overheating will have on the health of accused 13, who had previously fainted.²⁴

36 The representative for accused 8, 9 and 10 made common cause with the above submissions and added nothing further.²⁵

²¹ Record: 33 line 3-5

²² Record: 34 line 19-20

²³ Record: 38 line 11-16, 41 line 21-24

²⁴ Record: 41 line 1-5

²⁵ Record: 40 line 10-14

- 37 The State and the representatives of the accused 1, 15, 16, 17 and 18 did not oppose the access application and abided by the decision of the court.²⁶
- 38 The three reasons for opposition are articulated differently by different legal representatives. None of the reasons however allege prejudice to any of the fair trial or other rights of the accused or that any prejudice that may be felt is likely to occur. This ought to have been the end of the enquiry.
- 39 The transcript indicates that the modalities of accommodating the media was the true concern given the size of the courtroom, the procedures to be followed during Covid and the needs of the court manager.²⁷
- 40 This concern is not novel and logistics and ensuring non-disruptive, reasonable accommodation are an accepted part of any court order granting media access and live television broadcasting for court proceedings. This on its own, is not a basis for failing to apply the legal test in *Van Breda*. Indeed given the concern regarding Covid the court did order that another room in the building is made available to accommodate journalists.

²⁶ Record: 32 line 22, 42 line 5-7, 44 line 10

²⁷ Record: 46 line 1-10 and 21-25

41 Aside from failing to permit live television broadcasts, other aspects of the application were rejected without explanation being provided in the judgment. The court failed to permit:

41.1 the taking of photographs 15 minutes after proceedings resume from the lunch break each day;

41.2 the live audio broadcast of the proceedings.²⁸

42 The court did so even though none of the accused specifically opposed these aspects of the application. It is submitted that the court's failure to properly apply the principles set out in *Van Breda* and the Guidelines tainted its reasoning and led to the rejection of aspects of the application without proper consideration.

APPROPRIATE RELIEF

43 The court ought not to have created an artificial distinction between trial and pre-trial proceedings. This error of law resulted in all further errors in the judgment.

44 *Van Breda* itself distinguishes only between matters of argument in court and those matters where oral evidence / witness testimony is led. In this second category, the SCA contemplated that there may be a need to

²⁸ Guideline par 1.5.2, 1.5.3

differentiate between different types of witnesses (lay, expert or professional witnesses).²⁹ This distinction is prudent and serves a purpose, that in the ordinary course there can be little basis for restricting media access in circumstances where no evidence is led, counsel is advancing argument or the court is giving directions or handing down judgments or sentencing.³⁰ Where oral evidence is led the rights of witnesses is a fundamental concern and any objections and prejudice alleged by the individuals must be given due regard by the court.

45 On this appreciation, even if the magistrate was correct in creating a distinction between trial and pre-trial proceedings, in applying the SCA dicta, the magistrate would have concluded that it was unlikely that witness testimony would arise in pre-trial proceedings, the proceedings comprise largely argument by counsel on behalf of the accused and rulings handed down by the court and, as such, the access application is granted as prayed for. To the extent that oral evidence is led, it would be the right of the witness to request on 24 hours' notice that live broadcasting is restricted based on the witnesses grounds of opposition and prejudice alleged.

46 The SANEF therefore seeks the setting aside of the judgment and order of the magistrates court.

²⁹ *Van Breda* (above) par 72

³⁰ Guidelines par 1.5

Sha'ista Kazee

Advocates Chambers, Sandton

26 May 2021

APPELLANT'S LIST OF AUTHORITIES

1. *Van Breda v Media 24* 2017 (3) ALL SA 622 SCA
2. Guidelines Regarding Access of Representatives of the Media During Court Proceedings and Applications for Permission to Photograph, Film or Record Such Proceedings published by the Magistrates Commission (July 2020)