

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 58668/2011

DATE: 2017-07-31

2017-08-01

In the matter between

JC STOBBS & 2 OTHERS

Plaintiff

And

NDPP & 3 OTHERS

Defendant

BEFORE THE HONOURABLE MR JUSTICE RANCHOD

ON BEHALF OF THE PLAINTIFF:

ADV A CARELSE (SC)
ADV MAHON

ON BEHALF OF THE DEFENDANT:

ADV BOKABA (SC)
ADV GCABASHE (SC)
ADV MAKHARI (SC)
ADV WILLS
ADV TERERAI
ADV QOFA

INTERPRETER:

[NOT REQUIRED]

VOLUME 1 [PG 1 – 94]



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PROCEEDINGS ON 31 JULY 2017

[11:06]

MR MAHON: May it please you M'Lord, I appear for the plaintiffs in the matter, together with Mr Carelse.

COURT: Thank you.

5 MR MAKHARI: M'Lord, I appear together with Ms Gcabashe, Mr Bokaba and Ms van Heerden for the 1st to 7th defendants.

COURT: Thank you Mr Bokaba.

MR ?: M'Lord, I appear for the state respondents, only in respect of the media access.

10 COURT: Yes thank you.

MR WILLIS: May it please Your Lordship, I appear for the 8th defendant, together with my learned friend Ms Atwood and Ms Qofa M'Lord.

COURT: Thank you Mr Willis. Firstly the court would just like to apologise for not having being start on time this morning and the reason
15 for that is that there are several issues that needed to be dealt with regarding the conduct of the trial. I therefore had asked, or requested counsel to see me in chambers and the issues have being discussed and we unfortunately have to stand the matter down to tomorrow morning at
20 10:00 for the further conduct of the trial, or matter, while the various parties will deal with the issues have being discussed in chambers. So the matter will have to stand down until 10:00 tomorrow morning.

MR BOKABA: As the court pleases.

COURT ADJOURNS TO 01 AUGUST 2017 AT 10:00

COURT ADJOURNS

PROCEEDINGS ON 01 AUGUST 2017

[10:24]

COURT: Who will commence?

MR MAHON: May it please the court M'Lord.

COURT: Yes.

5 MR MAHON: I appear as before, together with my learned friend
Mr Carelse for the plaintiffs M'Lord. M'Lord by whether an
understanding given to my learned friends, I have requested my
attorney to ensure for present purposes that the Ant Farm cameras
are switched off and that there is no recording being done by
10 Ant Farm on behalf either Fields of Green for All, or Daily Maverick
until such time as Your Lordship deals with the application for leave to
appeal.

COURT: Yes.

MR MAHON: As for the South African Broadcasting Corporation and
15 ANN7, Your Lordship may note that their cameras are on. That was
discussed informally between counsel M'Lord, subject to what
Your Lordship may have to say. But as pointed out in chambers
M'Lord, we have been told by the SABC and ANN7 that they have
requested permission to broadcast the proceedings. There seems to
20 some uncertainty as to whether or not they have been granted that
permission. But having discussed it amongst my colleagues and I, it
is agreed between us that there is no objection to the broadcasting of
the proceedings being done by the SABC or ANN7 and so we leave
that in Your Lordship's hands.

25 COURT: Yes. I should just mention that some individuals

representing these media organisations, including the Citizen Newspaper, approached my registrar a few minutes ago to request the permission, as it were, I think they were informed that such request did not reach me. I basically have indicated to them via my registrar
5 that I will allow that. Subject to the usual conditions, which I set out in the Practice Manual of this division. Such as, no close-up photograph etcetera. I am told that they understand that.

MR MAHON: Yes. I assume that directive M'Lord applies to the SABC and to ANN7 as well M'Lord.

10 COURT: Yes, yes I am referring to – it was the SABC and ANN7 and the Citizen who approached my registrar, individuals representing them.

MR MAHON: As Your Lordship pleases.

COURT: So I have indicated to them that I will permit the recording
15 and visual and audio, subject to the conditions that normally is set out in the Practice Manual of this division.

MR MAHON: As the court pleases. M'Lord then what serves before Your Lordship presently is two applications for leave to appeal brought by the defendants respectively, that is the 1st to 7th on the one hand
20 and the 8th defendants against Your Lordship's previous ruling, granting broadcasting rights to Fields of Green for All. Those applications are to be dealt with, followed thereafter M'Lord by two applications to strike out, which similarly have been brought by the defendants M'Lord.

25 COURT: Yes.

MR MAHON: I then turn it over to my learned friends.

COURT: Thank you. Mr Makhari, I think you will begin.

MR MAKHARI ADDRESSES COURT: Indeed M'Lord. M'Lord for the record, I appear for the State/Respondents in the trial matter. But I
5 am appearing for them as applicants in the application for leave to appeal against the decision that Your Lordship made in chambers on 28 July 2017.

Just to recap on what Mr Mahon has said, in respect of the traditional media houses. We have made it clear that we do not have
10 any objection in any of the traditional media houses, such as the SABC and others to broadcast this trial and these proceedings in whatever format in compliance with the Practice Directive of this court. We are mentioning this because, in this matter that I am arguing as a leave to appeal, we are taking an objection to a company or entity
15 called Fields of Green for All and PC to be permitted by the court to broadcast the trial in these proceedings in any format. And of course ...[intervenes].

COURT: Sorry Mr Makhari, the applicant that is Fields of Green, let us refer to them by the acronym FOGFA as they have being referred
20 to, for convenience. They seem to have restricted their application to live stream broadcast.

MR MAKHARI: Yes I understand that FOGFA in their request to Your Lordship, they ultimately restricted the request to the live streaming broadcast.

25 COURT: Yes.

MR MAKHARI: So that is why I said that we object to them broadcasting in any format. So basically we are saying that they should not be permitted to broadcast at all. Whether they utilise the services of an intermediary such as Ant Farm, because we understand
5 Ant Farm in this instance to be simply their intermediary, but they are principle requestor for this.

So if I burden Your Lordship with the bundle that we have prepared which consist of the correspondence that Your Lordship has considered.

10 COURT: Yes.

MR MAKHARI: We paginated it for Your Lordship's convenience. What we also included in the bundle, the two legislations which is the Electronic Communications and as well as the Broadcasting Act. So this will be the bundle which consist of the documents that
15 Your Lordship would have considered being the correspondence that was exchanged.

COURT: I must say that I indicated in my reasons that I did not necessarily have access to all the correspondence.

MR MAKHARI: Indeed, indeed I saw that and I appreciate that.

20 COURT: I would not know whether it is all of them. Whatever was made available to me, is what I had regard to.

MR MAKHARI: Indeed and we appreciate that, I saw that as well.

MR MAHON: M'Lord, I am sorry to interrupt my learned friend I mean no disrespect, but we have not been given a copy of the bundle
25 handed to Your Lordship, so we would be at somewhat of a

disadvantage.

MR MAKHARI: Okay I am sorry about that. My junior will make one available. In fact, when we made copies we made copies which will be able to be given to all the parties. It was an omission.

5 So M'Lord we would like to thank Your Lordship for having exceeded to our request to provide the reasons for the decision made on Friday 28 July and for doing so on such a short notice. We really appreciate that.

10 So we have attached the reasons to the application for leave to appeal, which will point to Your Lordship in order to attempt to persuade Your Lordship that the decision to grant FOGFA permission to live stream the broadcast ought not to have been granted.

15 If I start with the notice of application for leave to appeal, just to put the grounds of appeal in the proper perspective. I would like to refer Your Lordship to page 3 of the notice of application for leave to appeal, where we deal with the ground of appeal relating to legal standing, or *locus standi* of FOGFA.

20 What we say here is that the honourable court ought not to have granted FOGFA the permission to live stream broadcast the trial proceedings scheduled to commence on 31 July 2017. We mention six reasons why that ought not to have happened at 1.1 we say, FOGFA is not a media, nor is it a media house, but it is a non-profit organisation of which the two founding members are the 1st and 2nd plaintiffs, who are also standing as accused persons in the
25 Krugersdorp Magistrate's Court, where they are charged with

possession and dealing in cannabis. A fact which is common cause between the parties.

COURT: Actually [mechanical breakdown].

MR MAKHARI: It is of [mechanical breakdown].

5 COURT: No because this is [indistinct] *locus standi*, the right of a party to be [indistinct] in court [indistinct]. We are referring to *locus standi* in the context of a request for access to live stream broadcast.

MR MAKHARI: Indeed.

COURT: Now I have mentioned that in my reasons as well. That I
10 take into consideration the Practice Directive. I took into consideration the Supreme Court of Appeal's Practice Note of 2009, or as reported in 2009 Law Reports. Nowhere do I find anything relating to the concept of a *locus standi*. In fact in von Breda case that is the most recent one that I also referred to, the Supreme Court
15 of Appeal seems to refer, or not seems, but in fact refers to Section 16 of the Constitution. As I understand the reasoning, he took into account Section 16 and he took into account Section – is it 173?

MR MAKHARI: 173.

COURT: 173. 173 is about the court having its inherent right to
20 conduct his proceedings in a particular manner. Section 16 deals with the issue about – and perhaps we can go there, freedom of expression.

MR MAKHARI: Freedom of expression.

COURT: And it says, everyone has the right to freedom of
25 expression, which includes freedom of the press and other media, and

other media. Freedom to receive or impart information or ideas, freedom of artistic creativity etcetera.

So that brings me to the question that where did the applicants rely on the issue or concept of *locus standi*, on what basis do they
5 challenge that? Where does one find that ground for leave to appeal?

MR MAKHARI: Yes. Thank you M'Lord. Well it is a tricky matter, but an important one which goes to the heart of the decision. What we understand Section 16 which our courts have relied on, when considering to permit the media to broadcast.

10 We understand it and the von Breda case we do not see anything different to that, is that Section 16 has various components giving freedom of expression to a variety of persons and bodies. In paragraph A, it gives that right of freedom of expression to the press and other media.

15 So, we are dealing here with an application which – or let me call it, a request which was made by FOGFA to live stream broadcast of the proceedings. The broadcast is a domain, as we understand, regulated by law in South Africa. So that will be regulating the press and other media. The press of course, we understand it as a print
20 media and other media will be any other media that provides and we know that we can have the media through audio visual and other forms.

COURT: Yes.

MR MAKHARI: For present purposes, as we understand, we shall not
25 bother much about print media, but we shall focus on the audio visual,

because that is what the FOGFA is requesting to do.

So, their application falls to be considered under Section 16 (1) (a).

COURT: Can it not be under (b)?

5 MR MAKHARI: No.

COURT: Not?

MR MAKHARI: It cannot be under (b) because they seek to broadcast. As I have said M'Lord a broadcast ...[intervenues].

COURT: Proceed or impart information.

10 MR MAKHARI: Yes.

COURT: Perhaps I should just clarify something before you proceed, sorry to interrupt you Mr Makhari.

MR MAKHARI: Yes it is fine M'Lord.

COURT: That is that we are talking her about live stream broadcast.

15 MR MAKHARI: Yes.

COURT: Meaning broadcast as the proceedings continue in this court.

MR MAKHARI: Yes.

COURT: Unlike when – because you sought to distinguish, or the
20 applicant seek to distinguish between media houses versus this organisation that is not a media house. I take that point.

MR MAKHARI: Like social media and so on.

COURT: Yes I have no issue with that. But it goes a bit further and that is that where they undertake to broadcast as is, without any
25 editing, without any – initially they wanted to – from the

correspondence that I read, that this organisation wanted to even at the end of each day perhaps highlight aspects of the trial. But later correspondence indicates that they said that they will not do that. In other words, the effect of what they want, as I understand it, and you
5 can correct me if I am wrong if you feel you have a different view on that.

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

MR MAKHARI: Yes. M'Lord we first have to ask the first question and answer it. The first question is, what is it that they seek to do in this court. The answer is, they seek to broadcast and that is where the answer to the question lies. If they seek to broadcast, then
20 broadcast is a legal concept in the Republic because it is legislated. So if you go to the Broadcasting Act, it would tell you exactly what is the meaning of broadcast. If somebody is talking to a couple of friends in the street, he is imparting knowledge to them, but he is not broadcasting.

25 So broadcast has a particular meaning in law and once we attach

that meaning, then we have to first establish whether this entity that seeks to broadcast, in whatever format, has the requisite legal standing in law. So that is really then the issue that we shall not miss, because once we miss that issue, you are going to ask the wrong
5 question and the wrong question that you are going to ask is going to be, what is wrong with somebody just transmitting what is happening in court as it is. But that is not the question.

COURT: Mr Makhari, I have not understood the defendants' opposition to this live stream broadcast to be that it is a contravention
10 of some Broadcasting Act. I do not see that in any – or to my recollection in any of the correspondence.

MR MAKHARI: Yes I understand.

COURT: And nor is it in the grounds for appeal.

MR MAKHARI: Well it is there, it is there.

15 COURT: It is there?

MR MAKHARI: Because basically then the *locus standi* goes to that. You want to broadcast and whereas broadcasting is regulated. So that is the issue.

But I do not blame Your Lordship for not having seen that
20 objection from the state respondents. Because as Your Lordship has pointed out in the reasons, Your Lordship was not favoured with all the correspondence that ensued between the parties.

COURT: So you wish to refer me to any particular correspondence?

MR MAKHARI: In particular the letter dated 24 July 2017. It is a very
25 long letter, 16 pages, it sets out in detail all the objectionable grounds.

COURT: Where is it from?

MR MAKHARI: I will refer Your Lordship to it. I am told it is at page 100. So, I do not know if Your Lordship was favoured with this letter. It is a 16 paged letter. It goes up to page – well not necessarily
5 16 page, but it goes up to page 110 or page 109 and I refer Your Lordship to page 101 of that letter paragraph 9.1 where the state attorney specifically says that there is no compliance with the Broadcasting Act 4 of 1999, which provides as follows: "Section 4 (1) of the Broadcasting Act" and when we turn to page 1-02
10 paragraph 10, we refer to Section 5 of the Class Act and we say that is provides what we state in paragraph 10.1 and 10.2. But of importance in 10.1 we make reference to Broadcasting Service License and in 10.2 we refer to a Class Broadcasting Service License.

So we pertinently raise these issues and as we can see in
15 paragraph 11, we further then motivate with regard to the provisions of the Broadcasting Act and we refer again to Section 5 (1). So will you turn the page to page 103, then we deal with those aspects really. This was in my view such an important letter. It sets out the legal regime, which makes it impossible for this court to grant FOGFA the
20 right to broadcast in whatever format. So we then end ...[intervenes].

COURT: Does the fact that FOGFA is using, or intends to use Ant Farm, make a difference?

MR MAKHARI: It does not make any difference because all what they are telling us is that, we will use a service provider, anybody uses a
25 service provider to deliver a particular service. Like for instance, I

have noticed and it is one of the grounds that we have highlighted in the reasons for judgment by Your Lordship that this Ant Farm was even permitted to live stream in the Oscar Pistorius matter. That is not correct.

5 COURT: No not live stream.

MR MAKHARI: Well I mean to – well they were one of the service providers, but they were not granted permission by the court and we took the liberty. I do not know if Your Lordship has that judgment – I want to get that judgment of this court by Judge President Mlambo.

10 All I want to read there is that:

"The parties who had granted the right to broadcast in that matter, the Oscar Pistorius criminal trial, were MultiChoice and as well as the Prime Media, Media 24."

15 It was up to them, once granted that permission to engage the services of whoever is a professional in that particular area and that person is not answerable. It is like a classic case of a service provider appointed, wanted a tender and then he appoints a subcontractor. The subcontractor has no relationship with the principal in the form of
20 the employer in that instance.

So it is the same thing here. So the mere fact that they say that they have got somebody who can do the job in the form of Ant Farm, does not change the legal position, because it is not Ant Farm which is coming to make a request. It is them who are making the request.

25 So in fact it compounds their problem, because it shows that they

admit that on their own they are not a media. Whilst Your Lordship is still on that bundle, if Your Lordship can go to page 94 of that bundle with regard to their response in that regard. Paragraph 4 is their letter which starts at page 93. Your Lordship will see that it is their letter of
5 20 July 2017. Then in paragraph 4 of that letter they say the following:

"We agree and our client accepts that it does not and as an unregistered media house, enjoy the same rights in law as an
10 organisation which is regulated by the codes of the Broadcasting Complaints Commission and the Press Council. The regulatory codes of this body is essential to ensure accurate reporting. Indeed, this is true when
15 considering that the information, such organisations report on, is usually edited and the reportage and/or coverage delayed. A live stream broadcast is lastly different means of distributing information in an unadulterated
20 and unedited manner."

Of course then the last part of this paragraph, they are missing the point completely. They are missing the point because then they believe that live stream broadcasting is not broadcasting and that is clearly wrong. Because broadcasting can be done in different formats
25 and that is why in the Oscar Pistorius matter, the Judge President in

the order that he granted, the end of his judgment was the live streaming and as well as the other forms. Because then it was up to the media houses that he has granted permission to decide that today we will do a live streaming, tomorrow we will not and whatever. So
5 they can decide to do that. But at the end of the day, it remains one thing, and one thing only with this broadcasting.

What we say is that, as we understand all the cases that have being decided by either the High Court, the Supreme Court of Appeal, or the Constitutional Court in respect of access by a person to
10 broadcast. It has always been the media and that media has being regulated media.

So the reason why we say that this is a case which goes to uncharted grounds, it is because it is a case where an organisation which is not a media unregulated in respect of which two of its
15 members, are the very same plaintiffs in this court and are in fact standing accused for the offences related to the very same trial which is to take place here are asked the court to say that, give me the right to live stream these proceedings to the public unregulated. That cannot be correct.

20 Let us take an example M'Lord, because the law must be interpreted in the context of the movement of society. Let us take an example of somebody who is standing trial for heinous crimes. Like for instance, prison and that person then says, because he has got deep pockets, I want to live stream my trial, because I want the public
25 there to see what is happening here. That cannot be correct, because

it is to open the floodgates for anybody. I understand that when these courts in South Africa conservative as it has been before our Constitution, because before our constitutional dispensation, the South African courts have being conservative in respect of allowing
5 cameras in court. That of course is confirmed, even by the judgment of the Constitutional Court in the SABC matter, which related to the trial of Schabir Sheik. Even after the advent of the Constitution, our courts were still very slow. Because they understood the abuse that may befall that type of permitting. But at that stage the focus has
10 always being on the media.

COURT: Yes. Perhaps, I think we will have to careful that we are not traversing something that is not part of this leave to appeal.

MR MAKHARI: Yes indeed.

COURT: Perhaps we should just confine ourselves.

15 MR MAKHARI: I will confine myself to the issue of the *locus standi*. So the point that we are making is that – and we understand Your Lordship, when Your Lordship says in the reasons for judgment, referring to the Practice directive that Your Lordship also took into account, the Practice Directive of this court and of the SCA. Of
20 course that is also a court in the Breda judgment by the SCA when it says that, when we consider media access, the default position applies.

So basically the default position is that, you allow it because of open justice and transparency. But that is the media. That is the
25 problem. That is why we said that we do not have no problem with the

SABC and others in broadcasting, because the default position applies and that is the Practice Directive.

COURT: How different would it be if, if example, a registered media house decides to live stream the broadcast and here it is an
5 unregistered or unlicensed one, as you say, does exactly the same thing. What has happened, is the difference there?

MR MAKHARI: The difference is that the last thing is done a by regulated body, which is accountable and which operates in term of the prescribed rules and guidelines.

10 COURT: Now if the – sorry.

MR MAKHARI: So then I want to answer the question, I mean I know then what Your Lordship then says. So once that media house is permitted to live stream, it can engage the services of whoever. At the end of the day if anything goes wrong, it is it which is held
15 accountable, not that which it engaged. So let us take an example that the SABC or the ANN7 then decides that we will utilise the services of Ant Farm or whoever, nobody is going to regulate them in that space. Because we know at the end of the day if anything goes wrong, then they are the ones who will be held accountable.

20 COURT: Now can that issue, as I understand your argument, FOGFA is not licensed, it is not regulated and therefore if it breaches the normal broadcasting rules, then there is no recourse as it were, is that what you are saying?

MR MAKHARI: There is no recourse, because the only recourse you
25 have to come to court but the very reason ...[intervenes].

COURT: Yes that is what I was going to say that I was going to –
when I indicated that I would grant them permission to live stream
broadcast, it will be subject to conditions and those conditions would
have being part of a court order. So they would be bound by that
5 court order and if they breach it and followed that there might be
contempt of court proceedings. So there is some consequences for
breaching the court's directives.

MR MAKHARI: Yes the courts are the final *obiter* of all disputes in our
land. But the courts are not supposed to be over-flooded unnecessary
10 with disputes. That is why legislation, or certain legislations provide
mechanisms by which those persons answerable to that professional
body, are held accountable.

So I can imagine a situation where the court – and that is an
example that is like giving of a doctor that because this person is vest
15 with the knowledge and the practicalities of treating people for certain
ailment and even conduct certain operations, because he had seen
the doctor, or he has seen doctors doing it. Then because he says
that he does not have money to take his sibling or whoever to the
hospital to perform an operation, he will do it. And he approaches the
20 court and says, that I can demonstrate that I know how to do it and the
court will say that it is fine, I will allow you to do it and then I will
regulate you so that if you do it wrongly then I will hold you in
contempt. So it cannot happen that way.

The first question must always be asked, if this profession
25 regulated? If it is regulated, what does it say. If it says that you must

have a license, then if you do not have a license it is the end of the matter. So that is the point what we are trying to point out here that they do not have a license.

COURT: That is why you say they do not have *locus standi*?

5 MR MAKHARI: So they do not have *locus standi*.

COURT: So can we then proceed to the next point?

MR MAKHARI: Yes. Of course that is why then when we turn to page 4.

COURT: Just before you go there. You also say in paragraph 2 or
10 the applicant say that the effect of this is that the 1st and 2nd plaintiffs disguised as FOGFA are permitted to live stream broadcast their own trial. Now this is not a trial here.

MR MAKHARI: No that is why, I mean Your Lordship must proceed, there is a comma and proceed.

15 COURT: Yes.

MR MAKHARI: Albeit it not being the criminal trial.

COURT: Yes.

MR MAKHARI: But, an offshoot of the criminal trial pending in the Krugersdorp Magistrate's Court. I do not know if Your Lordship saw
20 the court order which gave rise to these proceedings?

COURT: Yes. Now I am saying, one of the primary arguments of the applicants is, that there is that pending trial.

MR MAKHARI: Yes.

COURT: Now live stream broadcast of proceedings in this court
25 dealing with particular issues, which do have a bearing on the trial

there about the legalised use of cannabis or dagga.

MR MAKHARI: Yes, yes.

COURT: But I still do not see how a live stream broadcast can influence in any way the pending trial when it takes place, or if it takes
5 place in the future. Because that is how I understand the argument to be. Are you saying it is prejudicial?

MR MAKHARI: Yes it is prejudicial.

COURT: In which way?

MR MAKHARI: If we take it in the context of the legal concept of bias,
10 like saying, the presiding officer is bias. What is understood is that it works in two ways, actual or perceived, but he must be reasonable. So what we are submitting must be seen in the context is that, you will not be able to demonstrate actual prejudice, but you will be able to demonstrate reasonably in the context of, this is the very same person
15 who is then the accused and who seek to live stream the proceedings. So then you look at the interest of the public. What must the public say and how must the public receive that which they are told that this is live stream.

Because when I am sitting at home watching television, all what I
20 am told is that this is done live. But that it is showing every single aspect that I am supposed to see. I do not know. So the mere fact that the proceedings are being broadcast live, or it is a live stream, does not mean that that is done objectively. Because there is no way in which you can show the entire court. So we are saying again, once
25 the public is assured that this live stream is done by a registered

broadcaster, then they know that a registered broadcaster is obliged to be impartial and objective, so therefore I assume that what I am seeing is an objective view of what is happening there. But when I see the very same thing from a person who is the very same litigant
5 there, then I have my own doubts. So it is approached in the context of the public rather than what the litigant himself tells us that, I am simply transmitting exactly what happens in court.

So to us we say, it makes a fundamental difference as to who does it.

10 COURT: Yes.

MR MAKHARI: So I will simply say that – but I mean, but Your Lordship is aware of the court order which gave rise to these proceedings.

COURT: Yes.

15 MR MAKHARI: So there is no need for me to read that court order.

COURT: Yes.

MR MAKHARI: Then when we turn to page 4, we have dealt with those issues already.

COURT: Yes.

20 MR MAKHARI: So now the second – so basically what we are saying M'Lord is that, when Your Lordship is approached by a media house than to broadcast, the law is settled on that. Media houses have *locus standi* then to us to be present in court during proceedings and even to broadcast that. That one is settled M'Lord, nobody will argue about
25 it.

COURT: Yes.

MR MAKHARI: But then Your Lordship is approached by an individual, like myself say I want to broadcast. Your Lordship will not do it, then Your Lordship would then want to know on what basis and
5 what is your interest. Is your interest commercial or is it personal and so on? All those questions must be asked.

COURT: Yes.

MR MAKHARI: If those questions are not asked, then we say that the decision that is arrived at, then is actually flawed. So that is the point
10 that we are making.

COURT: Yes.

MR MAKHARI: Now then in the second ground that we are making then is on formal application. M'Lord we accept, we have looked at the practice, we accept that these types of applications for the media
15 to broadcast should not unnecessarily detain our courts. So that is why then there is a default position that people can just come and ask and if no objection, then they must be allowed to broadcast like we have seen with the SABC this morning.

But then we say that, because of the [indistinct] of the applicant
20 or the requestor in this case, a formal application was warranted, because there we would have being an opportunity to place under oath matters which the court will take into account, and for the court to have a full ventilation of all the facts.

COURT: Yes.

25 MR MAKHARI: Now we know that Your Lordship did not have all the

facts when making a decision, because some of the correspondence was not given to Your Lordship to make a decision. So if the plaintiffs FOGFA had filed a formal application, then Your Lordship would be able to deal with the matter in a proper context. We say that a formal
5 application in this instance was in fact important.

COURT: Yes.

MR MAKHARI: So that is why then in paragraph 12 at page 5, we say that Your Lordship erred in considering the matter purely on the correspondence between the parties, because then correspondence
10 may not give a full picture, especially when our letter of 24 July 2017 deals extensively with the issues that we have referred to.

Of course, I have already dealt with the issue of the Oscar Pistorius criminal trial that Ant Farm has never applied to court then for such permission. But it was of course used by one of the
15 service providers then to provide a service there.

The right to a fair trial. Now here M'Lord we are looking at what Your Lordship say in the reasons on the right to a fair trial. Of course we accept that Your Lordship approached the matter on a basis that Section 16 is there to allow freedom of expression by anybody.

20 COURT: Within constraints that are mentioned there.

MR MAKHARI: Yes of course. Yes but I am saying that the approach of Your Lordship was that it is freedom of expression and anybody then can ask for it. We do not say that that is not so. But we are saying that, then Your Lordship would then have to look at the right to
25 a fair trial in the context of who is asking for that permission. So in

this context, it means that Your Lordship – one is faced with the request from FOGFA and the very same FOGFA that Your Lordship has accepted in the reasons that two of its members are actually the very same plaintiffs here. Then Your Lordship will ask the following
5 question – I mean of course Your Lordship is sitting in chambers, it is only facing only correspondence. Your Lordship will sit back and say that, but these people why do they want to do it? What do you stand to benefit financially first of all. So these are the questions that would be asked. Do they have a personal interest? Because you know that
10 in broadcasting proceedings in court is for only justice and for fairness and to allow the public to have access. It is not a personal interest. Once there is a personal interest, then that must be discounted.

COURT: Yes.

MR MAKHARI: So those are the questions that must be asked. So
15 we say that the rights to a fair trial must be looked at in the context of the party asking, or requesting permission.

COURT: Yes.

MR MAKHARI: We say that in this case, the right to a fair trial will actually simply be compromised, by virtue of who is actually
20 broadcasting.

COURT: So you say the right trial. Fair trial in these proceedings, or a fair trial of the first two plaintiffs in this matter who is in a pending trial?

MR MAKHARI: At both, at both.

25 COURT: To both?

MR MAKHARI: Because even if this one is a trial. So we talk of the fair trial, then the fair trial in the context of civil proceedings is looked at in the context of the fair trial of the issues before court.

COURT: Yes.

5 MR MAKHARI: So in the context of a criminal matter is a fair trial to the accused person.

COURT: Yes.

MR MAKHARI: So we are saying that it impacts on both. So page 7, we deal with the current jurisprudence which we say that it is
10 distinguishable. The only reason why we saying that it is distinguishable M'Lord is that in all – and I took time to look at almost all the jurisprudence dealing with broadcast of court proceedings. It has always been media houses.

So I have not seen an individual who is a third party, because
15 ...[intervenes].

COURT: Sorry. Mr Makhari you are saying that even in the von Breda matter it was a registered media house?

MR MAKHARI: It was a registered media.

COURT: Thank you.

20 MR MAKHARI: Because this judgment of the Supreme Court of Appeal is really – Justice Poland really did a thorough work, because it is a 50 page judgment where he dealt with various scenarios and even of foreign – I mean than foreign jurisdictions. But as I was reading it, in all instances he has always being saying "the media, the
25 media, the media", because he understood the media which is

regulated. So here we are faced with a [indistinct] of a third party who is not a media, but an interested party direct to the proceedings who seek permission of the court to broadcast. We say that that must be looked at in the context of a fair trial and all relevant factors.

5 COURT: Those are the reasons that you say these grounds that you have now referred to in the leave to appeal and which you have argued about, are reasons why I should grant leave?

MR MAKHARI: Indeed M'Lord.

COURT: And you request that it be either to the full court here or to
10 the Supreme Court of Appeal?

MR MAKHARI: If Your Lordship is inclined to grant it to the full court, it is fine, but I would prefer the SCA, because of the novelty of the issue. So that is why then Your Lordship will see under conclusion, paragraph 21 we say, we have satisfied the requirements of 17 (1) (a)
15 and (b). Because (a) deals with the prospect of success and (b) deals with the compelling reasons why the leave should be granted.

COURT: Yes.

MR MAKHARI: Yes indeed. So we rely on both. So we will ask Your Lordship to grant leave. Of course, once Your Lordship grants
20 leave, it is up to the plaintiffs to decide whether they want to continue with the trial whilst leave in this issue is being dealt with, because it does not impact on these proceedings. But it is up to them to decide. As the court pleases M'Lord.

COURT: Yes. Thank you Mr Makhari.

25 MR MAKHARI: Thank you M'Lord.

COURT: Yes Mr Willis.

MR WILLIS: May it please Your Lordship. M'Lord in the interest of time, Your Lordship may want to indicate to me whether Your Lordship is inclined to grant leave to appeal. That would negate me having to
5 make submissions to Your Lordship.

COURT: Well I would want to at least hear the respondents.

MR WILLIS: As Your Lordship pleases.

COURT: But perhaps, I think much of what the 8th defendants' grounds are, overlaps or are virtually similar to those of the 1st to
10 7th defendants.

MR WILLIS: It does appear so M'Lord in the factual basis.

COURT: Yes now what you could do to avoid wasting time as you say, just highlight what you now wish to add over and above what Mr Makhari said. I think that would be the quickest way of hearing.

15 MR WILLIS: Yes. M'Lord, I will try and be as brief as I can.

COURT: Yes.

MR WILLIS ADDRESSES COURT: M'Lord the first submission I wish to make to Your Lordship is the test that Your Lordship is bound by and that is whether another court might come to a different decision to
20 the one that Your Lordship came to.

COURT: Yes.

MR WILLIS: Because M'Lord would have noted from the 8th defendants' application for leave to appeal that we expressly make the point that Your Lordship's decision, order, ruling whatever it might
25 otherwise be described as, is final in effect.

M'Lord might I ask Your Lordship whether Your Lordship needs to hear from me in that regard, or whether Your Lordship accepts that is final in effect?

MR MAHON: M'Lord if it assists Your Lordship, we do not take the
5 point that it is not final in effect M'Lord.

COURT: Yes thank you. I was about to answer you as soon as I finished my note, one moment.

MR WILLIS: Yes M'Lord, I will wait for Your Lordship.

COURT: Yes. To answer your answer, obviously this is a novel thing,
10 in the sense that as I indicated in chambers. An application for access, and I use the word "application", for any media or either party to have access to recording etcetera of proceedings in a court, is not done by way of a – as would normally be the case in court proceedings by way of affidavits on motion and so on. It is done, as
15 the Practice Directives says, by way of a letter to the registrar of the court who would then contact the presiding Judge who then decides. So in that sense that is why I prefaced my reasons not with the heading that it is a Judgment in the – because lest it be understood that it was in a formal application on affidavit on motion roll.

20 So I gave my reasons on the basis that there was a requestor for permission. Of course, that raises the question that when you apply for leave to appeal on what basis do it and which rule do you apply. So I understand why you want clarity and I am glad that Mr Mahon conceded that – or will not take the point. Did I understand you
25 correctly?

MR MAHON: Yes M'Lord. Your Lordship unfortunately might have to grapple with the issue. But we do not take the point, we have no submissions on the issue M'Lord.

COURT: Yes. It is somewhat novel, as I said in the sense that it is
5 not your normal application that has been decided with a formal judgment being delivered and then it be ruled relating to an appeal apply.

But be that as is may. It is also something that I take note that in the Western Cape High Court in the von Breda matter, as I
10 understand the way the matter ended up in the Supreme Court of Appeal, was that that was a request there. The Director of Public Prosecutions and the accused objected. We need not go into all the detail for present purposes. When the Judge, the presiding Judge gave his decision that he will allow access, there was – like here, an
15 objection. The parties approached the Constitutional Court, it said it will not hear the matter at that stage. They then went to the Supreme Court of Appeal and as I understand it, the Supreme Court of Appeal took it upon itself in terms of its inherent powers I take it, to entertain that matter there and then give its decision.

20 So bearing that in mind, I will take this what I have said as a final ruling that you may then decide to appeal it if you so wish to.

MR WILLIS: Very well, I will proceed on the basis Your Lordship accepts.

COURT: Yes.

25 MR WILLIS: And of course this is a record, this appeal should

Your Lordship grant leave to appeal, or if Your Lordship does not and the parties – the defendants decide to petition the Supreme Court of Appeal. M'Lord given part of our arguments, which Your Lordship I think concedes on it, you did have everything in front of you. You did
5 not believe you needed to have it, but you did not have it all. That the transcript of this argument will become as important as whatever order is granted M'Lord.

So I will not address – I will not take you to the relevant authorities as to how what tests the finality of the decision.

10 COURT: No it is not necessary.

MR WILLIS: Mr Mahon said he is not taking the point. But of course, we cannot exclude the Supreme of Appeal's jurisdiction to grapple with the issue in due course, should we get there.

M'Lord I would like to, with the greatest of respect to just remind
15 Your Lordship that in von Breda, Media 24 actually brought an urgent application to court. If I understood it correctly myself, they brought it before the presiding Judge. It was an application on papers, the notice of motion and there was also ...[intervenes].

COURT: You mean there was a formal application?

20 MR WILLIS: There was a formal application in the Media 24 matter.

COURT: I see.

MR WILLIS: That I am very certain of and Your Lordship can regard to.

COURT: So you are saying then that, it is different from what I have
25 just highlighted what might be the ...[intervenes]?

MR WILLIS: Yes M'Lord. By extension what Mr Makhari submitted to Your Lordship, on issues of *locus standi*, we must start at the beginning. The Rule of Law prescribes that we go back to *locus standi*. Your Lordship may well be aware of the recent Eskom and
5 Westing House Arriva judgment that made its way from the Gauteng High Court all the way to the Constitutional Court via the Supreme Court of Appeal.

COURT: Yes.

MR WILLIS: There the Constitutional Court dismissed, or refused the
10 appeal ultimately, simply on a technical issue of *locus standi*. Of course we know that the [indistinct] decision in that judgment M'Lord, I forget who the Justice was who wrote the [indistinct] decision. The point that was made is that, the Constitutional Court is a court where technicalities ought not in the ordinary course of matters to trump the
15 interest of justice.

But M'Lord the Rule of Law prescribes demands that the principles be applied. We start with *locus standi*. I refer Your Lordship with respect to that judgment M'Lord, I do not have the citation here, it just occurs to me as I make the submission to
20 Your Lordship that Your Lordship must start there. Mr Makhari commenced his argument at that point. I am not going to labour it, Your Lordship has heard his submissions.

M'Lord will note that we take a nuance approach in our application in respect of Your Lordship's order. I am going to call it an
25 order. M'Lord we take issue with the fact that the parties were not

heard. I think Mr Makhari did not labour that issue, so I am going to labour that issue with Your Lordship.

M'Lord, I think M'Lord as often happens in the very difficult task of a Judge who has many, many responsibilities, even immediately
5 prior to a matter, or more especially prior to a matter, Your Lordship sought to do what Your Lordship believe was best. But M'Lord those are always the [indistinct] of pressurised situations.

COURT: Well that is not the only reason. The primary reason is that the Practice Directive provides a procedure by which you make an
10 application.

MR WILLIS: I was going to add that in M'Lord.

COURT: Yes.

MR WILLIS: And Your Lordship is correct and I fully appreciate, in fact Your Lordship is one of the very few Judges who had to deal with
15 this. More recently the South Gauteng High Court dealt with it on an application M'Lord where an outside party did bring – one of the – the application, also a party much like this, brought the application before court. But there was no objection M'Lord, I appeared in that matter and we had no objection in that instance.

20 COURT: Yes.

MR WILLIS: But M'Lord in other words, no issues were raised and a very stringent order was granted. But M'Lord inasmuch as Your Lordship relies and it has continually brought Mr Makhari back to the directive issue. I support Mr Makhari's submissions to
25 Your Lordship as to the wording and what the import of that directive

is. We go back to the Supreme of Appeal's directive, at no point in time in either the von Breda or the Supreme Court of Appeal judgment, or even before His Lordship Mr Justice Mlambo, did anybody anticipate in those judgments and conceive of applicants
5 such as FOGFA, those are all media houses.

COURT: Yes I see that.

MR WILLIS: So M'Lord that is the golden thread that runs through the directive from the SCA into the directive in Your Lordship's division.

COURT: Yes. The emphasis here seems to be that the applicant
10 here is not registered, it has not got a license and so on.

MR WILLIS: Well it is more fundamental than that. Let us assume that Your Lordship had before you a media house, a media house. I will not pick a name M'Lord so it is not to cast any aspersion in any way. But any media house that Your Lordship is aware of that are in
15 these various judgments M'Lord brought that application, now they were a plaintiff in the matter, or a defendant and nobody else thought there was much interest in the matter. So there was nobody else fighting for space, as we have cameras fighting for space here M'Lord and they brought that application and they have a personal interest.
20 Well M'Lord, the considerations will be vastly different and they would be a media house and they would comply with. But as Mr Makhari pointed out to you the issue of personal interest would have to be considered.

M'Lord ultimately our submission ...[intervenes].

25 COURT: But you take into account in this example that you have just

given.

MR WILLIS: Yes M'Lord.

COURT: That in this instance it is to do with live stream broadcast as is, with no editing, no changes.

5 MR WILLIS: Yes M'Lord and that I am very much going to get there.

COURT: You accept that. Yes.

MR WILLIS: I know that Your Lordship did also want to be addressed on that by Mr Makhari and I will address Your Lordship too. M'Lord the first issue we have the issue of *locus standi*. We say that they
10 have no *locus standi* till they demonstrated and proved – and there is nothing stopping a court from recognising *locus standi* through substantial interest. That is the very point that was made in the minority decision in the Constitutional Court. What interest is there, because sometimes interest can trump technicality.

15 COURT: Mr Willis, I am going to now say this, because this is an application for leave to appeal.

MR WILLIS: Yes M'Lord.

COURT: The issue of *locus standi*, I debated it with Mr Makhari as well and ultimately it is not for me here to make a decision on that
20 issue. You are using, or saying that that is an additional ground among others, for granting leave to appeal.

MR WILLIS: Yes.

COURT: And I need to consider that.

MR WILLIS: That is right. But I am developing another point with
25 respect, if I could just ask for a moment M'Lord.

COURT: Yes.

MR WILLIS: Ultimately M'Lord, I am saying that *locus standi* can – as an acceptable point can be trumped by interest.

COURT: Yes.

5 MR WILLIS: By substantial interest and we know the test applicable to that. So too M'Lord where a party has a personal interest and we know the test applicable to that. So too M'Lord where a party has a personal interest as we criticise FOGFA and the 1st and 2nd plaintiff for having in the matter, so too can their *locus standi* ultimately not be –
10 or their order be denied by virtue of the argument that would come through *locus standi*.

So M'Lord we say they have a personal interest. We say that FOGFA M'Lord – and it is in our letters M'Lord, I just do not know to what extent Your Lordship considered it.

15 COURT: No I am aware of that.

MR WILLIS: You know what we say in our notice M'Lord.

COURT: Yes.

MR WILLIS: But M'Lord FOGFA is nothing more than a front. There is no more than a Chinese war between FOGFA and the 1st and the
20 2nd plaintiffs. Your Lordship need only go and have regard to the website, or listen to the radio presentations under the last ...[intervenes].

COURT: Well I would not be interested in doing that for the purposes of this trial.

25 MR WILLIS: Very well M'Lord. But M'Lord there is no difference

between the 1st and 2nd plaintiff. In fact, you barely see ...[intervenes].

COURT: Mr Willis can I just say that we need to move on.

MR WILLIS: M'Lord with respect if Your Lordship – another court is likely to come to a different decision M'Lord having regard to these
5 facts M'Lord.

COURT: Because I will tell you why, I am going to put a question to you Mr Willis.

MR WILLIS: Yes M'Lord.

COURT: The emphasis here is that the two plaintiffs are the founding
10 members of FOGFA, they have an interest there, they are the ones who have applied for permission. Now let us say the same permission that has being sought for live stream broadcast was done by another media house, what would be the difference?

MR WILLIS: This will be the difference M'Lord, the other media house
15 does not have a personal interest in the matter.

COURT: Live stream broadcast as is.

MR WILLIS: M'Lord that is not what FOGFA presents Your Lordship and that is our entire point M'Lord. Your Lordship was rushed in to make a ruling.

20 COURT: No, no, no Mr Willis they have given undertakings in some of the letters that I have.

MR WILLIS: No M'Lord they have lied to us M'Lord. M'Lord at the beginning of this matter – at the beginning of the ...[intervenes].

COURT: I have not understood it in that sense.

25 MR WILLIS: Well M'Lord, Your Lordship has not given – I said to

Your Lordship in chambers yesterday, the defendants that we prefer to put in affidavit as oppose to making submissions from the bar.

COURT: Mr Willis my fundamental – the criteria that I adopt here is access to this court and its proceedings to members of the public who
5 may have such interest.

MR WILLIS: Yes M'Lord, but what Your Lordship has not had full information on M'Lord, is the real motives and intentions behind FOGFA application to Your Lordship and how that effects M'Lord Doctors for Life in my case and the State in their case M'Lord.

10 Did Your Lordship read the state – have regard to the state's letter where we cited – what we would call "hate speech" by FOGFA none other than the 1st and 2nd plaintiffs themselves in their reference.

COURT: Alright. So Mr Willis you are saying it is a ground for appeal?

15 MR WILLIS: Absolutely M'Lord it is a ground that would influence another court M'Lord.

COURT: Yes.

MR WILLIS: As to whether or not an order should have ever being granted. M'Lord before you came into court, I was informed by both
20 the SABC and ANN7, that they have being offered this live stream for a price.

Now M'Lord I have those persons names here and M'Lord ...[intervenes].

MR MAHON: M'Lord my learned friend is now – it is not on the record
25 anywhere M'Lord, with respect.

COURT: Yes Mr Willis.

MR WILLIS: I will leave that then M'Lord.

COURT: Yes.

MR WILLIS: The point of the matter is, it is relevant M'Lord because
5 there is a letter that was placed before Your Lordship ...[intervenes].

COURT: Now you are giving evidence from the bar here.

MR WILLIS: No, no M'Lord I am not giving evidence from the bar, I
am giving Your Lordship an example as to what has happened, things
that took place prior to – in particular that Your Lordship had no
10 regard to, it was never informed of, is that Your Lordship never
prescribed a formal application, a substantive application which, as
Your Lordship recalls, we have informed Your Lordship and debated
this at chambers. M'Lord that FOGFA themselves, their attorney
themselves foreshadow that, not only in June, but as recently as
15 Thursday last week M'Lord. I can take Your Lordship to the
correspondence. At the beginning of June M'Lord, or at the beginning
of the process, FOGFA's attorneys gave us an undertaking on their
instructions that FOGFA did not stand to make any money out of the
live stream broadcast.

20 M'Lord the other fact we allude to in the correspondence is the
convention.

COURT: How do I take into consideration these issues? Now I have
given my ruling on the basis of facts that were before me at the time.
You are now giving me new facts which I must consider for the
25 purposes of an application for leave to appeal, which is not

permissible.

MR WILLIS: M'Lord, Your Lordship is missing my point. It is in the scope and purview of our criticism that Your Lordship did not give us an opportunity to place those facts before you.

5 COURT: I have taken that point.

MR WILLIS: Thank you M'Lord.

COURT: But you need not bring in other evidence that is subsequent to the granting of the ruling.

MR WILLIS: As Your Lordship said [mechanical breakdown]
10 [indistinct] the applicant wants to – well it is FOGFA [indistinct]. Well Your Lordship understands my submissions to Your Lordship in chambers.

But M'Lord the point is that the correspondence that Your Lordship did have before you did by the state and by Doctors for
15 Life did not at all – the parties and their correspondence show they did not appreciate that that was being used as the deciding making material. We anticipated at every point, every step right up until – even FOGFA anticipated that up until Thursday afternoon Your Lordship gave the order on Friday. But on Thursday afternoon
20 M'Lord and I want to read this to Your Lordship, asking you to bear with me. That Bokwana Burns, even a suit as late as – it is at page 133.1 in the bundle we have handed up to Your Lordship. It is 28 July. In fact that is Friday M'Lord, not even Thursday when Your Lordship made the decision they said – Your Lordship may I just
25 first establish before I complete that submission M'Lord.

Your Lordship is aware of the prior references, because we have discussed this. I am trying to cut the time down, to other instances in the correspondence where the parties were discussing both the fact of a substantive application, as well as even the FOGFA suggesting
5 certain terms. Your Lordship did have regard to that?

COURT: Yes.

MR WILLIS: So I do not need to go there. M'Lord if you read paragraph 9 on page 133.3.

COURT: Yes.

10 MR WILLIS: It is stated:

"We appeal to the honourable
Judge Ranchod, that honourable
Judge Ranchod now makes a final decision
on the request and should Your Lordship be
15 so inclined that an order in the alternative be
made, directing a formal application on motion
with appropriate timelines to exchange
papers."

M'Lord right up till the end it was firmly understood by all the
20 parties, not just the defendants, that Your Lordship would grant an
application to deal with the matter. They put it in these words that
they would like you to make an order, but in the proper context
M'Lord, everything that was done by the defendants, the respondents
to the request. It was done in the anticipation of motivating why there
25 should be a formal application.

COURT: Yes.

MR WILLIS: M'Lord our primary gripe M'Lord is that ultimately we were not heard on papers under oath M'Lord that would deal with all of these – the factual detail that my learned friends do not like. Well,
5 it is interesting M'Lord, our learned friends in fact act for the 1st and 2nd plaintiffs, but that – it is in a different context. Mr Mahon is now being asked to argue for FOGFA.

But M'Lord if Your Lordship was not going to hear in formal papers, with the greatest of respect M'Lord, Your Lordship ought to
10 have heard it in open court by way of argument, such as we are doing here.

COURT: Yes.

MR WILLIS: That is our point M'Lord with the greatest of respect and of course Your Lordship having regard to our application, we make the
15 point M'Lord that of crucial importance which we have argued before you and would have argued had we had the opportunity M'Lord, is that in fact FOGFA do not have any right. We started debating Section 16 of the Constitution of Mr Makhari. We persist M'Lord that has never been considered whether or not there is in fact a right. Because all
20 expression of rights and the interpretation thus far in these courts that have dealt with these matters that pertain to media houses and traditional media.

M'Lord, I submit with respect that there is every possibility and likelihood that another court would come to another decision M'Lord
25 and we employ Your Lordship to grant the appeal. M'Lord which

court, I agree with Mr Makhari, that is why it is not set out in our notice that we are appealing to upstairs M'Lord so to speak. We submit to Your Lordship that you would refer to the Supreme Court of Appeal M'Lord.

5 COURT: Yes. I did not ask Mr Makhari the question of costs.

MR WILLIS: Well M'Lord if Your Lordship refuses the application, well then costs follow the result.

COURT: Yes.

MR WILLIS: If Your Lordship grants the application, they in the
10 course.

COURT: Normal in the course.

MR WILLIS: Normal in the course M'Lord. So M'Lord if you would give me one moment to ensure that I have not ...[intervenes].

COURT: What is your view regarding that if I did grant leave to
15 appeal, what happens to the present proceedings?

MR WILLIS: No the proceedings continue M'Lord, there is no reason why the proceedings cannot continue. Obviously the effect of the order is that that there can be no live streaming of the matter. But Your Lordship has taken – before we proceed with the matter, taken
20 care of the interests of other media houses and the public so to speak.

COURT: Yes. Thank you Mr Willis.

MR WILLIS: As Your Lordship pleases.

COURT: Mr Mahon.

MR MAHON ADDRESS COURT: Thank you M'Lord.

25 COURT: Perhaps I should just ask you to tell me how do you

pronounce your name? I hear different parties pronouncing you name some what differently.

MR MAHON: Yes. M'Lord, I think the answer to that question M'Lord depends on where you are. But I have been told by my parents that
5 the correct way to pronounce it is "Maan", but I have always being called Mahon by everyone, so I take no issue with that.

COURT: Mahon?

MR MAHON: Mahon yes M'Lord.

COURT: Thank you.

10 MR MAHON: Whatever rolls off the tongue as it were M'Lord.

COURT: Yes.

MR MAHON: M'Lord for the purposes of clarity, if I could just point out that obviously I am briefed on behalf of the plaintiffs in the matter, but also on behalf of FOGFA and on behalf of Daily Maverick.

15 My instruction – my brief on behalf of both FOGFA and Daily Maverick came this morning, due to the urgency underwhich this application had to be considered and my instructions from Bokwana Burns that they were unable to procure the services of alternative counsel.

20 I would also point out M'Lord that Your Lordship will recall from the correspondence which served before Your Lordship that Daily Maverick albeit late to the party, joined as a co-requestor. Although Daily Maverick is not cited as a party in the applications for leave to appeal. But we oppose the application for leave to appeal on
25 behalf of the plaintiffs, on behalf of FOGFA and on behalf of

Daily Maverick M'Lord. We say M'Lord that there is no prospect that another court would come to a different decision. Not only because of the rationale set out comprehensively in the von Breda judgment. But because M'Lord of the fundamental factor that the conditions
5 underwhich the broadcast is to take place, have not yet being set.

So all of the complaints which are raised by my learned friends, can be adequately dealt with M'Lord. The suggestion that there has been no *audi alteram partem* and its obligation to be heard has not being compiled with M'Lord, they still can be heard.

10 Your Lordship indicated in your ruling that you invited the parties to your chambers to discuss the conditions underwhich the broadcasting would be made. It is at that point M'Lord that my learned friend for the 8th defendant can make whatever submissions he wants to make.

15 If I could go directly to that M'Lord. I do not want to dignify the suggestion that the plaintiffs have lied with too many submissions M'Lord, but clearly they deny that. We say it is unwarranted and in the absence of having placed any basis for that submission before Your Lordship, M'Lord we say quite frankly and with the greatest of
20 respect to my learned friend, it is undignified and unfair.

In any event, should they want to make submissions to Your Lordship, as I have said, the time for doing that will be when we discuss the conditions underwhich the broadcast is to be given.

The provisions for the granting of access M'Lord are governed by
25 the provisions contained in the Practice Manual. The Practice Manual

does not contemplate a substantive application. What is contemplated is notice not less than 24 hours before. The fact that it is 24 hours before M'Lord is a further indication that a substantive application is not contemplated. Because one realises the difficulties in dealing with applications on paper on a mere 24 hours notice. It contemplates notice, it contemplates objections in writing and then it contemplates a decision on the entitlement and on the conditions. That process M'Lord has run its course.

The parties cannot by themselves dispense with the provisions of the Practice Manual. They cannot do so by agreement and any suggestion that an application will be brought, obviously is always subject to directives, or direction by the Judge, by yourself M'Lord. So it could never have been taken for granted that absent agreement between the parties a substantive application would follow. The Practice Manual says that Your Lordship can make a ruling in the absence of a substantive application, not expressly obviously, but it does not contemplate a substantive application.

So we say there could never have been any – under any misapprehension that a substantive application would necessarily come.

COURT: The argument by Mr Willis that in the correspondence between the parties, there was reference to bringing an application as to, that there is an agenda, I think it is word used somewhere on the part of the plaintiffs etcetera and that therefore, bearing in mind what the defendants had to say in the correspondence that this court

should have allowed their formal, or that their formal application be brought. What do you say to that?

MR MAHON: M'Lord my answer to that is twofold. One, as we say, whatever was said about a substantive application, could only have
5 been understood subject to the provisions of the Practice Manual and so they could not have taken it for granted that there would have be a substantive application. But if they were under some misapprehension M'Lord, then as early as 11 July, Bokwana Burns delivered a letter. My junior is trying to find the reference in the main
10 bundle M'Lord. But this is a letter from Bokwana Burns on 11 July and in paragraph 12 it is directed to yourself M'Lord and copied to the other parties. It says:

"We appreciate that it is only Your Lordship,
you may pronounce a decision insofar as our
15 clients' intention and request is concerned. Our understanding is that Your Lordship will consider this request and solicit agreement or objections from the defendants' parties. Whereafter a decision will be made."

20 That is on 11 July M'Lord. My learned friends ...[intervenes].

COURT: Have you found the page, the reference to the bundle?

MR MAHON: Page 58 M'Lord.

COURT: Fifty eight?

MR MAHON: Yes if I could take Your Lordship there. It is curious
25 M'Lord that my learned friend do not refer to this letter in the

submissions to Your Lordship.

COURT: You are reading this from paragraph?

MR MAHON: Paragraph 12 M'Lord. "We appreciate that it is only Your Lordship, it says you may pronounce, this is obviously should be

5 "who may pronounce" ...

"a decision insofar as our clients' intention and request is concerned. Our understanding is that Your Lordship will consider this request and solicit agreement and objections from the
10 defendant parties, whereafter a decision will be made. It is therefore unnecessary to bring a formal application on motion, unless Your Lordship directs otherwise."

So as early as 11 July M'Lord, if they were under a
15 misapprehension which they ought not have being, that misapprehension was clearly dispelled when this letter was sent.

COURT: Yes.

MR MAHON: Despite that letter being sent on 11 July and now knowing that there was every risk to the applicants for leave to appeal
20 that Your Lordship would make a ruling in the absence of a substantive application, a further six letters collectively between – all of the 1st to 8th defendants were then sent to Your Lordship setting out their various objections, having their say. So they certainly were given a full opportunity in light of the contents of the letter of 11 July,
25 to make whatever submissions they wanted to make.

In any event M'Lord, if the matter were to go on appeal, the Appeal Court would be bound to the record which served before Your Lordship, which is merely the submissions which have being made to Your Lordship in those letter. Nothing new would be
5 permissible on appeal.

So we say M'Lord that the applicants for leave to appeal had every opportunity to make submissions and to make their objections known and indeed they did so. They fully benefited from the principle of *audi alteram partem* part. Now Your Lordship will be well aware of
10 the line of jurisprudence which says, the *audi* rule does not dictate a trial. It does not dictate a substantive application. It dictates an opportunity to be heard. Not, you must be heard, an opportunity, a reasonable opportunity given to be heard and they had every opportunity M'Lord, with respect elected not to raise matters before
15 Your Lordship which they now seek to raise. That is their own problem with respect.

In any event, as I have said, those matters which they want to raise, can still be raised when it comes to the discussion on the conditions underwhich the broadcast will be done and those concerns
20 can all be catered for, if they are legitimate concerns.

They were notified firstly of the intention to broadcast on 6 June, almost 2 months ago. They wait until the Friday before the trial to then say, now bring your application. We say M'Lord it is mischievous. It is intended – and our directives M'Lord, I must say, not at my learned
25 friends, as we know they are creatures of instruction. But we say

M'Lord that it is deliberately intended to disrupt these proceedings and delay the commencement of the trial, as with the strike-out application which we will come in due course.

The 8th defendant objected on 21 June and again on 7 July. The
5 1st to 7th defendants objected on 14 July, setting out full reasons. All
defendants made further submissions on 24 July and then on the
evening of the 27th there is a request for a substantive application by the
8th defendant.

M'Lord, I need to correct myself, Mr Carelse points out to me that
10 there were in fact insinuations prior to 28 July, that is, they wanted an
application to be brought. But be that as it may.

We know M'Lord that this matter is clearly one which is in the
public interests, it is of national importance. I go now to whether
another court is going to come to a different conclusion M'Lord.

15 All the defendants indicated that they have no objection in principle
to proceedings being broadcast. But their reservation is in relation to
the relationship that the 1st and 2nd plaintiff have to FOGFA. None of
them, with respect M'Lord has answered Your Lordship's pertinent
question, which is, how is the relationship between the plaintiffs and
20 FOGFA in any way going to play a role under circumstances where
there is simply a live broadcast, a live stream. They have not dealt with
that adequately M'Lord.

COURT: Yes.

MR MAHON: And of course again, any concerns that they may have
25 can be dealt with when we discuss the conditions.

M'Lord, Your Lordship will have noticed the recurring theme on the part of Bokwana Burns in the correspondence, is always a certain level of accommodation. This is what we propose, then there is an objection, alright well if that is your objection then we will withdraw this proposal
5 and we will propose something else, or we propose that the Judge, the honourable Judge deal with it in a particular way. They are not hell-bent or married to a particular crafting of an order. It is curious to me M'Lord that we cannot come to some accommodation on the conditions.

But nonetheless, I have been instructed M'Lord to allay whatever
10 concerns the applicants for leave to appeal might have. To tender that the broadcast will take place on the Daily Maverick website and not on the Fields of Green website. And thus the only involvement which the plaintiffs and Fields of Green will have. Well, they will have no involvement in the procurement, the recording and the procurement of
15 the live feed onto the website. All that they have undertaken to do is pay for Ant Farm services.

The motive behind the application M'Lord, we say is really that the defendants do not want any negative reporting about them. That is not a basis to oppose an application for broadcasting. If it was so, we
20 would not have much to watch on the news these days.

Of course, if Your Lordship makes an order, setting the conditions, if that order is breached they have their remedies, they can go to court, they can go to court urgently. They can request that Your Lordship withdraw the leave to broadcast, that can be done at any point in time
25 M'Lord.

In fact M'Lord those remedies would be far more severe for FOGFA than the remedies which would be suffered by a traditional media house, a complaint to the Broadcasting Complaints Commission or something of that nature, because FOGFA would be in contempt of
5 court.

What is conspicuously absent M'Lord from the submissions by the applicants for leave to appeal is the question of prejudice. I have already made the point that it is unclear how they can be prejudice by a live feed. They seem to suggest M'Lord that it is a matter of principle.
10 Well M'Lord the test is not matters of principle, the test is matters of prejudice when it comes to the broadcasting.

COURT: In the von Breda case, the SCA says that it seems to be one of the most important considerations.

MR MAHON: Absolutely M'Lord.

15 COURT: And not just a likely – I do not have the correct words here, that it must be ...[intervenes].

MR MAHON: Clearly set out and not speculative.

COURT: In real, not speculative.

MR MAHON: Yes M'Lord and the suggestion by my learned friend for
20 the 8th defendants that there will be profit obtained by Fields of Green for All and the insinuation of lies and the true motives. M'Lord that is speculative parexcellence, there is no factual foundation underlying any of that.

Now we would urge Your Lordship to also have regard to the rights
25 of the plaintiffs in particular. The von Breda matter was slightly different

in the sense that the application was made by media house and the accused in that case, in addition to the state, is the one who objected to the proceedings being broadcast.

But M'Lord in this case, the plaintiffs have being branded as
5 criminals. They have being upfront about their conduct, there is no factual dispute about what conduct they engaged in. They say that the law is prohibiting that conduct to unconstitutional. There is no question of dishonesty in that. They say frankly and earnestly this is what we have done, but we believe that we have a constitutional right to do it.
10 So they have the right M'Lord to have their names cleared in that sense, in open court, in full view of the public, so that their reputation and dignity can be preserved.

If I could at that point turn to the – oh, on the question of *locus standi* M'Lord let me deal with that. Because that is now seems to be
15 part of the central argument M'Lord.

We say with the greatest of respect that the provisions of the Electronic Communications Act which are relied upon, have been completely misunderstood. The applicants for leave to appeal M'Lord, with respect, conflates the concept of providing a broadcasting service,
20 as distinct from broadcasting. They are two separate things. Broadcasting is defined in Section 1 of the Electronic Communications Act discretely from broadcasting service.

"Broadcasting means, any form of any
unidirectional electronic communications
25 intended for reception by the public, sections of

the public or subscribers to any broadcasting service, whether conveyed by means of radio frequency spectrum, or any electronic communications network, or any combination thereof and broadcast is construed accordingly".

Broadcasting service is something different. Broadcasting service means:

"A service which consist of broadcasting and which service is conveyed by means of an electronic communications network."

Then it talks later in the Act about the types of broadcasting licenses that are given. But what it has expressly excluded from the term "broadcasting service" is:

(a) A service which provides no more than data or text, whether with or without associated still images."

Now audio visual on a website is data. It also specifically excludes the service in which the provisions of audio visual material, or audio material is incidental to the provision of that service.

Now Fields of Green for All is not a broadcaster in its ordinary form of business. What it is, is it is an organisation that advocates for the decriminalisation of cannabis. The fact that it wants to broadcast something on its website is merely incidental to its object.

On my learned friend's interpretation of the Act, anyone who

wanted to post a video to uTube or FaceBook or their own website, would have to first obtain a broadcasting license. That is clearly not what is intended by the Act M'Lord. The broadcasting license requirement is not applicable to an *ad hoc* situation where someone
5 wants to post something for a singular purpose for a limited amount of time. Broadcasting licenses in terms of Sections 49, 50 and 51 are given to public broadcasters like South African Broadcasting Commission, the SABC, or Community Broadcasting Services like Cape Town TV. Organisations which are in the business of
10 broadcasting, they require a license and it is quite obvious why that is, it is because they serve a fundamental purpose in a democratic society. They are the people from which members of the public can expect to receive their news on a regular basis and so they need to be regulated. Something quite different from where someone who is involved in a trial
15 with the permission of a Judge, wants to broadcast the proceedings of just that trial.

So the *locus standi* point, with respect M'Lord is of no merit.

COURT: Yes.

MR MAHON: It was indicated by my learned friend for the Government
20 Departments, they have no objection to traditional media houses broadcasting. Why then, we ask do they have an objection to Daily Maverick Broadcasting? Daily Maverick is a traditional media house.

COURT: If I recall correctly there was some things said about it also not
25 being part of the traditional media.

MR MAHON: What they say M'Lord is that it is not a traditional broadcaster.

COURT: Broadcaster?

MR MAHON: Yes and then they also make complaints against
5 Daily Maverick in regard to their competence and they allude to the fact that Daily Maverick is part of the liberal media, without defining who that terms is supposed to include.

M'Lord, I hear whisperings from my learned friend.

COURT: Yes.

10 MR MAHON: I am asking my junior to just check if that is correct. If it is not, then I will point it out. Yes they make the fact that – they make the point that publications in Daily Maverick have being published, which in their tone suggests a favourable stance towards decriminalisation of cannabis.

15 COURT: I see.

MR MAHON: But of course M'Lord in the von Breda case, bearing in mind in that case, Media 24 is also not a traditional broadcaster. Media 24 is a traditional digital print media house. They are in the business of news primarily on the internet. The fact that they
20 sometimes have video clips, does not mean that they now fall in the definition of a broadcasting service, as I have pointed out to Your Lordship. The position is no different with Daily Maverick.

In regard to Section 16 of the Constitution, my learned friends for the state seem to suggest that an application of this nature can only
25 really be brought under the provisions of Section 16 (1) (a) of the

Constitution. In other words, under the freedom of the press and other media. But if you read the section M'Lord, the subparagraphs to Section 16 (1), are not on numerous classes. It says M'Lord everyone has the right to freedom of expression. That includes freedom of the
5 press and other media. It also includes (b) freedom to receive or impart information or ideas. That is a right of everyone, it is a right which everyone enjoys M'Lord.

COURT: So you are saying it is not restricted to those set out in (a) or (b)?

10 MR MAHON: Exactly M'Lord. One asks oneself M'Lord that if it were only traditional media houses or broadcasting companies which were subjected to the provisions of the Broadcasting Complaints Commission and other regulations, then why the need for – or why does the provisions of the Practice Manual specifically contemplate the crafting of
15 an order, so as to deal with parties' objections? Because it would follow that if it was only media, then the normal rules would apply as applicable to media houses.

COURT: Yes.

MR MAHON: Oh yes, the contentions in regard to the broadcast media
20 and what really goes to my learned friend's *locus standi* point. Your Lordship asked, well was that raised in the correspondence and it was pointed out to Your Lordship in the letter at page 100 that it was raised. But that of course was about 5 days before Your Lordship gave the ruling. Now only Your Lordship will know of course whether you saw
25 this or not. But we certainly – it stands to reason that you have must

have seen it M'Lord.

COURT: Yes.

MR MAHON: Then M'Lord in order to concretise the submission that we make about another court coming to another different conclusion, we
5 submit that the distinctions which the applicants for leave to appeal wish to draw between our case today and that of the von Breda case are more imagined than real. Because if you read what the von Breda case says, the principles are clearly equally applicable. Those principles
M'Lord if I could briefly go to them. Paragraph 44, the Supreme Court
10 of Appeal says this:

"Pencils and sketch pads are now considered an anachronistic. There is no restriction regarding filming outside the court, nor is there any restriction regarding attending in court and
15 taking notes, drawing picture, or upon accessing exhibits."

I am paraphrasing M'Lord.

"There simply can be no logic in a court permitting journalists to utilise their reporting
20 techniques of the print media, but not permitting a television journalist to utilise his or her technology, a method of communication, being the broadcasting and recording of proceedings, despite the fact that live camera
25 footage would be more accurate than a

reporters after the fact summary."

Let us think about this M'Lord. What would be better suited to the concerns raised by the applicants for leave to appeal? An unedited live broadcast by Fields of Green for All or Daily Maverick, or a restriction on live broadcast and the plaintiffs which they are accused of dishonesty, reporting to the media their squid personalised biased versions of events and that being reported in the media. Their complaints M'Lord are protected by the fact that it is a live stream – their concerns are assuaged by the fact that it is a live stream.

10 Paragraph 51:

"Arguably, complete broadcast coverage of the trial is important to achieve the valuable and serve by increasing public access to judicial proceedings. In that regard "gavel to gavel coverage" as it has sometimes being described, may be preferable to know, or limited coverage. The way in which stories that have been told in court and retold by the media may make a difference as to how the law has appreciated and the functioning of the court understood. With "gavel to gavel" coverage, the role of the media more closely approximates that of a conduit, rather than a processor and interpreter of court proceedings, by keeping cameras out of the courtroom, court

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reporters continue to be relegated to conveying information by judicial proceedings from the steps of the courtroom, as has traditionally been the case, despite the fact that the oral and visual nature of broadcasting would give the public a more direct sense of what has transpired, than a verbal report in highly summarised form."

Paragraph 59:

"Where there is debate about whether giving 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. The power of the court to do so is an inherent one, flowing from Section 173 of the Constitution and must be exercised in the interest of justice."

Your Lordship still has to do that. Paragraph 64:

"The SABC judgments must therefore yield to a new reality. For even as we grapple with television in the courtroom, there are many, particularly younger viewers, who are increasingly turning to the internet to keep up to date with news and current affairs. Many

people now use social media as their main source of information, resulting in a shifting how information is disseminated and received. As McLaughlin CJ observed, the explosive growth of new media signals a shift in who reports on legal proceedings. Court decisions may no longer be the preserve of trained professional journalists. Anyone with a keyboard and access to a blog, can now be a reporter, and who is to say there are not. Some bloggers will be professionals and academics, providing thoughtful commentary and analysis, others will fall short of basic journalistic standards. Will accuracy and fairness be casualties of the social media era? What will be the consequence for public understanding of the administration of justice and confidence in the judiciary. How can a medium such as "twitter" inform the public accurately or adequately in 140 characters or less, if witness or juror contamination is a concern with television, is it not even more so with ubiquitous social media, access or received automatically via handheld device."

25 Recognition is given here M'Lord to the fact that it is not only

traditional media houses which have become reporters of news. In our submission, there can be no complaint in principle of a non-traditional media house broadcasting the proceedings. Again, many people sitting in the gallery will be tweeting viscerally as to the outcome and
5 continuation of these proceedings. Who knows whether they will do it accurately or not. At least with the live broadcast, one can verify the accuracy of those statements.

Paragraph 70:

10 "In permitting the televising of court proceedings, this court is doing no more than recognising the appropriate starting point. It will always remain open to a trial court ..."

Your Lordship in this instance.

15 "...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 Section 173 of the Constitution to do so. It shall be for the media
20 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 request should be considered. It shall be for the trial court to
25 exercise a proper discretion, having regard to

the circumstances of each case."

Paragraph 71:

5 "In exceeding to a request, the Judge may
issue such directions as may be necessary to
conduct of the proceedings, ensure that the
corum of the court and prevent distractions and
ensure the fair administration of justice in the
pending case."

Paragraph 72 is a penultimate paragraph that I am quoting M'Lord.

10 "The default position has to be, that there can
be no objection in principle to the media
recording and broadcasting counsels' address
and all rulings and judgments, in respect of
both conviction and sentence delivered in open
15 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 therefore
and the affects he or she asserts, such
20 coverage would have upon his or her
testimony. This approach entails a witness by
witness determination and recognises as well
that a distinction may have to be drawn
between expert, professions, such as police
25 officers and lay-witnesses. Such an

individualised inquiry is more finally a tune to
reconciling the competing rights at play than is
a blanket ban on the presence of cameras from
the whole proceedings when only one
5 participant objects."

So the point again M'Lord is, if it is the concern of the State that, for
example, witnesses will feel intimidated by the presence of the cameras,
Your Lordship can direct – even if you had not done so upfront, at any
point in the proceedings can direct that those concerns are catered for.

10 COURT: Yes.

MR MAHON: And can be dealt with on an ongoing basis. The last
paragraph M'Lord.

"For example, television journalists are often
able to disguise the identity of a person being
15 interviewed by means of special lighting
techniques and electronic voice alteration, or
merely shielding the witness from the camera."

That is the point I have already made.

Taking those broad principles into account M'Lord and those are
20 only some, it is a comprehensive judgment, it is clear M'Lord that there
has clearly being a shift in the traditional jurisprudential thinking when it
comes to broadcasting. The default position is, open access to justice
must as closely as possible equate, what would in the past have
manifested itself in the observance by a witness in court of what is
25 taking place in court.

COURT: Yes.

MR MAHON: What truer equation to that manifestation can there be, than a live broadcast? There can be none in our submission.

M'Lord then lastly just on the question of costs. My learned friend
5 said that obviously if leave to appeal is granted then the cost will be in the cause. If the leave to appeal is not granted, then obviously we would want the cost of the application for leave to appeal, inclusive of the cost of two counsel.

I have been asked to make this submission M'Lord and that is that
10 we are now just short of lunchtime on the second day of a trial which has not yet started. That has, as we pointed out to Your Lordship previously some serious implications on the further conduct of the trial, given that we have an expert witness, number of expert witnesses who have being flown in, either from overseas or from other parts of the
15 country. They have limited availability M'Lord, to the extent that the disruption in the trial proceedings has being as a result of the applications for leave to appeal.

If the application for leave to appeal is dismissed, we would ask for costs, including cost of two counsel. But we would ask Your Lordship to
20 reserve the question of whether those costs ought to include the cost associated with the travel and accommodation of the experts. Because time will tell what affects these disruptions have had on the trial M'Lord.

COURT: Sorry, would you just say – so you say the question of?

MR MAHON: The question of whether those costs should include the
25 cost associated with the travel and accommodation.

COURT: One moment.

MR MAHON: Of the experts should be included.

COURT: Of the experts?

MR MAHON: Of the experts M'Lord. Thank you M'Lord.

5 COURT: Thank you Mr Mahon. In reply Mr Makhari.

MR MAKHARI IN REPLY: M'Lord just on a lighter note, based on what our learned friend has just submitted now. There were no experts in this leave to appeal, just to make it clear.

COURT: I beg your pardon?

10 MR MAKHARI: There were no experts in this leave to appeal. I understand my learned friend is asking for costs for experts, there were no experts here. So he is simply conflating issues, issues that you must deal with in the trial matter.

COURT: I think it is the costs ...[intervenes].

15 MR MAKHARI: Call them into the leave to appeal.

COURT: So you are saying that should not be considered now?

MR MAKHARI: No it does not belong here.

COURT: No but it is reserved.

MR MAKHARI: I am dealing with the leave to appeal here.

20 COURT: Yes.

MR MAKHARI: He is talking about cost of an expert. So I am saying that there are no experts in this leave to appeal. So if he wants to deal with matters relating to the experts, he must deal with them in the trial. So the moment we are dealing with leave to appeal. So just to make it

25 clear. It is so, I mean I am not saying that he did it deliberately, it is just

a conclusion.

COURT: I think, as I understood counsel it is in the context that this application for leave to appeal – or this entire issue relating to specifically the application for leave to appeal.

5 MR MAKHARI: Ja I understood, but there is no basis in that M'Lord. It is Your Lordship who said he wants to hear the leave to appeal.

COURT: No, no that it has caused a delay in the start of the trial itself and therefore, as I understand the submission, there are cost implications in regard to witnesses who have been called here from
10 overseas or other parts of this country.

MR MAKHARI: Yes.

COURT: Travel and accommodation costs.

MR MAKHARI: Yes. But I am just saying that ...[intervenes].

COURT: So you are saying it should be something to be dealt with in
15 the main trial?

MR MAKHARI: Yes they do not belong here.

COURT: I see.

MR MAKHARI: Because here we are dealing with leave to appeal.

COURT: I see.

20 MR MAKHARI: And leave to appeal which everybody has a right to bring. In fact, Your Lordship said that he is going to hear this leave to appeal this morning. So I am saying that – it is just conflation of issues, I mean based on complete misunderstanding of procedure.

By anyway, let me deal with in reply with the points raised by
25 FOGFA, to demonstrate that in fact properly construed M'Lord, FOGFA

agrees with us that this is a matter which requires the attention of the Supreme Court of Appeal, but they are not just saying so.

5 Firstly the opening address by FOGFA was to present Your Lordship with this continuing moving target. Your Lordship will remember that when FOGFA for the first time requested Your Lordship to be permitted to broadcast, it was a blanket broadcast in respect of everything. When they received an objection, they abandoned some then we take some. An objection they abandoned until they remained – or then they introduced Daily Maverick. When there was an objection 10 then to Daily Maverick, then they introduced Ant Farm. So it continued as a moving target, until when Your Lordship made a decision. Even after Your Lordship has made a decision, Your Lordship is still presented with a moving target. That in fact this leave to appeal does not include Daily Maverick.

15 Let us look at Your Lordship's reasons. Because we are appealing against Your Lordship's decision, not their request. Paragraph 1 of Your Lordship is very clear.

20 "The requestor for live stream broadcast of the proceedings in this matter is FOGFA, an nonprofit organisation of which the two founding members are the 1st and 2nd plaintiffs in this matter."

25 That this is an organisation that Your Lordship has granted permission. It cannot be permissible that when we are dealing with leave to appeal, post Your Lordship's decision, then Your Lordship is

presented with Daily Maverick. No decision has being made by Your Lordship in respect of granting Daily Maverick.

COURT: Yes.

MR MAKHARI: If there was such a decision, then Your Lordship will
5 today would have been confronted with leave to appeal against that decision to grant Daily Maverick. So, let us pack it aside. If Daily Maverick wants to request, let is do so some other time. So let us remove the Daily Maverick out of the picture, we are dealing with leave to appeal.

10 Then we understand FOGFA now to be saying that Your Lordship has dealt with this matter to grant permission having regard to the Practice Manual. Your Lordship will understand my submission in that regard was very simple and even our ground of appeal there, I mean our notice of leave to appeal. We say, we really do not take issue with
15 Your Lordship having dealt with the matter in the manner in which Your Lordship did, because that is the default position. That is what we understand the Practice Manual to be also saying in respect of these type of matters.

20 What we are saying is that, that situation applies in circumstances where it is the ordinary media that is regulated. Because that manual was written in that context, that is what we are saying.

COURT: Yes.

MR MAKHARI: Hence we say that, in this context, or in the context of this matter where Your Lordship – and it is common cause from the
25 submissions made that Your Lordship is confronted by a third party who

is not a media and a media house, he is not even in the base of broadcasting. That is where then we say that a formal application ought to have being brought. So I am making it very clear, so we are not taking issue with the manner in which Your Lordship then has dealt with
5 it. We are simply saying that in the context of this matter.

COURT: Yes.

MR MAKHARI: That is right. Then now – so the other point that has been raised is that, we are not answering the question of what prejudice will be suffered by a live streaming of the proceedings. We understand
10 this question to be completely missing the point, because the point is not about live streaming. Because I have referred Your Lordship to the judgment of the Judge President Mlambo in the Oscar Pistorius matter, where he granted the media live streaming. It is not a new thing. It has always being done. The issue here is the live streaming by who and
15 that is a question that is not being answered. That is what we call a novelty.

We accept that it is not the issue which preoccupied Your Lordship when Your Lordship was dealing with the matter. But it remains a live issue for purposes of the order that has being granted, or the decision
20 that has being granted for purposes of the leave to appeal.

The von Breda judgment, indeed I agree with our learned friend for the 8th respondent that there the application was brought as a formal application, as an urgent application and decided by the presiding Judge before the actual trial commenced. In fact, it was in the same
25 format as in the Oscar Pistorius matter where the application by the

media houses was brought prior to the commencement of the trial. In fact, in this case – I mean in the Oscar trial a different Judge was allocated to deal with the actual trial. But the application for media access was dealt with by another Judge, which was the Judge President
5 at the time. It was a formal application which was fully argued in open court.

So, the two then are clearly then distinguishable and clearly different and the issues that were dealt with there were clearly different.

Then we are told that Your Lordship must now in determining leave
10 to appeal must now interpret Electronic Communications Act and as well as the Broadcasting Act. The very same provisions which Your Lordship did not consider. So Your Lordship must now amplify his own reasons then in this regard. Your Lordship was correct when engaging our learned friend for the 8th respondent. But we are dealing with leave to
15 appeal. Not the issues, not things that I did not consider or things which are not before me. So we are dealing with leave to appeal in the context of what is before Your Lordship and what informed Your Lordship's decision.

Of course, the interpretation that is given to the provisions of the
20 Electronic Communications Act and Broadcasting Act are clearly incorrect. Because Your Lordship has been given that it is difficult to follow about broadcasting service/broadcasting and with the conclusion that, well broadcasting it means anybody can do it. But where is it that where it says that anybody can do it? You can do broadcasting without
25 a license? There can never be such a thing.

In fact, if I take Your Lordship to paragraph 64 of the very von Breda judgment which our learned friend for FOGFA had then raised. It in fact then disagrees with the very same proposition that he puts. Because this paragraph, just this [indistinct] contemplates the
5 flooding of social media and other forms of reporting. Then he then asks a question and this is an issue which was left unanswered by the Supreme Court of Appeal, maybe for another day. Then he says that, will accuracy and fairness be casualties of the social media era?

But we are told here that there may be other people who are sitting
10 here tweeting. But these people do not ask permission from court. So we are not dealing with them, we are dealing with those people who asked permission from the court and FOGFA asked permission from the court and therefore it must be dealt with through the court way. Whether then people who are sitting tweeting are allowed to do that, is
15 not something that should detain Your Lordship, let it be a debate for another day. Because this court does not concern itself with academic questions.

So what we know here is that from the submissions made by our learned friend, he concedes that they are actually not a media and a
20 media house. In fact he actually took it further. They are not even broadcasting at all, they are not in the business of broadcasting. So he confirms the submissions I made to Your Lordship earlier that they are just a third party, a party or anybody. I even gave an example of a person like myself. So they in a position of a person like myself who
25 simply says, I want to live stream and broadcast. He confirms all that.

So we submit M'Lord that this is a novel issue which requires – in our respectful submission, the attention of the Supreme Court of Appeal and this does not at all interfere with the access to justice and openness to the public's right to be informed. Because already Your Lordship has
5 made an order this morning allowing the traditional media to broadcast and they are broadcasting.

So who then says that they cannot be trusted that they can broadcast accuracy when they are licensed and which will actually be concerned about somebody who tells the court that I do not even have a
10 license, I am not even a broadcaster, but I am the one then who must be allowed to broadcast. It is just unfathomable. So there is no prejudice at all.

Then the trial must continue. Your Lordship grants leave to appeal and this issue is dealt with by the Supreme Court of Appeal. What we
15 have not had a single submission on is, what interest do they have FOGFA? Do they have a personal interest, do they have commercial interest or what? That is, we are faced with a dead silence on that issue. But we know their interest, because then they are actually then the members of the very FOGFA which had done that.

20 COURT: Are not saying that it is in the broader public interest?

MR MAKHARI: No I am saying that what interest they have themselves.

COURT: Themselves?

MR MAKHARI: Than themselves, that is what I am talking about. What personal interest do they have. The public interest is already taken care
25 of by the presence of other media houses. We are not dealing with the

situation where the court is told that, this is a matter where other media houses are not interested in it and therefore the public will not be informed. We are not dealing with that type of a situation. We are dealing with a situation where the media, the traditional media has
5 interest – has taken interest in the matter and it has taken it upon itself to inform the public about it.

So the question of public interest which is not going to be served by them, providing the live broadcast, is just not correct.

So again there was a repetition in the submission by FOGFA that,
10 why not allow the Daily Maverick. I say that is a moot point, because Your Lordship did not allow the Daily Maverick, so then that is a moot point. But of course if Your Lordship allowed it, then we would have dealt with it. Of course, we know the position that we have taken regarding the Daily Maverick.

15 So M'Lord then we respectfully submit that based on the novelty of the issue and especially on the common cause facts that we are dealing with an NGO which is not a broadcaster, he does not have a license which simply says that I want to live stream and Your Lordship did not deal with that issue in the context of the *locus standi* which is a primary
20 point. I actually echo what my learned friend for the 8th respondent has said. In fact, I should have brought that judgment, because I have always used to deal with the question of *locus standi*. That a question of *locus standi* is not actually a technical point, it is a substantive point, because it goes to the heart of whether this person can be heard by the
25 court or not. That is the Eskom case which has referred to by the

Supreme Court of Appeal. If Your Lordship wants a copy, we can bring that copy. It was in the context of a party, that judgment was in the context of a party that did not submit a tender and wanted to review the award of the tender to somebody. The Supreme
5 Court of Appeal has then said – I mean the Constitutional Court actually then said that you do not have *locus standi*, it is not actually a SCA matter, it is a Constitutional Court because it went up to the Constitutional Court. He said, you do not have *locus standi* and it is not even – this matter should not even have gone any further. So the issue
10 of who is the person asking to broadcast is a very fundamental issue that requires to be considered. If it is a traditional media house, it is licensed, it is regulated, then there can be no issue about that.

Then in that situation, we talk about – let us talk about the conditions of the broadcast. How do you talk about the conditions of the
15 broadcast of somebody who does not even have a right then to do that.

COURT: Yes.

MR MAKHARI: So we submit M'Lord that Your Lordship should grant leave to appeal the costs be the cost in the appeal.

COURT: Thank you Mr Makhari.

20 MR MAKHARI: Those are our submissions.

COURT: Mr Willis.

MR WILLIS IN REPLY: As Your Lordship pleases. M'Lord the outset, I need to withdraw the submission I made in response to Your Lordship's question on costs, it will occur immediately afterwards. The correct
25 submission to make to Your Lordship is that if you refuse this

application, inline with the authority in [indistinct] Star M'Lord, that we are placed before Your Lordship. It is constitutional importance of these matters, Your Lordship should not grant costs, there should be no cost order if we fail. Obviously if we succeed M'Lord ...[intervenes].

5 COURT: You say this is a Constitutional matter?

MR WILLIS: These are constitutional issues yes M'Lord.

COURT: No constitutional issues in the trial yes, but are you saying constitutional issues regarding access?

MR WILLIS: Yes absolutely M'Lord that is everything we had being
10 arguing to Your Lordship with respect. We are dealing with procedures, we are dealing with – on both procedural as well as the substantive level. Your Lordship makes the point that well there is no requirement specifically in the directive that Your Lordship should require a formal substantive application and that is correct it does not say that M'Lord.
15 But that does not mean that it is correct. We have made the point that the authorities all deal with media houses M'Lord. We have looked at Section 16 of the Constitution, you debated that to all of my learned friend Mr Makhari. M'Lord we take the point, this goes to the other constitutional – it is the very basis of *audi alteram partem*. Our learned
20 friends on the other side have made the submissions with the same effect.

So M'Lord in my respectful submission, there is no doubt that these are constitutional relevant issues. My learned friend Mr Makhari uses the word "novelty", he is quite right M'Lord with respect. I submit that
25 [indistinct] Star advises on that ...[intervenes].

COURT: So you are saying then that case, if it is a constitutional issue, each party pays its own cost?

MR WILLIS: Yes.

COURT: Or are you saying ...[intervenes].

5 MR WILLIS: Yes M'Lord yes, yes.

COURT: Yes.

MR WILLIS: Sorry it is not [indistinct] Bio-Watch M'Lord.

COURT: Bio-Watch yes.

MR WILLIS: Bio-Watch M'Lord. M'Lord just to deal to in reply. M'Lord
10 with what we have not heard, we have heard from counsel for FOGFA
why Your Lordship was right and that is not the question, it says M'Lord
another court will come to another decision. That is an entirely different
test M'Lord.

The prejudice our learned friend Mr Makhari pointed out to
15 Your Lordship it has no place here. Of course we agree with that.
M'Lord it is when you put that – because in trying to address that
question in the context of our complaint of no *audi alteram partem* that
M'Lord had to then stay as close to the window because I did not tell
Your Lordship about other information, which we otherwise have no
20 regard to, before Your Lordship safe to a limited to read some of the
correspondence. So M'Lord prejudice has no role to play here in
considering leave to appeal.

M'Lord the crux of our application to Your Lordship, I think the
same goes for the state M'Lord, if Your Lordship exercised the
25 discretion, we have placed ourselves fairly and squarely within an

application for leave to appeal and why Your Lordship should grant us
leave to appeal. We have [indistinct] the exercise of your discretion, we
have gone to the heart of the *audi alteram partem* M'Lord, where there
was no formal substantive application where one had being envisaged
5 we say.

M'Lord our learned friends pointed to a letter and said, well they
are surprised we did not mention the letter. Well M'Lord we [indistinct]
to mention the letter firstly. But secondly M'Lord, that only adds to the
debate M'Lord as to what the parties were expecting Mr Makhari his
10 analogy of a moving target, very, very act M'Lord. That letter at page 58
paragraph 12 Your Lordship identified, is an example of the moving
target M'Lord.

It is that discretion M'Lord that we have brought ourselves within
the scope and purview. We actually needed to do that, but
15 Your Lordship sees that from the application.

Then M'Lord I would submit with respect M'Lord that when you
consider everything you have heard around the von Breda case, the
von Breda case M'Lord is not a case which simply reflects, expounds on
an amplify as the rights of the public or the rights of the media house.
20 That is not ultimately what His Lordship Mr Justice Pollen says.
His Lordship upholds von Breda's appeal and he says this in respect of
the court *a quo* M'Lord. If Your Lordship would just give me – my
computer has abandoned me for a moment. M'Lord he says at
paragraph 76, I believe it is [mechanical breakdown] [indistinct].

25 COURT: Yes.

MR WILLIS: So M'Lord the reliance on von Breda supports the case for the applicants for leave to appeal before Your Lordship.

COURT: What you just read was from paragraph 76?

MR WILLIS: Yes paragraph 76 M'Lord.

5 COURT: Yes thank you.

MR WILLIS: So M'Lord it is on that basis that M'Lord we bring this application. This is, M'Lord with respect, this is not a *mala fide* application. Even were Your Lordship to consider and the allegations that these are all designed to delay the trial M'Lord, that is without merit

10 M'Lord. Your Lordship has heard the argument, our submission, this is a *bona fide* application M'Lord.

COURT: Yes.

MR WILLIS: As Your Lordship pleases.

COURT: Thank you.

15 MR WILLIS: In fact M'Lord, I just want to point out. Our basis is not precisely the same as the state. Our motivation is that of the state. I think you have seen that M'Lord.

COURT: Yes.

MR WILLIS: As Your Lordship pleases.

20 COURT: Thank you Mr Willis.

MR MAHON: M'Lord might I just address the new submissions it is purely on the question of costs M'Lord?

COURT: Yes.

25 MR MAHON: We say M'Lord the application for leave to appeal has distinct from the trial itself. It does not invoke meaningful considerations

of constitutional matters. Therefore, the principle because it is a constitutional matter each party should pay their own costs, it does not apply.

But in any event M'Lord, if the applicants for leave to appeal wish
5 to raise a constitutional point, then they ought to have delivered a notice in terms of Rule 16 (a) and their failure to do so would have precluded them from raising the constitutional point.

COURT: Yes.

MR MAHON: So on that basis M'Lord, we say there is no merit in that
10 suggestion M'Lord.

COURT: Thank you. One more point, Mr Makhari said that your submission or request that the cost of accommodation and travel of the witnesses must be – should not even be considered in this matter. It should be dealt with in the trial.

15 MR MAHON: No M'Lord, one need not be prescriptive in that sense. The application for leave to appeal is in respect of a matter which is in effect interlocutory to the trial and thus, anything arising from that interlocutory issue, including the application for leave to appeal, it being
20 also an interlocutory matter, in that application an order can be made in relation to the cost of the application to be reserved for determination in the trial. Obviously when we say "reserved" we mean – what we are referring to is the costs consequent upon the implications of the application for leave to appeal in the trial must be reserved for consideration during the course of the trial. That is all we say.

25 Whether your – there is nothing that precludes Your Lordship from

making that order in the application for leave to appeal. We just want to avoid a situation wherein the trial itself, if we now want to say, well there is a cost implication arising from the fact that there was an application for leave to appeal, we would be precluded from raising it. Then of
5 course, one can guess what the argument would be.

COURT: If it was said that those costs should be determined at the end of the trial.

MR MAHON: Yes there is nothing that prohibits Your Lordship from making such a ruling and in effect we ask Your Lordship to do. Safe
10 that we want the cost of the application, we just want the question reserved of whether those costs must include the consequent cost associated with it on the ...[intervenes].

COURT: Whether they must be included must then be dealt with ...[intervenes].

15 MR MAHON: That question can be dealt with during the course of the trial or at the end of the trial, yes M'Lord.

COURT: Yes thank you. I see that it is just after 13:00. I will give my decision at 14:00. The court adjourns.

COURT ADJOURNS [13:05]

[13:40] **COURT RESUMES**

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MR MUHON: As the court pleases.

MR WILLIS: As Your Lordship pleases.

MR MAKHARI: As the court pleases.

COURT: Mr Makhari?

5 MR MAKHARI ADDRESSES THE COURT: M'Lord, as a matter of
courtesy... [intervene].

COURT: Yes.

MR MAKHARI: ...because of the importance of the matter, I have
instructions that if Leave to Appeal is refused, as Your Lordship has
10 done, to petition the Supreme Court of Appeal on this matter, which in
any event will impact on the second part that Your Lordship was
supposed to deal with, which is to engage the parties in respect of the
conditions of the broadcast.

COURT: Yes.

15 MR MAKHARI: And we intend to do so, because we regard the matter
as, of extreme urgency to take the necessary steps to have that Leave
to Appeal filed by tomorrow, if not so the day after tomorrow.

COURT: The petition.

MR MAKHARI: The petition, indeed, M'Lord.

20 COURT: I see.

MR MAKHARI: So it was necessary that I should place it... [intervene].

COURT: The fact that you, you, would you not be requiring a transcript
of the proceedings for the purposes of the petition?

MR MAKHARI: No, they will... No, we will not require any transcript for
25 purposes of the petition... [intervene].

COURT: I see.

MR MAKHARI: ...because all is in the correspondence and the BUNDLE that we have handed up. Yes, indeed.

COURT: So what is the next step?

5 MR MAKHARI: The next step is for... [intervene].

COURT: Because there is still the, an application to strike off... Are we going to deal with that at this stage then, or what is your view?

MR MAKHARI: Yes, that is a matter that will be dealt with here. So I just mentioned... [intervene].

10 COURT: Mr Makhari... [intervene].

MR MAKHARI: Ja, I was just mentioning it in the context that the order of Your Lordship permitting FOGFA to broadcast was based on the certain conditions which are still to be discussed. I am saying that in view of the instructions, so it means that we will not be able to even
15 engage on the issue of the conditions, because we have to file the petition, which in any event will suspend then the very order.

COURT: Yes.

MR MAKHARI: As the court pleases.

COURT: Thank you, Mr Makhari.

20 MR MAKHARI: Thank you, M'Lord. And if there is anything... Then if there is nothing, then that was the, that was the business of the day for myself.

COURT: I see. So you are seeking to be excused.

MR MAKHARI: To be excused, M'Lord.

25 COURT: Certainly.

MR MAKHARI: As the court pleases.

COURT: Thank you Mr Makhari.

MR WILLIS ADDRESSES THE COURT: May it please Your Lordship.

M'Lord, my instructions are equally to petition.

5 COURT: Yes.

MR WILLIS: So I, I need say no more at this stage.

COURT: And do you also hold as a view that you would be able to file the petition or as I understood Mr Makhari by tomorrow?

MR WILLIS: But out of the record, I am not, I am not certain of that fact,

10 M'Lord. I cannot... But be that as it may. There is... There are ways of getting around that. One can... That can be obtained at a later stage... [intervene].

COURT: Later stage.

MR WILLIS: ...M'Lord.

15 COURT: Yes.

MR WILLIS: So that does not stand in the way of us filing our petition.

COURT: Yes.

MR WILLIS: M'Lord... So, M'Lord, I do not seek to be excused. I... I will be remaining in Your Lordship's court... [intervene].

20 COURT: I would be surprised if you did.

MR WILLIS: Well we, we are brothers, M'Lord.

COURT: Thank you Mr Willis.

MR WILLIS: As Your Lordship pleases.

COURT: Mr Muhon?

25 MR MUHON ADDRESSES THE COURT: Yes, M'Lord. Before Mr

Makhari leaves, M'Lord, what we have heard present somewhat of a practical difficulty, M'Lord, in the sense that if the petition is to take its natural course, in other words in accordance with the normal time limits associated therewith, then that would defeat, it would end up defeating
5 the very purpose of the application in itself.

The remedy of course under those circumstances is to bring an application declaring that Your Lordship's order is not suspended pending the appeal. The... There is a recent decision, and when I say recent I think it is to be reported in this coming month law reports, which
10 is a full bench decision written by His Lordship Justice Sutherland, and I think Justice Windell was there.

I cannot remember who the third Judge was, which says, it might have been Modiba, M'Lord, that you cannot bring such an application until the petition has been lodged with the Registrar of the
15 Supreme Court of Appeal. So who knows how long they can take before they can do it. In terms of the rules they have a month to do that. By that time the trial will have come and gone.

In the interim though the rule says that until they lodge that petition the order is not suspended. So the order can be given effect to.
20 So we would want to engage with the other parties. They can do so without prejudice to their rights, and they could say they are doing it under protest.

It would not be... We would not take the point of pre-emption of appeal, but we would want to engage with them on the conditions
25 under which FOGFA can now start to broadcast. If they are not

prepared to engage with us, M'Lord, we, then we would ask for an order from Your Lordship on those conditions... [intervene].

COURT: Yes.

MR MUHON: ...and then, and then it will take its natural course,
5 M'Lord.

COURT: Yes. I think I... [intervene].

MR MUHON: Yes.

COURT: Mr Makhari, you, you are back on record.

MR MAKHARI ADDRESSES THE COURT: Yes, indeed, M'Lord.

10 COURT: Yes.

MR MAKHARI: Well, we are dealing with matters which are already outside the Leave to Appeal. All what I was doing was to inform Your Lordship as a matter of courtesy... [intervene].

COURT: Yes.

15 MR MAKHARI: ...but also to place on record that whilst we have one month to file Leave to, to petition, the Supreme Court of Appeal, because of the urgency of the matter we intend to do it by tomorrow or the day after tomorrow.

20 But of course as to what happens now, the rules are very clear on what must take place. Section 18 of the Superior Courts Act is there. Then, if they want to invoke it, they must do so. But what we are saying ourselves is that... [intervene].

COURT: But will you, will you be able to engage with counsel for the plaintiff in the matter? You... Your... [intervene].

25 MR MAKHARI: M'Lord, it will be cosmetic in a sense that whilst we will

have to engage them and take instruction from our client, then the engagement will be interrupted by our filing of the petition which we will do it by tomorrow. So then that engagement will be a futile exercise. So all what I am saying is that... [intervene].

5 COURT: So is that a definite commitment?

MR MAKHARI: It is a definite commitment, because my clients regard this matter as very important, because their view is that it will set a precedence which then will ultimately mean that anybody then can actually broadcast. And to them that is a very important matter.

10 COURT: *Ja*.

MR MAKHARI: And certainly we will be starting to draft the petition and ensure that we file by tomorrow.

COURT: I see.

MR MAKHARI: Yes.

15 COURT: Do you wish to say anything, Mr Willis?

MR WILLIS ADDRESSES THE COURT: Just to say, M'Lord, that I, I am not going to give the same undertaking, but it matters not, because once their petition is... I am... I am not... I am on brief and instruction on a broad spectrum. I do not have the benefit of Mr Makhari's position
20 where he can, where he can go and deal with that. But it matters not, M'Lord, because once their petition is, is filed, then the... [intervene].

COURT: Yes, it does not have to be both the petitions, is that what you are saying?

MR WILLIS: Yes, it does not have to be both. So I am not going to give
25 any commitment that I will file tomorrow, but I will file in terms of the

Rules of Court, M'Lord. But it, it, like I say, it matters not in my submission.

COURT: I see. Thank you, Mr Willis, yes.

MR WILLIS: As Your Lordship pleases.

5 COURT: Anything else, Mr Muhon?

MR MUHON: Yes, M'Lord. I take it then that the other parties are not prepared to engage with us. The question is what happens between now and the time of the delivery of the application, whenever that may be. I do take my learned friend's undertaking that it will be, will be
10 tomorrow, but we do not know what happens between now and that time, we do not know what time tomorrow.

COURT: Yes.

MR MUHON: So we would ask Your Lordship for an order that will accommodate what is to take place between now and the time that that
15 petition is lodged, and it could be done broadly in accordance with the draft order which was submitted to Your Lordship in the correspondence, and that can be the prevailing position until such time as the petition is lodged, and then we can see where we are and revisit the matter, M'Lord. Those would be our submissions.

20 COURT: Yes.

MR MAKHARI ADDRESSES THE COURT: M'Lord, unless if Your Lordship is prepared to vary his own decision, Your Lordship's decision was that the conditions will be agreed upon. That is the order. So if
25 then they are asking for the variation of that order, I hope we are not going to be saddled time and again with informal applications, when

already then we are trying to deal with one.

So if then they want the court to vary his own order, they must say so, because the order it says that it must be by agreement between the parties, and I do not understand the plaintiff to be saying that the state respondents do not have the right to appeal. And as to what happens when an appeal is done, I have said that section 18 is very clear as to the position.

But at the moment Your Lordship has a decision which says that the parties will agree, discuss and agree on the undertaking, I mean on the conditions. And now Your Lordship is asked to mero motu now impose... [intervene].

COURT: But what I, what I said... Sorry Mr Makhari, the email that I caused my Registrar to send out to the parties, I said that I will allow the live stream broadcasting, which will be subject to certain conditions. The conditions will be discussed on Monday morning at the commencement of the trial.

MR MAKHARI: That is right. So that is the very same one I am referring to.

COURT: That is not by agreement between the parties.

MR MAKHARI: No, no, I think that that was my misquoting, ja.

COURT: Yes.

MR MAKHARI: Indeed. So...

COURT: It is in other words... [intervene].

MR MAKHARI: Yes.

COURT: ...because I must finalise or give the final approval of the

conditions, so I am involved in that.

MR MAKHARI: Yes. Yes.

COURT: So it is a matter of coming together and agreeing on the conditions.

5 MR MAKHARI: Yes.

COURT: And as I understand the plaintiff's counsel now is that although you have given the undertaking, and we have no reason to doubt the undertaking, but sometimes unforeseen things happen, and I think plaintiff is concerned with what happens... [intervene].

10 MR MAKHARI: Yes.

COURT: ...now and for any reason if that petition is only filed tomorrow afternoon, that is a whole day.

MR MAKHARI: Yes.

COURT: That is how I, what I understand here. So would, would you
15 be prepared or would it be within your instructions to discuss the conditions now. We can do it informally in chambers, and then finalise it in court, as... Because until the petition is filed, as Mr Mahon correctly pointed out, they are entitled to proceed with the broadcasting again in terms of my order.

20 But I also hear what you are saying, the conditions have not been finalised. So would you have any difficulty with now getting together, where we finalise the conditions. And of course, once you have filed your petition, then the ruling will again be suspended, as it were.

25 MR MAKHARI: Which is something that I was trying to avoid, because

we will prefer an orderly process of the court, because if there is an undertaking that there will be leave, I mean there will be a petition that will be filed by tomorrow or so, and the moment it is filed it does not require any permission from a Judge... [intervene].

5 COURT: Yes.

MR MAKHARI: ...it is automatically suspended.

COURT: It follows.

MR MAKHARI: So we just have to inform the court and they have to switch off the cameras.

10 COURT: Yes.

MR MAKHARI: I find it to be a very undesirable situation. In fact it will be clumsy to have such a situation when there is an undertaking. When there is no undertaking, then we will understand that there is no undertaking and therefore one could not anticipate. And if we are not
15 able to file it by tomorrow, then we will communicate and say that we are not able to do so, and then Your Lordship can then put, put conditions, because I have to instead of focussing my energy on discussing the conditions of the broadcast, when these proceedings probably when, we are left with only one hour today or less than two
20 hours, to broadcast.

To me I find it difficult to see what is the rationale behind the whole thing. Unless we say that we adjourn these proceedings until tomorrow. If by tomorrow there is no petition, then Your Lordship can proceed to put those conditions, and we can engage, of course. We
25 can engage.

COURT: In... In view of what has, what has already happened, there is also an application to strike out that has to be dealt with.

MR MAKHARI: Yes.

COURT: And in order not to unnecessarily cause any delays, it is my
5 view, subject to what the parties say here in regard to that application, to hear it immediately after this today.

MR MAKHARI: Oh yes. Oh yes.

COURT: So there is some urgency in seeing to it that this issue about the conditions be finalised now.

10 MR MAKHARI: Yes. Yes. Well, I do not see any urgency in the conditions being finalised, because then in any event they will be suspended by the petition.

COURT: Yes. I have already indicated my view.

MR MAKHARI: But I will leave it to... [intervene].

15 COURT: So are you, are you... [intervene].

MR MAKHARI: ...Mr Bokaba to... [intervene].

COURT: ...are you saying then that you do not wish to participate in that part officially?

MR MAKHARI: Yes. So... Yes.

20 COURT: That you will not participate in any arrangement about finalising the conditions.

MR MAKHARI: No, the proposal I am putting forward is that... [intervene].

COURT: No, no... [intervene].

25 MR MAKHARI: Yes.

COURT: ...I, I hear your proposal.

MR MAKHARI: Yes. Yes.

COURT: I am saying that I want to get that done and immediately thereafter deal with the application to strike off.

5 MR MAKHARI: And deal with the application to strike out.

COURT: Yes, subject to what the parties will tell me in that application.

MR MAKHARI: Oh yes. Oh, alright. Okay. That we can... [intervene].

COURT: But you are on this side of this aspect rather.

MR MAKHARI: Yes. Yes, I am on that aspect... [intervene].

10 COURT: So that is why I just need to know from you.

MR MAKHARI: Yes. I think we can do it. I mean we can... [intervene].

COURT: Can we do that?

MR MAKHARI: We can do it in chambers, yes.

COURT: So can we perhaps meet in chambers just for a few moments

15 so that there is no... [intervene].

MR MUHON: Yes, certainly, M'Lord.

COURT: ...have a discussion... [intervene].

MR MUHON: Yes. Yes.

COURT: ...and then we will come back in court and then formally make

20 an order... [intervene].

MR MAKHARI: Indeed.

MR MUHON: As Your Lordship pleases.

MR MAKHARI: Yes.

COURT: Okay. The court adjourns.