IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO 32492 / 2012

In the matter between:

COMBINED ARTISTIC PRODUCTIONS CC	Applicant
and	
KETSEKELE, SANDI WELCOME	First Respondent
ROAD ACCIDENT FUND	Second Respondent
VAN NIEKERK, FRANSA	Third Respondent

In re:

KETSEKELE, SANDI WELCOME	Plaintiff
and	
ROAD ACCIDENT FUND	Defendant

APPLICANT'S CONCISE HEADS OF ARGUMENT

INTRODUCTION

1. This is an unopposed application by a member of the media for permission to use mobile digital devices to broadcast live over the Internet ("**livestream**") certain of this Court's proceedings in which there is public interest, namely an application by an attorney (the third respondent) for leave to appeal against a judgment in which her conduct in the litigation was criticised and reported to the Law Society of the Northern Provinces.

2. The third respondent (an attorney) has sought leave to appeal against a judgment of this Court (given by the Honourable Bertelsmann J), which, while upholding the compensation claim brought by her client (the first respondent), against the Road Accident Fund ("**RAF**") (the second respondent), contained the following adverse pronouncements against her and the other legal representatives involved:[1]

> *The lawyers' actions are prima facie lacking in probity. It would appear that their duty to act honestly toward the court and strictly in the best interests of their clients was sacrificed on the altar of personal enrichment. It is only proper that all their fees are disallowed to mark the court's disapproval. This judgment will be referred to the Law Society of the Northern Provinces and to the Pretoria Society of Advocates for further investigation and appropriate action, should any be indicated.*

3. The applicant seeks permission to livestream the hearing of the third respondent's application for leave to appeal ("**the leave hearing**").[2] As a member of the media, a long-established and award-winning investigative journalism production house,[3] the applicant seeks this permission in the exercise of its constitutional right and responsibility to make matters of public interest accessible to the public at large.

4. This application rests on two simple but significant propositions:

4.1 The constitutional principle of open justice permits the media to livestream any court proceedings, unless exceptional circumstances justify otherwise.

4.2 There are no exceptional circumstances justifying the refusal of permission to livestream the leave hearing, and in fact there is compelling public interest in favour of it.

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[1] **Ketsekele v Road Accident Fund 2015 (4) SA 178 (GP)** para 37

[2] **Record** pp 1-3: applicant's notice of motion

[3] **Record** pp 7-8: applicants' founding affidavit para 4

CONSTITUTIONAL PRINCIPLE OF OPEN JUSTICE

5. In **SABC**,[4] which concerned an application for permission to broadcast audiovisual recordings of Supreme Court of Appeal proceedings, the Constitutional Court (per Langa CJ) recognised "open justice" as an integral component of a constitutional democracy:[5]

> *A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.*
>
> *This case, then, is not essentially about the rights of the SABC. Rather it concerns the right of South Africans to know and understand the manner in which one of the three arms of government functions, namely, the judiciary. This is a strong constitutional consideration. The right of the people to be informed of judicial processes presupposes that courts are open and accessible. The fact that courts do their work in the public eye is a key mechanism for ensuring their accountability. As we have already said, this case is also about the obligation upon courts to ensure that accused people have a fair trial. ...*
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> *Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial*

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[4] **South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others [2006] ZACC 15; 2007 (1) SA 523 (CC)**

[5] **Ibid** paras 28-29 and 32

and the right to a public hearing (ie the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.

6. In **Independent Newspapers**,[6] where a newspaper sought access to portions of a court record that had been kept confidential on the grounds of national security, the Constitutional Court (per Moseneke DCJ) went further, commenting that open justice had essentially become a right of its own:[7]

> *There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice. The constitutional imperative of dispensing justice in the open is captured in several provisions of the Bill of Rights. First, section 16(1)(a) and (b) provides in relevant part that everyone has the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas. Section 34 does not only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in section 35(3)(c) which entitles every accused person to a public trial before an ordinary court.*
>
> *This systemic requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of state function.*

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

[7] **Ibid** paras 39-41

From the right to open justice flows the media's right to gain access to, observe and report on the administration of justice...

7. Pertinently, in **MultiChoice**,[8] where members of the media (including the present applicant) sought permission to broadcast live audiovisual footage of a prominent murder trial, this Court (per Mlambo JP) explained the rationale for the principle of open justice in the following terms:[9]

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

8. The principle of open justice has also been given explicit statutory recognition in the **Superior Courts Act, 2013**, section 32 of which provides as follows:

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

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

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

[9] **Ibid** para 23

10. This vital rationale was recognised by the Constitutional Court in **Mamabolo**,[10] one of the earlier judgments considering open justice in a constitutional context:

> *Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where* ***all can see****. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts.*

11. Most recently, in **SANRAL**,[11] concerning public access to records filed in court, the Supreme Court of Appeal (per Ponnan JA) firmly amplified the above position:[12]

> *[I]t may be said that the right to public courts, which is one of long standing, does not belong only to the litigants in any given matter, but to the public at large. ...*
>
> *Thus Moseneke DCJ accepted in* ***Independent Newspapers*** *(para 43) that 'the default position is one of openness'. Accordingly, court proceedings should be open unless a court orders otherwise.*

PERMISSION TO LIVESTREAM PROCEEDINGS

12. In **SABC**, while the majority of the Constitutional Court ultimately deferred to the discretion of the Supreme Court of Appeal to disallow live broadcasting of certain criminal appeal proceedings (and thus made no pronouncement on whether live broadcasts are, in principle, permissible), Moseneke DCJ dissented as follows:[13]

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[10] **S v Mamabolo [2001] ZACC 17, 2001 (3) SA 409 (CC)** para 29 (emphasis added).

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

[12] **Ibid** paras 18-19

[13] **SABC** (n 4) paras 97-101.

[The Supreme Court of Appeal] omitted to bear in mind that the principle of open justice, which is well entrenched in our law, provides a powerful reason for allowing the broadcast of court proceedings. The principle of open justice is an incident of the values of openness, accountability and the rule of law, as well as a core part of the notion of a participatory democracy. All these are foundational values entrenched in the Constitution. Its preamble contemplates "a democratic and open society in which government is based on the will of the people" whereas section 1(d) requires that our democracy shall ensure accountability, responsiveness and openness.

In the judicial sphere, notions of openness are even more important. The public is entitled to have access to the courts and to obtain information pertaining to them. There is no gainsaying that the gathering of information pertaining to how courts function is indivisibly linked to representative democracy. Once more, sections 34 and 35(3)(c) of the Constitution require that court proceedings in this country must be "public". After all, courts of law exercise public and often coercive power. What they do and do not do is of legitimate public concern. ...

It is perhaps appropriate to draw attention to the fact that permitting audio-visual recording and broadcast of appellate proceedings is by no means without precedent. The Supreme Court of Canada provides a live feed of all appeals to the Canadian Parliamentary Press Gallery. The Court holds copyright over all video recordings. The Court has an arrangement with the Canadian Public Affairs Channel which allows the Channel to broadcast hearings at a later date. Upon written request, permission may be given to allow limited use of video recording of cases for educational, non-commercial purposes. Members of the media write to the Registrar to obtain permission.

In concluding the discussion on the principle of open justice it is important to recognise that its relevance in our context is even greater. On the papers the evidence suggests that the majority of South Africans receive news and information principally by means of radio and television. The printed media is a preserve of a few. This is so partly on account of the extensively high level of illiteracy. We are told that daily newspapers average a circulation of

approximately 1.6 million. Whereas the national television network reaches approximately 18 million people and the radio has a daily adult audience of around 20 million people. ...

It is no answer to this telling point that the court will be open to the public during the appeal hearings. Besides obvious distance and space limitations, the vast majority of citizens prefer to rely on the media rather than personal attendance at court proceedings.

13. These practical considerations highlight the vital role of the media in providing the most accurate information available to the widest audience possible. In **SANRAL**, this was emphasised as follows:[14]

The Constitutional Court has noted that the media has a duty to report accurately, because the 'consequences of inaccurate reporting may be devastating.' It goes without saying that to report accurately the media must be able to access information. Access to information is 'crucial to accurate reporting and thus to imparting information to the public.' Whilst s 32 of the Constitution guarantees the right of persons to access relevant information, s 16 entitles them to distribute that information to others. ... The media hold a key position in society. Courts have long recognised that an untrammelled press is a vital source of public information (see ***Grosjean v American Press Co. [1936] USSC 33; 297 US 233 (1936)****).* ***Grosjean*** *recognised that 'since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern'. In this country the media are not only protected by the right to freedom of expression, but are also the 'key facilitator and guarantor' of the right. The media's right to freedom of expression is thus not just (or even primarily) for the benefit of the media: it is for the benefit of the public.*

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[14] **SANRAL** (n 11) para 20

14. Significantly, in **SABC**, the majority too recognised the importance of ensuring that the contents of court proceedings be reported as accurately as possible:[15]

> *The time has come for courts to embrace the principle of open justice and all it implies. However, in our view, it should be borne in mind that the electronic media create some special difficulties for the principle of open justice. Broadcasting, whether by television or radio, has the potential to distort the character of the proceedings. This can happen in two ways: first, by the intense impact that television, in particular, has on the viewer, in comparison to the print media; and second, the potential for the editing of Court proceedings to convey an inaccurate reflection of what actually happened. This is particularly dangerous, given that visual and audio-recordings can be edited in a manner that does not disclose the fact of editing. This distorting effect needs to be guarded against. It arises not so much from the presence of cameras and microphones interfering with the court proceedings themselves. But, more dangerously, it may arise from the manner in which coverage can be manipulated, often unwittingly, to produce communications which may undermine rather than support public education on the workings of the Court, and may also undermine the fairness of the trial.* ***Such distortions are much more likely to arise from edited highlights packages than from full, live broadcasts.***

15. The permission sought by the applicant in this matter comprehensively addresses all of the above concerns, as livestreaming would ensure that the *most immediate* coverage of the leave hearing will also be the *most accurate*, being a pure live feed, uncensored and unedited, accessible to the widest possible audience.

16. Most pertinently, in **MultiChoice**, in granting permission for live broadcasting of audiovisual footage, Mlambo JP affirmed the position that, if court proceedings are

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[15] **SABC** (n 4) para 68 (emphasis added)

to be open to *anybody*, they must be open to *everybody*, unimpeded by obstacles to physical attendance at court:[16]

> *[I]n the open democratic society envisaged by our Constitution, and 'in which the public have a right of access to the workings of the judicial system', the issue is not whether the electronic, broadcast or print media should be allowed to cover court proceedings, 'but how guarantees can be put in place to ensure that the public is indeed well informed about how the courts function' when dealing with proceedings before them. ...*
>
> *My view is that it is in the public interest that, within allowable limits, the goings-on during the trial be covered, as I have come to decide, to ensure that a greater number of persons in the community who have an interest in the matter, but who are unable to attend these proceedings due to geographical constraints, to name just one, are able to follow the proceedings wherever they may be.*

17. The permission now requested by the applicant differs from the relief granted by Mlambo JP in **MultiChoice** in only one respect: the broadcasting equipment would not be pre-installed and remote controlled video cameras,[17] but merely a mobile phone or tablet.[18] By virtue of its relatively rudimentary nature (in contrast with the sophisticated video cameras contemplated in **MultiChoice**), a mobile phone or tablet must be manually operated and positioned to capture the proceedings being broadcast. This should not, however, cause any disturbance or interference with the proceedings, particularly as a mobile phone is wireless and relatively compact (again, in contrast with the video cameras contemplated in **MultiChoice**).

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[16] **Multichoice** (n 8) paras 20 and 27

[17] **Ibid** para 30

[18] **Record** pp 23-24: applicants' founding affidavit paras 56-59

18. This fact is borne out by the practical experience that mobile phones and tablets are already overwhelmingly used by journalists across the country to report live on court proceedings by posting concise updates on the online platform Twitter,[19] a practice which was encouraged by Mogoeng CJ shortly before **MultiChoice**, "*as it increases transparency of court proceedings, provided that it [is] accurate*".[20] The permission sought in this matter, to livestream court proceedings over Twitter, would indeed be conducive to absolute accuracy, and would thus immeasurably improve upon the present use of Twitter as a court reporting tool.

NO EXCEPTIONAL CIRCUMSTANCES JUSTIFYING REFUSAL OF LIVESTREAMING

19. This application is unopposed. Accordingly, no party has raised any exceptional circumstances warranting derogation from the applicant's full freedom to impart information about the leave hearing to the public in the most immediate, accurate and accessible manner possible.

20. On the papers, it appears that the third respondent and/or her counsel, at some stage, expressed apprehension about the relief sought by the applicant.[21] Given that no opposition to this application has been entered, they must be taken to have abandoned such apprehension. To the extent, however, that the Court may have any apprehension that the role players in the leave hearing might be inhibited or prejudiced in any way, it is respectfully submitted that this does not constitute an exceptional circumstance justifying refusal of the permission sought.

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[19] **Record** pp 22-23: applicant's founding affidavit paras 52-55

[20] **Record** p 58-61: applicant's annexures GM6.1 and GM6.2

[21] **Record** p 24: applicant's founding affidavit para 60

21. In **SABC**, Moseneke DCJ (dissenting, but uncontradicted on this aspect, which was not addressed by the majority) commented as follows:[22]

> *[T]he Supreme Court of Appeal concluded that there was a reasonable possibility that allowing the public broadcaster to record the proceedings and to broadcast them on sound television and radio would 'inhibit justice' because counsel and the court will be distracted by the extensive publicity surrounding the appeals such that an unfair hearing would result contrary to the fair trial guarantees in sections 34 and 35(3) of the Constitution. There is no doubt that the appeals have elicited unprecedented public interest and the political stakes are high. The record is indeed long and trying. The evidence therein will be subjected to incisive analysis and often trenchant criticism. A variety of legal arguments will be made and refuted. And certainly there will be searching and sometimes robust exchanges between counsel and the bench. This however seems to me as par for the course. It certainly comes with the territory. I have agonised much over the reasonable prospects of judges and counsel alike being inhibited in discharging their solemn duties. I am not persuaded, nor do the facts indicate any material risk that counsel, very senior ones at that, would shirk their responsibility to advance as vigorously as is permissible the cause of their clients. I can find no real likelihood that senior counsel would not address the court "with their customary dignity, erudition and helpfulness". Nor am I persuaded that judges would not discharge their obligations "impartially and without fear, favour or prejudice".*

22. More recently, in **SANRAL**,[23] the Supreme Court of Appeal (per Ponnan JA) applied the following reasoning from the Canadian Supreme Court in **Attorney General (Nova Scotia) v MacIntyre [1982] 1 SCR 175** at 185:

> *Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the*

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[22] **SABC** (n 4) para 104

[23] **SANRAL** (n 11) para 14

integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

23. Finally, the apprehension invoked by counsel for the accused in **MultiChoice**, that live broadcasting may cause him to be "*inhibited in the questioning of witnesses and the presentation of his case*",[24] was firmly rejected by Mlambo JP, who considered "*the inhibitory effect of audiovisual recording equipment*" to be legally relevant only as far as it affected the accused and his witnesses "*when they give their evidence*".[25]

24. At the leave hearing, which the present applicant seeks to livestream, there will be no witnesses giving evidence, only officers of the Court performing their functions as such, who are each bound, as much as the Court itself, by the full import of the constitutional principle of open justice.

25. In the absence of exceptional circumstances justifying the imposition of fetters on the applicant's freedom to impart accurate information about the leave hearing, it is respectfully submitted that a proper case has been made for the relief set out in the notice of motion.

COMPELLING PUBLIC INTEREST IN FAVOUR OF LIVESTREAMING

26. For the sake of completeness, however, it is necessary to state that, even if there were exceptional circumstances counting against livestreaming the leave hearing, such circumstances would be outweighed by the compelling public interest in free, unimpeded and unedited public access to the leave hearing.

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[24] **MultiChoice** (n 8) para 12

[25] **Ibid** para 25

27. It is relevant that the leave hearing emerges from a matter concerning the RAF, a publicly funded institution, the financial workings of which are manifestly matters of public interest and importance. As the Constitutional Court noted in **Mdeyide**, the RAF is "*a hugely important public body which renders an indispensable service to vulnerable members of society*".[26] It is also relevant that litigation against the RAF is an area of legal practice that is notorious for attracting admonishment by the Bench for unprofessional conduct by officers of the Court.[27]

28. In **Geach**, concerning disciplinary proceedings against advocates who were found to have improperly enriched themselves at the expense of the RAF, the Supreme Court of Appeal held as follows:[28]

> *As officers of our courts lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them.*

29. The ethical probity of legal practitioners is, itself, a matter of considerable public interest. Thus, in **Randell**, the Supreme Court of Appeal set aside an order staying an application to have an attorney struck from the roll, commenting as follows:[29]

> *The matter is of huge public importance. The respondent is an officer of the court whose position requires scrupulous integrity and honour. He is facing grave allegations of dishonesty and impropriety. In assessing prejudice generally the judge a quo regrettably appears to have focused solely on the*

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[26] **Road Accident Fund and Another v Mdeyide [2010] ZACC 18; 2011 (2) SA 26 (CC)** para 78; see also **Law Society of South Africa and Others v Minister for Transport and Another [2010] ZACC 25; 2011 (1) SA 400 (CC)** para 66

[27] See eg **Motswai v Road Accident Fund [2012] ZAGPJHC 248; 2013 (3) SA 8 (GSJ)** paras 33-35 and the other judgments cited therein

[28] **General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA)** para 87

[29] **Law Society of the Cape of Good Hope v Randell [2013] ZASCA 36; 2013 (3) SA 437 (SCA)** para 33

respondent's practice. ... It was prejudice not only to the respondent that he had to consider but also the protection of the public interest.

30. It is in this light that the present matter must be considered. The third respondent seeks leave to appeal against this Court's pronouncements of serious misconduct by her and the other legal representatives involved in this case, as well as wider malfeasance in the profession:[30]

> *It is patently obvious that the lawyers involved in this matter, counsel and attorneys alike, confidently expected this forensic scam to be implemented without any problem, indicative of a practice that appears to be in vogue in RAF matters. The agreement the parties reached was recorded on a template that had open spaces to record the plaintiff's particulars and the individual details of the proposed settlement the parties intended to finalise at court. The agreement to pay costs on the High Court scale, set out above, is part of the pre-printed portion of the template. The lawyers involved were clearly surprised that what might be described as their cosy arrangement was questioned by the Court. This provides further proof of a system that appears to be evident in dealing with RAF matters.*
>
> *The lawyers' actions are prima facie lacking in probity. It would appear that their duty to act honestly toward the court and strictly in the best interests of their clients was sacrificed on the altar of personal enrichment. It is only proper that all their fees are disallowed to mark the court's disapproval. This judgment will be referred to the Law Society of the Northern Provinces and to the Pretoria Society of Advocates for further investigation and appropriate action, should any be indicated.*

31. As disciplinary proceedings against officers of the Court are not instituted for the purpose of punishing the practitioners but rather for the purpose of protecting the

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[30] **Ketsekele** (n 1) para 35-36

public,[31] there is self-evidently compelling public interest in the third respondent's leave hearing, particularly if the pronouncements against her were warranted.

32. Finally, it bears mention that there would be no less public interest in accessing the leave hearing if this Court's pronouncements regarding the third respondent were *unwarranted.* On the contrary, in her leave application, the third respondent makes serious allegations of judicial misdirection, including the following:

> *2.6 The Court a quo was unduly harsh in its criticism of the fact that the Plaintiff's attorney had filed the various expert reports. ...*
>
> *2.10 The fact that the Road Accident Fund legal representatives conceded issues with regard to costs of experts does not establish the fact that there is a "scam". The Court was unduly harsh in making this finding and could not have reached this conclusion on the facts before it. ...*
>
> *2.12 The Court should not have found, as it did in paragraph 35 of the judgment, that the lawyers involved in the matter, counsel and attorneys alike, confidently expected this forensic scam to be implemented without any problem". There was no factual basis to make so extreme a finding.*

33. For the reasons set out repeatedly by the Constitutional Court and other Courts as the rationale for the principle of open justice, there is tremendous public interest in assessing whether the third respondent's criticism of this Court's judgment is correct, which requires that the public be afforded the most immediate, accurate and accessible coverage of the leave hearing that current technology can provide.

CONCLUSION

34. It is accordingly submitted that a proper case has been made out for the relief set out in the notice of motion.

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[31] **Geach** (n 28) paras 67, 88 and 153

BEN WINKS
Attorney with right of appearance in the Superior Courts of South Africa, in terms of Act 62 of 1995

Webber Wentzel
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14 January 2016