



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR79/2025

In the matter between:

**e-Sat TV (PTY) LTD
e-TV**

**FIRST APPELLANT
SECOND APPELLANT**

and

THE STATE

RESPONDENT

ORDER

On appeal from: Durban High Court (Balton J, sitting as court of first instance):

Having read the papers and after hearing counsel, the following order is made:

1. Condonation for the late filing of the appellants' appeal record is granted.
2. The appeal is upheld with costs, including the costs of two counsel on scale C, and including the costs of the applications for leave to appeal before the court a quo and in the Supreme Court of Appeal.
3. The order of the court a quo dated 3 May 2024 is set aside and replaced with the following:
 - 3.1. The order of 28 July 2023 is rescinded.

- 3.2. The respondent is directed to pay the applicants' costs of the application, including the costs of two counsel on scale C.
4. The matter is referred back to the trial court with the direction that any future application to vary the November 2022 order must be brought on affidavit, on a witness-by-witness basis, supported by sworn objections, served on the media and the accused, and after hearing all affected parties, with consideration of less restrictive means before any restriction on broadcasting.
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JUDGMENT

Date Delivered: 3 October 2025

Masipa J (Sibiya J et Moodley AJ concurring)

Introduction

[1] This is an appeal against the judgment and order of Balton J, delivered on 3 May 2024, dismissing the appellants' urgent application to rescind, vary, or set aside the ruling made on 28 July 2023 ('the July Ruling').

[2] The July Ruling imposed restrictions on the recording and broadcast of a portion of the ongoing trial of Ms Zandile Gumede and 21 co-accused ('the Gumede trial'), who face charges of corruption, fraud, racketeering and related offences arising from tender awards in the eThekweni Municipality. Specifically, the July Ruling prohibited live television broadcast of an entire 'thread' of State witnesses, barred publication of their identities and testimony, prohibited the use of cell phones and recording devices by journalists, and permitted audio recordings only for archival purposes, with delayed release after the conclusion of that thread.

[3] The appellants, who are licensed broadcasters and were parties to the earlier November 2022 consent order ('the November Order') permitting coverage, contend that the July Ruling unjustifiably infringed their constitutional rights, was granted without hearing them, and was based on inadmissible hearsay evidence. They further challenge the court a quo's findings on urgency, standing, and costs.

Background

[4] In July 2022, the presiding trial judge directed that no cameras would be permitted in the Gumede trial. That ruling was challenged by South African National Editors Forum and the appellants, resulting in the November 2022 consent order, which allowed one television camera, audio recording, and pooling arrangements, all subjected to guidelines to maintain the decorum of the court.

[5] The trial commenced in March 2023. On 22 July 2023, a State witness's home was subjected to a shooting incident. Then, on 24 and 26 July, the prosecutor informed the court that witnesses scheduled to testify in a forthcoming thread of evidence were fearful of testifying.

[6] On 28 July 2023, after discussions between the State and defence counsel, but without hearing the appellants, the presiding judge issued the July Ruling. Its effect was to prohibit live broadcasting and impose strict restrictions on coverage for the duration of that thread of evidence.

[7] On 17 August 2023, the appellants launched an urgent application to rescind or vary the July Ruling. They contended that their exclusion violated the *audi alteram partem* rule, that the ruling infringed the constitutional principles of open justice and freedom of expression, that the reliance on hearsay evidence was impermissible, and that the ruling was disproportionate when measured against less restrictive alternatives.

[8] The application was opposed by the State. On 3 May 2024, Balton J dismissed the application with costs. It is that judgment which forms the subject of this appeal.

Standing

[9] Before turning to the grounds of appeal, it is necessary to first determine the nature of the appellants legal standing in representing public interest. The court a quo took the view that the appellants pursued commercial interests whereas the State represented the public interest.

[10] The appellants, however, argued that they have standing both in their own right, as parties to the November Order, and under s 38 of the Constitution, being in the public interest. They emphasised s 16(1)(a) and (b) of the Constitution: which protect the freedom of the press and ‘freedom to receive or impart information’. They submitted that it is in the public interest that high-profile trials be broadcast live, so that citizens know and are aware of events as they occur. In support, they relied on *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*,¹ and *South African National Editors Forum v Abbu*.²

[11] This Court is mindful that the issue of standing in constitutional matters must be approached generously. Section 38 of the Constitution expressly provides that ‘anyone acting in the public interest’ may approach a court to vindicate rights enshrined in the Bill of Rights. Our courts have consistently endorsed this broad approach. In *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others*,³ the Supreme Court of Appeal stressed that the Constitution envisages ‘public interest litigants’ whose role is to ensure accountability and legality. The Court held that limiting standing too narrowly would undermine constitutional democracy.

[12] In *National Director of Public Prosecution and Others v Freedom Under Law*,⁴ the Supreme Court of Appeal reaffirmed that standing should not be denied merely because the State is also a guardian of the public interest. The Court deals directly with locus standi and states the following: ‘Included amongst these formal objections was a challenge to *FUL*’s legal standing. However, this challenge was not pursued in argument. Suffice it

¹ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SACR 408 (CC) (SABC).

² *South African National Editors Forum v Abbu and Others* (Leave to Appeal) [2023] ZAKZPHC 163 (SANEF).

³ *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA); [2011] 3 All SA 513 (SCA).

⁴ *National Director of Public Prosecutions and Others v Freedom Under Law* [2014] ZASCA 58; 2014 (4) SA 298 (SCA); 2014 (2) SACR 107 (SCA) (*Freedom Under Law*) para 18.

therefore to say that in my view the objection to FUL's standing was unsustainable from the start. FUL's mission to promote accountability and democracy and to advance respect for the rule of law and the principle of legality in this country has been recognised by this court (see eg Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others 2011 (3) SA 549 (SCA) paras 19–21). In addition, I agree with the finding by the court a quo that the matter is one of public interest and national importance.'

The effect of these decisions is that standing cannot be denied merely because the State is ordinarily the guardian of the public interest. Where the State fails to act, or where its conduct is itself impugned, it is both necessary and appropriate for a civil society body or media actor to “step into the breach” to vindicate constitutional rights.

[13] In *SABC*,⁵ Langa CJ emphasised at paragraph 29 that television coverage brings openness to millions who cannot physically attend court. This demonstrates that broadcasters serve as conduits of constitutional rights rather than private actors solely in their own interests. In *SANEF*,⁶ the High Court recognised the media's standing to litigate in defence of open justice, even where their commercial interests coincided with the public interest. The Court explained that the coincidence of interest does not dilute or undermine the public character of the litigation.

[14] Applying these principles, I conclude that the appellants clearly have standing. First, they were directly affected as parties to the November Order, which was varied without their participation. That alone suffices to establish standing. Second, their litigation is quintessentially in the public interest: to secure transparency in the trial of high-profile public officials. In *SANEF*,⁷ the High Court confirmed that the media may approach the courts to defend openness and access. That case illustrates that the coincidence of commercial and public interests does not negate standing. To hold otherwise would be to construe standing in a manner inconsistent with s 38 and to ignore the essential role of the media in a constitutional democracy. The objection to standing must therefore fail.

[15] The State argued that it only represents the public interest and that the appellants' motivation was a commercial gain.

⁵ *SABC* above fn 1.

⁶ *SANEF* above fn 2.

⁷ *Ibid.*

[16] Section 38(d) of the Constitution confers standing to ‘anyone acting in the public interest’. In *Freedom Under Law*,⁸ the Supreme Court of Appeal stressed that s 38 must be generously applied. *SABC*⁹ recognised that broadcasters vindicate the public’s right to know. Section 16 of the Constitution protects not just the media’s right to impart information, but the public’s right to receive it contemporaneously. The appellants were parties to the November Order, and their rights were directly affected. They also act in the public interest by facilitating real-time access to proceedings. The objection to standing is therefore unfounded.

Mootness

[17] A preliminary issue arises as to whether the appeal has become moot, given that the ‘thread’ of evidence covered by the July Ruling may have, by now, completed their testimony.

[18] The appellants argued that, at the time of appeal preparation, the relevant thread had not yet been concluded. Moreover, they contended that, even if it had, the issue remained of pressing systemic importance. They relied on *JT Publishing (Pty) Ltd v Minister of Safety and Security*,¹⁰ at paragraph 15, where the Constitutional Court held that the Court has a discretion to hear matters which are moot...where the interests of justice so demand, particularly if the issue is one capable of repetition but evading review.

[19] The State argued that the July Ruling was temporary in nature and specifically tailored to a defined segment of the trial; once that segment concluded, the order lapsed and the appeal became academic.

[20] I agree with the appellants. The legality of restrictions on media coverage in criminal trials is a recurring issue of constitutional importance. Such orders are typically temporary, and without appellate scrutiny, they may consistently evade

⁸ *Freedom Under Law* above fn 4.

⁹ *SABC* above fn 1.

¹⁰ *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1997 (3) SA 514 and *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC).

review. This appeal therefore raises a live controversy in law even if the factual thread has ended. The appeal is therefore not moot.

Grounds of appeal

[21] The appellants raise six grounds of appeal:

- (a) That the court a quo erred in holding that the July Ruling did not infringe open justice and freedom of expression.
- (b) That the court erred in finding that there was a potential threat to witnesses, admitting hearsay evidence not properly before it.
- (c) That the court failed to apply the *Van Breda*¹¹ ‘witness-by-witness’ approach, instead imposing a blanket prohibition for an entire thread.
- (d) That the court failed to apply the *audi alteram partem* rule and s 34 of the Constitution.
- (e) That the court failed to consider the need for expeditious resolution of the application while the trial was continuing.
- (f) That the court erred in ordering the appellants to pay costs, contrary to the *Biowatch*¹² principle.

Respondent’s overall defence

[22] The State supported the judgment of the court a quo, contending that the restrictions were a proportionate exercise of judicial discretion to protect and regulate their own process under s 173 of the Constitution. The State pointed to the volatile context, including the shooting incident and emails from witnesses expressing fear, as sufficient justification for protective measures. The State maintained that the appellants were not without recourse: they were later informed of the July Ruling and exercised their right to seek rescission.

¹¹ *Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others* [2017] ZASCA 97; 2017 (2) SACR 491 (SCA) (*Van Brenda*).

¹² *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) (*Biowatch*).

[23] On urgency, the State argued that the appellants delayed in launching their rescission application, and that the trial court was entitled to manage the case considering the ongoing proceedings. Regarding costs, the State initially supported the order of the court a quo but later conceded that it was difficult to reconcile with *Biowatch*.¹³

Grounds of appeal analysed

Ground 1: Infringement of open justice and freedom of expression

[24] The court a quo¹⁴ held that open justice was not infringed because:

‘Members of the press and the public continued to have access to the courtroom. Journalists could take notes and publish their reports. Audio recordings were permitted, albeit with delayed release. In my view, justice remained visible.’

[25] The appellants argued that open justice requires more than physical access; it requires meaningful accessibility to the public at large. They emphasised that unlike media that is in print, the first appellant is a satellite broadcaster and the second a free-to-air television broadcaster. Their core function is live broadcast. By prohibiting them, the July Ruling struck directly at their constitutional role.

[26] The appellants contended that the court a quo failed to consider this distinction and treated television broadcasting as though it were interchangeable with print. They relied on *SABC*,¹⁵ where Langa CJ said that:

‘[27] Ultimately, however, what is central to the issue is not the responsibility and rights of the SABC as a broadcaster. What is at stake is the right of the public to be informed and educated...

[28] The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy...

[29] 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

¹³ Ibid.

¹⁴ See paragraph 42 of the judgment of the court a quo.

¹⁵ *SABC* above fn 1.

have already said, this case is also about the obligation upon courts to ensure that accused people have a fair trial.’

[27] Mokgoro J, in a separate concurring judgment,¹⁶ said the following:

‘[120] While the right of the SABC under s 16 consists primarily of the right and freedom to disseminate information, this right correlates with its duty as the public broadcaster to inform the public. The public in turn has the right to receive information. In an open democracy based on the values of equality, freedom and human dignity, the right of the public to be informed is one of the rights underpinned by the value of human dignity.’

The right of the public to be informed is the foundation for the right of the media to broadcast court proceedings. As was argued by the appellants, television coverage brings the reality of the courtroom into the homes and workplaces of millions of people who would otherwise be unable to attend.

[28] The appellants contended that the July Ruling effectively reversed the November Order without hearing them. Additionally, that the court a quo in arriving at its decision following the rescission application, ignored their ‘with prejudice’ draft order, which proposed less restrictive measures such as anonymisation, masking, or sworn objections by individual witnesses. They submitted that *Independent Newspapers (Pty) Ltd v Minister of Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another*¹⁷ requires that any departure from open justice as protected by the Constitution would be justified by evidence and after hearing those affected.

[29] The appellants further relied on *Multichoice (Proprietary Limited v National Prosecuting Authority and Another*,¹⁸ where Mlambo JP stressed that less restrictive means must be preferred, and on *Van Breda*,¹⁹ where the Supreme Court of Appeal held that demonstrable prejudice must be shown.

[30] The State argued that open justice was not infringed as journalists could attend and report on proceedings and the public could read reports. The State

¹⁶ Ibid.

¹⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC) (*Independent Newspapers*).

¹⁸ *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another* 2014 (1) SACR 589 (GP) (*Multichoice*).

¹⁹ *Van Breda* above fn 11.

further stressed that the trial court had a discretion under s 173 of the Constitution to regulate its own proceedings in light of witness fears.

[31] The Constitutional Court has consistently emphasised that openness is the default. In my view, as set out in *SABC*,²⁰ television coverage brings the reality of the courtroom into the homes and workplaces of millions of people who would otherwise be unable to attend. *SABC*²¹ stands for the rule that openness is the default, and limitations are the exception requiring justification. Therefore, the exercise of permitting or refusing broadcasting must strike an appropriate balance between the rights at stake, but the starting point must always be that openness and transparency are the default. Limitations must be justified by clear and compelling considerations.

[32] The July Ruling imposed the most restrictive form of limitation, a complete blackout of an entire thread, without sworn evidence linking broadcasting to risk. The appellants' compromise, consistent with *Multichoice*²² and *Van Breda*,²³ was not considered.

[33] Crucially, the appellants are broadcasters rather than media that is in print. Preventing them from broadcasting live is qualitatively different from delaying a newspaper report. It denies the public the ability to observe justice contemporaneously. Section 16(1)(a) and (b) of the Constitution protects both the right to impart and the right to receive information. As the Constitutional Court noted in *Independent Newspapers*,²⁴ 'the legitimacy of the courts is bolstered when their functioning is subject to public scrutiny'.

[34] By equating openness with the physical presence of journalists and the delayed release of an audio, the court a quo misapprehended the nature of the constitutional right. Therefore, the July Ruling unjustifiably infringed open justice and freedom of expression.

²⁰ *SABC* above fn 1.

²¹ *Ibid.*

²² *Multichoice* above fn 18.

²³ *Van Breda* above fn 11.

²⁴ *Independent Newspapers* above fn 17.

Ground 2: Erroneous reliance on hearsay and finding of threats

[35] The court a quo²⁵ accepted that there was a potential threat to witnesses, holding that:

‘The court has before it emails from witnesses expressing fear for their safety, a note from a psychiatrist confirming anxiety, and the recent shooting incident at the home of a witness. Taken together, these justify a cautious approach to media presence.’

[36] The appellants argued that the respondent never invoked s 3 of the Law of Evidence Amendment Act 45 of 1988 (‘LEAA’). They submitted that hearsay evidence was admitted without application, contrary to *Knoop NO and Another v Gupta (Execution)*,²⁶ which held that an order made *mero motu* without pleadings, without an application, and without affording the parties a hearing is a nullity. By parity of reasoning, they contended that hearsay cannot be admitted *mero motu* without compliance with s 3, since the statute sets out the exclusive framework for admissibility.

[37] They relied further on *Robert Paul Serne v Mzamomhle Educare*,²⁷ where reliance on untested hearsay evidence was held to be a misdirection.

[38] Substantively, the appellants contended that the materials did not establish a nexus between the presence of cameras and any risk to the witnesses. The shooting incident was not linked to broadcasting. The emails reflected only generalised fear, and one witness requested to testify virtually which would still permit broadcasting. In *Van Breda*,²⁸ the Court stressed that speculation cannot suffice; prejudice must be demonstrated by evidence from individual witnesses.

[39] They also pointed out that the emails and psychiatrist’s note were not before the trial court on 28 July when the ruling was made. Their retrospective use to justify

²⁵ See paragraph 42 of the judgment of the court a quo.

²⁶ *Knoop NO and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA) (*Knoop*) paras 27–33.

²⁷ *Robert Paul Serne NO and Others v Mzamomhle Educare and Others* [2024] ZASCA 152 paras 20–23.

²⁸ *Van Breda* above fn 11 at para 72.

the order contravened *Molusi and Others v Voges N.O. and Others*²⁹ and *Four Wheel Drive Accessory Distributors CC v Rattan NO*,³⁰ which prohibit courts from introducing issues not pleaded. Accordingly, the appellants argued that the court a quo's finding of a potential threat rested on inadmissible and inadequate evidence.

[40] The State argued that the fears expressed by witnesses were genuine, that the trial court was entitled to take them into account given the volatile context of witness intimidation, and that the Court acted within its discretion under s 173 of the Constitution to regulate its own process in the interests of protecting vulnerable witnesses.

[41] I cannot endorse the approach of the court a quo. Section 3 of the LEAA prescribes three gateways for the admission of hearsay: (a) consent of the parties; (b) testimony by the declarant; or (c) an application and a finding that admission is in the interests of justice. None of these requirements were met. The respondent made no application, and the trial court admitted the hearsay *mero motu*. The admission of the hearsay evidence was a misdirection by the court a quo.³¹

[42] *Knoop*³² stressed that a court may not act outside the statutory framework or invoke inherent powers to override statutory limits. Where a court purports to do so, its order is a nullity. That reasoning applies here: admitting hearsay without following s 3 is ultra vires. Moreover, these materials were not before the court at the time the July Ruling was made on 28 July 2023. To invoke them retrospectively to justify the ruling was to exceed the record.³³

[43] Moreover, the substance of the hearsay materials did not justify the conclusion drawn. There was no causal link between broadcasting and the alleged threats. At most, the material revealed generalised anxiety. As *Van Breda*³⁴ makes clear, speculation cannot suffice; concrete evidence of specific prejudice is required.

²⁹ *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC) (*Molusi*).

³⁰ *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) (*Four Wheel Drive*) paras 19-23.

³¹ *Knoop* above fn 26.

³² *Ibid.*

³³ *Molusi* above fn 29.

³⁴ *Van Breda* above fn 11.

[44] Finally, the retrospective invocation of these documents to justify the July Ruling was impermissible. As *Molusi*³⁵ and *Four Wheel Drive*³⁶ emphasise, courts may not raise and decide issues that were not pleaded or supported by the record before them. The use of hearsay materials not before the trial court on 28 July 2023 amounted to an impermissible reconstruction of justification after the fact.

[45] The court a quo therefore misdirected itself in admitting hearsay without compliance with s 3, and in relying on material that was inadequate and irrelevant to the issue of broadcasting. Its conclusion that there was a potential threat to witnesses cannot stand.

Ground 3: Failure to apply the Van Breda³⁷ witness-by-witness approach

[46] The court a quo³⁸ held that imposing restrictions to a thread of evidence was a proportionate compromise:

‘While the order is broader than witness-by-witness adjudication, it is confined to a defined sequence of evidence. This is administratively manageable and protects vulnerable witnesses.’

[47] The appellants strongly contested this reasoning. They argued that the *Van Breda*³⁹ principle is categorical: any limitation on openness must be justified by demonstrable prejudice to a specific witness, tested through evidence. They contended that the danger of thread-based restrictions is that they operate as blanket orders, thereby silencing broadcast rights in respect of witnesses who may have no objection at all. The appellants submitted that their own ‘with prejudice’ draft order squarely addressed this difficulty. It proposed that any witness who objected should depose to an affidavit identifying the basis of prejudice; the court a quo would then assess each objection on its individual merits. This approach, they argued, was both practicable and constitutionally compliant, aligning with the less restrictive means test under s 36 of the Constitution.

³⁵ *Molusi* above fn 29.

³⁶ *Four Wheel Drive* above fn 30.

³⁷ *Van Breda* above fn 11.

³⁸ See paragraph 62 of the judgment of the court a quo.

³⁹ *Van Breda* above fn 11.

[48] The State argued that a witness-by-witness adjudication was impractical in a trial of this scale, and that a thread-based approach fell within the court's discretion.

[49] The Supreme Court of Appeal in *Van Breda*⁴⁰ held that:

[72] The default position has to be that there can be no objection in principle to the media recording and broadcasting counsel's address and all rulings and judgments (in respect of both conviction and sentence) delivered in open court. When a witness objects to coverage of his or her testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effects he or she asserts such coverage would have upon his or her testimony. This approach entails a witness-by-witness determination and recognises as well that a distinction may have to be drawn between expert, professional (such as police officers) and lay witnesses. Such an individualised enquiry is more finely attuned to reconciling the competing rights at play than is a blanket ban on the presence of cameras from the whole proceeding when only one participant objects. Under this approach cameras are permitted to film or televise all non-objecting witnesses. Spurious objections can also be dealt with. It is for the court concerned to ensure that in balancing the public's interest in the coverage of criminal proceedings against those of objecting participants, the trial process, already time-consuming and expensive, must not be allowed to become further unnecessarily protracted. Every objection should not represent an unneeded incursion into the trial court's discretion in managing a fair trial.

[73] If the judge determines that the witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness's fears. For example, television journalists are often able to disguise the identity of a person being interviewed by means of special lighting techniques and electronic voice alteration, or merely by shielding the witness from the camera. In other instances, broadcast of testimony of an objecting witness could be delayed until after the trial is over. If such techniques were used in covering trials, the public would have more complete access to the testimony via television, and yet the witness could maintain some degree of privacy and security.

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

This imposes a constitutional discipline: openness is the rule, departure is the exception, and the exception must be individually motivated.

⁴⁰ Ibid.

[50] The July Ruling was not consistent with this standard as mentioned above. It prohibited broadcasting for an entire thread of evidence without any sworn evidence from individual witnesses and without testing their claims of prejudice. While the State relied on emails and unsworn expressions of fear, these do not satisfy the evidential threshold described in *Van Breda*.⁴¹ To accept such generalised material is to invert the burden of justification. Moreover, the appellants' compromise proposal demonstrated that a workable, less restrictive path was available. By failing to consider that proposal, and by preferring convenience over constitutional rigour, the court a quo misdirected itself.

Ground 4: Failure to apply audi alteram partem and s 34 of the Constitution

[51] The court a quo held that the appellants' subsequent rescission application 'afforded them a full opportunity to be heard' and thus cured any earlier omission.⁴²

[52] The appellants argued that *audi alteram partem* was denied twice: first when the July Ruling was made without them, and second when the rescission judgment rationalised instead of adjudicating. They relied on *President of the Republic of South Africa v South African Rugby Football Union and Others*,⁴³ *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association Intervening)*,⁴⁴ *Premier Foods v Manoim NO*,⁴⁵ *Mazetti Management Services (PTY) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others*,⁴⁶ and *Vodacom (Pty) Ltd v Makate and Another*.⁴⁷

[53] The State argued that the rescission application afforded the appellants a fair hearing.

⁴¹ Ibid.

⁴² See paragraph 70 of the judgment of the court a quo.

⁴³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)* [1999] ZACC 11; 2000 (1) SA 1 para 216.

⁴⁴ *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC) para 11.

⁴⁵ *Premier Foods v Manoim NO* [2015] ZASCA 159; 2016 (1) SA 445 (SCA) para 34.

⁴⁶ *Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others* 2023 (6) SA 578 (GJ) para 79.

⁴⁷ *Vodacom (Pty) Ltd v Makate and Another (Makate)* [2025] ZACC 13 para 64.

[54] The Constitutional Court in *SARFU*⁴⁸ made plain that:

‘[216] Indeed, any such expectation could not in the circumstances of this case have been considered to be legitimate, giving rise to a right to be heard by the President. The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether, in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a “legitimate expectation of a hearing” exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances. It is for this reason that the English courts have preferred the concept of “legitimate expectation” to that of “reasonable expectation”...’

The July Ruling was taken in the absence of the appellants, who were directly affected parties. That omission was not merely procedural; it was constitutional in nature.

[55] In *Makate*,⁴⁹ it was reaffirmed that the right to a fair hearing under s 34 encompasses more than access to a courtroom; it requires that disputes are properly decided. The Court stressed that judicial errors are inevitable, but where flaws in reasoning or evidence assessment are so fundamental and pervasive as to vitiate the judgment, there is a failure of justice. Such a failure amounts to a denial of the right to a fair hearing. The Court went further, holding that a decision marred by this kind of malperformance is no decision at all, since litigants come to court to have disputes *decided*. Section 34 protects not only access but also the right to have disputes properly adjudicated in a fair process. This imposes on courts a duty of proper consideration: to have regard to all material evidence and submissions and to bring reasoned judgment to bear on them. Without such proper consideration, there is no fair hearing within the meaning of the Constitution. The rescission judgment did not cure the initial denial of *audi alteram partem* but entrenched it by retrospectively rationalising the July Ruling.

⁴⁸ *SARFU* above fn 43.

⁴⁹ *Makate* above fn 47 paras 43-45.

[56] The July Ruling excluded the appellants, who are directly affected parties. The rescission judgment did not remedy the breach: instead, it entrenched it by rationalising the decision. The court a quo erred in finding otherwise.

Ground 5: Failure to ensure expeditious resolution

[57] The court a quo held that the application was not urgent, reasoning that the appellants ‘waited three weeks before approaching this Court’ and that the trial needed to continue without disruption.

[58] The appellants argued that they acted speedily and with urgency, launching the application within a matter of weeks, and that the real delay was attributed to the failure to hear and determine the matter promptly. They further argued that, meanwhile, the trial proceeded under unconstitutional restrictions. They relied on *MEC for Education, in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*.⁵⁰

[59] The State argued that the appellants delayed in bringing the application and that the court reasonably managed the trial’s progress.

[60] In *Rivonia Primary School*,⁵¹ the Constitutional Court held that urgency is contextual, especially where constitutional rights are impaired. Here, the ongoing trial meant that witnesses testified under restrictions while the rescission application was pending. That continuation was itself prejudice. Thus, the court a quo erred in dismissing urgency.

Ground 6: Costs granted despite Biowatch⁵²

[61] The court a quo ordered costs against the appellants, applying the rule that costs follow the result.

[62] The appellants relied on *Biowatch*,⁵³ paragraph 24, *Print Media South Africa*

⁵⁰ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC) (*Rivonia Primary School*).

⁵¹ *Ibid.*

⁵² *Biowatch* above fn 12.

⁵³ *Ibid.*

and Another v Minister of Home Affairs and Another,⁵⁴ paragraph 54, and *Harrielall v University of KwaZulu-Natal*.⁵⁵ They argued that they acted in good faith to vindicate constitutional rights.

[63] The State initially defended the costs order but conceded in oral argument that it would be difficult to sustain the defence in view of *Biowatch*.⁵⁶

[64] In *Biowatch*,⁵⁷ the Constitutional Court laid down the guiding principle that in constitutional litigation between a private party and the State, an unsuccessful private litigant should not ordinarily be mulcted in costs. O'Regan J explained at paragraph 24 that this principle protects access to courts, ensuring that 'those who seek to assert constitutional rights in good faith are not deterred by the risk of an adverse costs order'.

[65] In *Print Media*,⁵⁸ the Court reinforced that the chilling effect of costs orders is especially severe where media freedom is at stake. At paragraph 54, the Court stressed that 'constitutional litigation by the media serves not their private commercial interests alone, but more importantly the public's right to receive information.' Accordingly, imposing costs on the media for bringing bona fide challenges risks discouraging them from fulfilling their democratic role.

[66] The principle was reaffirmed in *Harrielall*,⁵⁹ where the Court emphasised at paragraph 17 that even where constitutional litigants are unsuccessful, costs should not be awarded against them unless their conduct was frivolous, vexatious, or manifestly abusive.

[67] The appellants here acted bona fide, raising issues at the core of ss 16 and 34 of the Constitution. There was no indication that their conduct was vexatious. To penalise them with a costs order would disregard the substantive law set down in

⁵⁴ *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC) (*Print Media*).

⁵⁵ *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38 (*Harrielall*).

⁵⁶ *Biowatch* above fn 12.

⁵⁷ *Ibid.*

⁵⁸ *Print Media* above fn 54.

⁵⁹ *Harrielall* above fn 55.

*Biowatch*⁶⁰ and its progeny and failed to appreciate the chilling effect identified in *Print Media*.⁶¹ The court a quo therefore erred in principle, and this Court must correct that misdirection.

Remedy and conclusion

[68] Having found that the July Ruling unjustifiably infringed the principles of open justice and freedom of expression, relied on inadmissible hearsay, failed to apply the *Van Breda*⁶² witness-by-witness standard, violated the *audi alteram partem* principle, and wrongly burdened the appellants with costs, the question now arise as to the appropriate remedy. The appellants urged us to declare the July 2023 order *pro non scripto*. They relied on *Knoop*,⁶³ and argued that the order was a ‘nullity’.

[69] While there is force in that submission, this Court is mindful that judicial orders, even if flawed, are binding until set aside.⁶⁴ The more appropriate remedy is rescission.⁶⁵ This recognises jurisdiction but annuls the order retrospectively for misdirection and constitutional breach, in a manner consistent with judicial comity.

[70] As to costs, the appellants have succeeded on every ground of appeal. It follows that they are entitled to their costs of the appeal, including the costs of the application for leave to appeal before the court a quo and in the Supreme Court of Appeal. In accordance with *Biowatch*,⁶⁶ successful constitutional litigants should be protected from adverse costs. Moreover, the appellants were compelled to vindicate not merely their commercial interests, but the public’s constitutional right of access to information and open justice.

[71] I am further persuaded that the engagement of two counsel was justified in this matter. The issues were factually complex, involving a voluminous record, and constitutionally weighty, implicating ss 16, 34, 36, and 38 of the Constitution. The

⁶⁰ *Biowatch* above fn 12.

⁶¹ *Print Media* above fn 54.

⁶² *Van Breda* above fn 11.

⁶³ *Knoop* above fn 26.

⁶⁴ *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3; 2023 (4) SA 421 (CC).

⁶⁵ *Van Dyk v Rhodes* 2025 (4) SA 313 (GJ).

⁶⁶ *Biowatch* above fn 12.

legal questions traversed multiple decisions of the Constitutional Court, Supreme Court of Appeal, and comparative authority. In such circumstances, the retention of senior and junior counsel was both prudent and reasonable. As was held in *S v Leepile and Others*⁶⁷ and reaffirmed in *Van Breda*⁶⁸ at paragraph 73, where litigation raises constitutional principles and matters of public interest of the highest order, a higher scale of costs is justified. I therefore award costs on scale C, including the costs of two counsel.

Order

[72] Having read the papers and after hearing counsel, the following order is made:

1. Condonation for the late filing of the appellants' appeal record is granted.
2. The appeal is upheld with costs, including the costs of two counsel on scale C, and including the costs of the applications for leave to appeal before the court a quo and in the Supreme Court of Appeal.
3. The order of the court a quo dated 3 May 2024 is set aside and replaced with the following:
 - 3.1. The order of 28 July 2023 is rescinded.
 - 3.2. The respondent is directed to pay the applicants' costs of the application, including the costs of two counsel, where employed on scale C.
4. The matter is referred back to the trial court with the direction that any future application to vary the November 2022 order must be brought on affidavit, on a witness-by-witness basis, supported by sworn objections, served on the media and the accused, and after hearing all affected parties, with consideration of less restrictive means before any restriction on broadcasting.

MASIPA J

⁶⁷ *S v Leepile and Others* (1) 1986 (2) 333 (W).

⁶⁸ *Van Breda* above fn 11.

APPEARANCE DETAILS:

For the Appellant:	Mr Du Plessis (SC) With Ms T Palmer
Instructed by:	Rosengarten & Feinberg Attorneys Westcliff, Johannesburg
For the Defendant:	Mr Kisson-Singh (SC) With Ms Siraramen
Instructed by:	State Attorneys
Matter heard:	5 September 2025
Judgment delivered:	3 October 2025