THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 20786/2014

Reportable

In the matter between:

CITY OF CAPE TOWN	**APPELLANT**
and	
SOUTH AFRICAN NATIONAL ROADS AUTHORITY LIMITED	**FIRST RESPONDENT**
PROTEA PARKWAYS CONSORTIUM	**SECOND RESPONDENT**
N1/N2 OVERBERG CONSORTIUM	**THIRD RESPONDENT**
GTIMV CONSORTIUM	**FOURTH RESPONDENT**
MINISTER OF TRANSPORT	**FIFTH RESPONDENT**
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	**SIXTH RESPONDENT**
MINISTER OF TRANSPORT AND PUBLIC WORKS, WESTERN CAPE PROVINCE	**SEVENTH RESPONDENT**
MINISTER OF FINANCE, ECONOMIC DEVELOPMENT AND TOURISM, WESTERN CAPE PROVINCE	**EIGHTH RESPONDENT**
N2/T2 CRISIS COMMITTEE	**NINTH RESPONDENT**
THEEWATERSKLOOF MUNICIPALITY	**TENTH RESPONDENT**
BREEDE VALLEY LOCAL MUNICIPALITY	**ELEVENTH RESPONDENT**

Neutral citation: *City of Cape Town v South African National Roads Authority Limited & others* (20786/14) [2015] ZASCA 58 (30 March 2015)

Bench: Ponnan, Saldulker and Zondi JJA and Van Der Merwe and Gorven AJJA

Heard: **18 March 2015**

Delivered: **30 March 2015**

Summary: Open justice – court records by default should be open to the public – any departure an exception and should be justified – high court's adoption of implied undertaking rule and interpretation of rule 62(7) of the Uniform rules - inconsistent with that constitutional principle.

ORDER

On appeal from: Western Cape Division, Cape Town (Binns-Ward J, sitting as court of first instance): judgment reported *sub nom South African National Road Agency Limited v City of Cape Town & others*; *In Re: Protea Parkway Consortium v City of Cape Town & others* [2014] 4 All SA 497 (WCC).

1. The appeal is upheld with costs including the costs of three counsel.

2. The order of the court below is set aside and replaced with the following:

   'The application is dismissed with costs including the costs of three counsel.'

JUDGMENT

Ponnan JA (Saldulker and Zondi JJA and Van Der Merwe and Gorven AJJA concurring):

[1] This appeal raises matters of the greatest public importance to the people of Cape Town and the region, involving as it does the construction and tolling of principal motorways in a project to be undertaken by an organ of State. And so one might say, with apologies to John Donne of course, perchance he for whom the toll tolls may be so ill as not to know that it tolls for open justice.

[2] The respondent, the South African National Roads Authority Limited (SANRAL), an organ of State as defined in s 239 of the Constitution, is responsible for the strategic planning, design, construction, management, control, maintenance and rehabilitation of our national roads. Pursuant to a tender and evaluation process SANRAL selected Protea Parkways Consortium (PPC) as the preferred bidder and Overberg Consortium as the reserve bidder in respect of what is described as the N1/N2 Winelands Paarl Highway Toll Project. The appellant, the City of Cape Town (the City), launched a review application in the Western Cape High Court, Cape Town in terms of rule 53 of the Uniform rules of court seeking, inter alia, to review SANRAL's decision to award the tender to PPC.[1] SANRAL furnished the City with the administrative record in terms of rule 53(1)*(b)* in two parts, marked respectively as, the 'non-confidential record' and 'the confidential record'. That generated a dispute between the parties as to precisely what constituted the rule 53 record. An exchange of correspondence followed, which

[1] In addition to SANRAL, which was cited as the First Respondent, Protea Parkways Consortium, N1/N2 Overberg Consortium, GTIMV Consortium, Minister of Transport, Minister of Water and Environmental Affairs, Minister of Transport and Public Works, Western Cape Province, Minister of Finance, Economic Development and Tourism, Western Cape Province, N2/T2 Crisis Committee, Theewaterskloof Municipality and Breede Valley Municipality were cited as the Second to Eleventh Respondents respectively. But as none of them participated in the appeal, nothing further needs be said about them.

culminated in a letter dated 25 October 2013 written by the City's attorney to SANRAL's attorney recording:

'3. The terms to which the parties have already agreed are in a series of letters. For convenience, and to avoid any future dispute as to what was agreed, in what follows we collate the agreed terms, along with the City's position on the two issues discussed in the previous paragraph.

3.1 SANRAL will provide the City's legal representatives with copies of the documents forming part of the Rule 53 record which SANRAL considers to be relevant but claims to be confidential, and such representatives will sign the attached confidentiality undertaking, which prevents them from using or disclosing such documents except for purposes of the litigation, and then only either in a manner agreed between the parties, or in accordance with any directions by a judge or a court.

3.2 If in their opinion it is necessary, the City's legal representatives may disclose such documents to the City's officials and experts, subject to their also signing the confidentiality undertaking.

3.3 The City may place any document or information which SANRAL or the Consortium claim to be confidential before the court hearing the review application, either publicly or in closed affidavits, arguments and hearings. If the parties cannot agree whether a particular document should be dealt with publically or on a closed basis, the parties will ask a judge or the court to decide that question at a preliminary hearing. Any such preliminary hearing will be closed, and the parties and the judge or court will be able to have sight of and refer to copies of the contested documents. The parties will endeavour to agree suitable dates and arrangements for any such hearing.

3.4 SANRAL will provide the City with a list of documents and information, including the bids by persons other than the Consortium, which SANRAL proposes to exclude from the record on the basis of irrelevance, so that the City can decide whether it wishes to see them. SANRAL will provide copies of any such documents or information if the City requests them, provided that any document or information which is also claimed to be confidential will be subject to the confidentiality undertaking.

3.5 The City records that at this stage it does not concede the validity of any claim to irrelevance or confidentiality. In the event of a dispute, the City contends that the onus rests on SANRAL and/or the Consortium to prove that a document is confidential and/or may not be produced in open court. SANRAL does not concede this and contends that the issue of onus can be determined should a dispute arise.'

[3] In accordance with that agreement, each of the City's representatives furnished the envisaged confidentiality undertaking to SANRAL. And prior to serving and filing its supplementary founding affidavit (the SFA), the City supplied SANRAL with a copy thereof. The SFA made reference to both the 'non-confidential' and 'confidential' records provided by SANRAL on the basis, so the City contended, that the information was not confidential and should immediately be made known to the public in the public interest. SANRAL then made application to the high court, seeking orders that parts of the SFA be redacted prior to it being formally served and filed. SANRAL sought an order in the following terms:

'1. The Confidentiality Undertakings signed by the parties to the Review Application, and their legal representatives remain in force and binding, subject to any variations necessitated by the order granted below;

2. The Supplementary Founding Affidavit, including the annexures and annexed affidavits ("the Supplementary Affidavit") is to be redacted in accordance with the first and second schedules, copies of which are attached hereto marked "NOM1" and "NOM2" respectively;

3. The redacted Supplementary Affidavit may then be served and filed;

4. After the service and filing of the Applicant's (First Respondent in the main application) Answering Affidavit, the Supplementary Affidavit may be further amended, so as to exclude the redaction set out in the first schedule (NOM1);

5. The amended Supplementary Affidavit, subject to the retention of the redactions as set out in "NOM2" which will remain effective, may then be served and filed;

6. The full Supplementary Affidavit, without any redactions, may only be provided to the Judge hearing the review application;

7. Insofar as the Heads of Argument may refer to the contents of the un-redacted portions of the Supplementary Affidavit, such Heads of Argument may only be provided to the Judge hearing the review application;

8. The review application is to be heard in camera, as and when any of the aspects and/or information as set out in "NOM2" is raised and dealt with;

9. The First Respondent is to pay the costs of the application.'

[4] In support of the application, Mr Nazir Alli, SANRAL's Chief Executive Officer, stated:

‘71. SANRAL objects to the service and the filing of the Supplementary Affidavit, and the annexures thereto, in its current format, and has identified two separate categories of documents, which are explained below.

72. The first category relates to information and documentation that needs to be kept confidential until after the filing of SANRAL’s answering affidavit in the Review Application. Such information and documentation has been identified and described in the schedule attached to the Notice of Motion as annexure “NOM1” (“the First Schedule”). The first category of documentation and information must be kept confidential, as the failure to do so will simply cause unjustified and unnecessary concern among the general public, and will result in unjustified antagonism and bias towards SANRAL by the general public.

73. The second category relates to information and documentation that must be kept confidential at all times during the legal proceedings, and thereafter. Such information and documentation has been identified and described in the schedule attached to the Notice of Motion as annexure “NOM2” (“the Second Schedule”). The second category of documentation and information ought to be kept confidential, as the failure to do so will not only cause harm and damage to SANRAL, but also to the bidders in the tender process, the South African fiscus and economy and the general public. In addition, the disclosure of such information and documentation will fall foul of SANRAL’s statutory obligations.’

Mr Alli added:

‘74. As appears from the City’s correspondence and the City’s submission, it is clear that the City’s aim in filing the Supplementary Affidavit is to enable the Press to report on the contents of the Supplementary Affidavit and the annexures thereto.

75. The City has attached Affidavits of “Experts” to the Supplementary Affidavit and in the Supplementary Affidavit the City refers to certain costing implications of the Project and ultimately SANRAL is criticized on a socio-economic basis.

76. I do not intend to reply in this Affidavit, to the contents of the Supplementary Affidavit, as this will be done, in detail, in the Answering Affidavit currently being prepared. I do however intend to deal, in very general terms, with certain “observations” made by the City’s “Experts”–

76.1 The “Expert” reports filed in support of the Supplementary Affidavit also raise the same criticisms, as are raised in the Supplementary Affidavit, and provide commentary on the commercial and economic viability of the entire Project.

76.2 The “Experts” utilized by the City suggest that the Project would ultimately result in a negative benefits-to-cost ratio.

76.3 Naturally such conclusions and statements relating to the cost of the project, and ultimately the effect thereof on the potential road users, may result in unjustified alarm being created amongst the general public.

76.4 The “Experts’ are “predicting” the economic and financial viability of the Project, by incorrectly calculating the cost benefit ratio.

77. In a nutshell, the conclusions and calculations put forward by the City’s “Experts” are simply wrong, and would create a false impression amongst the general public.

78. I attach hereto some recent examples of press reports relating to the Project, which clearly evidence the intention of the City to disclose information to the public by way of the media, marked “H1” to “H7” respectively.

79. In the circumstances, and in order to avoid unjustified alarm the portions of the Supplementary Affidavit and the supporting documentation, as described in the First Schedule should not be released until after SANRAL has had an opportunity of filing its Answering Affidavit and its own expert reports, which will deal with and refute the allegations made.

80. The Answering Affidavit will provide a proper response to the costing predictions set out in the Supplementary Affidavit, and will provide appropriate answers to the fears expressed by the City’s “Experts”. It would certainly be to the benefit of the general public to have “both sides of the story”, before drawing any conclusions.

81. SANRAL will accordingly contend for a procedural directive, compelling the City and other Respondents to comply with the confidentiality undertaking in regard to this category pending the filing of SANRAL’s Answering Affidavit in the Review Application.

82. It is clear from the correspondence referred to above that the City seeks to file highly confidential and sensitive information in respect of the tender received with an outstanding tender process still to be conducted in respect of the financing of the Project (which process has not been finally concluded) as a public record. This will allow access to and unfair advantage to the other bidders, potential competitors, financial institutions, and the public at large to such documentation.

83. This will make a complete mockery of a competitive process required for the procurement of goods and services in a transparent and fair manner.

84. SANRAL’s evaluation of the tenders is sensitive not only for the reason of the confidential information discussed in relation to the tenderers, but also as SANRAL will be placed at a massive disadvantage in its negotiations with the Preferred Bidder or if necessary the Reserve Bidder and the financiers concerned if the documentation became public. The release of the documentation and information into the public records may frustrate the successful conclusion of the negotiations with PPC. It is important that confidentiality is

observed by all the parties, especially since negotiations are still to be finalized. Such confidentiality is important not only to protect the integrity of SANRAL's evaluation and negotiation strategy, but also to protect commercially sensitive or any proprietary trade information that the bidders might have included in their proposals and which they would not wish to be made known to their competitors.

85. The second category of documents encapsulate the following sub-categories of documents which require protection –

85.1 Bidders' commercial information;

85.2 Debt funding competition;

85.3 SANRAL's Bid Evaluation.'

[5] The response to those allegations by the City Manager, Mr Achmat Ebrahim, on behalf of the City, was:

'8. In essence, the issue for determination in both secrecy applications is whether SANRAL and PPC have made a case for secrecy. SANRAL and PPC seek orders which courts such as ours, which are committed to open justice and the upholding and protection of constitutional principles and rights – such as accountability, transparency, freedom of speech, and press freedom – grant exceptionally rarely. The City contends that neither application makes out a case for secrecy.

. . .

84. Having considered the information listed in NOM1 and NOM2 on the basis of the case presented by SANRAL, the City is of the view that disclosure of that information will probably not cause any of the harm which SANRAL alleges.

85. That being so, SANRAL has failed to provide sufficient evidence to make a case that disclosure of the information listed in NOM1 and NOM2 will probably cause harm. Even if SANRAL had pleaded a cause of action (which is not the case), I respectfully submit that this Court is consequently unable to grant the secrecy orders on the grounds of alleged harm.

. . .

114. SANRAL does not even suggest any legal basis or any cause of action for its "procedural directive" imposing secrecy in respect of the first category of information. I am advised that there is none.

. . .

153. Even if this court finds that the disclosure of specified information would cause the harm alleged (which the City does not accept), that does not mean that SANRAL is entitled to the relief sought. I am advised that SANRAL must establish a cause of action for the extraordinary

secrecy orders which it seeks. Harm in itself is insufficient. SANRAL has not pleaded any cause of action for the secrecy orders founded on the alleged harm.'

[6] Accordingly, what called for determination on the papers as they stood was whether: (a) the information in NOM1 and NOM2 was confidential; (b) its disclosure would cause the harm to SANRAL, as asserted by it; and (c) such harm provided a basis for secrecy. The high court (Binns-Ward J) decided all of those issues in the City's favour. It did so principally on the basis that SANRAL had failed to make out a case for the relief sought. It held:

'59. . . . SANRAL would have to establish confidentiality in the true sense or such similar basis for exclusivity, or show that its wider availability would be prejudicial to the fair and just determination of the case. SANRAL has not sought to show any of these things in respect of the material identified in schedule NOM1. Its object in respect of the NOM1 material is merely to avoid premature publicity to evidence obtained by the City through Rule 53(1)(b).

67. . . . Indeed, the impression is given that the deponent to the supporting affidavit made his statement before the content of schedules NOM 1 and 2 to the notice of motion were settled. In my view, it is not for the court, in the absence of sufficient indication in the body of the supporting affidavit of a particularised link between the items listed in schedule NOM 2 and the prejudice contended for, to have to search in the voluminous bid documentation to see if a case could be made for SANRAL's position; cf. *Crown Cork* supra, at 1101F. Nor is it for a respondent in such a situation to have to fathom the particularity of the case it is expected to meet.

68. SANRAL's founding papers failed to link the apprehended harm – described by the deponent in the broadest terms – with particularised aspects of the documents concerned. There is no excuse for this, especially considering that the parties had agreed that the court would be requested to hear the interlocutory applications *in camera*.'

[7] Having found that SANRAL had failed to make out a case in respect of each of categories NOM1 and NOM2, the high court in paragraph 1 of its order dismissed SANRAL's application. That, one would have thought, would have been the end of the matter. It was not, because the high court then saw fit to issue the following orders:

'3. It is declared that the administrative record disclosed by SANRAL in terms of rule 53(1)(b) of the Uniform Rules of Court is subject to the "implied undertaking rule" explained in the body of this judgment, with the effect that no person, including any recipient of the

supplementary founding papers delivered in terms of paragraph 2 hereof, shall be permitted, unless authorised thereto by SANRAL or by the Court, on application, to disseminate, publish, or distribute any part of the administrative record, or any part of any affidavit in the supplementary founding papers that quotes or substantively reproduces the content thereof, before the hearing of the aforementioned pending review application.

4. Paragraph 3 of this order shall not be construed to derogate from the right of any party in the review application to refer to, or in any other manner deal with, the administrative record in any affidavit to be delivered by it in the review application, provided that the dissemination, publication, or distribution of the affected parts of any such affidavit shall likewise be limited by the implied undertaking rule.

5. The papers in the current interlocutory applications, save to the extent that their partial release into the public domain was authorised in terms of the order obtained on 5 August 2014 at the instance of Right2Know and Section 16, shall remain under seal, subordinate to the degree of access permitted to the papers in the review application, between now and the hearing of the review.

6. There shall be no order as to costs in either application.'

The high court, although thereafter recognising 'that the application of the rule in the context of disclosure in the judicial review process is unprecedented', somewhat surprisingly dismissed the City's application for leave to appeal to this court. The City appeals with the leave of this court. There is no cross appeal by SANRAL. With the leave of the President of this Court, a range of public interest organisations – eleven in all, were admitted as *amici curiae*.[2]

[8] The high court issued the additional orders because of what it described as:

'an evident misapprehension by the parties as to the extent to which the material that has been made available by SANRAL in terms of Rule 53(1)*(b)* may be disseminated before the review application is heard, I consider it appropriate to make an order with declaratory effect. The order that I propose to make will also address the concerns of those respondents, such as the fourth and fifth respondents in the review, who have not been favoured yet with unexpurgated copies of the City's supplementary founding affidavits.'

[2] The Amici include media organisations, public interest law firms, research and advocacy institutions, non-profit organisations that fight corruption and institutions established to promote free expression and access to information. They are: Right2Know Campaign, Section16, Open Democracy Advice Centre, Mandg Centre for Investigative Journalism, South African National Editors Forum, Legal Resources Centre, Section27, Socio-Economic Rights Institute of South Africa, Corruption Watch, Democratic Governance and Rights Institute, South African History Archive.

Paragraph 3 of the high court's order and the ancillary orders in paragraphs 4 and 5 stem directly from the high court's adoption of the implied undertaking rule (the rule). On that score the high court stated:

'57. I am thus of the view that if there be any doubt that the judgment in *Crown Cork* has not already done so, the time has come to hold unequivocally that the implied undertaking rule does form part of our law and that it is of application in respect of material disclosed by a respondent in review proceedings in terms of rule 53(1)*(b)*, save to the extent that any part of the record on review was not already a matter of public record before its disclosure in the litigation. For the reasons discussed above, the rule serves an important purpose; not only in upholding the constitutional right to privacy, but, equally importantly, in promoting the effective administration of justice. Its application is susceptible to adjustment to meet the effective administration of justice. Its application is susceptible to adjustment to meet the exigencies of any case that might afford sufficient reason to depart from its ordinary incidence. There is no sound reason, in my view, to call its constitutional compatibility into question.'

[9] The rule had not been raised by SANRAL in its affidavit. The City had thus not been called upon to answer that case. The high court prohibited the publication of all information from the rule 53 record, including 'the non-confidential record' until the review application is called, whereas SANRAL's case was that: all such information, apart from NOM1 and NOM2, could be made public immediately; and the information in NOM1 must be kept secret only until SANRAL filed its answering papers, not until the hearing. The high court further held that documents filed with the registrar are, in any event, regulated by rule 62(7) of the Uniform rules of court (the subrule). According to the high court, that subrule regulates access to such information and 'provides an important administrative basis to support the implied undertaking rule'. The subrule, so held the high court, 'permits the registrar to give only any party to the cause and any person having a personal interest therein . . . access to the documents in the court file'. The high court took the view that 'public access to the content of the court file in litigious proceedings is permissible only after the matter has been called in open court'.

[10] In respect of both issues the high court appears to have impermissibly ranged beyond that which it had been asked to adjudicate. For, when one compares SANRAL's notice of motion to the order that ultimately issued, it is clear that: (a)

SANRAL did not secure the relief that it had sought; and (b) conversely, the relief that issued was not sought by it. In that regard the following from *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) paras 13 and 14 is apposite:

'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.'[3]

So too, is the statement by Howie JA in *Western Cape Education Department & another v George* 1998 (3) SA 77 (SCA) at 84E that it is desirable:

'. . . that any judgment . . . be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that are necessary for the decision of the case.'

[3] See also in this regard *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd & others* 2014 (6) SA 286 (KZP) paras 80-82, 92 and 98.

[11] It nonetheless, remains, because the issues are not, primarily, about factual disputes between the parties, but rather matters of law that will affect many litigants beyond the confines of this case, to consider the correctness of the high court's judgment. But, before turning to a consideration of the rule and subrule it would be appropriate to first touch on some key principles that inform that discussion.

[12] 'The open court principle is a venerable principle, deeply rooted in western consciousness. And for good reason.' – so declared the Chief Justice of Canada, the Rt Hon Beverley McLachlin PC, in an address to the Middle Temple during January 2014 entitled: 'Is the open court principle sustainable in the 21st century'.[4] The Learned Chief Justice began by saying that the 'open court principle was rightly venerated as a key component of the rule of law'. She elaborated - the open court principle meant in practice that: (a) court proceedings including the evidence and documents disclosed in proceedings should be open to public scrutiny; and (b) juries and judges should give their decisions in public. (It did not require every aspect of the judicial process to be open, so that for example judges' deliberations could remain private, and some evidence might be protected by privilege). Open justice was important for three reasons: First, it assisted in the search for truth and played an important role in informing and educating the public. Second, it enhanced accountability and deterred misconduct. Third, it had a therapeutic function, offering an assurance that justice had been done.

[13] The principle of open justice, according to Chief Justice Spigelman,[5] is one of the most pervasive axioms of the administration of common law systems. It was from such origins, so he states:

'that it became enshrined in the United States Bill of Rights and, more recently, in international human rights instruments such as Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention for the Protection of Human Rights,

[4] Rt Hon B McLachlin PC 'Openness and the rule of law' address by the Honourable Chief Justice to the Annual International Rule of Law Lecture on 8 January 2014 available at http://www.barcouncil.org.uk/media/270848/jan_8__2014_-_12_pt._rule_of_law_-_annual_international_rule_of_law_lecture.pdf, accessed 23 March 2015;

[5] Rt Hon J J Spigelman AC 'The Principle of Open Justice: A Comparative Perspective' (September 20, 2005). *University of New South Wales Law Journal* (2006) Vol. 29 No. 1 at 147-166; also available on the Social Science Research Network at http://papers.ssrn.com, accessed 30 March 2015. Address by the Honourable JJ Spigelman AC, Chief Justice of New South Wales to the Media Law Resource Centre Conference in London on 20 September 2005.

as adopted and implemented by the British *Human Rights Act* 1998. In both cases the right is expressed as an entitlement to "a fair and public hearing by an independent and impartial tribunal established by law."'[6]

The significance of the principle of open justice, he adds, 'is of such a high order that, even where there is no written constitution, or a written constitution does not extend to the principle, the principle should be regarded as of constitutional significance.'[7] The tradition of open justice had its origins in England before the Norman Conquest, when freemen in the community participated in the public dispensing of justice.[8] The tradition had spread from England, particularly to those parts of the world which had adopted and retained that common law heritage, but was also observed and respected in civil law societies. The open court principle was affirmed in England in the strongest terms by the House of Lords in the case of *Scott v Scott* [1913] AC 417, where Lord Atkinson had said (at 463):

'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.'

Later in *R v Legal Aid Board, ex parte Kaim Todner (a firm)*,[9] Lord Woolf said:

'This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.'

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[6] J J Spigelman op cit at 9.
[7] Ibid at 10.
[8] B McLachlin op cit at 4-5.
[9] *R v Legal Aid Board, ex parte Kaim Todner (a firm)* [1998] 3 All ER 541 at 549J-550B.

[14] Likewise, in the Canadian Supreme Court in *Attorney General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175 at 185, Justice (later Chief Justice) Dickson said:

'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 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.'

With the advent of the Canadian Charter of Rights and Freedoms, the open court principle was recognised as a component of freedom of expression, protected by s 2*(b)* of the Charter.

[15] In the United States of America, *Richmond Newspapers v Virginia* 448 US 555 (1980), observed that the origins of the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. A summary of that history showed that throughout its evolution, the trial has been open to all who cared to observe. Chief Justice Burger pointed out that one 'cannot erase from people's consciousness the fundamental, natural yearning to see justice done . . .' He added:

'The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." . . .

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.'

More recently, the US Court of Appeals for the Sixth Circuit strongly affirmed the open court principle when it stated:

'Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately . . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us" . . . They protected the people against secret government.'[10]

The court added that: 'Open proceedings, with a vigorous and scrutinizing press, served to ensure the durability of our democracy.'[11]

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[10] *Detroit Free Press v John Ashcroft* 303 F.3d 681 at 683.
[11] Ibid at 711.

[16] The idea that South African civil courts should be open to the public goes back to 1813.[12] The principle of open courtrooms is now constitutionally entrenched.[13] 'Publicity', said the philosopher Jeremy Bentham, 'is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.' The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government.[14] In *Independent Newspapers*,[15] the Constitutional Court dealt with an application for access to classified documents which formed part of an appeal record. National security, so the Minister asserted, required that the documents not be made available to the media and the public. The Constitutional Court confirmed that the default position is one of openness and disavowed an approach that proceeded from a position of secrecy, even in a case where the documents in question had been lawfully classified as confidential in the interest of national security. In deciding whether to make the disputed documents publicly available, the Court expressly recognised a cluster of related constitutional rights and principles which capture the 'constitutional imperative of dispensing justice in the open.'[16] It concluded that open justice is a crucial factor in any consideration of a request to limit public disclosure of a court record.[17] Although the issue at stake concerned only access to the record – all the court proceedings were held in public. Yet the court still emphasised the importance of openness and ordered that, despite claims of national security, the vast majority of the record should be made publicly available.

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[12] Marais J explained in *Financial Mail (Pty) Ltd v Registrar of Insurance & others* 1966 (2) SA 219 (W) at 220F-G that: 'Until 1813, in consonance with the then universal practice in Holland . . . whilst judgments and orders of the Cape courts had to be pronounced in public, evidence and argument in trial cases were heard in camera, with only the parties and their lawyers in attendance. The British Governor of the Cape, in 1813, issued a proclamation requiring all judicial proceedings in future to be carried on with open doors as a matter of "essential utility, as well as the dignity of the administration of justice"; it would imprint on the minds of the inhabitants of the Colony the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner.'

[13] Section 34 of the Constitution provides that: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.'

[14] *South African Broadcasting Corporation v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) paras 30-31.

[15] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services and another, In Re Masetlha v President of the Republic of South Africa and another* 2008 (5) SA 31 (CC).

[16] These included the rights contained in ss 16, 34 and 35(3)*(c)* of the Constitution and the founding values of the Constitution: *Independent Newspapers* paras 39 and 40.

[17] *Independent Newspapers* paras 42 and 43.

[17] There exists, as Moseneke DCJ put it, '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.'[18] That animating principle, it is submitted by the City and the *amici*, is undermined by the judgment of the high court, which endangers a range of overlapping and inter-related constitutional rights, namely: (a) the rights of litigants to a public trial in both civil and criminal matters; (b) the right of the public to open justice; (c) the right of everyone to access information; (d) the right of a litigant to freedom of expression; and (e) the media's right to report on court proceedings. Those rights, so the submission goes, are underpinned by the same broad principle, namely a system where court proceedings and court documents are, by default, open to the public. The right to a public hearing in s 34 of the Constitution and the right to a public trial in s 35(3)*(c)* is afforded to litigants in civil matters and accused persons in criminal matters. The publicity of a trial usually serves as a guarantee that the matter will be determined independently and impartially. The glare of public scrutiny makes it far less likely that the courts will act unfairly. In *Shinga v The State*[19] Yacoob J put it thus:

'Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.'

[18] As a general rule litigants are prejudiced when their proceedings are not held in public. That is not to say that litigants may not sometimes wish to keep their litigation private or that there may not be situations where a court may justifiably depart from the default rule that court proceedings are public. But it will be a dangerous thing for all litigants in both civil and criminal matters, for court documents, as a general rule to be inaccessible and unpublishable. For, it 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

[18] *Independent Newspapers* para 42.
[19] *Shinga v The State & another* (*Society of Advocates, Pietermaritzburg Bar as Amicus Curiae*); *O'Connell and Others v The State* 2007 (4) SA 611 (CC) para 26.

the public at large. Open justice is, moreover, required by s 32 of the Superior Courts Act 10 of 2013, which provides:

'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.'

[19] It needs be emphasised that courts are open in order to protect those who use the institution and to secure the legitimacy of the judiciary, not to satisfy the prurient interests of those who wish to examine the private details of others. The public, said Langa CJ in *SABC v NDPP,* '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'.[20] Without openness, the judiciary loses the legitimacy and independence it requires in order to perform its function. 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. The logical corollary must therefore be that departures should be permissible when the dangers of openness outweigh the benefits. And by extension, the right of open justice must include the right to have access to papers and written arguments which are an integral part of court proceedings (*Independent Newspapers* para 41). That must follow axiomatically, it seems to me, because the public would hardly be in a position to properly assess the legitimacy or fairness of the proceedings if they could observe the proceedings in open court but were denied access to the documents that provide the basis for the court's decision.

[20] The right to freedom of expression lies at the heart of democracy, and is one of a 'web of mutually supporting rights' that hold up the fabric of the constitutional order.[21] Section 32(1) of the Constitution guarantees everyone the 'right of access to information held by the state'. Citizens and public interest groupings rely on this right to uncover wrongdoing on the part of public officials or for accessing information to report on matters of public importance. The Constitutional Court has noted that the media has a

[20] *SABC v NDPP* 2007 (1) SA 523 (CC).
[21] *Case and Another v Minister of Safety and Security and Others*; *Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) para 27.

duty to report accurately, because the 'consequences of inaccurate reporting may be devastating.'[22] 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.'[23] 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. Section 16(1)*(b)* of the Constitution provides: 'Everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas'. Importantly, therefore, the right to freedom of expression is not limited to the right to speak, but also to receive or impart information and ideas. 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.* 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.[24] 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.[25] In *Khumalo v Holomisa*,[26] the Constitutional Court put it thus:

'In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.'

When justice is open, court reporting is a crucial avenue for public knowledge about what the government does. It is particularly important where the government is one of the parties in a case and where other sources of information are limited.

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[22] *Brummer v Minister for Social Development* 2009 (6) SA 323 (CC) para 63.
[23] Ibid.
[24] *SABC V NDPP* 2007 (1) SA 523 (CC) para 24; *Mail and Guardian v Minister for Social Development* 2009 (6) SA 323 (CC) para 63.
[25] *Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 6.
[26] *Khumalo & others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 24.
See also *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC) at para 49.

[21] Not all information is readily revealed by the State and even powerful media organisations sometimes face great difficulty in obtaining information in some areas. In an environment of secrecy, journalists become vulnerable to off-the-record briefings and strategic leaks by government. In this context, open justice is particularly important because through court cases information can be exposed and tested in ways that may not otherwise be possible. The judicial process generally shrinks from hearsay. Witnesses swear to the truth and if they lie make themselves open to prosecution for perjury. The rules of evidence, which regulate what is revealed, are applied by an independent judiciary. The whole process is thus designed to limit the extent to which parties can craft and shape information for public consumption. In *Scott* (at 477), Lord Shaw of Dunfermline famously warned 'in the darkness of secrecy, sinister interest and evil in every shape have full swing.'

[22] Dr Lawrence McNamara[27] makes the point that:

'As well as helping to ensure the fairness of trials and being a dimension of free speech rights, open justice also has broader implications for democratic governance and government accountability. The government derives its authority from the democratic process. Executive action should, in theory at least, be carried out in the public interest. The public are able to express this interest through a variety of forums and channels, the most obvious being general elections. In order for the public to be able to express its opinion in an informed way, it is heavily reliant on the media's ability to scrutinize the executive.'

The big-picture view of open courts is thus that it protects those on trial not just from the unfair application of the law, but crucially and in the long term, from unfair laws.[28] Open justice therefore serves democracy as much as it serves justice. It allows voters to review the outcomes of current laws and to advocate, if needs be, for law reform.[29] This is an essential feature of a flourishing democracy, because, and this cannot be emphasised enough, more openness and visibility about government activities helps to build citizens' trust in their government. Even where national security is concerned and

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[27] Dr Lawrence McNamara is a Global Uncertainties Fellow and a Reader & Director of Postgraduate Research at the School of Law at the University of Reading. See L McNamara 'Opinion: Civil liberties open justice and protection from terrorism' (2010) available at http://www.debatingmatters.com/globaluncertainties/opinion/civil_liberties_open_justice_and_protection_from_terrorism/, accessed on 25 March 2015.

[28] K Fitzpatrick 'Courts need to expand view of open justice' *Irish Times* of 16 June 2014 available at http://www.irishtimes.com/news/crime-and-law/courts-need-to-expand-view-of-open-justice-1.1831537.

[29] Ibid.

there are frequent restrictions on public access to evidence or information, as Dr McNamara points out, limiting public access to evidence on national security grounds is invariably controversial because the decision to impose restrictions will often be based on information which is itself secret and cannot be publicly tested. [30]

[23] Reverting then to the judgment of the high court – it did not provide a precise formulation of the implied undertaking rule.[31] Jenkins J first coined the expression 'implied undertaking' in 1948 (*Alterskye v Scott* [1948] 1 All ER 469). Until then, the court often required an express undertaking before ordering production of particularly confidential or sensitive documents. In *Home Office v Harman* [1982] 1 All ER 532 (HL), it was held that the rule continued to bind the parties to a matter even after the hearing. That aspect of the rule was successfully challenged before the European Commission of Human Rights.[32] As a result, in 1987 the legislature changed the law so that it would no longer be a contempt of court to make public material contained in documents compulsorily disclosed in civil proceedings once those documents had been read out or referred to in open court.[33] In April 1999 the Rule was codified in the Civil Procedure

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[30] Dr McNamara observes that courts face a dilemma where any party – but in practice usually the government – claims that openness would result in a danger to national security and restrictions must be placed on the ability of the public to scrutinize the judicial process. On the one hand, the court should be convinced that the danger is genuine and that national security is not just being used as an excuse to keep politically embarrassing information from the public. On the other, the courts may not always be in the best position to judge whether information will pose a danger to national security as it is the executive government which arguably has a more complete picture of the circumstances and relevance of the information concerned. L McNamara op cit.

[31] The high court stated in para 40:
'The notion of an "undertaking" is, however, somewhat misleading. The use of the term arises from the original requirement in the early 19th century of an express undertaking. Its continued use is convenient in the context of characterising breaches of the rule as contempt of court in the sense of involving the breaking of a national undertaking to the court.' In *Bourns Inc v Raychem Corp* [1999] 1 All ER 908 at para 16, Laddie J put the position more realistically when he explained that the fiction of an implied undertaking was in fact an expression of the existence of a legal obligation:
"The implied undertaking not to make collateral use of documents disclosed on discovery arises automatically as an incident of the discovery process. It is in no sense implied as a result of dealings between the parties. The discloser may well not have thought of the implications of giving discovery and the disclosee may well not have turned his mind to the matter of what use he can make of the documents outside the action. Had he thought of it, he might well have wanted full freedom to do what he liked with the material, particularly if his own discovery is non-existent or very limited. So the obligation is not to be likened to a term implied in a contract between the parties to the litigation. On the contrary, it is an obligation to the court, not the other party, which is implied. It is for that reason that its breach is treated as contempt. The obligation is imposed as a matter of law."' (Footnotes omitted.)

[32] *Harman v UK* (1985) 7 EHRR 146 (EComm).

[33] RSC Ord. 24, r. 14A (CCR Ord. 14, r. 8A).

Rules 1998 (CPR) as a self-contained provision.[34] The English codification sought to introduce uniformity in part because prior cases were inconsistent. The general rule under CPR r. 31.22 is that a party to whom a document has been disclosed may use such document only for the purposes of the proceedings in which it is disclosed. There are three exceptions however, namely, where: (a) the document has been read to or by the court, or referred to, at a hearing that has been held in public; (b) the court gives permission; or (c) the party who disclosed the document, and the person to whom the document belongs agree. While the rule generally binds third parties, a court may grant the Crown leave to use material covered by the rule as evidence for the prosecution in criminal proceedings.[35] In some cases third parties are not bound and a court may, in the public interest, allow a third party to use material disclosed in breach of the rule without leave of a court.[36]

[24] The rule is applied in Australia,[37] but does not appear to have found universal favour. In a minority judgment in *Hearne v Street* [2008] HCA 36 (6 August 2008), Kirby J pointed out that there has been recognition in both England and Australia that the rationale for the rule is looking 'rather threadbare' and that the arguments for a court

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[34] CPR r. 31.22(1)(a) states:
'Any undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the Court, or referred to, in open Court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs.'

[35] *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 (HL); *Attorney General for Gibraltar v May and Others* [1999] 1 WLR 998.

[36] In re *Judicial Review* [2010] NIQB 95 (17 September 2010): The Northern Ireland Queen's Bench refused to bar the use in professional misconduct proceedings of documents which had been disclosed in breach of the Rule. The court held that the third party was not bound by the implied undertaking and could use the documents obtained as it was in the public interest that the disciplinary charges proceed. This was confirmed in *H v W* [2012] NIFam 8 (29 May 2012).

[37] A Stanfield and P N Argy *Electronic Evidence* 3ed paras 8.35 and 8.36 state:
'There is an implied undertaking by the recipient of discovered material not to use the discovered documents or material contained in them for any ulterior purpose other than the proceedings in relation to which they were produced. A breach of this duty will be punishable as contempt of court. If discovered documents contain commercially sensitive or confidential information, the court may require the party seeking inspection to give express confidentiality undertakings and may limit the persons authorised to inspect the documents (most commonly to outside legal advisors).
The court may allow a party, upon application, to use discovered documents for a purpose other than conduct of the proceedings in which they were discovered if there are "circumstances which take the matter out of the ordinary course" which make such an exercise of the court's discretion in the interests of justice. The same implied undertaking not to use documents for a collateral purpose applies to "wherever the coercive power of the court has been employed to enable a person to obtain the documents of another" including in relation to witness statements, answers to interrogatories, affidavits, subpoenaed documents and documents obtained pursuant to search orders.' See also *Australian Competition and Consumer Commission v Allphones Retail Pty Limited (No 3)* [2009] *FCA* 1075.

continuing to uphold and enforce the rule left him 'unconvinced'. There appear to be differences in the application of the rule there. The Australian Federal Court Rules provide that the rule ceases to apply to any document after it has been read to or by the court or referred to in open court in such terms as to disclose its contents unless the court otherwise orders.[38] In the State of Victoria, however, there is a distinction between original documents that exist independently from and generally prior to the litigation and those produced solely for the purposes of litigation such as witness statements. In the case of the former, the rule remains in force even if those documents had been tendered in evidence in open court and, in the latter, the rule applies only until the witness statement passes into evidence.[39] The rule generally applies to third parties, including journalists and other non–parties who acquire the documents and who are compelled to seek leave to be released from the undertaking to be able to use it.[40] In Victoria, third parties are permitted to inspect the documents to determine whether they wish to use them and whether they wish to apply for them to be released from the undertaking.[41] A court may in the public interest grant a release from the rule to allow for evidence to be used in a criminal investigation and prosecution.[42]

[25] The rule was first introduced in Canada in 1985. In some provinces, the rule exists as part of the common law while Ontario, Manitoba and Prince Edward Island have codified the rule.[43] The implementation varies significantly across Canadian jurisdictions. An issue on which there is no uniformity is whether the rule remains operative for an indeterminate period or expires when the information to which it

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[38] Federal Court of Australia, Federal Court Rules, No. 140 of 1979 Order 15 rule 18, provides:
'Any order or undertaking, whether express or implied, not to use a document for any purpose other than those of the proceedings in which it is disclosed shall cease to apply to such a document after it has been read to or by the Court or referred to, in open Court, in such terms as to disclose its contents unless the Court otherwise orders on the application of a party, or of a person to whom the document belongs.'

[39] *British American Tobacco Australia Services Ltd v Cowell (No 2)* (2003) 8 VR 571 at para 43. See also R Williams 'Implied Undertaking: Express reform required' Monash Law Review (Vol 34, No. 1) which sets out the differences in the Federal code and State of Victoria.

[40] *Esso Australia Resources Ltd v Plowman* [1995] 183 CLR 10 at 37.

[41] As provided for in r 28.05 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic). See also *British American Tobacco Australia Services Ltd v Cowell (No 2)* (2003) 8 VR 571 at para 37. This was based on the rationale that since such persons can only know the use to which they intend to put the documents once they have read and considered it, they should be able to read them subject to the undertaking in order to determine whether to seek leave to be released from the undertaking. In relation to documents tendered in evidence, *Cowell* is inconsistent with the course adopted in most other jurisdictions but remains the Victorian position on the issue.

[42] *Andrew Koh Nominees Pty Ltd v Pacific Corporation Ltd [No 2]* [2009] WASC 207.

[43] C Papile 'The Implied Undertaking revisited' *The Advocates Quarterly* 2006 at 191 and 194.

pertains is introduced in open court. The divergence arises from the tension between wanting to preserve confidentiality on the one hand and a resistance to creating the anomalous situation that third parties can access information but the recipient of the discovery cannot use it on the other. For that reason, the rule usually ceases to apply once the discovered document is presented in open court. In three provinces - British Columbia, Alberta and Nova Scotia - the rule ceases to operate only when the court so orders.[44] Unlike in England and Australia, the Canadian Supreme Court[45] refused to grant a release from the rule to allow material covered by it to be used as evidence in the prosecution of serious criminal charges.

[26] The rule does not form part of the law in the United States of America. It is for the party making production to obtain an express agreement of confidentiality from the receiving party or a protective order from court. Absent an express confidentiality agreement between the parties or an order of court, there are no restrictions on the uses to which materials received on discovery may be put. If the agreement seeks to maintain confidentiality beyond the pre-trial stage it is likely to raise public policy and First Amendment issues. Once the material is filed at court, the principle of public access to court records creates a presumption that the material will be available to the public.[46]

[27] The rule is not part of our law. Only three earlier reported South African authorities have referred to the rule. In the first, *Crown Cork & Seal Co Inc & another v Rheem South Africa (Pty) Ltd & others* 1980 (3) SA 1093 (W), Schutz AJ, recognised at the commencement of his judgment that there appears to be no direct authority in South Africa as to whether a court 'may place limitations upon a litigant's ordinary right of untrammelled inspection and copying of documents discovered by his opponent . . .'. After usefully summarising the position as it obtained in England, the learned judge posed the question (at 1098F-G) whether the 'English practice may be adopted in South Africa, and if it may, whether it should?' Implicit in that statement, it seems to me, was

[44] C Papile op cit at 191.
[45] *Juman v Doucette* 2008 SCC 8.
[46] C Papile op cit at 193. A party may motion the court in terms of Federal Rule of Civil Procedure 26(c) for a protective order to keep disclosed materials confidential.

the recognition that the English practice was not yet a part of our law. Although he did thereafter state (at 1099H) that in his view 'it is open to a South African court to adopt the English practice', he proceeded to decide the matter in accordance with our rule 35(7). I do not read the rest of the judgment as having, one way or the other, affirmatively answered the question earlier posed by the learned judge. The high court appears to have been plagued by similar uncertainty when it stated: '[I]f there be any doubt that the judgment in *Crown Cork* has not already done so, the time has come to hold unequivocally that the rule does form part of our law. . .'.[47] In the second - *Replication Technology Group & others v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) - which considered whether documents disclosed during arbitration proceedings between the parties could be relied upon in related contempt proceedings, Malan J stated (para 17) that he did not have to determine whether the rule forms part of South African law because the use of the documents in question was permitted by a recognised exception to the rule in that case. The third – *Mathias International Ltd & another v Baillache & others* 2015 (2) SA 357 (WCC) – also a judgment by Binns-Ward J, held in the context of Anton Piller proceedings that the applicant's supporting affidavit in the *ex parte* application brought in that case to obtain a search order had contained such an implied undertaking. The high court accepted that no South African court had made any 'explicit determination' that the rule is part of our law and that we have hitherto regulated access to and dissemination of information forming part of the court record or discovered documents which were regarded as confidential, without any invocation of the rule.[48]

[28] In adopting the rule, the high court appears to have invoked its inherent power to regulate its own processes in terms of s 173 of the Constitution.[49] That our courts were endowed with such power even in our pre-constitutional era is evident from the following dictum of Corbett JA: 'There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration

[47] Paragraph 57.
[48] Paragraph 53.
[49] Section 173 of the Constitution provides:
'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

of justice . . . '.[50] Courts now derive their power from the Constitution itself.[51] As it was put by the Constitutional Court in *SABC v NDPP*:[52]

'This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common law. . . . The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that Courts in exercising this power *must take into account* the interests of justice.' (Footnotes omitted.)

But the Constitutional Court did remind us that 'it is a power which has to be exercised with caution[53] and sparingly having taken into account the interests of justice in a manner consistent with the Constitution.'[54]

[29] In addition, s 39(2) of the Constitution makes it plain that, when a court embarks upon a course of developing the common law, it is obliged to 'promote the spirit, purport and objects of the Bill of Rights.'[55] This ensures that the common law will evolve, within the framework of the Constitution, consistently with the basic norms of the legal order that it establishes.[56] The Constitutional Court has already cautioned against overzealous judicial reform. Thus, if the common law is to be developed, it must occur not only in a way that meets the s 39(2) objectives, but also in a way most appropriate for the development of the common law within its own paradigm.[57] Faced with such a task, a court is obliged to undertake a two-stage enquiry: It should ask itself whether, given the objectives of s 39(2), the existing common law should be developed beyond existing precedent - if the answer to that question is a negative one, that should be the end of the enquiry. If not, the next enquiry should be how the development should

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[50] *Universal City Studios Inc and others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G.
[51] *Phillips & others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 47.
[52] *SABC v NDPP* 2007 (1) SA 523 (CC) para 35 and 36.
[53] *S v Pennington and another* 1997 (4) SA 1076 (CC).
[54] *Parbhoo and others v Getz NO and another* 1997 (4) SA 1095 (CC).
[55] *S v Thebus* 2003 (6) SA 505 (CC) para 25; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) para 20.
[56] *Pharmaceutical Manufacturers Association of South Africa*; In re *Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 49.
[57] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 55.

occur and which court should embark on that exercise. None of these considerations merited even a mention in the judgment of the high court.

[30] Even were it open to the high court to invoke s 173, that section does not empower a court to create a procedural rule in the absence of a lacuna. And it has not been suggested that the existing law is insufficient. Moreover, s 173 did not empower the high court to make a law of general application. *Independent Newspapers*[58] stressed that a court had to consider the competing rights or interests at stake on a case by case basis to ensure a fair trial. According to the Constitutional Court, when there is a claim for secrecy in respect of part of the court record, 'the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public.'[59] *Independent Newspapers* did not authorise or contemplate the adoption by a court of a new rule which would apply indiscriminately to all cases without regard to the circumstances.

[31] A court attempting to transplant a rule from a foreign jurisdiction should of necessity have regard to the differing constitutional contexts between that country and this. The Constitutional Court recently affirmed that the following principles apply in considering the use of foreign law:[60]

'(c) The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours.

(d) Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values.'

All law, in this country, must be grounded in constitutional values and respect must be given to the fundamental rights set out in the Bill of Rights. The adoption of a rule from another country must be considered in that context and in particular against a

[58] *Independent Newspapers* para 45.
[59] *Independent Newspapers* para 55.
[60] *H v Fetal Assessment Centre* (CCT 74/14) [2014] ZACC 34; 2015 (2) SA 193; 2015 (2) BCLR 127; (CC) para 31.

constitutional right of access to information held by the State regardless of the reason, and a right of access to privately-held information required for the exercise or protection of any right.[61]

[32] In procedural matters, s 171 of the Constitution makes plain that '[a]ll courts function in terms of national legislation and their rules and procedures must be provided for in national legislation'. A further bar to the adoption of the rule would thus seem to be the doctrine of the separation of powers. There are a number of reasons why a court is ill-suited to adopting the rule. They include the following: the rule, on the face of it, would appear to be at odds with the default Constitutional position - which makes openness, access to information and free expression the norm, and requires justification of an exception. The rule, by contrast, makes secrecy the default position. The content, timing, duration, ambit, limitations on and enforcement of the rule are complex matters involving controversial and difficult policy considerations. This is evident from the fact that where the rule does apply in comparable foreign jurisdictions, its content is not uniform. Questions of whether such a rule is necessary, and if so its content, are matters that may well require public debate and consideration. This is a legislative and not a judicial task. If there is a deficiency, the remedy lies in appropriate legislation or the amendment of Uniform rules of court.[62]

[33] Although the high court shied away from any attempt at formulating the rule, from its references to other jurisdictions, one may infer that it intended the rule to have some - if not all - of the following attributes: A party may use discovered documents only for the litigation in which it is engaged and not for a 'collateral' or 'ulterior' purpose. Impermissible 'collateral' use includes use of information in different legal proceedings, use as evidence of a serious criminal charge, and the dissemination, publication or distribution of discovered information in a pending case. The rule applies not only to the documents discovered, but also to information derived from those documents and covers even innocuous information that is not confidential. The rule binds any third party who receives the discovered documents. The rule applies as well to a rule 53 record. It ceases to apply at the latest when the matter is placed before the court for hearing.

[61] Section 32 of the Constitution.
[62] *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 755J.

Both the court and the party making discovery may authorise their dissemination, publication or distribution. In matters of public interest, the court would tend to allow general access to the content of a court file at an earlier stage, once pleadings in the case have closed and application has been made for a hearing date, or such a date has been fixed. A court may relax or modify the rule to meet 'the exigencies of a case that might afford sufficient reason to depart from its ordinary incidence.'

[34] In the event, and notwithstanding the fact that it had not properly defined the rule, the high court appears to have been in favour of reformulating the rule - from what is not exactly clear:

'to, in general, allow public access to the content of the court file, including any information subject to the implied undertaking rule that has been included in the pleadings or affidavits, once a matter has been set down for hearing, rather than only after the matter had been called in court, because this would conduce to more effective open justice without unduly impinging on the parties' rights of privacy. . .'[63]

But declined to do so because:

'I do not consider that the current case affords a suitable basis to undertake the exercise. It is one that in any event probably would be more appropriately addressed by the Rules Board after a process of public participation.'[64]

The high court thus appears to have seen only the reformulation of the rule, but paradoxically, not its adoption or initial formulation, as a matter for the Rules Board.

[35] The high court held that the rule applies to discovered documents and that since rule 53(1)*(b)* is 'an incident of discovery in our law, by parity of reasoning' the rule derived from English law applies to rule 53(1)*(b)*. Rule 53,[65] which governs review

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[63] Paragraph 50.
[64] Ibid.
[65] Rule 53 provides:
'(1). Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-
(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give

proceedings in this country, is home-grown. In *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660, Kriegler AJA explained:

'Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record. In terms of para (b) of subrule (1) the official concerned is obliged to forward the record to the Registrar and to notify the applicant that he has done so. Subrule (3) then affords the applicant access to the record. (It also obliges him to make certified copies of the relevant part thereof available to the Court and his opponents. The Rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.) More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of an interlocutory application, to "amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit". Subrule (5) in turn

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or make, and to notify the applicant that he has done so.
(2). The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.
(3). The registrar shall make available to the applicant the record dispatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.
(4). The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.
(5). Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall-
(a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometers of the office of the registrar at which he will accept notice and service of all process in such proceedings; and
(b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.
(6). The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.
(7). The provisions of rule 6 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings.'

regulates the procedure to be adopted by prospective opponents and the succeeding subrules import the usual procedure under Rule 6 for the filing of the applicant's reply and for set down.'

Kriegler AJA emphasised at 662C:

'Our Rule 53 and our practice for the review of decisions by extrajudicial tribunals differs *toto caelo* from Order 53 of English practice. Indeed, virtually all they have in common is the number.'

[36] Rule 53 exists to facilitate applications for review. Thus the simple equation by the high court of discovery to a rule 53 disclosure appears inappropriate and unjustified. In terms of rule 53, the right to require the record of the proceedings of a body whose decision is taken on review, is primarily intended to operate for the benefit of the applicant.[66] While there is a similarity between trial discovery and review proceedings, inasmuch as in both a party is compelled to make disclosure for the purposes of litigation there are fundamental differences between the two. Unlike rule 53, discovery is only undertaken after the pleadings have closed. The object of mutual discovery is to give each party before trial, all the documentary material of the other party so that each, after the contours have already been drawn, can consider its effect on his own case and his opponent's case and decide whether to carry on at all and, if so, how to carry on the proceeding. Discovered documents do not form part of the record, and are not before the court unless a party decides at the trial to make use of them. It is therefore quite possible, even likely, that many of the documents which were discovered will never see the light of day in court. In those cases, there may possibly be reason to argue that such privacy interest as originally existed, continues to exist unless and until the documents are used in the litigation. Review, on the other hand, usually arises from the exercise of a statutory or public power. When an applicant in review proceedings files its supplementary affidavit, after having had sight of the record, it is, in effect fully stating its case for the first time. Here, the City has used the material in question for the purpose for which it was provided, namely in its SFA. The material is relevant. The high court found that the information is not confidential or secret in the sense that it requires sealing or other protection. It saw 'no reason why, when the review application gets to be heard, [the documents] should be kept secret'. The approach of the high court

[66] *Saccawu v President Industrial Tribunal* 2001 (2) SA 277 (SCA) para 7.

appears to be that the rule protects the right to privacy. The privacy, so it seems, would come to an end 'at the latest' when the matter is placed before the court for hearing. What remains unexplained though is what privacy can possibly exist in material that: (a) has been used for the purpose for which it was provided; (b) is relevant to the litigation; (c) is not secret or confidential; and (d) in any event will be disclosed in due course.

[37] Discovery impinges upon the right to privacy of the party required to make discovery. According to Lord Denning MR,[67] 'compulsion is an invasion of a private right to keep one's documents private'. But while there is an interest in protecting privacy there is also the public interest in discovering the truth. The purpose of the rule therefore is to protect, insofar as may be consistent with the proper conduct of the action, the confidentiality of the disclosure. Litigants must accordingly be encouraged to make full discovery on the assurance that their information will only be used for the purpose of the litigation and not for any other purpose. In that sense, so the thinking goes, the interests of the proper administration of justice require that there should be no disincentive to full and frank discovery.[68] Those considerations can hardly apply in respect of documents disclosed by a public body in rule 53 proceedings. And, as rule 53 will only ever apply to the disclosure of documents by public bodies, I entertain some doubt as to whether such body can invoke the right to privacy to protect from disclosure documents relied upon by it to make its decisions. That does not mean that public bodies never have a claim to keep their documents confidential. But any claim of confidentiality arises from other interests such as security or perhaps even the privacy rights of persons mentioned in the documents, but not from its right to privacy. It must be remembered that SANRAL did not plead any reliance on the right to privacy. It claimed only a confidentiality right and not a privacy right, and then only in respect of the material in NOM2. That confidentiality claim was rejected by the high court. The production of the administrative record is inherently necessary for a court to undertake the task of determining the regularity of the proceeding sought to be impugned. 'Without the record a court cannot perform its constitutionally entrenched review function' (*Democratic Alliance v Acting NDPP* 2012 (3) SA 486 (SCA) para 37).

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[67] *Riddick v Thames Board Mills Ltd* [1997] 3 All ER 677 at 687-688.
[68] *Replication Technology Group & others v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) at 539D-F.

[38] Section 32(1)*(a)* of the Constitution affords everyone 'the right of access to information held by the state'. Section 32(2) requires national legislation to be enacted to give effect to that right. The Promotion of Access to Information Act 2 of 2000 (PAIA) is the national legislation in question. It establishes, in accordance with s 32 of the Constitution, a default position of openness in relation to documents held by the State. Once a record is obtained under PAIA there are no restrictions on how the information may be used. PAIA does not prevent persons who have obtained documents from the State from further distributing them. Those documents are public documents and can be made publicly available. However, a person, in the position of the City, who may obtain those self-same documents through review proceedings is, on the approach of the high court, prohibited from using them and, what is more, would appear to commit an offence by doing so. In importing the rule into South African law, the high court held that its breach would lay the person concerned 'open to being committed for contempt of court'. Without quite appreciating it, the high court appears to have created a new crime or extended the definition of an existing crime. But, as Schreiner ACJ observed in *R v Sibiya* 1955 (4) SA 247 (A) at 256G-H, 'it is not for the Courts to create new crimes, nor is it for the Courts to give an extended definition to a crime'. And, in *Jayiya v MEC for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA), this court held that the definition of contempt of court may not be extended by a court.

[39] Turning to the subrule: The high court interpreted the subrule restrictively to permit only persons with a direct legal interest access to a court file. Anyone else who seeks access must apply to court. This interpretation applies to all court documents and in all cases (not just documents produced by way of discovery or in terms of rule 53). It effectively seals court records which, at least before a hearing, would no longer be treated as public records. It does so without regard to whether their contents are in fact confidential or should be secret, or whether it in fact serves a public interest that it be available. The high court's approach to the subrule was informed by its view that the subrule is 'an important administrative basis to support the implied undertaking rule'. The restriction of public access was so that 'the effect of the implied undertaking rule would not be materially curtailed'. The high court noted in its judgment that the parties had approached the matter on the assumption that once the pleadings had been filed at

court they became ‘generally open to the public’. But that was in accordance with the then prevailing practice in the high court.

[40] Rule 62(7) reads: ‘Any party to a cause, and any person having a personal interest therein, with leave of the registrar on good cause shown, may at his office, examine and make copies of all documents in such cause’. {move next sentence back} Section 39(2) of the Constitution enjoins courts when interpreting any legislation and when developing the common law to promote the spirit, purport and objects of the Bill of Rights. That requires courts when interpreting a statute (or in this instance a rule of court) to avoid an interpretation that would render the statute unconstitutional and adopt an interpretation that would better promote the spirit, purport and objects of the Bill of Rights. The purpose is to find a reasonable interpretation which saves the validity of the subrule. The subrule must be understood in the context of the whole of rule 62. Rule 62 deals with technical, procedural and oftentimes plain mundane matters. It is concerned with the preparation, filing and inspection of documents. It specifies the type of ink and paper that must be used; deals with numbering and indexing; and affords the registrar the power to refuse to accept documents that do not comply with the rule. It would thus be somewhat surprising that if the drafters had meant to drastically restrict access to court documents, they would have done so in terms of the subrule. In the context of the rule as a whole, the subrule is better read as doing no more than permitting the copying and examination of court records, which must occur with the registrar’s leave, at his or her office, rather than as a substantive prohibition on access.

[41] The high court held that ‘the expression “personal interest” in the context of rule 62(7) connotes something equivalent to a direct legal interest’.[69] It thus interpreted the subrule to mean that the registrar may only provide access to: (a) parties; and (b) those with a direct legal interest in the case. That requires the registrar to make a determination as to whether or not a party has a direct legal interest in the matter. It is entirely unclear how the high court envisioned this determination would be made by the registrar.

[69] Paragraph 35.

[42] The subrule uses the phrase 'personal interest'. The qualifier 'personal' can equally well be read to mean any person who is personally interested in the matter. The *amici* submitted that there are several pointers that this is not only the only plausible - but also a preferable - interpretation of the subrule. First, the rules of this court,[70] the Constitutional Court,[71] the Land Claims Court,[72] the Labour Court[73] and the Magistrates' Court,[74] all state that 'any person' may make copies of all court documents in the presence of the registrar (or clerk). Only the Uniform rules qualify the phrase 'any person' with the words 'having a personal interest therein'. Yet there appears to be no reason in logic that would suggest that the difference in wording requires a different approach in practice in the high court. The phrase 'any person having a personal interest therein' is clearly capable of referring, as the other rules do, simply to 'any person'. The ambiguity in the meaning should therefore be resolved by adopting the meaning that is consistent with the unambiguous intent of every other rule in South African courts on the issue. Second, this is how the rule has in fact been interpreted in practice. Prior to the high court judgment, that was the practice in that court. With a few exceptions, it remains the default practice in most, if not all, the other divisions that any person may obtain access to court documents. This thus appears the most natural interpretation of the subrule. Third, such an interpretation, moreover, coheres with how the phrase is used elsewhere in the rules. The only other place the phrase 'personal interest' appears is in rule 57. That rule requires an application for the appointment of a *curator ad litem* to be accompanied by an affidavit of a person who knows the patient, and two medical practitioners. If the person 'has any personal interest in the terms of any order sought' the affidavit must disclose the 'full details of such relationship or

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[70] Supreme Court of Appeal Rule 4(3)*(a)* reads: 'Documents filed for Court purposes are public documents and may be inspected by *any person* in the presence of the registrar.' (My emphasis.)

[71] Constitutional Court Rule 4(6) reads, in relevant part: 'Copies of a record may be made by *any person* in the presence of the Registrar.' (My emphasis.)

[72] Land Claims Court Rule 4(4) reads: 'All documents forming part of the records in a case may be perused by *any person* in the presence of the Registrar or any person designated by him or her.' (My emphasis.)

[73] Labour Court Rule 28(4) reads: '*Any person* may make copies of any document filed in a particular matter, on payment of the fee prescribed from time to time, and in the presence of the registrar, unless a judge otherwise directs.' (My emphasis.)

[74] Magistrates' Court Rule 3(5) reads: 'Copies of the documents referred to in rule 3(4) may be made by *any person* in the presence of the registrar or clerk of the court.' Rule 3(4) refers to all documents filed with the court. Magistrates' Court Rule 63(6) reads: '*Any person*, with leave of the registrar or clerk of the court and on good cause shown, may examine and make copies of all documents in a court file at the office of the registrar or clerk of the court.' (My emphasis.)

interest'. In addition, the medical practitioners should be people 'without personal interest in the terms of the order sought'. It is meant to capture those people who have an intimate or financial relationship with the patient. That appears to demonstrate that 'direct legal interest' is not the necessary, let alone the most obvious, meaning of 'personal interest' when the phrase is used in the Uniform rules. In my view there is much to be said for these submissions by the *amici*. Textually, it appears the most plausible. It does not seek to give the term personal interest a stretched or unnatural meaning. It adopts the ordinary meaning that: (a) is consistent with the constitutional right to open justice; (b) is compatible with the position in all other comparable courts as expressed in the rules and as given effect to in practice; and (c) fits with the other uses of personal interest in the Uniform rules. Clearly, there is nothing inherent in the use of the word interest that requires it to be interpreted to mean direct legal interest.[75] Indeed, it is the interpretation advanced by the *amici* that best promotes constitutional rights. It is, therefore, the interpretation that this court should endorse. The high court's interpretation is inconsistent with the Constitution. It severely limits the basic principle of open justice, and the rights to public hearings, freedom of expression and access to information for the reasons described earlier. And it relies on a contrived textual interpretation. It makes the high court an outlier, with far more restrictive rules of access than any other superior court. It should be rejected for all those reasons.

[43] With a view to limiting the degree of violation, the high court held that: (a) 'the court may permit an inspection of the record at any time if it is appropriate to do so, and due cause is shown for a departure from the usual consequences of the rules'; and (b) the prohibition in each instance operates only until the case is called in open court. Neither procedure materially ameliorates the restriction, inasmuch as: First, an applicant, having no access to the court file, may well have great difficulty in making out a case as to why such access should be granted. Such person is thus expected to show 'good cause' without having had sight of the papers, and would have to approach a court blindfolded, so to speak. It may thus prove well-nigh impossible for any third party

[75] It is so that where this court was required to interpret a similar phrase, namely 'person with an interest' in *Minister of Environmental Affairs and Tourism & others v Atlantic Fishing Enterprises (Pty) Ltd & others* 2004 (3) SA 176 (SCA) para 14, it was willing to assume, without deciding, that it referred to 'a legal interest'. Streicher JA stated 'I shall assume in favour of the appellants that the word "interest" should be given the narrow meaning contended for by them.'

to intervene. In any event one would imagine that such an applicant would need the papers before the hearing in order to assess whether or not they even wish to intervene. Second, the public generally may have as legitimate an interest in cases that never get heard in open court, because they are settled or withdrawn, as in cases that are called in open court. It is not clear to me how or why the interest of either the litigants or the public would materially alter simply by virtue of the fact that the matter has been called in open court. One way or the other the parties have still chosen to engage in court proceedings. Even if a matter settles, it seems to me, that it should still be subject to the requirement of openness, more especially where litigation involves public entities. For, the public will have as real an interest in evaluating the court papers to determine whether the decision to settle or withdraw was justified. Third, it is not possible for the media to report accurately on court proceedings if they can only access the documents once the case is called. It is vital that the public be able to have access to court records prior to the hearing so that they can follow the proceedings in open court. Without prior access to the papers, the proceedings will have less meaning for them. Moreover, having access to papers in advance allows journalists to prioritise reporting on matters of public interest. Fourth, cases that are settled may also provide vital evidence that reveals wrongdoing and the public would be entitled to know whether a case was properly settled, or whether the settlement was influenced by some improper motive. That can only be determined by access to the papers. Fifth, an application for access to papers is an additional cost in time and money. In many cases, people who otherwise have an interest in the matter may be unable to afford an application for access. While the high court attempts to paint this option as enhancing access, in reality, it may prove an insuperable barrier to many, particularly litigants with limited funds. This not only negatively affects access to justice, it may disadvantage courts who will be deprived of the benefit of the submissions that *amici curiae* make.

[44] Both the rule and the high court's interpretation of the subrule thus impinge on open justice by preventing the public and media from being able to scrutinise court proceedings before a matter is heard. But there is a strong default position in our law against prior restraints on publication.[76] Prior restraints 'should only be ordered where

[76] *Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540

there is a substantial risk of grave injustice.'[77] A blanket rule can hardly, without more, meet that high threshold. If the rule and the subrule apply as found by the high court, they appear in my view to be almost certainly inconsistent with the Constitution. The blanket and default prior restraint on publication, as well, could hardly pass constitutional muster. The high court pointed out that the City did not challenge the constitutionality of the subrule or bring a counter-application seeking leave to depart from the incidents of the subrule. But the City could hardly have brought a counter-application or challenged a law: (a) which was not then in use or relied upon by SANRAL but employed by the high court in support of a right to privacy, which was not pleaded; and (b) on the basis of an interpretation which was not advanced by SANRAL and emerged only in the high court judgment.

[45] In the present case, the demand for accountability arises with particular force because of what is in issue in the review proceedings. Secrecy is the very antithesis of accountability. It prevents the public from knowing what decision was made, why it was made, and whether it was justifiable. As Ngcobo CJ pointed out in *M&G Media*, '[i]t is impossible to hold accountable a government that operates in secrecy'.[78] On that score Justice Brandeis of the US Supreme Court famously remarked that '[s]unlight is said to be the best of disinfectants'; electric light the most efficient policeman.'[79] It is a matter of fundamental importance to the administration of justice that members of the public, who are directly affected by the controversial issue of tolling, be allowed access to all of the arguments, the court records and the hearing of the review. The controversy would deepen if SANRAL were to ultimately succeed in having the review application dismissed after a partially secret hearing. That would not serve the public interest or the interests of justice.

[46] Our law and practice already impose limits on the dissemination of material produced by discovery or in terms of rule 53. They include: (a) the law of defamation; (b) the *actio injuriarum* which protects both dignity and privacy, and which prevents the

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(SCA) para 15.
[77] *Print Media South Africa and Another v Minister of Home Affairs and Another Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) para 44-46.
[78] *President of the Republic of SA v M & G Media Ltd* 2012 (2) SA 50 (CC) para 10.
[79] L Brandeis 'What Publicity Can Do' in *Harpers Weekly* of 20 December 1913 at 10.

publication of private facts';[80] (c) a court's discretion under rule 35(7) to limit inspection of discovered documents which are confidential (as in *Crown Cork*); (d) statutes which restrict publication of private and confidential information;[81] and (e) any reasonable limitation on the use of material which a court may order in a particular case, exercising its power in terms of s 173, to prevent an abuse of the rules of discovery or rule 53. There are cases where parties have – as the City did here – voluntarily provided express confidentiality undertakings, or where the courts have granted orders, tailored to the circumstances of the case, to protect allegedly confidential information, and provided mechanisms to resolve disputes. The principle of open justice has its limits of course and concomitantly a commitment to open justice does not mean that there should always be unrestricted reporting, nor that there may not be good and genuine reasons why information should sometimes be restricted. But whether that be so, falls to be determined on a case by case basis. To be sure, the science is unlikely to be exact and so the task may not be an easy one. Yet it can be accomplished if the court identifies and carefully evaluates what is at stake on both sides of the issue. If indeed the high court was satisfied that a proper case had been made out (it evidently was not) it could have fashioned appropriate relief to meet the exigencies of the particular case instead of impermissibly laying down – as it did - blanket rules.

[47] The animating principle therefore has to be that all court records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified. The high court's judgment, which is inconsistent with that basic principle with regard to both the rule and subrule, cannot be endorsed by this court. Its interpretation of the subrule creates a default rule of secrecy for all court records. In addition, its application of the rule limits the ability of litigants to ensure publicity when they challenge the actions of the State. In order meaningfully to exercise the right to open justice, members of the public (and the media) cannot simply be relegated to the role of spectator. While the gist of the matter may be apparent to a person attending the

[80] *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) para 34 and 55.
[81] Such as ss 33 to 37 of the International Trade Administration Act 71 of 2002 and ss 44 and 45 of the Competition Act 89 of 1998.

hearing, it is only through an understanding of the background and issues raised on the papers that proper comprehension and critical analysis of the proceedings, and ultimately the court's findings, is possible. This is especially so in motion proceedings, which are based on the affidavits before the court and their annexures, and where oral evidence is not given in open court. This means that court challenges to government action will be less open than they currently are. Thus where openness is most sorely needed – the consideration of government conduct – the high court judgment limits openness the most. The blanket of secrecy it throws over previously open proceedings undermines the legitimacy and effectiveness of the courts.

[48] It follows that as the high court was correct in dismissing SANRAL's application, costs, including those of three counsel (which it was accepted was necessary), obviously should have followed that result. For the rest, the order of the high court cannot stand and falls to be set aside. In the result:

1. The appeal is upheld with costs including the costs of three counsel.
2. The order of the court below is set aside and replaced with the following:
   'The application is dismissed with costs including the costs of three counsel.'

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	G Budlender SC (with him N Bawa and R Paschke) Instructed by: Cullinan & Associates, Cape Town Cordiers, Bloemfontein
For First Respondent:	J G Wasserman SC (with him G J Nel and I B Currie) Instructed by: Fasken Martineau, Sandton Webbers, Bloemfontein
For Amici Curiae:	W Trengrove SC (with him M Bishop) Legal Resources Centre, Cape Town Honey Attorneys, Bloemfontein