



CONSTITUTIONAL COURT OF SOUTH AFRICA

Herman Botha v Bool Smuts and Another

CCT 40/22

Date of hearing: 9 November 2023

Date of judgment: 9 October 2024

MEDIA SUMMARY

On 9 October 2024, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the Supreme Court of Appeal. The matter produced four judgments. The first judgment was penned by Kollapen J (Dodson AJ, Mhlantla J, Tshiqi J concurring). The second judgment was penned by Chaskalson AJ. The third judgment was penned by Rogers J (Schippers AJ concurring). The fourth judgment was penned by Zondo CJ.

In September 2019, a cyclist participated in an authorised cycle ride on a farm belonging to the applicant, Mr Botha. On his cycle, he encountered a dead baboon and porcupine in cage traps. Outraged by what he saw, he took photographs, sending the photographs with a map indicating the location of the farm to Mr Smuts, the first respondent. Mr Smuts was also provided with Mr Botha's name, mobile telephone number and occupation by a neighbour. Mr Smuts then discovered Mr Botha's insurance brokerage name, location and telephone number by way of a Google search. On 9 October 2019, Mr Smuts published a post on the Facebook page of the second respondent, Landmark Leopard and Predator Project. The post included the photographs, a Google search location of Mr Botha's insurance brokerage address and a WhatsApp conversation between Mr Smuts and Mr Botha, accompanied by a condemnation of Mr Botha's trapping activity. Comments on the post were mostly negative.

Mr Botha initiated urgent legal proceedings against the respondents to remove the post. The High Court granted urgent relief in the form of a rule nisi with an interim interdict ordering Mr Smuts to delete the post and refrain from posting further with reference to Mr Botha, his family, his addresses and his insurance brokerage. The relief Mr Botha

initially sought was substantially premised on a claim of defamation. It however included relief to prevent the publication of the confidential information of Mr Botha. In reply, accepting Mr Smuts' right to post the photographs, express his view on trapping and that publication of the post may have been in the public interest, Mr Botha challenged Mr Smuts' right to use his personal information to link him to the post on the basis that this would unjustifiably infringe his right to privacy. The High Court decided the matter on this basis, concluding that Mr Botha's privacy rights prevailed over the respondents' rights of expression. It confirmed the rule nisi but did not order the removal of the post in its entirety, ordering that the photographs of the animal traps and the anti-trapping commentary could remain.

The respondents brought a successful application in the High Court for leave to appeal to the Supreme Court of Appeal, which upheld the appeal and discharged the rule nisi. The applicant then sought leave to appeal in the Constitutional Court.

Mr Botha submitted that this Court's constitutional jurisdiction is engaged to the extent that the matter involves the relationship between the right to privacy and the right to freedom of expression. He submitted that the matter further engages its general jurisdiction because it requires this Court to consider how personal and business information may activate a claim for privacy even when it voluntarily enters the public domain. On the merits, Mr Botha took issue with the post as a whole rather than its composite parts, on the basis that his personal information is linked to the practice of trapping on his private farm. He also, for the first time, disputed the lawfulness of the photographs. He contended that he could never have reasonably expected that any person would link him to the trapping on his farm and he had every right to believe that such facts would remain private, stressing risk to his family and ruin to his business.

The respondents did not dispute jurisdiction. On the merits, they submitted the right to privacy is not truly implicated given that the information was in the public domain. They endorsed the Supreme Court of Appeal's finding that a commercial farm carries very little expectation of privacy and highlighted that Mr Botha's business and residence shared an address and he published this address on ten online commercial directories. The respondents also pointed out that all speech not excluded by section 16(2) is, by default, protected under section 16(1) of the Constitution.

Campaign for Free Expression NPC was admitted as *amicus curiae*. It submitted that this Court ought to be guided by the Protection of Personal Information Act 4 of 2013 and outlined factors based on comparative law to consider when distinguishing private facts from matters of public interest.

The first judgment

The first judgment was written by Kollapen J (Dodson AJ, Mhlantla J and Tshiqi J concurring). It held that this matter engages this Court's constitutional and extended general jurisdiction because this matter directly implicates the right to privacy and the right to freedom of expression. It raises an arguable point of law of general public importance: namely – is a claim to privacy in respect of personal information extinguished if that information is already in the public domain and placed there by the data subject? This matter is of appreciable significance to the broader public that engages with the dissemination of information online. The first judgment granted leave to appeal.

On preliminary matters, the first judgment held that the matter was not moot despite the post existing online for some time, because if interdictory relief were granted, the appeal would mean that future visitors to the Landmark Leopard and Predator Project Facebook page would not be able to view the reference to Mr Botha. However even if it could be said that the matter was moot, the interests of justice require the matter to be heard because of the preceding Courts' conflicting judgments and its implication for the rights of all online users. The first judgment also held that the issue of privacy was properly pleaded by Mr Botha in his notice of motion and founding affidavit in the High Court. It also concluded that even if the privacy issue was only raised for the first time in reply, the exception to the rule against raising a new matter in reply would apply since the High Court's consideration of the privacy case was not unfair or prejudicial towards the respondents. As regards the question of the lawfulness of the photographs, previously admitted, which was raised only in this Court, it was not appropriate to consider it at this late stage in the litigation.

The first judgment recognised that the matter implicates the rights to privacy, free expression and of the environment. The first judgment applied the law on privacy as set out in *Bernstein v Bester N.O.* [1996] ZACC 2, enquiring whether Mr Botha had a subjective expectation of privacy that society has recognized as objectively reasonable. It categorised Mr Botha's personal information in two parts – the information relating to Mr Botha's identity, his ownership and control of the farm and the trapping activities; and the information relating to his insurance brokerage and its address.

On the first category, the first judgment held that Mr Botha did not have a subjective expectation of privacy in respect of his ownership and control of the farm including the trapping activities. This is because there was no basis advanced as to why this information was to be considered as private. In addition, the commercial nature of the farm and the fact that Mr Botha authorised the public cycle across his farm suggested that this information was not private. The first judgment also held that Mr Botha did not have an

objective expectation of privacy in respect of this category due to the public interest nature of the trapping activities (which Mr Botha accepted) and the commercial nature of the farm. There was also no reason why the respondents ought to be prevented from linking Mr Botha's identity to his ownership of the farm and the activities thereon in the absence of a legitimate privacy claim.

On the second category of information, the first judgment held that Mr Botha did not have a subjective expectation of privacy of his insurance brokerage as his business because it was clear from his advertising that he wished the world at large to know that he was in the insurance business. In respect of the address, it was noted that Mr Botha's business address and home address were one and the same. The first judgment held that Mr Botha had a subjective expectation of privacy of this address as a home address, even though widely published in relation to his insurance brokerage. It further held that this expectation was objectively reasonable because of its intimate nature and the difference in purpose of Mr Botha's publication of the address and Mr Smuts' publication of the address. Just because a home and business share the same address does not mean that all privacy expectations are waived in respect of the home address. It recognised that for the many who work and live at the same address, they continue to enjoy privacy in respect of their home.

After establishing Mr Botha's legitimate privacy claim in respect of his home address, the first judgment considered how this privacy right weighed up against the respondents' right to freedom of expression, considering whether the public interest mandated prioritising expression over privacy. Due to Mr Botha's home address adding little value to the respondents' cause and the intimate nature of Mr Botha's information, the first judgment found that the inclusion in the post of Mr Botha's home address constituted an invasion of his right to privacy that could not be justified by the respondents' free speech assertion.

The second judgment

The second, concurring judgment was written by Chaskalson AJ and agreed with the order of the first judgment. It took a different view on the pleadings, holding that the only plausible privacy case that could be advanced on the basis of the founding papers was that the respondents' refusal to take down the post violated the privacy of Mr Botha in that it subjected him and his family to the threat of harassment at their home. On the preliminary issue of whether the privacy case was properly pleaded by the applicant, it held that there would be no prejudice to the respondents in allowing the applicant to recast his case in this narrow respect since there was no reason to believe that the respondents may have answered differently on the facts if the complaint had been framed expressly as a privacy complaint. It highlighted the fact that online publication was an ongoing process as

opposed to an instantaneous act and placed emphasis on the prospective nature of the interdictory relief sought by Mr Botha. The second judgment held that the correct approach was not to focus on the particular pieces of information and to ask whether Mr Botha had a reasonable expectation of privacy in respect of each such piece of information. Rather, it was to recognise that Mr Botha had a subjective and reasonable expectation of privacy in the form of being protected from unwanted harassment at his family home and that, by the time that the interdictory relief was sought, ongoing publication of the Mr Botha's home address threatened to expose him to harassment at his family home.

The third judgment

The third, dissenting judgment, written by Rogers J (Schippers AJ concurring), disagreed that Mr Smuts breached Mr Botha's privacy by publishing the address for his insurance brokerage business that turned out to be his residential address. It held that Mr Smuts did not know or indicate in his social media post that the business address was also Mr Botha's residential address. This fact was only disclosed by Mr Botha himself when he launched proceedings at the High Court.

The third judgment found that there was a difference between breaches of privacy when information is published and when others act on that information. It held that if anyone protested outside Mr Botha's home, there would be an independent question as to whether the protestors' conduct was a privacy violation. The third judgment found that it was unnecessary to decide whether that could constitute a privacy violation. However, a person's residential address was not private in the same way as what occurs inside the home, which is one's inner sanctum.

The third judgment took a different approach to reach the conclusion that privacy does not attach to Mr Botha's ownership of the farm. It found that a person generally has an entitlement to privacy even if they use their private property for commercial purposes. If a person enters that property without permission and takes and publishes photographs, that would, in its view, violate privacy. On the facts however, the cyclist in this case was allowed on the farm and there was no indication that he was not allowed to take photographs.

For these reasons, the third judgment would have granted leave to appeal but dismissed the appeal, with each party bearing their own costs. It would also not interfere with the Supreme Court of Appeal's costs orders.

The fourth judgment

Zondo CJ wrote a dissent. He noted that the only case that Mr Botha sought leave to appeal in order to pursue on appeal was a case based on an alleged infringement of Mr Botha's right to privacy. Zondo CJ examined Mr Botha's founding affidavit in the High Court and concluded that the infringement of Mr Botha's right to privacy was not part of Mr Botha's case in the High Court and concluded that Mr Botha could therefore not be allowed to pursue that case on appeal.

Zondo CJ said that the respondents were never given an opportunity to respond to a case of an alleged infringement of Mr Botha's privacy right. He said adjudicating the case on the basis of the alleged infringement of Mr Botha's right to privacy would violate the respondents' right to have a dispute adjudicated in a fair public hearing entrenched in section 34 of the Constitution. He concluded that therefore it was not in the interests of justice to grant leave to appeal and he would have refused leave to appeal with costs.

Conclusion

In summary, a majority of the Court (the first, second and third judgments) found that leave to appeal should be granted. A majority of the Court (the first and second judgments) found that the appeal should be upheld in that the rule nisi should be discharged subject, however, to the condition that the information relevant to Mr Botha's home address must be deleted and the respondents were interdicted from publishing this address as his home address further.

In respect of the information regarding Mr Botha's ownership and control of his farm (including the trapping activities), a majority of the Court (the first, second and third judgments) held that Mr Botha did not enjoy a reasonable expectation of privacy though there was not a majority in respect of the reasoning in support of this conclusion.

In respect of the information regarding Mr Botha's insurance brokerage, a majority of the Court (the first, second and third judgments) held that Mr Botha did not enjoy a reasonable expectation of privacy. The third judgment supported the first judgment's reasoning in this regard, resulting in the majority reasoning of the Court on this issue.

Also in respect of information regarding Mr Botha's home address, although the majority of the Court (the first and second judgments) agreed that Mr Botha held a reasonable expectation of privacy and that the publication of that address as a home address should be interdicted, there was no majority as to the reasoning thereof.