CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/22

In the matter between:

HERMAN BOTHA Applicant

and

BOOL SMUTS First Respondent

LANDMARK LEOPARD AND PREDATOR PROJECT – SOUTH AFRICA Second Respondent

and

CAMPAIGN FOR FREE EXPRESSION NPC Amicus Curiae

Neutral citation: *Botha v Smuts and Another* [2024] ZACC 22

Coram: Zondo CJ, Chaskalson AJ, Dodson AJ, Kollapen J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J

Judgments: Kollapen J: [1] to [179]
Chaskalson AJ: [180] to [242]
Rogers J: [243] to [257]
Zondo CJ: [258] to [335]

Heard on: 9 November 2023

Decided on: 9 October 2024

Summary: Section 14 of the Constitution of the Republic of South Africa — right to privacy — information in public domain — voluntary public disclosure of information — purpose of disclosure — scope of privacy protection for information in public domain — section 16 of the Constitution of the Republic of South Africa — right to freedom of expression in the public interest

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ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing from the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth):

1. Leave to appeal is granted.
2. The appeal is upheld in part and to the extent set out in paragraph 3 below.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following order:

"1. The appeal is upheld.

2. The order of the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth is set aside and replaced with the following:

'(a) The rule nisi granted on 11 October 2019 is discharged subject to paragraphs (b) to (d) below.

(b) The respondents must delete annexure F to the founding affidavit dated 9 October 2019 in its entirety from the second respondent's Facebook page.

(c) The respondents are interdicted from publishing any further posts which make reference to the applicant's address.

(d) The respondents are directed to ensure that any posts by third parties on the second respondent's Facebook page

which make reference to the applicant's address are promptly deleted so as to remove the address after such posts have come to the attention of the respondents.'

3. The parties shall bear their own costs in the High Court and in this Court."

4. The parties shall bear their own costs in this Court.

JUDGMENT

THE COURT:

This matter has produced four judgments. The majority of the court (Chaskalson AJ, Dodson AJ, Kollapen J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J) has concluded that leave to appeal should be granted. The same majority of the Court has concluded that Mr Botha had no reasonable expectation of privacy in respect to his ownership and control of his farm (including the trapping activities) and no reasonable expectation of privacy in respect of his insurance brokerage address. Regarding Mr Botha's home address, a different majority of the Court (Chaskalson AJ, Dodson AJ, Kollapen J, Mhlantla J and Tshiqi J) has concluded that Mr Botha had a reasonable expectation of privacy over his home address. Regarding Mr Botha's insurance brokerage address, a different majority of the Court (Dodson AJ, Kollapen J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J) has concluded that Mr Botha did not hold a reasonable expectation of privacy in respect of the insurance brokerage address because he published the information himself with the purpose of bringing public attention towards his insurance brokerage. There is a majority in the reasons for the conclusion relating to the insurance brokerage address. There is no majority in the reasons for the conclusion relating to Mr Botha's ownership and control of his farm (including the

trapping activities). There is also no majority in the reasons for the conclusion in respect of Mr Botha's home address.

The effect of the four judgments is that seven members of the Court grant leave to appeal. Seven members of the Court find that Mr Botha's information regarding his ownership and control of his farm (including the trapping activities) and his insurance brokerage address are not private and therefore the appeal is dismissed in this respect. Five members of the Court find that Mr Botha's information regarding his home address is private and therefore the appeal is upheld only in this respect.

KOLLAPEN J (Dodson AJ, Mhlantla J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal. The Supreme Court of Appeal judgment reversed the High Court judgment which had ordered the first respondent, Mr Boudewyn Homburg de Vries "Bool" Smuts, to remove all references to the applicant, Mr Herman Botha, his businesses and his family, from a post on the Facebook page of the second respondent, the Landmark Leopard and Predator Project. The High Court had also interdicted Mr Smuts from making any further posts on Facebook with such references.

[2] This case centres on the intersection between the right to privacy, including where information is already in the public domain, and the right to freedom of expression. These issues play out within the larger context of social media's ascendancy and the digitalisation of information.

The parties

[3] The applicant, Mr Botha, is an insurance broker who resides and conducts business in Gqeberha. He is also the owner of the farm Varsfontein situated in Alicedale in the Eastern Cape Province.

[4] The first respondent, Mr Smuts, is a wildlife conservationist, farmer, researcher and activist. The second respondent, the Landmark Leopard and Predator Project – South Africa, is a conservation non-governmental organisation focusing on human-wildlife conflict management and leopard and carnivore conservation. It was founded by Mr Smuts who is its executive director.

[5] The Campaign for Free Expression NPC, a non-profit company that describes itself as being dedicated to expanding the right to free expression, was admitted as an amicus curiae (friend of the court) and made written and oral submissions.

Factual background

[6] On 23 September 2019, Mr Nicolaas Louw (Mr Louw) was part of a group of cyclists who participated in an organised adventure ride that traversed Mr Botha's farm, Varsfontein. It is common cause that his presence on the farm as part of the adventure ride was lawful and authorised. In the ordinary course of his cycle across the farm, Mr Louw encountered a dead baboon and porcupine in cage traps. The animals appeared to him to have been exposed to suffering and distress. Outraged by what he saw, Mr Louw photographed the dead animals in the cages with the intention of sharing the photographs with an organisation capable of taking action. He shared them with Mr Smuts on 1 October 2019.

[7] Mr Louw also sent Mr Smuts a detailed map depicting the location of Mr Botha's farm on which he indicated the place on the farm where the photographs were taken. In a quest to identify the owner of the farm, Mr Smuts contacted Mr Botha's neighbour, Professor Alkers, who provided him with Mr Botha's name and

his mobile telephone number and also told him that Mr Botha was an insurance broker. Mr Smuts then did a Google search for Mr Botha which produced his insurance brokerage name, location and telephone number.

[8] On 3 October 2019, Mr Smuts sent the photographs to Mr Botha through WhatsApp. He also called him to explain his interest in the matter as a conservationist, communicated his view that what was depicted in the photographs was cruel and unethical, and inquired whether Mr Botha had the required trapping permits. Mr Botha indicated that he had the necessary permits but was not willing to discuss the matter any further, taking the view that there was no need for him to entertain Mr Smuts' enquiries because he was involved in a lawful activity on his property. He also blocked Mr Smuts from making further contact with him through WhatsApp.

[9] On 9 October 2019, Mr Smuts published a post on the second respondent's Facebook page with—

(a) a photograph of a baboon trapped in a cage;

(b) a photograph of a porcupine trapped in a cage;

(c) a photograph of Mr Botha and his minor daughter, six months old at the time (this photograph was removed on the same day it was posted following advice from Mr Smuts' attorney);

(d) a Google search location of Mr Botha's insurance brokerage address (which turned out also to be Mr Botha's residential address) and telephone number; and

(e) a WhatsApp conversation in which Mr Smuts asked Mr Botha whether he had valid permits to trap animals.

[10] Accompanying this information was a written post condemning Mr Botha's trapping activity. It labelled the traps as "unethical", "barbaric", and "environmentally damaging". Comments in response to the post were mainly negative and strongly critical of Mr Botha's conduct. Some comments, however, highlighted the dangers that baboons pose to farming operations and pointed out that Mr Botha's conduct was legal.

Litigation history

High Court

[11] 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.[1] Given the urgent timeline which accompanied the application and his absence from the Eastern Cape, Mr Smuts was unable to file an opposing affidavit. Accordingly, the matter was only opposed at that stage on the issue of urgency.

[12] Mr Smuts did, however, oppose confirmation of the interim interdict and filed an opposing affidavit to which Mr Botha replied. The relief Mr Botha sought was premised on his assertion that the post was "defamatory and intended to undermine [his] reputation, status and good name, cause harm to [his] business and endanger [him] and [his] family". He also included a prayer seeking to interdict the respondents from publishing his confidential information, saying that it exposed him and his family to risk. In answer to this, Mr Smuts relied on his right to freedom of expression to publish the post and disputed that the post was defamatory, arguing that it constituted fair comment based on facts that were true and on matters of public interest. In addition, he denied that what was published constituted private information, saying that he sourced most of it from public sources where it had been placed by Mr Botha himself.

[1] The High Court ordered as follows—

> "1. That a rule nisi shall issue returnable on 12 November 2019, calling on the Respondents to show cause, if any, why the following order should not be granted against them:
>
> 1.1. The Respondents are to forthwith remove the Facebook post made on the Second Respondent's Facebook page on 9 October 2019
>
> . . . .
>
> 1.2 The Respondents are hereby prohibited from submitting any further posts which make reference to the Applicant, his family, his addresses and his business."

[13] Mr Botha in reply invoked by name his right to privacy for the first time. He did not challenge Mr Smuts' constitutional right to post the photographs (except for one depicting his daughter which by then had been removed) and express his view on trapping. He explicitly accepted that publication of the post may have been in the public interest. While this was not the main thrust of the case made out in the founding affidavit, Mr Botha in reply 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.

[14] The High Court described the issue to be determined as follows:

> "In my view this case resorts in the tension between the right to privacy and the right to freedom of expression, both constitutionally protected. I do not intend to consider the question of damage to reputation, or the risk of personal and economic harm."[2]

[15] The High Court's judgment then canvassed the ground of privacy as the basis for the relief sought. It accepted that animal trapping raised strong and diverse public views and that despite being legal, such practices were open to criticism. The Court noted the ongoing debate on animal rights and the importance of breathing life into public conversation to minimise animal suffering.[3] It also recognised the central role that voices like those of Mr Smuts might play in advancing the debate.

[16] The High Court, however, concluded that Mr Botha's privacy rights prevailed over the respondents' rights of expression. Despite the fact that Mr Botha published his personal and insurance brokerage details on the internet, the Court emphasised his purpose in doing so – namely, to identify himself as an insurance broker and attract clients. That purpose, it said, did not include re-publication on as broad a platform as Facebook. It also concluded that, as Mr Smuts had obtained information regarding Mr Botha's ownership of the farm from Professor Alkers and not the Deeds Registry, it

[2] *Botha v Smuts* 2020 JDR 1231 (ECP) (High Court Judgment) at para 25.

[3] Id at para 24.

was not information obtained from a public source, suggesting that it was private information.

[17] The High Court relied in part on this Court's judgment in *Mistry*:[4]

> "[I]n deciding that the imparting of certain information had not breached the applicant's right to privacy, [the Court] took into account that '[the information] did not involve data provided by applicant himself for one purpose and used for another' and that 'it was not disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld'."[5]

[18] The High Court found that Mr Botha's right to privacy was infringed as he held an expectation that his personal information on the internet would not be published on a platform such as Facebook together with a post bound to instigate comments. It also concluded that the public interest lay in the topic of animal trapping and stopped short of Mr Botha's personal information including his identity and his ownership of the farm where the photographs were taken.

[19] The High Court confirmed the rule nisi but did not order the removal of the post in its entirety. It ordered that any reference to Mr Botha, his insurance brokerage and its location and the name of his farm be excised from the post. The photographs of the animal traps and the anti-trapping commentary could remain. The Court awarded costs in Mr Botha's favour.

[20] Aggrieved by the outcome, the respondents brought a successful application in the High Court for leave to appeal to the Supreme Court of Appeal.

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[4] *Mistry v Interim National Medical and Dental Council of South Africa* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) (*Mistry*).

[5] High Court Judgment above n 2 at para 34.

Supreme Court of Appeal

[21] The Supreme Court of Appeal reversed the order of the High Court. It focused on whether Mr Botha's personal information enjoyed privacy protection and identified the following issues—

(a) whether it is in the public interest to have the personal information of Mr Botha published;

(b) whether Mr Smuts could have shared the activities happening on Mr Botha's farm without disclosing Mr Botha's personal information; and

(c) whether the High Court erred in placing emphasis on Mr Botha's right to privacy in his information despite the fact that it was already in the public domain.

[22] On the first issue, the Supreme Court of Appeal found that section 16 of the Constitution gives activists the right to share information with the public if such dissemination is in the public interest by weighing the right to privacy against freedom of expression. The "issue resolves itself", according to the Supreme Court of Appeal, because *Bernstein*[6] vitiates Mr Botha's privacy claims. The Supreme Court of Appeal reasoned that it cannot "be said that Mr Botha ha[d] the subjective expectation of privacy that society recognises as objectively reasonable".[7]

[23] On the second issue, the Supreme Court of Appeal found that Mr Smuts could not use less restrictive means to name and shame Mr Botha. It found that he had a right to share honest information about animal trapping, including the personal information of those involved. The Court reasoned that the public had a similar right to receive such information. All of this was part of the development of a democratic culture which was founded on the dissemination of information in the public interest and the creation of a platform for the exchange of ideas.

[6] *Bernstein v Bester NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (*Bernstein*).

[7] *Smuts v Botha* [2022] ZASCA 3; 2022 (2) SA 425 (SCA) (Supreme Court of Appeal Judgment) at para 19.

[24] On the last issue, the Supreme Court of Appeal considered whether Mr Botha had a subjective expectation of privacy in respect of the information in question that society would recognise as objectively reasonable. It considered that Mr Botha's information was already in the public domain. Mr Botha's ownership of the farm was registered at the Deeds Registry and his insurance brokerage information and address were publicly available. The Court found that Mr Botha did not hold a subjective expectation of privacy that was objectively reasonable, largely due to the information being in the public domain, placed there by Mr Botha.

[25] Finding that the High Court had erred in confirming the rule nisi, the Supreme Court of Appeal upheld the appeal and discharged the rule nisi.

In this Court

[26] Mr Botha applies for leave to appeal against the judgment and order of the Supreme Court of Appeal. After the receipt of the opposing affidavit, the Chief Justice issued directions calling for written submissions on the following four questions:

(a) What personal or business information of or related to Mr Botha was publicised?

(b) For what purposes was Mr Botha's personal or business information publicised?

(c) Is the publication of the personal or business information defensible under the right to freedom of expression and, if so, on what basis?

(d) Are there any legal restrictions to the further publication of personal or business information available to the public through the internet, Deeds Registry or any other format?

[27] The parties responded to the directions and filed written submissions. On 2 May 2023, this Court admitted Campaign for Free Expression NPC as amicus curiae and granted it leave to make written and oral submissions. The parties and the amicus curiae filed written submissions prior to the hearing of the matter. I briefly

summarise the parties' and the amicus curiae's submissions below. Much of the substance of their submissions is also referred to in my analysis.

The applicant's submissions

[28] On jurisdiction, Mr Botha says that the matter engages this Court's constitutional jurisdiction to the extent that it involves the relationship between the right to privacy and the right to freedom of expression. In particular, he argues that the issue in dispute relates to the expectation of privacy and whether and under what circumstances it can be forfeited. Mr Botha also says the matter engages our general jurisdiction in raising an arguable point of law of general public importance which this Court should consider because it requires this Court to consider how personal and business information may still activate a claim for privacy even when it voluntarily enters the public domain.

[29] On the merits, Mr Botha takes issue with the post as a whole, rather than its composite parts, but does so purely on the basis that it contains his personal information which then links him to what he describes as the practice of trapping on his private farm, "paired with a narrative slandering [him] as an animal abuser". Before this Court, and for the first time, he disputes that the photographs were lawfully obtained and published. This was not an issue in dispute before the High Court and the Supreme Court of Appeal. He also accepts that he published information online about his insurance brokerage prior to Mr Smuts' post. He submits that he could never have reasonably expected that any person would link him to the lawful trapping on the farm and he had every right to believe that private facts would remain private, even if cyclists traversed the farm and saw evidence of such trapping.

[30] Mr Botha stresses, in part, "personal risk" to his family and "potential ruin" for his insurance brokerage. He rejects the Supreme Court of Appeal's approach as "miss[ing] the point" – the point being that the "linkage [was] designed to hurt [him]".

The respondents' submissions

[31] Mr Botha's submissions on jurisdiction are not disputed. On the merits, the respondents say that Mr Botha does not meet the dual analysis set out in *Bernstein* (and discussed below). They contend that the right to privacy is not truly implicated given that the information was in the public domain, diminishing any privacy interest. They endorse the Supreme Court of Appeal's finding that a commercial farm carries very little expectation of privacy in relation to the practice of animal trapping. As for Mr Botha's home, the respondents highlight that his business and residence shared an address and Mr Botha published this address on ten online commercial directories.[8]

[32] The respondents also explore the importance of freedom of expression. Relying on *Islamic Unity Convention*,[9] they point out that all speech not excluded by section 16(2) is, by default, protected under section 16(1) of the Constitution.

The amicus curiae's submissions

[33] The amicus curiae's submissions focus on three key areas: the application of the Protection of Personal Information Act[10] (POPIA), international and comparative law considerations, and the merits of the appeal.

[34] Regarding the application of POPIA, the amicus curiae argues that, despite the legislation coming into effect after this case's initiation, it would be desirable for this Court to give guidance on the meaning of some of POPIA's provisions for the benefit of future cases under POPIA.

[35] The second area concerns international and comparative law, relying on section 39(1)(b) and (c) of the Constitution which enjoins the consideration of

[8] Brabys.com, port-elizabeth.infoisinfo.co.za, mype.co.za, zalinkedin.com, buype.co.za, tuugo.co.za, ivote.co.za, thinklocal.co.za, africanadvice.com and sayellow.com.

[9] *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC).

[10] 4 of 2013.

international law and permits consideration of foreign law. The amicus curiae concentrates on the re-publication of private information in the public domain and the collation of discrete facts from public sources. It also provides an overview of different jurisdictions' varied approaches to privacy protections for publicly available personal information.

[36] On the merits, the amicus curiae outlines factors to consider when distinguishing private facts from matters of public interest and assessing alleged harm and submits that the published information was not private, served the public interest and was not calculated to cause harm.

Analysis

Jurisdiction and leave to appeal

[37] Our constitutional and general jurisdiction is engaged 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: is a claim to privacy in respect of personal information extinguished if already in the public domain and placed there by the data subject?[11]

[38] The Court is tasked with considering the public domain as including a wide range of online platforms, including social media. This matter is of appreciable significance to the broader public that engages with the access and dissemination of information in any online context. Today, that broader public is growing in its engagement with online platforms. In an ever-evolving digital age, this Court must address this issue as technology and its use develop in order to provide relevant direction on the lawful use of publicly available information and certainty on the expectation of privacy in those

[11] A data subject is the person to whom personal information relates, as defined in section 1 of POPIA.

circumstances. The issue is arguable in all of the respects alluded to by this Court in *Paulsen*,[12] in that—

(a) there is no authoritative pronouncement on the issue, with available, cogent, academic or expert views on it being divergent;

(b) it raises new and difficult questions of law; and

(c) the answer to the question in issue is not readily discernible.[13]

[39] It is also in the interests of justice that leave be granted as there are good prospects that the Court will reverse or materially alter the findings of the Supreme Court of Appeal. The issue is also of importance to a large sector of the general public and it is in the public interest for the Court to determine it. As such, this Court's jurisdiction is engaged and leave to appeal should be granted.

Preliminary issues for consideration

[40] There are three preliminary issues that need to be addressed. They are:

(a) Has the matter become moot? While this was not raised in the papers, it was the subject of some debate during the hearing.

(b) Has a case based on privacy been properly pleaded to warrant its consideration?

(c) How should the Court consider the belated challenge to the photographs depicting the trapped animals?

Mootness

[41] During the hearing, the practical effect of any relief that the Court might grant was raised. In *Premier, Provinsie Mpumalanga*[14] the Supreme Court of Appeal imposed a positive test for mootness: will a judgment or order have a practical effect or

[12] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

[13] Id at para 23.

[14] *Premier, Provinsie Mpumalanga v Groblersdalse Stadsraad* [1998] ZASCA 20; 1998 (2) SA 1136 (SCA).

result?[15] This Court has similarly held that "it may be in the interests of justice to hear a matter even if it is moot if 'any order which [it] may make will have some practical effect either on the parties or on others'".[16] Certainly, after years on the internet and three stages of litigation, the link between Mr Botha and animal trapping is readily available online. The appeal, if successful, would restore the order of the High Court which would effectively delink Mr Botha from the post. That may not undo what has occurred. It will, however, have a practical effect. Future visitors to the Landmark Leopard and Predator Project Facebook page will not be able to view the excised reference to Mr Botha. As such, any debate sparked by the photographs or in consideration of the post will exclude him. That in itself constitutes an order capable of having practical effect even if that effect is diminished by the passage of time.

[42] Most cases of online publication will generally run into a mootness problem. By the time this Court is in a position to consider actions for defamation and privacy infringements, the relevant information posted on social media will likely have been widely disseminated. In a rough analogy, the Supreme Courts of Canada[17] and the United States[18] have heard factually moot cases relating to pregnancy. They both rejected arguments which would have rendered moot any case brought by pregnant women seeking abortions. In *Roe*, the Court held: "[i]f that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid".[19]

[43] Ours is not. A consideration of the interests of justice, which is already part of this Court's jurisprudence, ensures that there is no rigidity. The ability of appellate

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[15] *Director-General Department of Home Affairs v Mukhamadiva* [2013] ZACC 47; 2013 JDR 2860 (CC); 2014 (3) BCLR 306 (CC) at para 35.

[16] *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32 citing *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg Municipality*) at para 11.

[17] *Borowski v Canada (Attorney General)* 1989 CanLII 123 (SCC), [1989] 1 SCR 342 and *Tremblay v Daigle* 1989 CanLII 33 (SCC), [1989] 2 SCR 530.

[18] *Roe v Wade* 410 US 113 (1973) (*Roe*).

[19] Id at para 125.

courts to address the rapid, widespread dissemination of information on social media may be rendered impotent by a rigid approach to mootness. Even if the practical effect of removal is lessened over the course of litigation, mootness jurisprudence cannot be so rigid as to deny relief. Here, Mr Smuts' post is still publicly accessible and, if this Court chooses to revive the High Court's interdict or change it, it will have effect, even if limited.

[44] Even if the practical effect of an order may be greatly diminished for the parties, or is lacking practical effect altogether, there is still a public interest in this Court grappling with the issues the case raises. Those issues may have continued importance for the litigants as well as the broader public. This Court has previously considered moot matters in the interests of justice. In *POPCRU*,[20] this Court held that "mootness is not an absolute bar to the justiciability of an issue [and that] the Court may entertain an appeal, even if moot, where the interests of justice so require".[21] According to *AAA Investments (Pty) Ltd*,[22] when two courts issue conflicting judgments, particularly when an appeal court's decision holds significant implications for future cases, there is a preference to consider a matter that is moot. On both points, this matter warrants consideration. First, the High Court and the Supreme Court of Appeal disagreed. Second, this matter implicates more than the rights of the parties. It implicates our collective relationship with the internet and its power over our online personae. As such, considerations of mootness should not prevent this Court from dealing with the matter.

The proper pleading of a case in support of the right to privacy

[45] At the hearing, the respondents raised concerns that Mr Botha never properly pleaded an infringement of his right to privacy in his founding affidavit in the High Court and that they thus did not have an opportunity to answer a case based on the

[20] *POPCRU v SACOSWU* [2018] ZACC 24; 2018 (11) BCLR 1411 (CC); 2019 (1) SA 73 (CC).

[21] Id at para 44.

[22] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) at para 27.

right to privacy. According to the respondents, such a case was only made out by Mr Botha in his reply.

[46] I set out how the privacy issue arose on the papers in the High Court. In his notice of motion, Mr Botha included interdictory relief that would prevent Mr Smuts from disclosing his "confidential" information. Paragraph 2.1.2 of the notice of motion reads:

> "[T]hat the Respondents be ordered to refrain from making any further social media posts, or other publications of any nature whatsoever, including both verbal and written, disclosing any information and/or confidential information and/or posts of, including but not limited to, a defamatory nature regarding the Applicant / his business / his farm in any manner whatsoever and treat all communication associated with this matter as confidential."

[47] In support thereof Mr Botha said this in his founding affidavit:

> "In addition to reputational damage he caused, the Respondent(s) have caused a security risk by posting photographs of me and my daughter, providing the name and location of my farm and by attaching a Google Search result depicting my home and business address."

[48] The scope of the relief sought in the notice of motion and supported in the founding affidavit was to urgently interdict the publication of information that was defamatory as well as information that Mr Botha regarded as confidential.

[49] Mr Smuts, in his answering affidavit, responded to that part of the case relating to the publication of confidential information as follows:

> "None of the information that I published concerning the applicant was private, much less confidential. (I mention this in light of paragraph 2.1.2 of the notice of motion, which is directed inter alia at the publication of confidential information concerning the applicant.) On the contrary, with the exception of the photographs taken by Mr Louw, the published information had been placed in the public domain by the

> applicant himself. This includes the applicant's WhatsApp profile picture which the applicant had himself selected for use on social media – and which was, as a result, available to anyone who had the applicant's cell phone number, or who was otherwise in contact with the applicant by cell phone."

[50] The answering affidavit thus addressed the privacy issue that arose out of Mr Botha's notice of motion and founding affidavit.

[51] Mr Botha on numerous occasions in reply, and relying substantially on the same facts advanced in the founding affidavit, formally invoked his right to privacy by name. He argued that the information, to which reference had been made in the notice of motion and in the founding affidavit, was personal information and its disclosure infringed his privacy rights. He says:

> "[T]he relief sought by me is that the First and Second Respondent should not be permitted to place any of my personal information on social media (including the photograph of me and my daughter, my name, my business/home address, business name and farm name – hereinafter referred to as "*my personal information*") without my permission." (Emphasis in original.)

[52] He says further:

> "I respectfully submit that the First Respondent's right to freedom of expression cannot outweigh our right to privacy nor our right to not be placed in potential physical and / or economic harm."

[53] While Mr Botha's case in the High Court was substantially grounded on his reputational right, it also included, to a lesser extent, the protection of his confidential information. While it was only in reply that Mr Botha directly clarified his reliance on his right to privacy, the basis for this was laid in the notice of motion and founding affidavit.

[54] The purpose of pleadings is to define the issues for the other party and the court.[23] The respondents knew from the outset that the case they were required to meet included a privacy case. Mr Smuts responded appropriately, in his answering affidavit, to the allegation that he had posted confidential information concerning Mr Botha and his family. He denied that the information was confidential, arguing that what he had published was already in the public domain, having been placed there voluntarily by Mr Botha.

[55] At that stage, which was prior to the filing of the replying affidavit, the issue of privacy had been raised by Mr Botha even though not as elegantly or directly as would have been desired, perhaps because the application was launched as one of urgency. Notwithstanding, Mr Smuts knew that the case he was required to meet included a privacy challenge and he responded to that in his answering affidavit. The privacy case was squarely and properly before the High Court for determination.

[56] The respondents did not bring an application to strike out the privacy averments in the replying affidavit, nor any request to file a further affidavit.[24] The only reference to the pleading issue in the Courts other than this Court is in the judgment of the High Court granting leave to appeal to the Supreme Court of Appeal where it was included as one of the grounds on which leave to appeal was granted. But for this, there is nothing in the judgments of the High Court and the Supreme Court of Appeal addressing any complaint about the pleading of the privacy issue. In this Court, the respondents, in opposing leave to appeal, allude in their answering affidavit only to the changing nature of Mr Botha's case. They raised no objection to it, nor did they allege

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[23] *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 28. Almost a century ago in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 (*Robinson*) at 198, the Court held there to be no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been:

> "The object of pleading is to define the issues; and parties will be kept strictly to their [pleadings] where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings."

[24] See, for example, *Sigaba v Minister of Defence and Police* 1980 (3) SA 535 (TkS) at 550F; *Pretoria Portland Cement Company Ltd v Competition Commission* [2002] ZASCA 63; 2003 (2) SA 385 (SCA) at para 63; and *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) at paras 51 and 71.

any prejudice or unfairness. In fact, Mr Smuts says in his answering affidavit in this Court that the privacy issue was properly considered by the Supreme Court of Appeal and the conclusion reached by that Court was "unassailable". These sentiments militate against any suggestion of prejudice or unfairness and in any event none is advanced by Mr Smuts.

[57] I accordingly conclude that the privacy issue was raised in the notice of motion and founding affidavit and was responded to in the answering affidavit. It was not raised for the first time in reply. I proceed nevertheless to deal briefly with the proposition that what occurred here was that a new case, alternatively a new argument, was raised for the first time in reply.

[58] In our law, there is a general rule that in motion proceedings "it is to the founding affidavit which a Judge will look to determine what the complaint is".[25] Ordinarily, a new case or new facts in support of the relief claimed should not be advanced in a replying affidavit or on appeal. There are exceptions to the general rule which I consider below.

[59] In *Barkhuizen*,[26] which considered on appeal a new legal point arising out of the trial, this Court characterised the test for making an exception as one which is underlined by considerations of fairness:

> "The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point."[27]

[25] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) (*Director of Hospital Services*) at 635H.

[26] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*).

[27] Id at para 39.

[60] *Betlane*[28] dealt with a new legal argument raised in reply, but where the applicant was a "lay litigant". This Court stated in express terms that a "case cannot be made out in the replying affidavit" as "one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit".[29] However, this Court made an exception on the facts of the case, stating that the applicant's situation was "special" as he did not until late in the day have the benefit of legal assistance. It went on to state that it was "in the interests of justice to decide" the issue, "given the exceptional circumstances under which it arose".[30]

[61] In *My Vote Counts*,[31] when considering a new legal point on appeal which arose in argument and not in the replying affidavit, this Court provided a concise expression of the general rule and the exception to the general rule:

> "It is, in any event, imperative that a litigant should make out its case in its founding affidavit, and certainly not belatedly in argument. The exception, of course, is that a point that has not been raised in the affidavits may only be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party."[32]

[62] In *Smith*[33] and dealing with the same theme, the Supreme Court of Appeal said that the rule against a new matter in reply is not absolute and should be applied with a fair measure of common sense when it found that the new matter raised in reply before it provided no material advantage to the applicant.[34]

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[28] *Betlane v Shelly Court CC* [2010] ZACC 23; 2011 (1) SA 388 (CC); 2011 (3) BCLR 264 (CC) (*Betlane*).

[29] Id at para 29.

[30] Id at paras 29 and 31.

[31] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) (*My Vote Counts*).

[32] Id at para 177.

[33] *Smith v Kwanonqubela Town Council* [1999] ZASCA 58; 1999 (4) SA 947 (SCA) (*Smith*).

[34] Id at para 15.

[63] What emerges from the above is that our courts have adopted an approach largely predicated on fairness to the parties and the proper ventilation of the issue raised, even if belatedly so. If the new case is legal in nature, foreshadowed in the pleaded case, and does not cause prejudice to the other party, then a court should allow an applicant to make the new case in reply.[35] The default position remains that a party must make out its case in the founding affidavit and a departure from that rule will only apply in exceptional circumstances. The present is a quintessential case where the exception to the general rule should apply.

[64] In these proceedings, while the privacy issue was not raised as directly as it could have been, there is sufficient reference in the notice of motion and the founding affidavit to foreshadow its later invocation. This emerges from the nature of the relief sought in the notice of motion as well as Mr Botha's reference to the details of his ownership of the farm at Varsfontein, the activities that took place there, the details of his brokerage and his address, and the photograph of him and his minor daughter.

[65] To the extent that Mr Botha made out a new case for privacy only in reply, the Court had a discretion to allow it to remain in the replying affidavit, giving the respondent an opportunity, on request, to reply should special or exceptional circumstances exist and in the absence of prejudice.[36]

[66] The High Court ultimately dealt with the case as one that was centrally concerned with the tension between the right to privacy and the right to freedom of expression. It did not do so purely on what was raised in Mr Smuts' replying affidavit. It did so on the basis of all the papers that were before it. This was proper. As is noted in *Erasmus*:

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[35] *My Vote Counts* above n 31 at para 177.

[36] *Juta & Co Ltd v De Koker* 1994 (3) SA 499 (T) (*Juta & Co Ltd*) at 511E-F and *Nkengana v Schnetler* [2010] ZASCA 64; [2011] 1 All SA 272 (SCA) (*Nkengana*) at para 9.

> "The court's central role in the identification of issues is important. It is only after careful thought has been given to a matter that the true issue for determination can be properly identified. That task should never be left solely to the parties or their legal representatives."[37]

[67] If there is any doubt that this matter was sufficiently pleaded on the founding papers, the exception would apply in allowing proper pleading in reply because the High Court's consideration of the privacy case was not unfair or prejudicial towards Mr Smuts, was foreshadowed in the pleadings, and was fully ventilated on the papers.

[68] Common sense suggests that this was never an issue of concern to the respondents and that they were not prejudiced by the privacy argument. I conclude that the High Court was correct in considering the privacy case because it was properly before it on the pleadings. Alternatively, the unique circumstances under which the privacy issue arose, including the urgent nature of the initial application, which justifies some leniency in favour of Mr Botha, satisfies its consideration as an exception to the general rule.

[69] This Court is equally entitled to consider the privacy challenge, having been favoured with the fullest argument on the issue. Whether sufficient evidence was advanced in support of the privacy claim is another matter.

The status of Mr Louw's photographs

[70] Before this Court, Mr Botha states that the granting of permission to cyclists did not constitute a waiver of his right to privacy in respect of the activities carried out on the farm. Based on this, he alleges the publication of the photographs violated his privacy.

[37] Van Loggerenberg *Erasmus: Superior Court Practice* Revision Service 22 (Juta & Co, Cape Town 2023) at D1 Rule 6-28. See also *De Wet v Khammissa* [2021] ZASCA 70; 2021 JDR 1070 (SCA) at para 14.

[71] The respondents' right to publish the photographs was not disputed in the High Court or the Supreme Court of Appeal. Mr Botha only took issue with the linkage between the post and himself. In this Court, Mr Botha however took the position that the photographs taken by Mr Louw and their publication violated his right to privacy as he did not waive his right to privacy in respect of the activities carried out on the farm. This position is inconsistent with his position before the High Court and the Supreme Court of Appeal. His objection never extended to the taking of the photographs by Mr Louw as constituting a breach of his privacy rights.

[72] It is not open to Mr Botha at this late stage of the matter to argue that Mr Louw was not entitled to take the photographs that he did. If this was allowed, this Court would be required to consider that issue for the first time; it would be required to do so in the absence of the facts relating to the issue and it would not have the consideration of the other courts that dealt with the matter. There is also no reference to the issue being raised in the record before us. For these reasons, it would be neither appropriate nor fair to consider the question of whether Mr Louw infringed Mr Botha's right to privacy by taking photographs of the animal traps and passing them on to Mr Smuts.

The legal framework

The three relevant rights

[73] The two central and operative rights in question are the right to privacy and the right to freedom of expression. Though not central to the determination of this matter, section 24 of the Constitution – the right to a healthy environment – is also implicated. As such, it is discussed insofar as the right to freedom of expression is used to draw attention to the issues concerning animal practices, which relate to our right to a healthy environment. Before the applicable legal tests are examined, the scope of each of the three rights is discussed.

Freedom of expression and the associated right to receive and impart information and ideas

[74] Section 16 of the Constitution provides:

> "(1) Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research."

[75] The very essence of an open and participatory society where debate is encouraged and flourishes is dependent on the free flow and exchange of information and ideas. Those debates are often robust and at times they traverse complex and contentious issues, often giving rise to difficult discussions.

[76] In *Khumalo*, this Court held:

> "Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled."[38]

[77] In *SANDU*,[39] this Court reflected on how freedom of expression was vital to moral agency and the search for truth when it said:

> "Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The

[38] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (*Khumalo*) at para 21. See also *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo*) at para 37 for another discussion of freedom of expression in a democratic society.

[39] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) (*SANDU*).

> Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."[40]

[78] This Court has also considered the relationship between free expression and activism on controversial topics. While activism is an indispensable feature of our common life and the struggle for freedom and democracy, it has also, in the post-apartheid era, taken on and embraced new challenges located in the Constitution. In *Mineral Sands*,[41] this Court observed:

> "One of the more positive features of our nascent democratic order is vibrant, vigilant and vociferous civil society participation in public affairs. In a truly broad based participatory democracy characterised by that kind of active participation, our Constitution's aspirations and values find meaning in the lives of the populace for whose benefit the Constitution was ultimately enacted. One of the notably active voices is that of the environmental interests lobby."[42]

[79] Other democracies similarly afford activist speech a high degree of protection.[43] For example, in *Steel and Morris*[44] the European Court of Human Rights observed:

> "[I]n a democratic society even small and informal campaign groups . . . must be able to carry on their activities effectively and . . . there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment."[45]

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[40] Id at para 7.

[41] *Mineral Sands Resources (Pty) Ltd v Reddell* [2022] ZACC 37; 2023 (2) SA 68 (CC); 2023 (7) BCLR 779 (CC).

[42] Id at para 1.

[43] Either by way of strategic lawsuit against public participation legislation or judge-made law.

[44] *Steel and Morris v The United Kingdom* [2005] ECHR 103, the so-called *McLibel* case.

[45] Id at para 89.

[80] In *Reddell*,[46] this Court also explored how free expression interacts with social media. Part of its discussion highlighted social media's dual capacity to both communicate and cause harm:

> "The real world of speech today is dominated by social media platforms. . . . Social media platforms are at once the greatest means by which freedom of speech may be exercised, and the greatest engine for falsity. They enhance democratic participation and threaten its foundations."[47]

[81] While in this application, the issue is one of publishing allegedly private information and not false information, the Court recognises that the benefits that social media has brought with it are at times accompanied by practices that have the potential to encroach upon human rights. This does not mean that social media should be viewed through the lens of scepticism or undue suspicion but simply that these tensions may be inevitable and must be managed in accordance with the norms established by and the values underlying the Constitution.

[82] With this in mind, I now turn to the right to privacy.

The right to privacy

[83] The right to privacy is enshrined in section 14 of the Constitution which provides:

> "14. Everyone has the right to privacy, which includes the right not to have—
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

[46] *Reddell v Mineral Sands Resources (Pty) Ltd* [2022] ZACC 38; 2023 (2) SA 404 (CC); 2023 (7) BCLR 830 (CC).

[47] Id at para 195.

[84] Privacy is an individual condition of life characterised by seclusion from the public, publicity and public scrutiny. In *Bernstein*, the seminal case on the constitutional right to privacy, this Court acknowledged the difficult task of defining the scope of the right to privacy. It said "the nature of privacy implicated by the 'right to privacy' relates only to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience".[48]

[85] In *Financial Mail*[49] it was held that a breach of the right to privacy could occur either by way of an unlawful intrusion upon the personal privacy of another or by way of unlawful disclosure of private facts about a person.

[86] The right to privacy accordingly recognises that we all have a right to a sphere of private intimacy and autonomy without interference from the outside community. The right to privacy represents the arena into which society is not entitled to intrude. It includes the right of the individual to make autonomous decisions, particularly in respect of controversial topics.[50] It is, of course, a limited sphere.

[87] This Court has stressed that the right to privacy "can never be overstated. It is fundamental to our existence as human beings".[51] Dignity and privacy are closely linked, as recognised in *Khumalo*.[52]

Environmental rights and their location within the dispute

[88] Section 24(b) of the Constitution proclaims that everyone has the right:

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[48] *Bernstein* above n 6 at para 79.

[49] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* [1993] ZASCA 3; 1993 (2) SA 451 (A) (*Financial Mail*).

[50] This topic is broached by Didcott J in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at paras 90-5 when he writes on state regulation of erotic material.

[51] *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 45.

[52] *Khumalo* above n 38 at para 27.

> "(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[89] In *National Society for the Prevention of Cruelty to Animals*[53] this Court, referring to *Lemthongthai*,[54] explained the connection between animal welfare and the protection of the environment:

> "*Lemthongthai* is also notable because it relates animal welfare to questions of biodiversity. Animal welfare is connected with the constitutional right to have the 'environment protected . . . through legislative and other means'. This integrative approach correctly links the suffering of individual animals to conservation, and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values."[55]

[90] Activists' "long history of guarding the interests of animals reflects constitutional values"[56] which are those embodied in section 24 of the Constitution. But it has been said that section 24 suffers from "ongoing silence" and "under-utilisation"[57]

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[53] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46; 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) (*National Society for the Prevention of Cruelty to Animals*).

[54] *S v Lemthongthai* [2014] ZASCA 131; 2015 (1) SACR 353 (SCA).

[55] *National Society for the Prevention of Cruelty to Animals* above n 53 at para 58.

[56] Id at para 59.

[57] Murcott "Minding the Gap: The Constitutional Court's Jurisprudence Concerning the Environmental Right" (2023) 13 *Constitutional Court Review* 147 at 148 citing Krüger "The Silent Right: Environmental Rights in the Constitutional Court of South Africa" (2019) 9 *Constitutional Court Review* 473; Kotzé and du Plessis "Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa" (2010) 3(1) *Journal of Court Innovation* 157 at 169-174; and Murcott *Transformative Environmental Constitutionalism* (Brill, Leiden 2022) at 89-92 and 113-126.

in that, while it provides what some call the world's most expansive and sophisticated rights-based approach to environmental protection, the right is often ignored.[58]

[91] The uncontested expert evidence on trapping highlights the practice's far-reaching and prejudicial consequences. Indiscriminate traps exacerbate the problems associated with trapping.[59] For instance, a trapped baboon's response is similar to that of a human. The family responds similarly as well. They make rescue attempts, they experience trauma and they injure themselves trying to escape. There is also acute social disruption in the troop when a baboon is removed from its social community. When the trapped baboon is a dominant male, the troop may manifest aberrant behaviour.

[92] At the same time, this Court is cognisant of the concerns raised by farmers in general and by Mr Botha in particular of the dangers posed by baboons and other wild animals to the farming community and to farming activities. To that end, the need to properly manage this concern is similarly recognised. In this, I understand Mr Smuts and others to say that the problems posed by wild animals to farmers and others can be managed by methods other than trapping.

[93] This Court recognises the divergent views on animal trapping prompting legitimate debate in the public interest. Of course, rights regularly come into conflict with each other, giving rise to disputes as to where their respective boundaries start and end in any given scenario. This Court dealt with that situation in *Arena Holdings*,[60] when it observed:

> "Modern democracies are in many respects characterised by the challenge of competing interests, especially in diverse societies – such as ours. In this diversity, it

[58] May and Daly *Global Environmental Constitutionalism* (CUP, Cambridge 2014) at 43-54, 69 and Kotzé "The Conceptual Contours of Environmental Constitutionalism" (2015) 21 *Widener Law Review* 187 at 196-8.

[59] High Court Judgment above n 2 at para 16.

[60] *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* [2023] ZACC 13; 2023 (5) SA 319; 2023 (8) BCLR 905 (CC).

> is not uncommon for communal interests to stand in conflict with individual interests. It is also not uncommon for the interests of privacy and individual self-determination to stand in conflict with the collective public interest and the values of openness and transparency. When those interests and rights come into conflict, there is no magical hierarchy that one can resort to in order to resolve the conflict. The conflict is invariably approached through the lens of the Bill of Rights by balancing those rights and interests in the manner contemplated by the limitation exercise in section 36 of the Constitution."[61]

The breach of privacy enquiry

[94] In *Bernstein*, Ackermann J wrote that while "[p]rivacy is acknowledged in the truly personal realm . . . as a person moves into communal relations . . . such as business and social interaction, the scope of personal space shrinks accordingly".[62] Privacy rights are not abandoned merely because a person moves into communal relations. Instead, they "shrink". In *Prince*[63] and *Bernstein*[64] this Court reasoned that privacy rights weaken once information is exposed to the public, abandoned, or obtained by consent. However, whether information is private or public cannot be determined by a bright-line rule.

[95] Since *Bernstein*, some courts have also made reference to the older American formulation of privacy as "the right to be le[f]t alone", "to be free from unwanted and unwarranted intrusions" in interpreting the scope of privacy rights.[65] In *S v H* and *Kampher*, both dealing with criminalised homosexual sex, the Court aligned itself with Justice Blackmun's dissent in *Bowers v Hardwick*[66] which placed the "fundamental

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[61] Id at para 129.

[62] *Bernstein* above n 6 at para 67.

[63] *Minister of Justice and Constitutional Development v Prince* [2018] ZACC 30; 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC) (*Prince*) at para 47.

[64] *Bernstein* above n 6 at para 75.

[65] *Makhanya v Vodacom Service Provider Co (Pty) Ltd* 2010 (3) SA 79 (GNP) (*Makhanya*) at paras 11-3; Brandeis and Warren "The Right to Privacy" (1890) 4 *Harvard Law Review* 193; *S v H* 1995 (1) SA 120 (C) at paras 125-6 (*S v H*); *S v Kampher* 1997 (4) SA 460 (C) (*Kampher*) at 481G-482I; and *Pretorius v Minister of Correctional Services* 2004 (2) SA 658 (T) (*Pretorius*) at paras 39-43.

[66] *Bowers v Hardwick* 478 US 186 (1986).

right to engage in homosexual sodomy" within "the right to be left alone" without heed given to "traditional Judeo-Christian values".[67]

[96] The starting point in the breach of privacy enquiry is to determine the scope of the privacy interest in question. This Court in *Bernstein* commended the approach adopted in the United States that a party seeking to assert a claim of privacy "must establish both that he or she has a *subjective expectation* of privacy and that the society has recognised that expectation as *objectively reasonable*".[68] I will refer to this as the test of dual expectations or the *Bernstein* test. It is used to determine the scope of the right and has been referred to and followed in numerous cases in this Court following *Bernstein*.

[97] In *Tulip Diamonds*,[69] this Court, in considering a claim based on privacy in review proceedings, referred to and applied the *Bernstein* test incorporating the subjective and objective expectations of privacy.[70] In *Prince*, which dealt with the confirmation of an order of constitutional invalidity, this Court in its examination of the scope of the right to privacy, referred to the discussion in *Bernstein* culminating in the dual expectations test incorporating the subjective and objective expectations of privacy.[71] Finally, in *Centre for Child Law*,[72] this Court, also in confirmation proceedings, referred to and applied the *Bernstein* test based on the legitimate expectations of privacy in determining the scope of the right.[73]

[98] That test may then practically be formulated as follows:

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[67] *S v H* above n 65 at 125E-126A and *Kampher* above n 65 at 481G-482I.

[68] *Bernstein* above n 6 at para 75.

[69] *Tulip Diamonds FZE v Minister for Justice and Constitutional Development* [2013] ZACC 19; 2013 (2) SACR 443 (CC); 2013 (10) BCLR 1180 (CC) (*Tulip Diamonds*).

[70] Id at para 35.

[71] *Prince* above n 63 at para 47.

[72] *Centre for Child Law v Media 24 Ltd* [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (4) SA 319 (CC).

[73] Id at para 45.

(a) Did the data subject have a subjective expectation of privacy? No element of reasonableness enters the equation here. If the answer is no, the data subject's privacy claim fails.

(b) If the data subject in fact entertained a subjective expectation of privacy, does that expectation pass the objective reasonableness test? That is, would society consider the data subject's expectation of privacy to be reasonable?

[99] If the conclusion is reached that a subjective expectation is reasonable then an intrusion into the privacy of another or a disclosure of private facts would constitute a breach of privacy. In that event, the court undertakes a justification exercise in determining how the right to privacy is balanced against the strength of other rights or interests that may compete for recognition. In instances where the breach of privacy is a consequence of a law of general application, a court would embark on a limitation analysis in terms of section 36 of the Constitution.[74] In any other instance, where a breach is due to some other consequence, a court would embark on a justification exercise to balance any competing rights or interests.[75] Section 36 would not apply, but the justification exercise may be broadly guided by the principles it contains. Strict adherence to the factors listed in section 36 would not be appropriate in all instances of justification as they are designed for a limitation by a law of general application. What constitutes relevant factors to be considered and an appropriate balance to be found ought to be determined by the set of facts at hand.

[100] The objective/subjective distinction is said to split hairs. Jurisprudentially, *Bernstein* performs an objective analysis of subjective expectations.[76] One may hold a subjective expectation of privacy, but *Bernstein* requires us to evaluate that subjective

[74] See *Prince* above n 63 at paras 59-61.

[75] In *Prinsloo v RCP Media Ltd* 2003 (4) SA 456 (T) (*Prinsloo*) at 475J-476A, the Court weighed the rights of privacy and dignity against the right of free expression, and despite making no order, held in principle that free expression in that instance would not justify the breach of privacy and dignity. See also *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at paras 125-7 and *Khumalo* above n 38 at paras 28 and 33.

[76] *Bernstein* above n 6 at para 75.

expectation through a reasonableness lens.[77] However, as the first part of the dual analysis centred on Mr Botha's mindset, a conundrum emerges known to American scholars as the "phantom doctrine". Kerr writes that the subjective test is very often subsumed by the objective test in practice.[78] According to Kerr only 43% of all United States Supreme Court cases discussing *Katz*[79] – the American equivalent of *Bernstein* – even mention the subjective enquiry.[80] The objective enquiry effectively "does the work originally intended for the subjective test".[81]

[101] Mindful of this development in the United States, our courts retain the dual expectations test for good reason. Due to the inherently personal nature of privacy rights, the proper place to start a privacy enquiry is to ask whether an expectation of privacy on the part of the data subject exists at all. If not, the enquiry ends there. A privacy claim is triggered by an individual's expectation of it and there is no reason for our law to protect privacy where no subjective expectation exists. The subjective expectation is then moderated by a reasonableness standard to ensure certainty and an alignment between subjective expectations with those expectations that society would regard as reasonable.

[102] In applying the dual expectations test set out in *Bernstein*, case-specific factors will always be considered. Moshikaro[82] suggests that when determining whether there was a violation of the right to privacy, a court should have regard to a number of factors, none of which are individually dispositive. These include—

> "(a) how the information was obtained;

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[77] Id.

[78] See Kerr "*Katz* Has Only One Step: The Irrelevance of Subjective Expectations" (2015) 82 *University of Chicago Law Review* 113.

[79] *Katz v United States* 389 US 347 (1967).

[80] Kerr above n 78 at 116.

[81] Id at 122.

[82] Moshikaro "Privacy" in Brickhill et al *South African Constitutional Law* (Juta, Cape Town 2023).

(b) whether the information pertains to intimate details of the infringed party's personal life;

(c) whether the information was provided by the infringed party, but for a purpose other than the purpose for which it was ultimately used;

(d) whether the information was garnered from a search or led to a search; and

(e) whether the information was communicated only to person or persons who had statutory responsibilities subject to requirements of confidentiality, or people from whom the infringed party could reasonably expect the information to be withheld."[83]

Application of the Bernstein test

[103] I categorise the personal information posted by the respondents into two parts—

(a) the information relating to Mr Botha's identity and his ownership and control of the farm; and

(b) information relating to his insurance brokerage and its address.

[104] I do so for two reasons. First, both parties agreed in the High Court that the photographs and anti-trapping commentary were published in the public interest. There was no such consensus in respect of the disclosure of Mr Botha's insurance brokerage and home address. Second, there is also a difference in how the information was sourced. The one category of information was received from a visitor to the farm, supplemented by a neighbour of Mr Botha's, part of which is contained in a public record. The other was obtained through publicly available websites where Mr Botha placed the information. While ultimately the applicable legal test remains the same, different factual considerations warrant their separate treatment.

[105] Our test for privacy inherently disaggregates the post into its composite facts because it focuses on whether each fact is objectively or subjectively private. Mr Botha's request that we only consider the "post as a whole" has no support in the law and better aligns with a defamation analysis. For instance, in *Financial Mail*,[84] the

[83] Id at 18.

[84] *Financial Mail* above n 49 at 464-5.

Court disaggregated the published information and dealt with it paragraph by paragraph. This makes good sense: a privacy analysis inherently probes whether facts are private and such an enquiry necessitates the isolation of each fact.

[106] Mr Botha submits that while the publication of the post and anti-trapping commentary constituted expression within the meaning of section 16, it exceeded the bounds of free speech in that it unreasonably intruded on his right to privacy. It was argued on Mr Botha's behalf that even though his ownership of his farm is reflected in a Deeds Registry and he posted his insurance brokerage information online, he continued to retain an expectation of privacy over this information. He argues that the important debate about the treatment of animals and the place of animal trapping in that discussion could have occurred without the publication of his personal details. He says that the publication of those details did not advance the public interest nor the right to expression and that the post could have used pseudonyms instead of his name.

[107] Mr Smuts' stance is that the information published, while personal, is not private in that it relates to neutral, objective information and lacks any quality of being intimate and sensitive. He further argues that what was published is not untrue and that the activity of trapping is something that Mr Botha accepts and defends as part of his commercial farming operations. There could therefore be no basis to suppress this information or treat it as secret and it forms both what Mr Smuts is entitled in law to share with the public and what the public in turn is entitled in law to receive as information relevant to and linked to the photographs and the post.

[108] The starting point is whether, applying the *Bernstein* test, each category of information is a private fact. If it is, its publication would constitute an invasion of the privacy rights of Mr Botha. In that event, the Court would be required to balance the privacy and expression rights.[85]

[85] See *Prinsloo* above n 75 at 469 ("Privacy . . . and freedom of expression . . . often compete and thus have to be balanced against one another"). See also *Khumalo* above n 38 at paras 23 and 26-30.

Personal information: Mr Botha's identity and his ownership and control of the farm

The first Bernstein question

[109] The enquiry here is whether Mr Botha in truth had a subjective expectation of privacy over the information that related to his ownership and control of the farm. Mr Botha asks this Court to "take cognisance of the right of individuals to control information about themselves". This is what is described as informational self-determination. Moshikaro[86] says that privacy is not just about protection against intrusion but also includes the protection of access to information about a legal subject.[87]

[110] Of course, individual data subjects are not the sole arbiters of the parameters of their informational self-determination. A voluntary decision to disclose information to the public in itself changes the boundaries of self-determination and shapes the data subject's subjective expectation of privacy. While the subjective expectation of privacy may not always be totally eroded when this happens, it is arguably diminished.

[111] Mr Botha says he held a subjective expectation of privacy in respect of his ownership and control of the farm including the trapping activities. There is very little that he says in support of this. At the time of publication of the post and when the interdict was originally granted, Mr Botha only raised privacy considerations in the notice of motion as part of the interdictory relief sought with no substantiation on his expectation of privacy in respect of his ownership and control of the farm including the trapping activities.

[86] Moshikaro above n 82.

[87] Id at para 23.9.2.1, Moshikaro says:

> "This . . . may be better described as protecting the decision by a person to disclose certain information to the public. It is this aspect of decision making autonomy that leads to the aspect of the right to be labelled informational 'self-determination.' This right to informational self-determination extends to being protected against the unlimited collection, storage and sharing of one's personal data."

[112] Mr Botha says Mr Smuts was only able to obtain his contact information after Mr Smuts obtained the farm name from Mr Louw and his name and mobile telephone number from Professor Alkers. There is nothing that Mr Botha says that suggests that Mr Louw or Professor Alkers were required to treat the information that they shared with Mr Smuts as private. Mr Botha accepts that Mr Louw was entitled to be on his farm, take the photographs that he took and share them with Mr Smuts. If all of this was acceptable, why then would Mr Louw be required to treat the location of the farm as a private fact but everything else as a public fact? There is no basis advanced by Mr Botha as to why this distinction should be made except that he did not wish to be associated with the animal trapping practice that was taking place on his farm.

[113] Professor Alkers is a neighbour who knew that Mr Botha was an insurance broker and the owner of the farm. He shared this information with Mr Smuts. There is nothing that Mr Botha says that suggests that Professor Alkers shared private facts or information. In addition, it would not be unusual for neighbours to know the identity of owners of properties in their neighbourhood. Mr Botha does not say why his ownership of the farm is a private fact.

[114] The manner in which Mr Botha exercised his ownership rights in respect of the commercial farm, which included its use for an adventure ride, also militates against the suggestion that his ownership of the farm is a private fact. The public nature of the access he allowed and the commercial nature of the farm locate both the farm and his ownership of it far from the inner sanctum of Mr Botha's life. In addition, Mr Botha does not say why they should be treated as private facts except that he held an expectation of privacy in respect of them. A subjective expectation does not arise simply because someone asserts it after the event. If the data subject does not sufficiently demonstrate that such an expectation was held, then a court cannot accept that it genuinely existed simply on the say-so of the data subject.

[115] On Mr Botha's own exposition of the facts, he could not have subjectively had the expectation of privacy in respect of his ownership of the farm and the animal

trapping activities that Mr Louw witnessed and photographed. These were not private facts and there was nothing advanced by Mr Botha to suggest otherwise.

[116] I do not advance the proposition that an expectation of privacy is waived when the public has legitimate access to private property or to private information. This determination will always be case-specific and will be subject to the dual expectations analysis that *Bernstein* commends. It may often be the case that there are implicit or explicit conditions in place when a member of the public is invited onto private property. The purpose of access should be considered, although it is not dispositive of the determination of a privacy right. Mr Botha's proposition of an expectation of privacy in respect of visitors photographing children swimming in the family pool may well be one such case where a subjective expectation of privacy would arise. That however is not the case in the matter of Mr Louw's traversal of the farm on the adventure ride.

The second Bernstein question

[117] The second *Bernstein* question examines the objective reasonableness of the data subject's expectation of privacy. Having concluded that Mr Botha did not hold a subjective expectation of privacy in respect of his ownership of his farm, there is no need to address the second question. However, I deal briefly with this question if it could somehow be said that such a subjective expectation of privacy may have existed.

[118] *Bernstein* describes the scope of shrinking privacy expectations when one moves from the personal to the social and business realm. Ackermann J writes that "[i]t is clear that any information pertaining to participation in such a public sphere [as a limited liability company] cannot rightly be held to be inhering in the person".[88] It is true that individuals can traverse the spectrum posed by *Bernstein* and "move into communal relations" via online platforms with far greater ease today. This comes with great advantages; instantaneous advertising often for little or no cost and rapid

[88] *Bernstein* above n 6 at para 85.

communication are only two. But it also comes with disadvantages; in particular, it is difficult to keep information both private and public. In many ways, it is necessary to divulge information on the internet in order to competitively operate a business.[89] The inner sanctum still exists, even if the boundary between inner and outer sanctums has become relatively porous. While there has been an increase in the frequency and ease with which individuals cross that boundary, individuals still must make a conscious choice to do so.

[119] Against that background, I consider the following submission, raised pertinently in the written submissions of Mr Botha:

> "[T]he applicant could never have reasonably expected that any person would link him to the trapping conduct on the farm and had every right to believe that private facts would remain private, even if cyclists traversed the farm and saw such trapping taking place."

[120] This formulation covers both the subjective and objective expectation of privacy and I deal here only with the objective expectation – the reasonableness of the expectation that Mr Botha references.

[121] In considering the reasonableness of Mr Botha's assertions viewed against the legal convictions of the community the following facts are relevant:

(a) The trapping practices on the farm are matters that the parties correctly accepted were in the public interest. Society has a legitimate interest in them as they relate to conduct that impacts on the environment we live in. It accords with the expectations of contemporary society that the existence of trapping permits does not stand in the way of the important debate that is triggered by trapping practices. The High Court aptly

[89] In *R v Bykovets* 2024 SCC 6 at para 48, the Canadian Supreme Court highlights the importance of informational self-determination, commenting that a choice not to use internet services is "not a meaningful one. . . . Canadians are not required to become digital recluses in order to maintain some semblance of privacy in their lives".

captured this when it said that "[p]ractices which are legal are often deplored".[90]

(b) Varsfontein is a commercial business and not a private place of abode. The practice of animal trapping is a part of the commercial operations of the farm. While Mr Botha described the trapping as a private fact, society would not. It is a practice in which society, including Mr Louw, has an interest, which would have entitled Mr Louw to take the photographs that he did and share them. It is a practice that, at least objectively, would raise the legitimate interest of visitors to the farm and would justify them in taking account of it and sharing it with others.

[122] For all of the above reasons, these facts do not, objectively speaking, constitute private facts. Their publication does not result in a breach of the privacy rights of Mr Botha.

[123] Although the issue of the public accessibility of information at the Deeds Registry was raised in the judgment of the High Court, on the papers neither party had the opportunity of dealing with it. It is therefore not possible to say whether the map that Mr Smuts received from Mr Louw reflecting the name and location of the farm would have been sufficient to conduct a successful search in the Deeds Office and the extent to which this would affect Mr Botha's reasonable expectation of privacy. Accordingly, it is not appropriate nor is there a need to consider the issue any further.

The debate without identification argument

[124] Mr Botha says that any debate on the photographs and the post could have occurred without mention of his identity and his ownership of the farm. The question, however, is not whether a public debate can occur without his personal information but rather whether there is any basis to withhold his personal information in publishing a post about a practice that occurs on a farm that he owns and that is managed under his

[90] High Court Judgment above n 2 at para 24.

control and authority. The answer must be no. There is no obligation to withhold information in the absence of a legitimate privacy claim.

[125] It would be artificial to engage in open and transparent public debate on a specific incident and form of trapping captured by photographs and a descriptive post without describing the location of the activity or person responsible for it. The essence of public debate is full disclosure which provides an opportunity to persuade others and a forum for different views to be aired. Conducting such a debate under conditions of anonymity undermines the transparency and newsworthiness of the dialogue. On the reasoning of Mr Botha, are we required to debate the benefit or otherwise of dune mining, or other activities which may be lawful but are seen as constituting a threat to the environment, anonymously or using pseudonyms without identifying those responsible? Society would not support an expectation of privacy under those circumstances. Our courts have said that there is little room for secrecy in matters affecting the environment.[91]

[126] If Mr Botha accepts that when members of the public witness the trapped animals, this would attract attention as a matter of public interest, then it is difficult to follow his reasoning that his identity and involvement should remain private. This is very different from the example he offers of passers-by not being entitled to take photographs of children swimming naked in the family pool. The latter represents personal information, close to the inner sanctum, of a private, personal and intimate nature. The matter at hand represents information that is not close to the inner sanctum, triggers public interest, and was openly on display and discovered in an ordinary and lawful way.

[127] Finally, if regard is had to the personal information in question, none constituted private facts – the photographs and the commentary are accepted as being in the public interest while the identity and ownership of the farm are also not private facts. What emerges, though, is the discomfort Mr Botha feels in linking these two categories of

[91] *Company Secretary, Arcelormittal South Africa Ltd v Vaal Environmental Justice Alliance* [2014] ZASCA 184; 2015 (1) SA 515 (SCA) at paras 66 and 71.

information. While I have dealt with why his resistance to having them linked is unsustainable, it does appear that it may be located in his original stance that the linkage is defamatory. That was the original basis for his application. But this is not a defamation case. Mr Botha elected to base the final relief on a right to privacy and the High Court was clear that it was not adjudicating an alleged infringement of any reputational right or the risk of personal or economic harm.[92] Mr Botha himself described the reasoning of the High Court as unimpeachable in his application to this Court.

[128] It would simply be untenable for a privacy claim to now ride on the back of a defamation claim that has not been ventilated. Even accepting that privacy considerations may impact on the right to dignity as *Khumalo* reminds us, this case, its evolution and the relief that Mr Botha sought were ultimately premised on his privacy rights.[93] If there is a defamation claim lurking somewhere, then that may be pursued separately and independently but it cannot be subsumed into this privacy enquiry. Mr Botha cannot have it both ways.

[129] In conclusion, it cannot be said that society would consider any expectation of privacy which may exist in relation to the ownership of the farm and the trapping activities as objectively reasonable. On this basis, I agree with the Supreme Court of Appeal that the respondents did not violate Mr Botha's privacy rights in respect of this component of the information in that Mr Botha did not establish an expectation of privacy that was objectively reasonable. As no privacy expectation has been established, the matter of Mr Smuts' right to freedom of expression does not arise.

[92] High Court Judgment above n 2 at para 25.

[93] *Khumalo* above n 38 at para 27.

Business information: Mr Botha's insurance brokerage and business (and home) address

The first Bernstein question

[130] Mr Botha posted details of his insurance brokerage and its address (which also served as his home address) online. It was clear from the posts that he wished the world at large to know that he was in the insurance business. Indeed, Professor Alkers also knew that Mr Botha was an insurance broker and shared this with Mr Smuts. He could hold no expectation of privacy in his profession as an insurance broker when this is what he wished the world to know. That concludes the part of the enquiry in relation to his status as an insurance broker. I move to deal with his address and the debate around that.

[131] Mr Botha's residential and business address were one and the same. By the time of the High Court proceedings, the respondents were aware of this. Did Mr Botha enjoy a subjective expectation of privacy over his home address? Any answer in the affirmative is complicated by the fact that he personally published that address as part of his advertisement of the insurance brokerage on ten separate websites.

[132] At least subjectively speaking, Mr Botha cannot be said to enjoy an unqualified expectation of privacy over information he willingly put into the public domain. His expectation must have been that his information would be shared and responded to in furtherance of his business as a broker. That is, after all, the object of a successful advertising campaign, which is what his information evidenced.

[133] While Mr Botha sacrificed part of his subjective expectation of privacy when he published his insurance brokerage information on ten websites, it cannot be said that by doing so he renounced all expectations of privacy in respect of his address. In particular, his subjective expectation would not have been that the address was open to be revealed to the world at large in connection with matters unrelated to the brokerage which shared the same address.

[134] Mr Botha's advertisements had the effect of revealing the location of his home. Their consequence would at the very least have been that those who sought to engage him in respect of his insurance brokerage would know the address for that purpose. To that extent, it would have the potential to make inroads into the privacy he would ordinarily be entitled to expect in respect of his home, at least in matters related to his brokerage business. But even then it is important to separate out business and home in determining privacy considerations.

[135] In business, one is generally involved in activity removed from the inner sanctum of one's life and in which one generally engages with the world outside. A home is a closed and private space where people live and in which they are entitled to expect the protection of their privacy. This accords with the "right to be left alone" formulation of privacy. That people may use the same space for another aspect of their lives should not unduly matter as the issue should not be about the common space that is used for dual purposes but rather the wholly divergent nature of the use to which that space is put. The one is public in nature, the other, intensely personal and private. This is an important distinction and moves the discussion away from the address to the difference in the activities taking place there, the interests at stake, and their claim to privacy protection. And so, it is another matter to suggest that the address as a home address was also fair game in respect of publication linking it to the operations on the farm. In those circumstances, a subjective expectation of privacy may well exist that in a post relating to animal trapping on his farm, his home address, even one widely published, could be a private fact.

[136] It is not inconsistent to find that the address published by Mr Botha on various directories was public for the purposes of his brokerage, but private to the extent that it constituted his home address. It will also be recalled that nowhere in Mr Botha's post of his brokerage did he indicate that the address he had chosen for his business was his home address. He did not conflate business and home and to that extent he expected that the privacy of his home and its location would continue to enjoy protection. This

distinction also avoids a formalistic and mechanical approach to the privacy enquiry that is invariably fact-specific. It is for these reasons that I conclude that Mr Botha retained an expectation of privacy that his address would remain a private fact for all purposes except the business of his insurance brokerage.

The second Bernstein question

[137] Given that there was no subjective expectation of privacy over the brokerage details, there is no need to determine the objective expectation of privacy in that regard. It is only Mr Botha's address that needs further consideration.

[138] An important consideration is the purpose for which information is published. Purpose is relevant here because Mr Botha published his address as part of advertising his insurance brokerage. Mr Smuts, however, re-published that information which included Mr Botha's address, in relation to animal trapping. If compatibility of purpose is relevant, then the reason for referring to his address falls to be interrogated in the infringement of privacy enquiry. If the mere fact of deliberate publication of the information renders it public for all purposes, then questions of purpose become academic. This should not be so.

[139] In New Zealand, Principle 11 of the Information Privacy Principles introduced in the Privacy Act of 2020 limits disclosure by an agency of personal information unless it believes on reasonable grounds that the disclosure of that information is one of the purposes in connection with which the information was disclosed or is closely related to such purpose.[94]

[94] Information Privacy Principle 11, subtitled "Limits on disclosure of personal information" reads in section 1(a) that:

> "(1) An agency that holds personal information must not disclose the information to any other agency or to any person unless the agency believes, on reasonable grounds—
>
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained."

[140] *Care Park New Zealand Limited*[95] involved the disclosure of parking tickets collected by a car park agency to the employer of the data subject under circumstances where the employer had significant control over the issuing of tickets and the clamping of vehicles for unpaid tickets. The Human Rights Review Tribunal said, in interpreting Principle 11, that the requirement that the belief that the disclosure of information aligns with the purpose of its provision must be held on reasonable grounds, has a subjective element (the belief) and an objective element (reasonable grounds). It concluded that the disclosure of the tickets did not breach the privacy rights of the plaintiff in that both requirements existed at the time of disclosure.

[141] *Duchess of Sussex*[96] related to the publication by the media of portions of a letter sent by the claimant to her father with whom she had a strained relationship. The Court referred to what has become known as the *Murray*[97] factors in determining the question of whether a claimant could be said to enjoy a reasonable expectation of privacy in respect of the information in question.[98] Those factors include the purpose of the intrusion and the purpose for which information came into the hands of the publisher. The other *Murray* factors include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the absence of consent and whether it was known or could be inferred, and the effect on the claimant. After enumerating the *Murray* factors, the Court in *Duchess of Sussex* also noted that it "must have regard" to whether the information is already "in the public domain".[99]

[142] While purpose considerations are not dispositive, they are relevant to the enquiry. The reconciliation of the purpose of the re-publication and the reason that the information is already in the public domain are important. In cases where the information in question was placed in the public domain for a limited purpose and it is

[95] *Judge v Care Park New Zealand Limited* [2023] NZHRRT 10.

[96] *HRH The Duchess of Sussex v Associated Newspapers Limited* [2021] EWCA Civ 1810 (*Duchess of Sussex*).

[97] *Murray v Express Newspapers plc* [2008] EWCA Civ 446 at para 36.

[98] *Duchess of Sussex* above n 96 at para 34.

[99] Id.

subsequently used for other purposes, the tension between the original purpose and the subsequent use may be more significant, and purpose may qualify and limit the future use of that information.

[143] Individual autonomy and self-determination are weighty matters that go to the very heart of who we are and how we locate our place in society. They structure the relationship we have with others and inform decisions about what personal information is made public and where this is done. In using online platforms, we are not required to surrender our autonomy nor the intimate aspects of our lives. We will invariably face challenges in how we take advantage of online publication and protect our private lives, but that is the task of living in the modern world where competing priorities and rights come into sharp conflict. It is how they are managed that ultimately matters.

[144] With regard to the home address, some delimitation is necessary to navigate how matters relevant to business activity may affect the right to privacy. In these proceedings, a vigorous debate arose as to whether Mr Botha made his residential address public by advertising his business as an insurance broker and including details of his address (which doubled as a business and residential address). Certainly, the dual status of his address brought the fact closer to his "inner sanctum". To suggest that his choice also to use his home as a place of business removed any privacy protection of his address as a place of residence would not only be overly formalistic but would undermine the importance that our courts have attached to the home and the right to privacy that must attach to that.[100]

[145] In addition, it would leave many who work and live at the same address in an untenable position. We live in a time when many may elect to work from the address where they live, while for many others, it may be an economic necessity. The privacy

[100] *Bernstein* above n 6 at para 67; *Residents, Industry House v Minister of Police* [2021] ZACC 37; 2022 (1) BCLR 46 (CC); 2023 (1) SACR 14 (CC) (*Industry House*) at paras 1, 49 and 198; and *S v Murphy* 2024 (1) SACR 138 (WCC) at para 20. In *Prince* above n 63 at para 108, this Court went as far as to use the term "in private" as an expansion of the concept of "at home", so synonymous are the two concepts.

they would ordinarily be entitled to in respect of their home details would be eroded once they chose their home as a place of work.

[146] In conclusion, locating his home and business at the same address cannot have the effect of extinguishing Mr Botha's right to privacy in respect of the place of his home. Mr Botha enjoyed a reasonable expectation that his home address would generally remain separate and private, certainly in relation to his farming and trapping operations. This is consistent with what the Court in *Jooste*[101] referred to when it said that the right to privacy encompasses the right to determine the destiny of private facts.[102]

Mr Smuts' right to free expression

[147] In concluding that Mr Botha's home address is private information, we must now consider how his privacy right weighs up against the respondents' right to freedom of expression.

[148] Our task is to balance two rights: Mr Botha's right to privacy and the respondents' right to freedom of expression. Doing so requires this Court to consider whether, in the circumstances of this particular case, the public interest mandates prioritising expression over privacy.[103] Simply put, the question is whether it is in the public interest to link Mr Botha's home address with legal trapping on a commercial farm.

[149] At its fullest, and absent any privacy considerations, the section 16(1)(b) freedom to receive or impart information bestows on the respondents and their audience the right to know about Mr Botha's home address. But this right is not absolute. It is weakest when it confronts private information. For our purposes, Mr Botha had a

[101] *National Media Ltd v Jooste* [1996] ZASCA 24; 1996 (3) SA 262 (SCA).

[102] Id at para 15.

[103] *Financial Mail* above n 49 at 464-5.

partial expectation of privacy over his home address. If his home address were critical to the respondents' cause, then the freedom to receive or impart information might well prevail over his partial expectation of privacy. His address was, at best for the respondents, merely peripheral.

[150] In other cases involving privacy and expression, foreign courts have examined the journalistic choice to publish peripheral, private information. In *Campbell*,[104] the House of Lords considered whether certain private information added "colour and conviction" to a wider set of published information. *Campbell* dealt with the free press and here we deal with activists. Still, we ought to consider whether the disclosure of Mr Botha's address added any colour or conviction to a campaign against animal trapping. It did not.

[151] In short, Mr Botha's partial expectation of privacy over his address must prevail over the right the respondents might have had to publish it. As this Court said in *Mamabolo*, "freedom of expression does not enjoy superior status in our law".[105] The nature of Mr Botha's information is deeply intimate. It is difficult to ascertain what public interest value Mr Botha's home address added to the post. It is certainly indicative of its minimal effect that most commenters on the post ignored it. Where private information is of a deeply intimate nature with little public interest value, courts have found the right to privacy weighs heavier in the competition with the right to free expression.[106]

[152] When deciding whether an invasion of privacy "is unlawful or not, the Court must have regard to the facts of the case and must test them in the light of contemporary *boni mores*".[107] Part of this test involves an analysis akin to the English proportionality test: even when an invasion of privacy is warranted, the invasion must "only go as far

[104] *Campbell v MGN Limited* [2004] UKHL 22.

[105] *Mamabolo* above n 38 at para 41.

[106] *Prinsloo* above n 75.

[107] *Huey Extreme Club v McDonald t/a Sport Helicopters* 2005 (1) SA 485 (C) at para 27.

as is reasonably necessary".[108] Here, the inclusion of the home address did little to advance the respondents' cause but had serious potential to bring into the public domain details of Mr Botha and his family that were personal and intimate – their home address.

[153] It is for those reasons that I find that the inclusion in the post of Mr Botha's home address constituted an invasion of his right to privacy that cannot be justified by any assertion that the free expression rights of the respondents should enjoy preference. Mr Smuts claims that the photographs and the post, including the details of Mr Botha's ownership of the farm, had the object of highlighting the practice of trapping and Mr Botha's involvement in it. Having accepted that no private facts accompanied the information in relation to the ownership of the farm or insurance brokerage, the same cannot be true in respect of the address of his insurance brokerage, because it shared a location with Mr Botha's home, an intimately private fact, adding very little to the respondents' exercise of expression. No freedom of expression imperatives accompanied its inclusion and, in the balancing exercise between privacy and expression in this case, privacy must clearly prevail. To that extent only, the appeal must succeed and the order of the Supreme Court of Appeal be amended to reflect this.

The suggestions of vilification and those of digital vigilantism

[154] Mr Botha argued that the post, in the manner in which it was curated, constituted a campaign to vilify him and was part of what was described as "digital vigilantism". These are strong and forceful words. Vigilantism evokes unsettling images of unlawfulness, self-help and a disregard for consequence or legality. The question is whether these facts support a charge of digital vigilantism. I disagree with this hyperbolic characterisation of the conduct of the respondents, having regard to Mr Louw's bona fide discovery of the caged animals, Mr Smuts' willingness to engage with Mr Botha prior to the post, the omission of Mr Botha's mobile telephone number from the post and the immediate retraction of the photograph of Mr Botha's minor child.

[108] Id at para 33.

[155] The risks and dangers of digital vigilantism may well exist and should ideally be addressed in a manner that undertakes a proper assessment of the law in relation to the matter, the protections the law may offer in instances of abuse of online platforms and any gaps that may exist. Such a process is well suited to the deliberative and participative processes of law reform institutions and the Legislature, if this should be deemed necessary, but to the extent that courts may be required to consider it, this is not the case to do so.

Second, third and fourth judgments

[156] I have read the carefully crafted second judgment in which Chaskalson AJ concurs with the conclusions reached in this judgment but does so for different reasons in respect of some of those conclusions. The second judgment agrees with the conclusion that Mr Botha's home address should not be published. However, it does so by considering the responses to the post to determine whether the post results in a breach of privacy. It asks the question whether, at the time that Mr Botha sued for interdictory relief, he had a reasonable apprehension of ongoing or future threats to his privacy caused by the ongoing publication of Mr Smuts' post.

[157] This is a novel approach to the determination of whether there is a breach of privacy rights. It suggests that the post, irrespective of its content, may subsequently be found to constitute a breach of privacy because the response to it results in a threat to privacy. With respect, such an approach will result in significant conceptual confusion as it shifts the focus away from what is posted to the consequence of the post in determining whether a breach of privacy occurred.

[158] That approach ignores that Mr Botha's case for relief was initially premised on the post itself and what he said was primarily its defamatory nature. The mischief that Mr Botha identified was the post, even when his case shifted to being primarily based on a breach of privacy. The responses to the post were used to support the defamation argument that the post resulted in or was likely to result in harm in relation to Mr Botha's personal security and business.

[159] The second judgment's focus on potential harm to "the security of Mr Botha and his family at their family home" suggests a cause of action based more on the right to bodily and psychological integrity in section 12(2) than the right to privacy. This was not the case Mr Botha asked the High Court to adjudicate. That Court was clear that the case before it was about resolving the tension between privacy and free expression and that questions of harm or of damage to reputation would not feature in its consideration.[109] It is this judgment that Mr Botha defends in this Court and which he describes as unimpeachable.

[160] Although publication on social media persists and could likely attract uncontrolled interactions and reactions, the online context ought not to change the test of whether an expectation of privacy exists. A determination that has regard to the content of the post enables a court to reach an informed conclusion based on the dual test that *Bernstein* advocates. The test postulated by the second judgment is located outside of the spectrum that *Bernstein* contemplates and conflates a test for harm for interdictory relief and the test for whether a breach of the right to privacy occurred. No good reason exists for a departure from the *Bernstein* test, even if interdictory relief was sought by Mr Botha.

[161] It is untenable to determine privacy by the unknown variable of the public response to the post. If the responses to a lawful post are unlawful then it is those responses that should be addressed. A separate harm would exist from the harm of a breach of privacy, and such separate harm might activate remedies that are more appropriate and based on the threatened harm rather than the lawful post. The respondents are not responsible for and ought not to bear the brunt of such a threat.

[162] The second judgment says that a lawful publication is capable of becoming unlawful if circumstances change. This may be true in respect of defamation when the

[109] High Court Judgment above n 2 at 25.

reasonableness of a belief at the time of publication is later called into question when new facts become available. That defence would then no longer avail a publisher. It is a totally different matter, however, to suggest that public responses to a post, irrespective of whether they are informed, reasonable or proportionate, can render a post lawfully made, retrospectively unlawful. In addition, the changed circumstances that the second judgment relies on are not facts as in the defamation-type cases based on reasonable belief but responses by third parties. These changed circumstances in the form of public responses cannot make private something that may not in itself warrant the description of being private.

[163] The second judgment says that privacy is about unwanted and unwarranted intrusion into the private sphere of one's life. The publication of private facts on a public platform would itself constitute such an intrusion into one's right to privacy, irrespective of the public response to it or whether it raises the risk of harm in other forms. The harm lies in making public that which is private. This is quintessentially what the right to be left alone is about. Harm is an important consideration when considering interdictory relief and in this instance, the breach of Mr Botha's privacy right is harm in itself, due to the very nature of privacy protection. The suggestion that, in this case, the focus should be on the threat of a physical intrusion to Mr Botha's home is unsustainable and Mr Botha should not need to rely on it. It was not the case Mr Botha asked the High Court to determine in confirming the rule nisi – that case was that the publication of private facts constituted a breach of the privacy rights of Mr Botha.

[164] It is for these reasons that I disagree with the stance taken in the second judgment and say that it will contribute to legal uncertainty and leave important legal questions around privacy to be determined by the nature of public responses to a publication, often generated by what the second judgment describes as excited groups. The approach penalises the publisher of the information due to the inappropriate reactions of others. There lurks the clear danger that an identical post may either constitute a breach of privacy or not, based purely on the responses to the post. Such responses, whatever

they may be, cannot be dispositive of a determination of privacy, however relevant they may be in other contexts. Our law should not be the subject of such uncertainty.

[165] I have also read the judgment of my Colleague Rogers J (the third judgment) which says the appeal should be dismissed. The substantial difference in our approach lies in the conclusion reached in the third judgment that Mr Botha's home address was not a private fact and as such did not enjoy protection. In addition, and while it agrees with the rest of the conclusions and the approach taken in this judgment, it says that in respect of the photographs, it reaches the same conclusion but does so by a more direct and simple route. I deal with these two matters of difference.

[166] The third judgment says that one must distinguish between a breach of privacy in the form of publishing information and a breach of privacy when somebody acts on that information in a particular way. It goes on to point out that there is no evidence that anybody reacted to the post by protesting outside Mr Botha's home, let alone in a way that might have disturbed the privacy of anyone working or living there. While there may be a distinction between a breach of privacy when publishing information and a breach of privacy when reacting to the information published, they are separate and independent breaches. While there is no evidence that anyone reacted to the post in a manner that led to harm, it does not mean that the original publication of the address did not constitute a breach of privacy. The post can and should be assessed on its own content in the determination of the privacy enquiry. This, after all, is the case that Mr Botha pursued in the High Court.

[167] It is neither practical nor legally sound to separate out, as the third judgment does, a home's location from what happens within the home itself. The privacy expectation of a home is not only a lack of intrusion in the physicality of the four walls of a house. Among other things, it is an expectation of privacy about the identities of those who enter and leave and the activities that may be undertaken inside the home – all of these private facts may be established merely by the presence of someone who observes the home from the outside. They are so close and so inextricably linked that

there is little difference in the privacy enquiry between the location of a home and what occurs inside of it, as the third judgment suggests.

[168] The third judgment also says that one may expect some members of the public to know where one lives or be obliged to provide one's address for legal and regulatory purposes. That is so, but it is a different matter when that address is revealed in a context where it has no relevance or connection to the publication to which it is attached. The limited disclosure of where one lives either through the coercion of the law or through the observation of others does not in itself render what is a private fact, public.

[169] The third judgment also says that Mr Smuts' publication of the address was the same as what Mr Botha published and there was no indication in what Mr Smuts published that the address was a home address – therefore there was no breach of privacy by doing so. Mr Smuts came to know, after publication, that the address he published was a home address and persisted with his publication. It cannot be said that because Mr Botha published his address it was open to Mr Smuts to do so as well. This contention ignores the question of purpose which this judgment has dealt with in some detail. Mr Botha, in publishing his address, did so purely in the context of his brokerage advertisement and for no other reason that can be discerned. Mr Smuts used this information for a totally different and unrelated purpose. The considerable difference in purpose, which is not in itself dispositive, must enable us to view the publication of the address with purpose in mind in the determination of whether the address constituted a private fact.

[170] Finally, in respect of the photographs, I agree that the lawfulness of an activity may trigger a conclusion on whether a breach of privacy occurred. I am not however satisfied that this can be dispositive of privacy. Even if one is on a property with the permission of the owner and no restrictions are attached to the permission, it cannot mean that there will never be a breach of privacy. The example of photographing children swimming in a family pool comes to mind. The absence of access restrictions could never immunise such conduct from constituting a breach of privacy. And so,

while the distinction the third judgment seeks to draw may be useful, I am not sure if it can be dispositive for the reasons I have given.

[171] I have also read the judgment of my Colleague Zondo CJ (the fourth judgment) which says leave to appeal should be refused on the basis that Mr Botha's privacy case was insufficiently pleaded. Accepting the authorities set out in the fourth judgment, I am of the view that Mr Botha's privacy case was advanced in the notice of motion and the founding affidavit in the High Court.

[172] The fourth judgment says at [298]:

> "[E]ven if Mr Botha were entitled to rely on an alleged infringement of his right to privacy, the respondents have put up a valid defence to a claim that by publishing the information they published concerning him, they infringed his right to privacy. This is so because, if you repeat publicly information about somebody that is already in the public domain, you cannot be said to infringe his right to privacy."

[173] That the respondents have sought to advance a defence to the privacy issue in their answering affidavit is indicative of the fact that they were aware that a privacy issue had been raised and they were required to address it. This puts paid to any suggestion that privacy was not properly pleaded. In addition, the respondents' argument that repeating what is already in the public domain cannot constitute a breach of privacy is exactly the argument that the High Court and the Supreme Court of Appeal considered and decided and the argument that this Court has been called upon to decide. No question of unfairness or prejudice arises or has been raised in the fourth judgment in this regard.

[174] Even if it can be said that the privacy issue was only raised in reply, I am of the view that it was a legal argument that was foreshadowed on the facts set out on the papers, including the founding affidavit and the answering affidavit, and thus permissible. It is for those reasons that I disagree with the conclusion reached in the fourth judgment that the appeal be dismissed.

Conclusion

[175] This case has highlighted some of the difficult areas the law is required to navigate in the era of online platforms, easy access to information and the growing phenomenon of personal information being placed in the public domain. People construct different relationships with social media and online platforms. Informational self-determination requires respect for these relationships and the acceptance by the data subject of the consequences that come with using online platforms. The law must retain the necessary flexibility to acknowledge different expectations of privacy and be sensitive to context, individual choice and the demands that the public interest generates.

[176] What has emerged from this case is that public disclosure of information does not necessarily mean that a data subject loses all expectation of privacy over that information. The compatibility in the purpose for which information was originally posted and thereafter used will remain a relevant factor in determining the bounds of the expectation of privacy.

Relief

[177] For the reasons given, an appropriate order would be to uphold the appeal in part, set aside the order of the Supreme Court of Appeal and in its place order that any reference to the address of Mr Botha in the post of 9 October 2019 be deleted and the respondents interdicted from publishing the address further. In addition, the respondents should be directed to ensure that any posts by third parties on the second respondent's Facebook page are edited, if necessary, to exclude all references to Mr Botha's address. Practically, this would require the respondents to delete the attachment to the post that contains the information about Mr Botha's insurance brokerage (annexure F to the founding affidavit in the High Court). However, the grant of this relief should not be taken as precluding the publication of the name of Mr Botha or his insurance brokerage on the second respondent's Facebook page.

[178] Given the complexity of the matter, the unique and unusual nature of the dispute and the rights implicated, as well as the fact that the parties enjoyed some measure of success in all stages of the litigation, an appropriate order in respect of costs would be to direct that the parties bear their own costs in the proceedings before the High Court, the Supreme Court of Appeal and in this Court.

Order

[179] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld in part and to the extent set out in paragraph 3 below.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following order:

"1. The appeal is upheld.

2. The order of the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth is set aside and replaced with the following:

'(a) The rule nisi granted on 11 October 2019 is discharged subject to paragraphs (b) to (d) below.

(b) The respondents must delete annexure F to the founding affidavit dated 9 October 2019 in its entirety from the second respondent's Facebook page.

(c) The respondents are interdicted from publishing any further posts which make reference to the applicant's address.

(d) The respondents are directed to ensure that any posts by third parties on the second respondent's Facebook page which make reference to the applicant's address are promptly deleted so as to remove the address after such posts have come to the attention of the respondents.'

3. The parties shall bear their own costs in the High Court and in this Court."

4. The parties shall bear their own costs in this Court.

CHASKALSON AJ:

Introduction

[180] I have had the pleasure of reading the judgments of my Colleagues Kollapen J (first judgment), Rogers J (third judgment) and Zondo CJ (fourth judgment). I agree with the first and third judgment that leave to appeal must be granted.

[181] Subject to a difference concerning the mootness of any dispute regarding the ongoing publication of posts identifying Mr Botha's involvement in the insurance industry (the insurance posts),[110] I agree with the judgment of Kollapen J in relation to the question of mootness which he addresses in [41] to [44] of the first judgment.

[182] I also find myself in agreement with Kollapen J's ultimate conclusions in relation to the matter. However, my reasoning for reaching these conclusions differs materially from his. My differences with the first judgment can be summarised as follows:

(a) First, I take a different view on the pleadings. In my opinion, the only plausible privacy case that can be advanced on the basis of the founding papers in this case is a case that the respondents' refusal to take down the posts on the Facebook page of the second respondent (Landmark) violated the privacy of Mr Botha in that it subjected him and his family to the threat of harassment at their home.

(b) Second, in regard to whether such a privacy case can be sustained, I consider that it is important to have regard to the digital/online context to the present dispute and the implications of this context not only for the right to privacy, but also for the fact that online publication is an ongoing process as opposed to an instantaneous act.

[110] See [234] below.

(c) Third, I place much more emphasis on the nature of the interdictory relief sought by Mr Botha. Linked to the fact that this is a case about an interdict which is a prospective remedy, I rely on facts that took place between the original post made by Mr Smuts, and the launch of the urgent proceedings before the High Court.

(d) Finally, I emphasise that an important element of the fundamental right to privacy is the right to be left alone from unwanted and unwarranted intrusion. With this focus, I differ from my Colleague Kollapen J in how the dual expectations "*Bernstein* test"[111] should apply in this case. In my view, having regard to the pleadings in this case, the correct approach is not to focus on the particular pieces of information in the post of Mr Smuts and to ask whether Mr Botha had a reasonable expectation of privacy in respect of each such piece of information. Rather it is to recognise that Mr Botha (like everyone else) has a subjective expectation of privacy in the form of being protected from unwanted harassment at his family home and that this subjective expectation of privacy is undoubtedly an objectively reasonable expectation of privacy. The test then shifts to a balancing enquiry. The questions to ask are whether the respondents' ongoing publication of any information posted by Mr Smuts infringed or threatened Mr Botha's privacy right to be free from unwanted and unwarranted intrusion at his family home, and if so whether the respondents' freedom of expression interest in the continued publication of the post outweighs Mr Botha's privacy right.

The pleadings

[183] The application for leave to appeal to this Court frames this case, almost exclusively, as a case about privacy. However, the case, as framed in the founding affidavit, was not based on the right to privacy. The right to privacy was not mentioned

[111] *Bernstein* above n 6 at para 85. See also *Tulip Diamonds* above n 69 at para 35 and *Prince* above n 63 at para 47.

at all in the founding affidavit. Instead, the privacy case of Mr Botha is one that was first retrofitted onto his application in the replying affidavit. The genesis of the privacy case, appears to be the following:

(a) No reliance was expressly placed on the right to privacy in the founding affidavit.

(b) The causes of action advanced in the founding affidavit were essentially threefold: a complaint about the allegedly defamatory nature of the posts made by the respondents; an allegation that the posts presented an unlawful threat of economic harm to Mr Botha in the form of a boycott of his insurance and farming businesses; and an allegation that the posts unlawfully created a security risk to Mr Botha and his family at their home. Mr Botha expressly alleged that the latter threat was caused by Mr Smuts' publication of his home address in the post on the Landmark Facebook page.

(c) Despite the absence of any express reliance in the founding affidavit on the right to privacy, prayer 2.1.2 of the notice of motion was a prayer for an order directing the respondents "to refrain from . . . disclosing any information and/or confidential information and/or posts . . . regarding the Applicant / his business·/ his farm in any manner whatsoever."

(d) In response to prayer 2.1.2 of the notice of motion, the respondents, in their answering affidavit, simply denied that any of the information published in the posts was of a confidential nature. As there were no allegations in the founding affidavit that sought to establish the confidential nature of any of the information in the posts, there was no confidentiality or "private information" case for the respondents to meet. Therefore, beyond pointing out that all of the published information which they still sought to maintain on the Landmark Facebook page was information which had originally been published by Mr Botha, they contented themselves with a bald denial that any of this information was confidential.

(e) In the replying affidavit, Mr Botha expressly invoked the right to privacy for the first time and now alleged that information of his name, his address, his business name and farm name was private information. Mr Botha labelled this information as his "personal information" and alleged that it could not be published on social media without his permission. He continued to link the publication of this "personal information" to an alleged threat to the safety of himself and his family, and he specifically referred in this regard to a threatening post in an annexure to the founding affidavit suggesting that someone should pay him a visit.

[184] We were informed from the bar that although the High Court judgment and the Supreme Court of Appeal judgment both treated the case as one about the right to privacy, the respondents had maintained before both courts that they had not been brought to court on founding papers that called upon them to answer a case based on the right to privacy.

[185] The respondents clearly raised the pleading issue as a ground of appeal before the High Court. The first basis upon which the High Court granted leave to appeal to the Supreme Court of Appeal was that there was a "reasonable prospect that another court would have approached the matter differently and considered the initial basis of relief which was dealt with in the answering affidavit, and not decided the matter based on the case raised in reply."[112]

[186] In their affidavit opposing leave to appeal to this Court, the respondents pointed out that "the applicant only raised his right to privacy as something of an afterthought in reply. He did not raise the right to privacy in his founding papers." At three separate places in their affidavit opposing leave to appeal to this Court, the respondents repeated their complaint that the right to privacy was not raised in the founding papers.

[112] *Botha v Smuts* unreported judgment of the Eastern Cape High Court, Port Elizabeth, Case No 2832/2019 (25 August 2020) at para 9.

[187] We are accordingly faced with a privacy case which was not pleaded in the founding papers and to which the respondents have objected before the High Court, the Supreme Court of Appeal and this Court. It is trite that—

> "in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits."[113]

[188] This problem is an issue of pleading that is more fundamental than the problem presented when an applicant seeks to introduce in a replying affidavit a new matter designed to bolster a cause of action already raised in the founding papers or to answer a defence to that cause of action raised in the answering affidavit.[114]

[189] In the circumstances, we can only consider Mr Botha's case based on privacy if, and to the extent that, we conclude that the respondents will not be prejudiced by having now to answer a case that was not pleaded in the founding papers and was accordingly not canvassed by them in the answering affidavit.[115] This is a matter to which I return below under the heading "privacy analysis" and when I consider the specific categories of information which Mr Botha seeks to interdict from publication by the respondents.

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[113] *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323F-G.

[114] The authorities cited in footnote 23 of the first judgment address this latter problem. See also *Smith* above n 33 at para 15; *Juta & Co Ltd* above n 36 at 511E-F and *Nkengana* above n 36 at para 9.

[115] In [272]-[278], the fourth judgment sets out the authorities for the basic rule that applicants must stand or fall by the case pleaded in their founding affidavit. The basic rule is subject to an exception in cases where the respondent will not be prejudiced if the Court considers an issue that was not pleaded in the founding affidavit. See *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44; 2023 (4) SA 325 (CC); 2023 (5) BCLR 527 (CC) at para 277; *My Vote Counts* above n 31 at para 177; *Robinson* above n 23 at 198; and *F v Minister of Safety & Security* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC) at para 128.

The digital/online context

[190] This case concerns the publication by Mr Smuts of information concerning baboon trapping practices on Mr Botha's farm. The publication took place on 9 October 2019 on the Facebook page of Landmark that Mr Smuts controlled on behalf of Landmark. The original post of Mr Smuts was read by third parties who then posted their responses onto the Landmark Facebook page. By the time that Mr Botha approached the Eastern Cape High Court a day later, over 200 posts had been made in response to the original post of Mr Smuts.

[191] The digital context of this case is central to how the problems it presents should be understood. In particular, my view is that our judgment must take account of three features of the digital age that are directly relevant to the present dispute:

(a) First, it is almost impossible to exist in the contemporary world without leaving a substantial online trail of information about oneself that a hostile third party can assemble into a targeted profile with a few online searches and investigations.

(b) Second, online publication is not a single act. It is a continuous process. As long as an online publication remains online, it continues to be published to third parties to whom the publication is accessible on the internet. Therefore, when the lawfulness of online publication is assessed, a court cannot confine its focus to the moment of initial publication. Online publication that originally may have been lawful, can become unlawful if the statement or document originally published continues to be published online despite changed circumstances that affect the lawfulness of ongoing publication. In this regard, it is significant that Mr Botha's complaint, from the outset, was a complaint about the continuing harm he was being exposed to as a result, not merely of the original publication of the post, but the failure of the respondents to take down the post (that is, their ongoing publication of the post) in light of the public responses which the ongoing publication of the post continued to invite.

(c) Third, social media platforms have specific features that are important for purposes of the present case. Publication on social media is frequently not a unidirectional process in the way that publication in print or broadcast media has historically been. Publication on social media is often designed to initiate or to engage in a process where participants on a social media platform respond to the posts that have preceded their posts. In this way, social media platforms can facilitate the active exchange of views and information in a way that print media publications could never do. However, social media platforms can also function as an echo chamber and can lend themselves to processes where like-minded individuals respond without reflection in an online crowd. When the excited responses of the online crowd are targeted at individuals, there is a particular risk of harm to those targeted individuals. It is that risk that Mr Botha raised when he repeatedly complained in the application papers about "social media warfare" directed against him.

[192] If we fail to take account of these three features of the digital age in the present case, we run the risks of—

(a) ignoring the threats to the personal privacy of individuals that can be presented by the harvesting of information that those individuals have voluntarily published themselves;

(b) focusing too closely on individual social media posts originally published at a single point in time and not enough on the ongoing process of posts and responses as continuous publication of the original post takes place and a social media "discussion" unfolds; and

(c) underappreciating the harm that can be suffered by individuals who find themselves selected for targeting on social media by an online crowd.

[193] In relation to the latter point, I agree with the first judgment that the risks and dangers of "digital vigilantism" are issues best left for Parliament to address. This Court is required to pronounce on the lawfulness of the conduct of the respondents. It must

do so by investigating whether that conduct violated the rights of Mr Botha. The category of "digital vigilantism" is not of any utility in that regard. Accordingly, I decline to express any view on whether the conduct of the respondents could appropriately be described as "digital vigilantism".

The interdictory relief and the facts

[194] Mr Botha's application is an application for interdictory relief. An interdict seeks prospective relief. It is designed not to address harm that has already taken place, but rather to prevent harm happening in the future.[116] So the question that this Court must answer is not whether, at the time that Mr Smuts made his original post, it was foreseeable that the post would trigger the responses that it did. Rather, it is whether, at the time that Mr Botha sued for interdictory relief, he had a reasonable apprehension of ongoing or future threats to his privacy caused by the continuing publication of Mr Smuts' post on the Landmark Facebook page. The latter question requires us to have regard not only to the content of the original post of Mr Smuts, but also to the ongoing publication of that post online and the ever-increasing responses that it was eliciting on the Landmark Facebook page controlled by Mr Smuts.

[195] As pointed out above, by the time that Mr Botha instituted his urgent interdict application on 10 October 2019, the original post of Mr Smuts had continuously been published on the Landmark Facebook page for over a day and, in the process, had prompted over 200 responses. Most of those responses were hostile to Mr Botha. The interim interdict obtained by Mr Botha ensured that the original post and the responses were taken down pending finalisation of the High Court proceedings. It was only after the Supreme Court of Appeal judgment in favour of Mr Smuts and Landmark, that the original post and the responses were reinstated on the Landmark Facebook page.

[196] When the respondents received the High Court interdict application, they were faced with an election. They could accept that, in the light of the responses the original

[116] *Philip Morris Incorporated v Marlboro Shirt Co SA Ltd* 1991 (2) SA 720 (A) at 735B.

post had already generated, and was continuing to generate, it was now clear that ongoing publication of the post presented a threat to the rights of Mr Botha. Alternatively, they could double down and insist on a right to continue publishing the original post, and in the process to invite further responses. The respondents chose the latter route. Save in relation to the photo of Mr Botha's minor daughter, in Mr Smuts' answering affidavit filed on 29 November 2019, the respondents insisted on their right to reinstate the original post. So it is necessary to analyse not only the original post, but also the responding posts in the context of which the respondents sought to reinstate Mr Smuts' original post.

[197] In the record that served before us, we do not have copies of all 212 posts that the original response of Mr Smuts elicited. However, the undisputed evidence is that the majority of the posts were hostile to Mr Botha. The posts that made their way into the record included the following:

(a) "This CANNOT be legal!! Herman Botha you should be ashamed of yourself!!!"

(b) "Shame him, let's start a social media campaign and shame him till he loses all his insurance clients"

(c) "What insurance companies does he work with?"

(d) "How do we find out where his produce goes? Is there a way? These unethical farmers absolutely need to feel it in their POCKET and realise if they commit these heinous acts of cruelty there will be a massive consequence."

(e) "Someone drop him a visit"

(f) "Not farmers, but killers."

(g) "Permits to poison wildlife? I don't think so."

(h) "Shockingly despicable of this human."

(i) "What an absolute asshole. He should be in that cage."

(j) "Share and shame"

(k) "What a joke!! Dumb f**k!"

(l) "What an idiot"

(m) "A PE insurance salesman pretending to be a farmer while hiding behind his silly lawyer. How low can one go!!"

[198] Mr Smuts maintains that he did not intend to harm Mr Botha by making his original post on 9 October 2019, only to "out" his animal trapping processes. He also maintains that he did not allege that Mr Botha had poisoned baboons or otherwise acted illegally, as opposed to unethically. Whatever the original intention of Mr Smuts may have been, by the time they received the interdict application, the respondents knew that their ongoing publication of the original post had, in just over a day, generated more than 200 third-party responses, the vast majority of which were hostile to Mr Botha. When the respondents filed their answering affidavit more than a month after the original post had been taken down in compliance with the interim interdict, they insisted on their right to reinstate the original post. Accordingly, when they asserted a right to reinstate Mr Smuts' post, the respondents must have foreseen that the reinstatement of the post was likely to generate a new wave of responding posts hostile to Mr Botha.

[199] After receiving the interdict application, the respondents knew that the address of Mr Botha that was contained in the original post was not only the address of Mr Botha's business (as Mr Smuts thought when he originally posted it) but was also the address of the home at which Mr Botha resided with his family, including his then 14-month-old daughter. In addition, the respondents knew by then that Mr Smuts' post had been interpreted to mean that Mr Botha was illegally poisoning baboons, that several responders were urging follow-up action to target Mr Botha, and that one of them was suggesting that someone should "drop him a visit" (presumably at the address that was included in Mr Smuts' post).

[200] The respondents did not tender any measures to constrain the responses on the Landmark Facebook page that reinstatement of the post was likely to prompt. Instead, they suggested that such moderation was the exclusive responsibility of Facebook and they asserted a right "to stimulate robust debate on a thorny and controversial topic". They did not even explicitly dissociate themselves from the more extreme responses

(although they sought to avoid responsibility for them). So when the respondents resisted the interdict, and sought a right to reinstate the post, they were asserting a right to continue publishing the post with knowledge of the responses that it had already prompted and was likely to continue to prompt in the future.

The privacy analysis

[201] It is in the context set out above that we must consider whether Mr Botha faced an ongoing violation of, or threat to, his privacy rights as a result of the conduct and attitude of the respondents. For the purposes of answering this question, it is useful to remember that in one of its earliest formulations, the right to privacy was described as the right "to be le[f]t alone from unwanted and unwarranted intrusion". This formulation was first developed over a century ago in the article by Brandeis and Warren that came to shape United States jurisprudence on privacy.[117] It was then expressed by Justice Brandeis in his famous dissent in *Olmstead v United States*[118] that has repeatedly been cited with approval by this Court. The formulation has been adopted by this Court in *NM*,[119] *Hyundai*,[120] *Gaertner*[121] and *Prince*[122] and has an even longer pedigree in the High Court.[123]

[202] Consistent with its origins in the libertarian world of the 19th century United States, the right "to be left alone" was framed by Brandies and Warren with reference only to unwanted and unwarranted intrusion from the State. However, we live in a 21st century world of online cyberbullying, privately owned and freely accessible

[117] Brandeis and Warren above n 65.

[118] *Olmstead v United States* 277 US 438 (1928) (72 L Ed 944).

[119] *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) at para 32.

[120] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Limited: In re Hyundai Motor Distributors (Pty) Limited v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (2) SACR 349; 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 16.

[121] *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (*Gaertner*) at para 47.

[122] *Prince* above n 63 at paras 54 and 71.

[123] *S v H* above n 65 at 125; *Kampher* above n 65 at 481; *Pretorius* above n 65 at paras 39-43; and *Makhanya* above n 65 at paras 11-3.

search engines, and digital surveillance by private corporations of movements, purchasing patterns, internet browsing preferences and the like. In our 21st century world the right to privacy would be eviscerated if it did not also protect against unwanted and unwarranted intrusion by private parties.

[203] Since the original formulation of the right to privacy as a right to be protected from unwanted and unwarranted intrusion, jurisprudence on the right to privacy has developed. The right to privacy is now understood to embrace much more than the original protection contemplated by Brandeis and Warren. In this regard, Sachs J noted in his concurring judgment in *National Coalition*[124] that—

> "the much-quoted 'right to be left alone' should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation."[125]

[204] The problem of defining the developed fundamental right to privacy led this Court in *Bernstein* to observe that the "concept of privacy is an amorphous and elusive one".[126] However, any formulation of the right to privacy in its developed form must still recognise that the right includes protection from unwarranted and unwanted intrusion. The right to privacy may have expanded beyond its libertarian origins, but

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[124] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC).

[125] *Bernstein* above n 6 at para 116.

[126] Id at para 65. In his article "Privacy: Its Meaning and Value" (2003) 40 *American Philosophical Quarterly* 215 at 215 Adam D Moore describes some of the different ways in which jurists and philosophers have attempted to define the right to privacy:

> "Privacy has been defined in many ways over the last century. Warren and Brandeis called it 'the right to be let alone.' Pound and Freund have defined privacy in terms of an extension of personality or personhood. Westin and others including myself have cashed out privacy in terms of information control. Still others have insisted that privacy consists of a form of autonomy over personal matters. Parent offers a purely descriptive account of privacy 'Privacy is the condition of not having undocumented personal knowledge about one possessed by others.' Finally, with all of these competing conceptions of privacy some have argued that there is no overarching concept of privacy but rather several distinct core notions that have been lumped together."

the freedom from unwarranted and unwanted intrusion remains an important element of the expanded right.

[205] The right to be left alone from unwanted and unwarranted intrusion is obviously subject to the general observations on the right to privacy emerging from the judgments of this Court in its founding judgments on privacy. In *Bernstein* this Court stated:

> "In the context of privacy . . . it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[127]

[206] Reflecting on this passage in *Mistry*,[128] this Court stated the following:

> "In *Bernstein and Others v Bester and Others N.N.O.* Ackermann J posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated."[129]

[207] While all people have a clear privacy interest in being left alone from unwanted and unwarranted intrusion in relation to their families and homes, they have little if any privacy interest in being left alone from unwanted and unwarranted interference in relation to their businesses.[130] The owner of a business may well have commercial and

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[127] *Bernstein* above n 6 at para 67.

[128] *Mistry* above n 4.

[129] Id at para 27.

[130] This is not to deny that violations of personal privacy can occur at the place of the business. To take a clear example – clandestine surveillance of employees in toilets at work would amount to a gross violation of personal privacy. See *López Ribalda and Others v Spain* no 1874/13 *ECHR* 2020 at para 125 and the international instruments cited in paras 61 and 65 of that judgment.

proprietary rights against interference with their business, but for the most part, these are not privacy rights. It is only when the interference is like the intrusive searches contemplated in *Hyundai* that the interest of that business owner can be treated as a privacy interest, as opposed to a commercial or proprietary interest that falls outside the right to privacy.[131] This distinction is important to hold in mind. If Mr Botha has commercial and proprietary rights that have been violated by the respondents, he will have other remedies available to him. The present application for leave to appeal to this Court concerns only his right to interdictory relief to protect his right to privacy.

[208] Concentrating on the "unwanted and unwarranted intrusion" element of the right to privacy in the present case allows us to focus the enquiry on the only privacy issue that, in my view, is open for us to consider in light of the case pleaded by Mr Botha in the founding affidavit. That issue is not whether the information originally published by Mr Smuts was of a private nature. As pointed out above, the founding affidavit contains no allegations that Mr Smuts published private or confidential information. So questions of the "private" nature of the information published by Mr Smuts were not fully canvassed on the papers by the respondents and in my view, it is not open to us to decide this case on the basis of whether particular information published in the post of Mr Smuts was private information.[132]

[209] I disagree with the statement in the first judgment that privacy concerns in this regard "[were] fully ventilated on the papers". The privacy concerns in this regard were ventilated in argument, but the respondents did not have the opportunity to ventilate them on the papers because they were raised for the first time in the replying affidavit. Moreover, before every Court, the respondents invoked the prejudice to them of allowing the applicant to rely on a privacy case in this regard that was not pleaded in the founding affidavit.

[131] *Hyundai* above n 120 at para 18.

[132] For this reason, I do not believe it is open to us to decide this case on the basis of whether particular information published in the post of Mr Smuts was private information.

[210] However, it is open to us to consider whether ongoing publication of the information on the Landmark Facebook page threatened Mr Botha's right to privacy, by subjecting him to threats of unwanted and unwarranted intrusion in the form alleged in the founding affidavit, namely a threat to the security of Mr Botha and his family at their family home and a threat of commercial harm to Mr Botha's insurance and farming businesses through a possible boycott campaign.

[211] The case in the founding affidavit was based on an allegation that the ongoing publication by Mr Smuts of certain information concerning Mr Botha and his businesses[133] and the responses the ongoing publication of that post was eliciting presented a threat to the security of Mr Botha and his family at their family home and a threat of commercial harm to Mr Botha's insurance and farming businesses through a possible boycott campaign.[134] These threats were not pertinently pleaded as violations of Mr Botha's right to privacy. However, the facts relevant to these threats were fully canvassed in the papers and there is no apparent prejudice to the respondents in allowing the applicant's complaint in this regard to be re-characterised as a privacy complaint of exposure to the threat of unwanted and unwarranted intrusion.

[212] In the written and oral argument submitted on behalf of Mr Botha, these threats were re-characterised as a privacy issue. Counsel for Mr Botha made extensive submissions about online bullying and the problem of doxing – the collection of information available online about a person and the re-publication of that information in circumstances calculated to cause harm to that person.[135] Therefore, to the extent that Mr Smuts' ongoing publication of information about Mr Botha implicated his

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[133] When the case was expressly pleaded as a privacy case for the first time in the replying affidavit, this information was described as "personal information." The label "personal information" was not used in the founding affidavit.

[134] There was also a defamation cause of action which is not relevant for present purposes.

[135] Counsel for Mr Botha referred in this regard to the analogous case of *Dutch Reformed Church Vergesig Johannesburg Congregation v Rayan Sooknunan t/a Glory Divine World Ministries* 2012 (6) SA 201 (GSJ) and to the Hong Kong case of *Junior Police Officers' Association of the Hong Kong Police Force v Electoral Affairs Commission CACV* 489/2019 [2019] HKCA 1197. He also referred to the discussion of doxing in South African Human Rights Commission "Social Media Charter" (2023) at 16, available at: https://www.sahrc.org.za/home/21/files/SAHRC%20Social%20Media%20Charter%20FINAL.pdf.

privacy rights by presenting him with a fear of harassment at his family home and a fear of boycotts of his businesses, there is no apparent prejudice to the respondents in allowing Mr Botha to argue a privacy case in this regard.

[213] The fourth judgment takes issue with my conclusion that there would be no prejudice to the respondents in allowing the applicant to recast his case in this narrow respect. It suggests that if the applicant had pertinently pleaded his harassment complaint as a privacy complaint, the respondents may have answered it differently. I disagree. This is not, as suggested in the fourth judgment, to argue that a hearing would have made no difference. It is to argue that the hearing took place, albeit under a different label. Any facts potentially relevant to the re-characterised privacy complaints would have been equally relevant to the originally pleaded complaints of a threat to security at Mr Botha's family home and a threat of commercial harm to his businesses. At the level of fact, the respondents' answer to the complaint about a risk to the security of the applicant and his family was not to deny the risk. It was merely to contend that this was not something for which they could be held responsible because, at best for the applicant, that risk flowed from third-party responses to the original post. There is 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 based on a risk of harassment of Mr Botha and his family at their home, rather than a complaint about a risk to the security of Mr Botha and his family at their home, which latter risk would have included any risk of harassment of Mr Botha and his family at their home. The same applies to the re-characterisation of the commercial harm complaint as a privacy complaint.

Application of the privacy analysis

[214] The relief claimed by Mr Botha and granted by the High Court dealt with five categories of posts: posts referencing Mr Botha himself, posts referencing his family, posts referencing his home address, posts referencing the name and location of his farm and the insurance posts. I address each of these categories in turn.

References to Mr Botha's family

[215] Mr Smuts and Landmark have apologised for posting a photograph of Mr Botha's infant daughter and have removed that photograph from the post. There is no suggestion on the papers that Mr Smuts or Landmark have ever threatened to make any other posts referencing Mr Botha's family. So this category of post does not need the protection of an interdict. This was already the case by the time the interim interdict was granted.

Mr Botha's address

[216] The refusal to remove the post of Mr Botha's address infringes his privacy because it subjects him to the threat of unwanted and unwarranted intrusion at his family home. At the time that Mr Smuts posted the address, he thought that it was only a business address. However, Mr Botha runs his business from home. So the address is the address of Mr Botha's home where he resides with his wife and young daughter.

[217] The original post of Mr Smuts triggered an excited group response targeting Mr Botha. Apart from various abusive posts directed against Mr Botha, one responder specifically suggested that Mr Botha should be paid a visit. It is clear from the founding affidavit that Mr Botha subjectively feared harassment at his family home. In his founding affidavit he repeatedly alleged that the effect of Mr Smuts' post, including its reference to what is his home address, was to endanger him and his family. This complaint was made again in the replying affidavit and in the affidavit in support of the application for leave to appeal in this Court.

[218] In relation to the fundamental right to privacy, this Court has repeatedly described the home as "the inner sanctum".[136] It has emphasised that this inner sanctum is a "relatively impervious sanctum".[137] Much of this Court's jurisprudence dealing

[136] *Gaertner* above n 121 at para 49 and *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 45.

[137] *Mistry* above n 4 at para 27. See also *Industry House* above n 100 at para 34.

with legislation authorising searches has emphasised the need to protect the sanctity of the private home.[138] The core of the right to be left alone from unwanted and unwarranted intrusion is the right to be left alone from unwanted and unwarranted intrusion in one's own home. So a fear of being harassed at one's family home is a fear that goes to the heart of the fundamental right to privacy. In the language of *Bernstein,* everyone has an objectively reasonable expectation not to be subjected to unwanted and unwarranted intrusion at one's own home.

[219] Mr Botha's fear of harassment at his family home was not a frivolous fear. Within the class of responders to Mr Smuts' original post there was a group of people who felt passionately about the trapping of baboons, and who felt free to abuse Mr Botha in strong terms. There is nothing in the record to suggest that the responder who suggested a visit to Mr Botha was in any way repudiated by the rest of the group that targeted Mr Botha. In the circumstances, Mr Botha would have had to be unusually thick-skinned not to fear that he and his family might be harassed at their home by some of the more reckless members of the group targeting him. In this regard, I disagree with the third judgment that because no-one had yet protested outside Mr Botha's home, he could not make out a case for the interdictory relief that he sought. The question, for the purposes of interdictory relief, is not whether Mr Botha could show that he had already been harassed at his family home; it is whether he had a reasonable fear that he would be harassed at his family home.

[220] The respondents do not suggest that there was no basis for Mr Botha to fear harassment at his family home. Instead, in the answering affidavit Mr Smuts confines himself to two different defences. First, he maintains that he personally had not in any way suggested harassment or abuse of Mr Botha and he disavows responsibility for the responses to his original post that may have done so. Second, he maintains that Mr Botha had no right to prevent publication of his home and business address because he had widely advertised this address online.

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[138] See for example *Gaertner* above n 121, *Industry House* above n 100, *Mistry* above n 4 and *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC).

[221] The first defence of the respondents does not avail them. As has been emphasised above, online publication is a continuous process and an interdict is a prospective remedy. So, the issue is not whether the original post of Mr Smuts deliberately or foreseeably invited abuse and harassment of Mr Botha. The issue is that, at the time that Mr Botha sought interdictory relief, he reasonably feared that, having regard to the responses Mr Smuts' post had triggered, ongoing publication of that post presented a continuing risk that he and his family would be harassed at their home.

[222] This concern with the harm threatened by continuing publication of the original post was raised pertinently in the founding affidavit. In his founding affidavit Mr Botha relied not only on the post itself, but also on the responses that its ongoing publication was triggering. He attached to the founding affidavit what he described as "the more egregious comments to the respondents' post" and he pertinently complained that:

(a) "the respondents' post has still not been removed and the public continue to respond on same"

(b) "These comments . . . cause harm to my business and endanger me and my family"

(c) "the comments made on Facebook have been made to cause, and have in fact caused, severe prejudice to me."

[223] In the circumstances, the respondents were clearly faced with a case in the founding affidavit that concerned not only the content of the original post but also its ongoing publication in the light of the responses that it had triggered on the Landmark Facebook page.

[224] As pointed out above, the second defence of the respondents is the claim that Mr Botha cannot rely on his right to privacy to prevent publication of his home and business address because he has widely advertised this address online. This defence is also unfounded. It is correct that Mr Botha has used the internet to publish his home and business address to the world. But the violation of Mr Botha's privacy with which

this judgment is concerned is not one based on publication of confidential or private information.[139] It is one based on the fact that the continuing publication of Mr Botha's address on the Landmark Facebook page, in the light of the responses that such publication had already triggered, left Mr Botha reasonably fearing that he and his family might be harassed at their family home.

[225] By subjecting Mr Botha to a fear of harassment at his family home, the ongoing publication of Mr Botha's address violated his fundamental right to privacy in a manner that goes to the very essence of the right. There may be cases where a respondent can show a freedom of expression interest that would justify such a violation of the fundamental right to privacy. However, this is not one of them. There is no apparent link between Mr Botha's address and the campaign against baboon trapping that the respondents seek to advance through Mr Smuts' post. In fact, the question does not even arise in the present case. Mr Smuts does not seek to justify publication of Mr Botha's home address with reference to any freedom of expression interest. His defence of publication of the address is confined to an argument that Mr Botha has already published the address himself and so it cannot be protected from re-publication on the Landmark Facebook page. As has already been pointed out, that defence does not avail the respondents because it misconceives the basis upon which Mr Botha's privacy rights were violated by the posting of his address on the Landmark Facebook page.

[226] It might be suggested that because Mr Botha's address is freely available on the internet, it would be pointless to compel Mr Smuts and Landmark to remove that address from any ongoing publication of Mr Smuts' post. This suggestion ignores the collective nature of social media and its capacity to act as an "echo chamber" for individuals with strong feelings on particular topics.[140] A Facebook post is designed to

[139] In any event, as the first judgment shows, there remains scope for a claim to privacy in respect of personal information that the data subject has placed in the public domain.

[140] See for example the Sir Henry Brooke Memorial Lecture for BAILII delivered by Lord Justice Sales and published as Sales "Algorithms, Artificial Intelligence and the Law" (2021) 105 *Judicature* 22 at 32. See also

invite comment from a wide range of people. A Facebook page is a platform for group responses, and can serve as a platform for excited group responses in which individual responders react in less controlled ways than they do in individual face to face interactions.[141] This aspect of social media was a particular concern for Mr Botha as evidenced by his repeated complaints on the papers of "social media warfare" against him.

[227] It is true that individuals wanting to target Mr Botha can individually find his address on the internet. However, the risk of harassment of Mr Botha at his family home is materially increased if that address is allowed to remain on the Landmark Facebook page where the group wishing to target him "meet" collectively online.

[228] The respondents may not be able to control the information that individual responders to Mr Smuts' post can find on the internet. But they can control what information is published on the Landmark Facebook page. It is therefore appropriate for this Court to order the respondents to use that control to ensure that Mr Botha's fear of harassment at his family home is not compounded by the ongoing publication of his home address on that Facebook page.

The posts referring to Mr Botha himself and his farm

[229] The status of posts referencing Mr Botha himself and his farm name and location has been analysed at length in the first judgment. Even if it were open on the pleadings for Mr Botha to advance the privacy case that he does advance in relation to these posts, I would agree, for the reasons similar to those set out in the first judgment, that any such

N Gillani et al "Me, My Echo Chamber, and I: Introspection on Social Media Polarization" (2018) *WWW '18: Proceedings of the 2018 World Wide Web Conference* at 823–31.

[141] The nature of excited group responses in virtual crowds on social media platforms can bear some similarities to the phenomenon of "deindividuation" that courts in the 1980s and 1990s considered in relation to individual actions within physical crowds. See for example *S v Motaung* 1990 (4) SA 485 (A) and *S v Matshili* 1991 (3) SA 264 (A).

privacy case should fail. Having regard to the constraints of the pleadings, in my view, it is clear that no privacy case can succeed in this regard.

(a) As stated above, the only privacy interest that Mr Botha can assert on the pleadings is his privacy interest in being protected from unwanted and unwarranted intrusion.

(b) To the extent that the disclosure of Mr Botha's identity affects his right to privacy in this respect, any such privacy interest of Mr Botha is outweighed by the freedom of expression interest of Mr Smuts and Landmark.

(c) The respondents are activists who regard the practice of baboon trapping as unethical even if it may be legal. Their freedom of political expression entitles them to criticise Mr Botha publicly for engaging in the practice of baboon trapping and for that purpose they are entitled to disclose his identity.

(d) In relation to the address of the farm, there does not appear to be any risk of unwanted or unwarranted intrusion that would violate the right to privacy. Mr Botha does not live at his farm. It is more than 100 kilometres away from his home. Apart from bald allegations in the founding affidavit, Mr Botha does not provide any evidence that the disclosure of the address of the farm exposes him, his family or anyone else to a risk of harassment at the farm.

[230] In relation to the freedom of expression interest of Mr Smuts and Landmark, the following observation of the Supreme Court of Appeal[142] is instructive:

> "[T]he High Court approached the matter by asking whether Mr Smuts could have exercised his right to freedom of expression with greater restraint so as to afford Mr Botha's right to privacy greater protection. That is not the correct way to look at the matter. A court should not act as a censor to determine how best persons might speak. The Constitution recognises that individuals in our society need to be able to

[142] Supreme Court of Appeal Judgment above n 7 at para 29.

> hear, form and express opinions freely, on a wide range of topics. Honest information and publication of animal trappings is no exception. Mr Smuts had a right to expose what he considered to be the cruel and inhumane treatment of animals at Mr Botha's farm."

[231] The speech with which this case is concerned is political speech expressed by an animal rights activist on the Facebook page of an animal rights organisation. This Court has repeatedly emphasised "the importance, both for a democracy and the individuals who comprise it, of being able to form and express opinions — particularly controversial or unpopular views".[143]

[232] It is in the nature of political speech that it may cause discomfort to the persons at whom it is directed. Freedom of expression prevents a court from imposing its sensibilities onto expressive acts.[144] In particular, a court cannot require political speech to be more finely tuned to avoid discomfort to third parties unless the rights of those third parties are violated in such a manner as to trump the freedom of expression interest of the speaker. This is not such a case.

The insurance posts

[233] There would be an element of absurdity in interdicting Mr Smuts and Landmark from disclosing the fact that Mr Botha has an insurance business, by handing down a judgment that must, of necessity, refer extensively to the fact that Mr Botha has an insurance business. The absurdity would be compounded when one has regard to the fact that this judgment follows widely published High Court and Supreme Court of Appeal judgments that have already referred to the fact that Mr Botha is an insurance broker, and that Mr Botha's status as an insurance broker has been republished online in countless press reports and law firm commentaries that analyse

[143] *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at para 125. See also *SANDU* above n 39 at para 8.

[144] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7; 2005 (8) BCLR 743 (CC); 2006 (1) SA 144 (CC) at paras 55 and 108; and *Premier, Western Cape v Public Protector* [2022] ZASCA 16; 2022 (3) SA 121 (SCA) at para 36.

the High Court and Supreme Court of Appeal judgments. In this respect, the dispute over whether the respondents must take down the insurance posts should now be regarded as moot. The contrary approach runs the risk of subjecting the process of this Court to ridicule.

[234] Even if we were to ignore the mootness of this issue, in my view, there is no basis for interdicting publication of the insurance posts. Mr Botha's involvement in the insurance business lies far from the inner sanctum of his right to privacy in the personal world. His insurance business activities are activities that he publicly advertises on ten different websites. They are commercial activities and part of his involvement "in a public realm where privacy would only remotely be implicated".[145]

[235] Mr Botha's interest in preserving the secrecy of his insurance business is to prevent that business from suffering economic harm by being associated with his baboon trapping practices, or by being targeted for a consumer boycott organised by some of the contributors to the Landmark Facebook page. That is a commercial and economic interest which does not carry any significant weight in an appeal before this Court concerning an application for an interdict founded on the right to privacy. In the language of *Bernstein*,[146] Mr Botha has no objectively reasonable expectation of privacy in this regard.

The first and third judgments

[236] I have addressed above[147] the central point of difference between this judgment and the fourth judgment. The first and third judgments both take issue with my focus on the ongoing publication of Mr Smuts' post on the Landmark Facebook page in the light of the responses that it had triggered on that page. They complain that my approach creates uncertainty because it means that the lawfulness of ongoing

[145] *Mistry* above n 4 at para 27.

[146] *Bernstein* above n 6 at para 85.

[147] At [213].

publication may change over time and that, depending on circumstances, ongoing publication of a post that was originally lawfully published may become unlawful.

[237] This objection to my approach ignores the interactive nature of a Facebook post and the ongoing or continuous nature of its publication. Publication by means of a Facebook post is not a unidirectional process. By their own admission, the respondents published Mr Smuts' post on the Landmark Facebook page with the intention that it would "stimulate debate on a thorny and controversial topic". They then asserted a right to continue publishing the post and to continue stimulating the debate on the Landmark Facebook page after that debate took on a hostile character that they claim they did not intend.

[238] At the level of principle, ongoing online publication of a post that was originally lawfully published must be capable of becoming unlawful if circumstances change. That is a necessary consequence of the continuous nature of ongoing online publication. A simple example from the law of defamation illustrates this proposition. A media company may be able to invoke the defence of reasonable publication[148] to justify the original online publication of an article containing defamatory statements about a plaintiff if, prior to initial online publication of those statements, it had taken satisfactory steps to verify the truth of the statements, and reasonably believed them to be true. However, once facts subsequently emerge that make clear that the defamatory statements are not true, if the media company continues to publish the defamatory article online in the face of those facts, it cannot rely on the reasonableness of its original publication of the article to justify its continued online publication of the article.

[239] The present case is no different in principle from the example posited above and I am not convinced by the attempt in the first judgment to distinguish the two situations. When Mr Smuts originally made his post on the Landmark Facebook page, the respondents did not intend to prompt responses that would leave Mr Botha fearing that

[148] *National Media Limited v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA) at 1211.

he and his family would be harassed in their home. Indeed, at the time of original publication, the respondents were unaware that Mr Botha's business address that they had published was also his home address. However, by the time that Mr Botha instituted his interdict application, the situation had changed. By this stage, the respondents knew that Mr Botha's business address and his home address were one and the same. They had also seen that the original post of Mr Smuts had triggered responses from visitors to the Landmark Facebook page that left Mr Botha reasonably fearing harassment at the address that they now knew to be his family home.

[240] These third-party responses were no longer an "unknown variable" as suggested in the first judgment. They were facts that were self-evident to the respondents who controlled the Landmark Facebook page onto which these responses had been posted. These facts were now no more an "unknown variable" than was the initially unknown fact that Mr Botha's business address and home address were one and the same.[149] The respondents nevertheless asserted a right to continue publishing the original post and thus to continue to invite responses of the sort that had already been made to that post on the Landmark Facebook page.

[241] In those circumstances, to escape interdictory relief, it was not enough for the respondents to defend the initial publication of the post on the Landmark Facebook page. It was necessary for them also to defend ongoing publication of the post into the future in view of (1) the now-known fact that the address published in that post was the address of the home of Mr Botha and his family and (2) the now-known fact that ongoing publication the original post was likely to trigger more responses of the sort

[149] The first judgment at [112] appears to accept the relevance of the fact that between original publication of Mr Smuts' post and Mr Botha's launch of the interdict proceedings the respondents acquired knowledge of the fact that Mr Botha's business address and home address were one and the same. It is not clear why this changed fact might affect the lawfulness of ongoing publication of the post, but other changed facts (that is, the responses that the post had triggered) should be treated as irrelevant in this regard.

that it had already generated on the Landmark Facebook page. This they have failed to do.[150]

Conclusion

[242] For the reasons set out above, I concur in the order set out in the first judgment.

ROGERS J (SCHIPPERS AJ concurring):

[243] I have had the pleasure of reading the judgments authored by my Colleagues Kollapen J (first judgment), Chaskalson AJ (second judgment) and Zondo CJ (fourth judgment). The first and second judgments agree on the disposition of the case – that Mr Botha should be granted leave to appeal and that the appeal should succeed in part – but differ in their reasoning. The fourth judgment holds that leave to appeal should be refused because Mr Botha did not make out a privacy case in his founding papers in the High Court. I conclude that leave to appeal should be granted but that the appeal should be dismissed.

[244] In general, I agree with the first judgment's approach to the pleadings and the legal tests to be applied. However, since there is no outright majority in favour of any one judgment, I should perhaps be more specific about the parts of the first judgment with which I agree (paragraph references are to paragraphs in the first judgment):

(a) On jurisdiction and leave to appeal, I agree with [37] to [39] of the first judgment, save that I would not describe Mr Botha's prospects of success on appeal as "good". His prospects of success are, however, adequate, and for this reason in conjunction with others leave to appeal should be granted.

(b) On mootness, I agree with [41] to [44].

[150] Given the importance of political expression, there may well be cases where a respondent could justify ongoing publication of activist material which leaves its target fearing harassment at their family home. However, as pointed out in [224] above, no such justification case has been made out in the present case.

(c) On the question of pleadings, I agree with [45] to [69].

(d) Regarding the legal framework, I agree with [73] to [102].

(e) On the application of the *Bernstein* test, I agree with [105], [108] and [130].

(f) Regarding vilification and digital vigilantism, I agree with [154] and [155].

(g) I agree with the first judgment's responses to the second and fourth judgments contained in [156] to [164] and [171] to [174] respectively.

[245] While the above tabulation does not necessarily mean that I positively disagree with everything else in the first judgment, I do not wish positively to associate myself with anything else. The extent to which I disagree will hopefully be apparent from my judgment. With reference to [124] to [126] of the first judgment, I entertain considerable doubt as to whether identifying Mr Botha as the farmer responsible for the trapping advanced the debate on the practice of trapping. Mr Botha is simply one of many farmers who lawfully engage in the practice. However, unless the information published by the respondents violated Mr Botha's right to privacy, he cannot complain if he is named.

[246] I agree, for the reasons given in the first judgment, that privacy does not attach to the information about the ownership of the farm Varsfontein. In truth, so it seems to me, Mr Botha does not really object to his identification as the owner of the farm. The problem for him is that, as the owner of this farm, he has been identified as being responsible for the trapping shown in the photographs. This is the result of the publishing of the photographs alongside information that they were taken on Varsfontein.

[247] On this part of the case, my approach is simpler than that of the authors of the first and second judgments. In principle, what happens on private property is private. The fact that property is used for a commercial purpose does not negate this privacy. A trespasser who snoops around my property and publishes photographs of what I do there

violates my privacy, even though I am using the property for a commercial purpose. I am entitled to keep private the things I do on my private property, whether they are domestic or commercial in nature.

[248] In the case of officials charged with policing a commercial activity, they must comply with the law if they want to come onto my property to inspect and take photographs of what is happening there. In assessing, from the perspective of privacy, the constitutionality of a law that permits officials to enter private property, the fact that the property is used for a regulated commercial purpose is relevant to the analysis, since the intensity of privacy may be less for such property than in the case of a home. Privacy in the case of a regulated commercial activity may more readily be overridden than in the case of non-commercial domestic activity, but it still exists.

[249] So if Mr Louw had come onto Mr Botha's property without permission and taken photographs of trapped animals, the publication of such photographs would in my view have violated Mr Botha's privacy. But Mr Louw did not come onto the property without permission. He was part of a group of cyclists whom Mr Botha allowed to traverse his property. With whom that arrangement was made does not appear from the papers. If Mr Botha had granted permission to traverse on terms which did not allow the cyclists to take photographs, the publication of Mr Louw's photographs would have breached Mr Botha's privacy. There was, however, no evidence of the terms on which the group was permitted to traverse and as to whether there were any express or implied limits on their right to take photographs. Given the way in which the privacy case was belatedly raised, and in the absence of an allegation by Mr Botha that his permission did not include a right to take photographs, the privacy case in that respect cannot succeed.

[250] In regard to the information about Mr Botha's insurance brokerage business, these particulars were widely published by Mr Botha himself on the internet. I understand the first and second judgments to accept that, if the address in Summerstrand had not also been Mr Botha's home, there would have been no violation of his privacy

by the publication of the particulars. I agree. A person who publishes the name and location of his business on the internet cannot complain if some members of the public use that information for reasons adverse rather than favourable to the business owner. It is a legitimate form of activism to encourage a boycott of a business because its owner does things of which the campaigners disapprove, even if the subject of the campaign is unrelated to the business.

[251] The question is whether this form of campaigning breaches privacy because it turns out that the address is also the home of the business owner. Mr Smuts did not make public that the address was also the place where Mr Botha lived. Mr Smuts did not know this to be the case. He merely posted a screenshot of an online page in respect of "Botha Herman Insurance Brokers". The fact that the address was also Mr Botha's home was disclosed by Mr Botha himself when he launched his application.

[252] So all that Mr Smuts published was that Mr Botha conducted an insurance brokerage business at a particular address. It was exactly the same information as Mr Botha himself had widely published (in ten online commercial directories). The persons to whom the information was published would not have known that it was also Mr Botha's home. If they were inclined to do anything in response to the information, it would have been a response in respect of Mr Botha's business.

[253] The second judgment states that Mr Smuts knew the true position by the time he opposed the application. However, by opposing the application Mr Smuts was trying to show that Mr Botha should not have been granted an interim interdict in the first place. He was saying that the information had been lawfully posted when it was published and that he should not have been required to take it down. He was not wanting to publish it afresh but to justify its initial publication. And he was not wanting to include new information so as to disclose that the address was also Mr Botha's home. He merely contended that his initial posting of the brokerage business' online page was and remained lawful.

[254] One must distinguish between a breach of privacy in the form of publishing information and a breach of privacy when somebody acts on that information in a particular way. There is no evidence that anybody reacted to the information by protesting outside the published address, let alone in a way that might have disturbed the privacy of anyone working or living there. But if that had happened, the question might have arisen whether the conduct of the protesters was a violation of the privacy of Mr Botha and his family. That question could have arisen whether or not the protesters had got their information from Mr Smuts' social media post.

[255] It is unnecessary to decide under what circumstances, if any, activity outside a person's residential address can amount to a violation of the occupants' privacy. There is a difference between what goes on inside a home – the inner sanctum – and what happens on a public road outside the home. While some people may prefer not to publish their residential addresses, the fact that a person lives at a particular address, if private, is not comparable to the privacy of what happens within the home. For many purposes, including legal proceedings, a person's address may have to be disclosed. Most people are able to preserve privacy in relation to what happens within their homes. Where one lives, on the other hand, cannot usually be kept private, because people need to use public roads to enter and leave their homes. Where a person lives can be publicly observed.

[256] I agree that the parties should bear their own costs in this Court. I would not, however, interfere with the costs orders made by the Supreme Court of Appeal.

[257] I would thus make the following order:

1. Leave to appeal is granted.
2. The appeal is dismissed.

ZONDO CJ:

Introduction

[258] I have had the benefit of reading the judgments by Kollapen J (first judgment), Chaskalson AJ (second judgment) and Rogers J (third judgment) in this matter. I am unable to agree with the outcomes in any of the three judgments. In my view, leave to appeal should be refused with costs. My reasons are that it is not in the interests of justice to grant the applicant leave to appeal against the judgment and order of the Supreme Court of Appeal because the only point on which it seeks to attack the judgment of the Supreme Court of Appeal is a point which the applicant may not pursue because it was not part of his case in the High Court. I elaborate below. However, first, I must deal briefly with the background.

Background

[259] The first judgment has sufficiently set out the factual background to this matter. Accordingly, it is not necessary to repeat that exercise. It is only necessary to state a few factual points in order to facilitate a proper understanding of my judgment. The few factual points are set out below:

(a) The first respondent, namely, Mr Bool Smuts, and, the second respondent, namely, Landmark Leopard and Predator Project South Africa, posted photos on a Facebook page which depicted scenes of a dead baboon in a cage and a porcupine trapped in the cage together with a photograph of Mr Botha and his minor daughter.

(b) The respondents also posted a Google search location of Mr Botha's home and business addresses and attached a WhatsApp conversation between Mr Botha and Mr Smuts in which Mr Botha had confirmed that he was the holder of a necessary permit to hunt and / or capture and / or kill baboons and porcupines.

(c) The respondents allowed the sharing of the post and the post had been shared 108 times at the time of Mr Botha deposing to the founding affidavit in the present matter in the High Court.

(d) Mr Botha contended that the publication of the material by the respondents on the second respondent's Facebook page concerning himself was unlawful on the basis that it was defamatory. Mr Botha demanded that Mr Smuts "remove the defamatory post from the Second Respondent's Facebook page" but Mr Smuts had already removed the photo depicting Mr Botha with his minor daughter.

(e) The respondents did not accept that there was anything unlawful about their conduct and refused to remove the post content.

High Court

[260] Mr Botha then brought an urgent application in the High Court for a rule nisi with an interim interdict prohibiting Mr Smuts and the second respondent from publishing defamatory statements about him. However, Mullins AJ granted a different order. He ordered the respondents to remove the photographs of Mr Botha and certain portions of the Facebook post that made reference to Mr Botha, his business, its location and the name of the farm. The respondents were also prohibited from making further posts that referred to Mr Botha, his family and the businesses.

[261] In opposing the confirmation of the rule nisi, the respondents stated the following:

(a) None of the information published by the respondents was private, much less confidential. In this regard, Mr Smuts said that he was mentioning this in the light of prayer 2.1.2 of the notice of motion. Paragraph or prayer 2.1.2 of the notice of motion sought to have the respondents ordered "to refrain from making any further social media posts or other publications of any nature whatsoever, including verbal and written, disclosing any information and / or confidential information and / or posts of, including but not limited to, a defamatory nature regarding the

applicant / his business / his farm in any manner whatsoever and treat all communication associated with this matter as confidential".

(b) With the exception of the photographs taken by Mr Louw, the published information had previously been placed in the public domain by Mr Botha himself.

(c) Mr Smuts was entitled to post the comments that he posted in the exercise of his constitutionally-guaranteed right to freedom of expression (section 16(4)).

(d) Mr Botha stated that, in any event, his comments amounted to fair comment based on the facts that are true and that relate to matters of public interest. He also pointed out that his posting of the photographs and commentary was, on these grounds, lawful.

[262] On the return day Roberson J confirmed the rule nisi. Part of the conclusion reached by the High Court was that the respondents had infringed Mr Botha's right to privacy. The High Court held that the respondents were entitled to publish the photographs and to comment on them. However, it held that the respondents were not entitled to publish the fact that the photographs were taken on a farm belonging to Mr Botha. The High Court said that the name of the farm and Mr Botha's identity, as owner thereof, constituted personal information protected by his right to privacy. It also concluded that the respondents had acted unlawfully in linking Mr Botha to the practice of animal trapping. As already indicated above, the High Court confirmed the rule nisi with costs.

Supreme Court of Appeal

[263] A subsequent appeal to the Supreme Court of Appeal by the respondents was upheld and that Court set aside the judgment and order of the High Court and replaced it with an order discharging the rule nisi. The Supreme Court of Appeal decided the appeal on the basis that Mr Botha's right to privacy had not been infringed. It therefore, upheld Mr Smuts' and the second respondent's appeal, set aside the decision of the High Court and replaced it with an order discharging the rule nisi with costs. The

Supreme Court of Appeal did not deal with the question whether it had been Mr Botha's case in the founding affidavit in the High Court that the respondents had infringed his right to privacy.

In this Court

Jurisdiction

[264] If leave to appeal is granted in the appeal, this Court will adjudicate the question whether or not the respondents' conduct infringed the applicant's right to privacy which is entrenched in section 14 of the Constitution. That is a constitutional matter. There is also the question whether Mr Botha is entitled to pursue a case based on the right to privacy. That will depend upon whether an alleged infringement of such right was part of Mr Botha's case as set out in his founding affidavit in the High Court. That question implicates the right to a fair public hearing in terms of section 34 of the Constitution. That too, is a constitutional matter. Accordingly, this Court has jurisdiction to adjudicate this matter.

Leave to appeal

[265] The applicant has brought an application in this Court for leave to appeal against the decision of the Supreme Court of Appeal in terms of which the Supreme Court of Appeal held that the respondents had not violated the applicant's right to privacy, upheld the respondents' appeal and set aside the judgment and order of the High Court which had been in favour of the applicant with costs. The only ground upon which the applicant seeks to appeal against the judgment and order of the Supreme Court of Appeal is that the respondents' publication of the comments that they published on the Facebook page about the applicant violated his right to privacy. This is reflected in paragraph 8 of the applicant's founding affidavit in the application for leave to appeal to this Court. In that paragraph, the applicant says:

> "The question to be answered is whether the Facebook post *is lawful or whether it violates my privacy*. That determination ultimately turns on

> whether my personal information including about my residential home is protected by the right to privacy." (Emphasis added.)

[266] In paragraph 24.1 of the applicant's founding affidavit before this Court, the applicant says:

> "The application is premised on, and seeking to enforce, my constitutional rights to privacy in terms of section 14 of the Constitution and the common law;"

Referring to what happened in the High Court in his founding affidavit in this Court, the applicant says in paragraph 43.5:

> "*[M]y right to privacy* was infringed by the publication, and I thus had a clear right to an interdict." (Emphasis added.)

As will be shown later, the applicant never relied in his founding affidavit on an alleged infringement of his right to privacy.

[267] Before this Court the respondents have submitted that the alleged infringement of the applicant's right to privacy was not part of the applicant's case in his founding affidavit in the High Court and that, therefore, the applicant cannot be allowed to advance on appeal before this Court a case based on the alleged infringement of the applicant's right to privacy.

[268] It seems to me that the question whether or not the applicant is entitled to pursue before this Court a case that is based on an alleged infringement of his right to privacy may be determinative of the application for leave to appeal. I say this because, if it is not permissible for the applicant to pursue a case based on an alleged infringement of the right to privacy, then leave to appeal should be refused because the applicant sought to pursue an appeal only on that ground.

The law

[269] In order to determine whether the applicant is entitled to rely on the alleged infringement of his right to privacy in this matter depends upon whether the applicant's case as set out in the founding affidavit in the High Court included an alleged infringement of his right to privacy. If it did, then the applicant is entitled to pursue the matter on that basis. However, if it did not, then the applicant is not entitled to pursue the matter on the basis of an alleged infringement of his right to privacy. I explain below why this is so.

[270] In our law, when legal proceedings are instituted by way of a notice of motion, the applicant is required to set out his or her case in his or her founding affidavit and the respondent is obliged to set out his or her defence or grounds of opposition in his or her answering affidavit. An applicant is not permitted to make a new case in his or her replying affidavit. The reason why an applicant is required to make out his or her case in the founding affidavit is that that enables the respondent to know what case to meet in preparing his answering affidavit.

[271] If an applicant makes his case in a replying affidavit, that is unfair to the respondent because the respondent is thus deprived of the opportunity to defend her or himself against such a case or to oppose such a case. This is so because, as a general rule, only three sets of affidavits are allowed in motion proceedings. This means that, when the applicant seeks to make a new case in his or her replying affidavit, the respondent does not get a chance to put his or her case in response to the applicant's case as contained in the replying affidavit. If the Court then decides the matter on the basis of the case raised for the first time in the replying affidavit, the respondent's right to a fair hearing as entrenched in section 34 of the Constitution is violated. Denying a party the opportunity to be heard seriously prejudices such party as the case is then decided without his side of the story. Indeed, it is a gross irregularity for any tribunal to do that.

[272] A century ago Krause J said in *Pountas' Trustee*[151]:

> "I think it has been laid down in this Court repeatedly *that an applicant must stand or fall by his petition and the facts alleged therein*, and that, although it is sometimes permissible to supplement the allegations contained in the petition, *still the main foundation of the application is the allegation of facts stated therein because these are the facts which the respondent is called upon to affirm or deny*."[152] (Emphasis added.)

This passage was quoted with approval in *Director of Hospital Services*.[153]

[273] In *Openshaw*[154] Mhlantla AJA, writing for the majority, said:

> "*It is trite law that the applicant in motion proceedings must make out a proper case in the founding papers.* Miller J in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*, puts the matter thus:
>
> > *In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet.*"[155]

[274] In *Betlane*[156] this Court said through Mogoeng J as he then was:

> "*It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time*. It was for this reason that

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[151] *Pountas' Trustee v Lahanas* 1924 WLD 67.

[152] See *Geanotes v Geanotes* 1947 (2) SA 512 (C) at 515.

[153] *Director of Hospital Services* above n 25 at 636.

[154] *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA).

[155] Id at para 29.

[156] *Betlane* above n 28.

> some of the allegations made in the replying affidavit, such as the unlawfulness of the writ of execution, were challenged. The applicant's situation is special, though. He is a lay person who, until recently, did not have the benefit of legal assistance. When he approached this court, he did so on his own. Consequently, his notice of motion and founding affidavit did not properly set out all the relevant issues. It was as a result of the legal advice that was not previously available to him that he became aware of the need to attack frontally the lawfulness of the writ of execution that was issued and executed, while his application for leave to appeal was pending."[157] (Emphasis added.)

In *Betlane* this Court only entertained an issue that had not been set out in the founding affidavit because of exceptional circumstances arising out of the fact that the applicant was a lay litigant who was not legally represented when he prepared his founding affidavit.

[275] There are no exceptional circumstances in the present case nor has the applicant proffered any reason why he did not include in his founding affidavit a complaint that his right to privacy had been infringed. It would be wrong for this Court to entertain a case made for the first time in the replying affidavit. Accordingly, *Betlane* provides no justification for this Court to deviate from the well-established rule of practice that an applicant stands or falls by the case in his or her founding affidavit.

[276] In *Director of Hospital Services*[158] the then Appellate Division of the Supreme Court, now the Supreme Court of Appeal, said:

> "When, as in this case, the proceedings are launched by way of notice of motion, *it is to the founding affidavit which a Judge will look to determine what the complaint is*. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:

[157] *Betlane* above n 28 at para 29.

[158] *Director of Hospital Services* above n 25.

> '. . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.'

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit' (*per* Van Winsen J in *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260.) It follows that the applicant *in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the Bar. I am not losing sight of the fact that, in the absence of an averment in the pleadings or the petition, a point may arise which is fully canvassed in the evidence, but then it must be fully canvassed by both sides in the sense that the Court is expected to pronounce upon it as an issue*."[159] (Emphasis added.)

[277] In *Genesis*[160] this Court quoted the first sentence in the above quotation from *Director of Hospital Services* and then said:

> "Obviously, when you want to establish in motion proceedings what the respondent's case or defence is or was, you look at the respondent's answering affidavit."[161]

[278] In *Bel Porto*[162] Chaskalson CJ, writing for the majority, said:

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[159] Id at 635-6.

[160] *Genesis Medical Aid Scheme v Registrar, Medical Schemes* [2017] ZACC 16; 2017 (6) SA 1 (CC); 2017 (9) BCLR 1164.

[161] Id at para 169.

[162] *Bel Porto School Governing Body v Premier of the Western Cape Province* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) (*Bel Porto*).

> "In [*Prince v President, Law Society, Cape of Good Hope*] it was made clear the parties must make out their case *in their founding papers* and will not ordinarily be allowed to supplement and make their case on appeal."[163]

In relation to proceedings where a party challenged the constitutionality of a provision in a statute, this Court said in *Prince v President, Law Society, Cape of Good Hope*:[164]

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal."[165]

It is now appropriate to turn to the question whether the applicant's case in his founding affidavit in the High Court included an alleged infringement of his right to privacy.

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[163] Id at para 119.

[164] *Prince v President, Law Society, Cape of Good Hope* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

[165] Id at para 22.

Did the applicant's case as set out in his founding affidavit in the High Court include an alleged infringement of his right to privacy?

[279] It seems to me indisputable that it was not the applicant's case in his founding affidavit in the High Court that the respondents' conduct infringed his right to privacy. Nevertheless, I consider it important to go through his founding affidavit to identify what case he sought to make out in his founding affidavit.

[280] It is trite that in motion proceedings an applicant must set out his or her cause of action in the founding affidavit. Where the issue is to establish what an applicant's case or cause of action is, we look at the founding affidavit. We only look at the notice of motion to establish the relief sought for the cause of action set out in the founding affidavit.

Mr Botha's founding affidavit in the High Court

[281] In the present case Mr Botha's founding affidavit in the High Court was made up of 34 paragraphs and annexures. Does Mr Botha make out a case of an alleged infringement of his right to privacy in those paragraphs? The answer is that nowhere in his founding affidavit did Mr Botha attempt to base his application on the infringement of his right to privacy. Instead, in paragraph 6 of his founding affidavit Mr Botha says that the application was brought on truncated time periods as "*the damage caused by the Respondent to my personal and professional reputation is irreparable*". This relates to defamation rather than the infringement of the right to privacy.

[282] In paragraph 14 Mr Botha states that on various occasions he attempted to contact Mr Smuts in order to provide him with the relevant hunting permit and, in the light thereof, "to request him to remove *the defamatory post from the Second Respondents' Facebook page, to no avail*". From this paragraph it is clear that Mr Botha's concern was that the publication was "*defamatory*" material and he wanted it removed. This shows that his case was one of defamation.

[283] In paragraph 15 Mr Botha complained that Mr Smuts and the second respondent "kept the account and the post alive" "clearly having no regard to, *inter alia, the reputational damage he / they have caused*". Mr Botha continued in the same paragraph:

> "In addition to reputational damage caused, the Respondent(s) have caused a security risk by posting photographs of me and my daughter, providing the name and location of my farm and by attaching a Google Search result depicting my home and business address."

The second part of this paragraph does not relate to the right to privacy but it relates to a complaint that the respondents were exposing Mr Botha and his family to possible physical attacks by keeping the account and post alive.

[284] Just above paragraph 17 of his founding affidavit Mr Botha announced very clearly the basis of his case. Mr Botha gave the following heading to paragraphs 17 to 24 of his founding affidavit:

> "THE DEFAMATORY PUBLICATIONS"

I suggest that, through this heading, Mr Botha announced that his case *was based on defamation*. In paragraph 21 Mr Botha stated that some of the replies from the public were "*defamatory and were fuelled by the Respondents' choice to post content suggesting that the practice was 'unethical and barbaric' as the animals were poisoned*". (Emphasis added.)

[285] In paragraph 25 Mr Botha stated that he was advised that, in order to obtain an interim interdict, the following requirements had to be met:

(a) a prima facie right;

(b) a balance of convenience; and

(c) no alternative remedy.

He then says in paragraph 26:

> "I submit that I have a prima facie right. These comments are per se *defamatory and intended to undermine my reputation, status and good name, cause harm to my business and endanger me and my family.*" (Emphasis added.)

In this paragraph Mr Botha made it crystal clear that his case was one of defamation. He made no mention of the right to privacy.

[286] In paragraph 28 Mr Botha went on to also emphasise that the case was about defamation. He said in paragraph 28:

> "*It is submitted that the Respondents' intention is to defame and slander my good name and reputation, further to harm my business and place me and my family in direct danger.*" (Emphasis added.)

In paragraph 29, as if what he had already said in all the above paragraphs to which I have referred was not enough to show that his case was that of defamation, Mr Botha said:

> "The Respondent(s) have turned to social media *with the primary aim to slander my good name, and reputation and defame me.* The comments made on Facebook have been made to cause, and have in fact caused, severe prejudice to me as many of the comments made on the original post call for the boycotting of my insurance broking business and my cattle-farming business." (Emphasis added.)

[287] In paragraph 32 of the founding affidavit, Mr Botha also said:

> "It is my further submission that this matter should be heard as one of urgency. *The publications are thus defamatory and untrue and must be removed, failing which I will suffer irreparable harm and ultimately this will affect my business and potentially the safety of me and my*

> *family*. If the situation continues unabated, there is no telling what the Respondent(s) may publish. Furthermore, the Respondent(s) have been requested to remove the post, to no avail." (Emphasis added.)

[288] In a reply posted by Mr Botha's attorney to Facebook in response to the respondents' publication relating to Mr Botha, Mr Botha's attorney also referred to the published statements being "blatantly false, *defamatory* and made by a clearly uninformed, individual".

Mr Botha's Counsel's certificate of urgency

[289] In the certificate of urgency signed by Mr Botha's Counsel, it was also made clear that Mr Botha's case was one of defamation and no mention was made of any alleged infringement of Mr Botha's right to privacy. Thus, in paragraph 8 of the certificate, it was stated:

> "The Applicant attempted contacting the First Respondent telephonically on 9 October 2019 in order to provide him with the hunting permit and, in light of the permit, *to request him to remove the defamatory post* from the Second Respondent's Facebook page, to no avail." (Emphasis added.)

[290] In paragraph 9 of the certificate Mr Botha's Counsel stated in part:

> "The Respondent(s) have kept the account and the post alive . . . clearly having no regard to, inter alia, the reputational damage caused. In addition to reputational damage caused, the Respondent(s) have caused a security risk by posting photographs of the Applicant and his daughter, providing the name and location of his farm, and by attaching a Google Search result depicting his home and business address."

[291] Just above paragraphs 11-21, the certificate reflects the heading as:

> "THE DEFAMATORY PUBLICATIONS"

In paragraph 15 of the certificate it is stated that the respondents have not responded to any of the replies submitted by the public, the majority of which "are similarly *derogatory* and *defamatory*".

[292] In paragraph 17 of the certificate it is stated that the comments were per se defamatory and intended to undermine the applicant's "reputation, status and good name, cause harm to his business and possibly endanger him and his family". In paragraph 18 of the certificate of urgency Mr Botha's Counsel said:

> "It is submitted that the Respondents' intention is to *defame and slander the Applicant's good name and reputation*. It also has the potential to cause physical harm to the Applicant and his family." (Emphasis added.)

[293] In the light of all the above there can be no doubt that Mr Botha's cause of action in the founding affidavit was defamation and there was simply no cause of action based on an alleged infringement of Mr Botha's right to privacy.

Respondents' opposing affidavit

[294] In his opposing affidavit Mr Smuts pointed out that the comments he made fell within the bounds of his constitutionally-entrenched right to freedom of expression. He also contended that his comments amounted to fair comment based on facts that were true and that related to matters in the public interest. Mr Smuts also stated in paragraph 10.13.1 of the respondents' opposing affidavit that none of the information published by the respondents on the Facebook page was private, much less confidential. He further stated that, except for Mr Botha's picture with his minor daughter, the information that the respondents published was material that was in the public domain as it had been placed there by Mr Botha himself. He then said that his "posting of the photographs and comments on 9 October 2019 [was] on those grounds, lawful".

[295] Mr Botha's reply to that statement appears at paragraph 10.2 and he does not deny that statement. Instead he says:

> "Whilst certain information he chose to reveal in his Facebook post was already in the public domain, the only manner in which he was able to obtain the said information was after he obtained my farm name from Mr Louw and thereafter obtained my personal details and telephone number from a farmer in the area who knows me, Prof Alkers."

[296] In paragraph 10.3 of his replying affidavit Mr Botha said:

> "In any event, that certain of the information was in the public domain does not give the First nor the Second Respondents the authority to publish a defamatory post on Facebook including my personal information that places the safety of me and my family at risk and infringes my constitutional rights."

[297] I wish to highlight the point that, since Mr Botha does not deny that except for his photo with his minor daughter which the respondents withdrew from Facebook within a few hours after it was published, the information that the respondents published concerning Mr Botha was information that was in the public domain, having been placed in the public domain by Mr Botha himself.

[298] The significance of the fact that Mr Botha does not deny this assertion of fact by the respondents is that, even if Mr Botha were entitled to rely on an alleged infringement of his right to privacy, the respondents have put up a valid defence to a claim that by publishing the information they did concerning him, they infringed his right to privacy. This is so because, if you repeat, publicly, information about somebody that is already in the public domain, you cannot be said to infringe his right to privacy. This is why, in relation to this aspect, Mr Botha relies on defamation rather than the right to privacy. He knows that there can be no violation of the right to privacy but that repeating defamatory material that is already in the public domain is no defence to a defamation

claim. Accordingly, even on the merits of the claim of the alleged infringement of the right to privacy, I would still have dismissed Mr Botha's appeal.

[299] In paragraph 62 of his opposing affidavit, Mr Smuts said:

> "As regards the relief sought in paragraphs 2.1.2 thereof, the applicant seeks an order:
>
> 62.1 restraining the respondents from
>
> 62.1.1 making any further social media posts or other publications of any nature whatsoever;
>
> 62.1.2 disclosing any information and / or posts of, including but not limited to, a defamatory nature regarding the applicant / his business / his farm in any manner whatsoever, and
>
> 62.2 directing the respondents to treat all communications associated with this matter [in] confidentiality."

[300] I draw special attention to the reference in the above paragraph to prayer 2.1.2 of the applicant's notice of motion because the first judgment relies on that prayer to make the proposition that by implication the applicant relied on an infringement of his right to privacy.

[301] In paragraph 63 of his opposing affidavit, Mr Smuts responds to prayer 2.1.2 of the notice of motion. In paragraph 63 Mr Smuts says about prayer 2.1.2 of the notice of motion:

> "I say the following in this regard:
>
> 63.1 As I have explained, I have removed the post that I made on 9 October 2019 in its entirety.
>
> 63.2 In any event, *the relief* framed in paragraph 2.1.2 of the notice of motion is overbroad in that:
>
> 63.2.1 First, it extends beyond defamatory matter and confidential information and seeks to interdict me from 'disclosing any information' concerning the applicant.

> I am advised that there is no basis in law for such an order.
>
> 63.2.2. *Second, and in any event, no case is made out for the protection of confidential information.*
>
> 63.2.3 Third, there is no basis for the order sought in the concluding (and altogether vague) part of paragraph 2.1.2 of the Notice of Motion i.e. that I be ordered to treat all communication associated with this matter as confidential." (Emphasis added.)

[302] In the first judgment reliance is placed upon what Mr Smuts said in paragraph 10.1.1 of his opposing affidavit in regard to paragraph 2.1.2 of the notice of motion to suggest that Mr Smuts would not be prejudiced if the Court were to adjudicate the matter on the basis that the respondents' conduct constituted an infringement of Mr Botha's right to privacy because in that paragraph Mr Smuts put up his defence to a case of an alleged infringement of Mr Botha's right to privacy.

[303] In paragraph 10.13.1 Mr Smuts effectively said that none of the information he published concerning the applicant was private, much less confidential. Mr Smuts then said in the next sentence in paragraph 10.13.1:

> "On the contrary, with the exception of the photographs taken by Mr Louw, the published information had previously been placed in the public domain by the applicant himself. This includes the applicant's WhatsApp profile picture which the applicant had himself selected for use on social media and which was, as a result, available to anyone who had the applicant's cellphone number, or who was otherwise in contact with the applicant by cellphone."

[304] Mr Botha responds to paragraph 10.13.1 in paragraph 10 but he does not create a genuine dispute with Mr Smuts' version as set out above that, except for the photographs taken by Mr Louw, all the information that the respondents published about Mr Botha had previously been placed in the public domain by Mr Botha himself. If he

does create a genuine dispute of fact, then the matter had to be decided on Mr Smuts' version as the applicant did not request that the matter be referred to oral evidence.

[305] Reliance on prayer 2.1.2 of the notice of motion to suggest that Mr Botha impliedly relied on an alleged infringement of his right to privacy falls to be rejected because a notice of motion is not a founding affidavit. In any event, in paragraph 63.2.2 of his opposing affidavit Mr Smuts took the point in relation to paragraph 2.1.2 of the notice of motion that, "*in any event, no case is made out for the protection of confidential information*". This point taken by Mr Smuts must be upheld because indeed, no case was made out in the founding affidavit for the protection of confidential information.

Mr Botha's replying affidavit

[306] Quite early in his replying affidavit Mr Botha made it clear in paragraph 6.1 that in bringing his application, he sought "to interdict the First and Second Respondents from defaming [him] and linking [him] personally to the photographs taken by Mr Louw". This was Mr Botha's purpose in bringing the application in the High Court. Therefore, his case was based on defamation. In paragraph 8.3 of his replying affidavit Mr Botha says "neither the First nor Second Respondent have (*sic*) any authority to publish a defamatory post on Facebook that places the safety of me and my family at risk nor would same be the appropriate action to take". In paragraph 10.3 of his replying affidavit Mr Botha says:

> "In any event, that certain of the information was in the public domain does not give the First nor Second Respondents the authority to publish a defamatory post on Facebook including my personal information that places the safety of me and my family at risk and infringes my constitutional rights."

[307] In any event, as will be shown below, it seems to me that Mr Botha never saw his case in the High Court papers as based on an infringement of his right to privacy. He saw his case throughout as one of defamation.

[308] Before I refer to what Mr Botha says in paragraph 11.4 of his replying affidavit, for context I need to repeat what the respondents said in paragraph 10.13.7. In responding to the applicant's case as set out in the founding affidavit in the High Court, the first respondent said in paragraph 10.13.7:

> "As regards the comments that I posted – relating to animal cruelty and damage to biodiversity – I aver that:
>
> 10.13.7.1 I was entitled to post these in the exercise of my constitutionally-guaranteed right to freedom of expression (section 16 of the Constitution).
>
> 10.13.7.2 In any event, my comments amounted to fair comment based on the facts that are true and that relate to matters of public interest.
>
> 10.13.7.3 My posting of the photographs and commentary was, on these grounds, lawful."

[309] In response to paragraph 10.13.7 of the respondents' answering affidavit, the applicant did no more than mention his right to privacy. He said in paragraph 11.4 of his replying affidavit:

> "I respectfully submit that the First Respondent's right to freedom of expression cannot outweigh our right to privacy nor our right to not be placed in potential physical and / or economic harm."

This is the only part of the applicant's replying affidavit in which the applicant mentions the right to privacy.

[310] I draw attention to the fact that in paragraph 11.4 what the applicant did was that he was responding to paragraph 10.13.7 of the respondents' opposing affidavit and simply said that the constitutionally-guaranteed rights on which the respondents relied could not "outweigh" his and his family's right to privacy. The applicant could only say this if he had relied on the infringement of his right to privacy in his founding

affidavit but the truth of the matter is that he had not relied upon such a right in the founding affidavit.

[311] In my view, the applicant cannot, on the basis of paragraph 11.4 of his replying affidavit, be said to have asserted an infringement of his right to privacy. On this basis alone, this application should be dismissed. However, even if it can be said that in paragraph 11.4 the applicant did allege an infringement of his right to privacy, the question has arisen whether he is entitled to seek leave to appeal on the basis of a case which he did not include in his founding affidavit but raised for the first time in his replying affidavit. That is the issue with which I deal below.

[312] There is also a suggestion made in the first judgment that prayer 2.1.2 of the notice of motion implied an infringement of his right to privacy. Prayer 2.1.2 of the notice of motion reads:

> "[T]hat the Respondents be ordered to refrain from making any further social media posts, or other publications of any nature whatsoever, including both verbal and written, *disclosing any information and/or confidential information and/or posts of, including but not limited to, a defamatory nature regarding the Applicant / his business / his farm in any manner whatsoever and treat all communication associated with this matter as confidential*." (Emphasis added.)

[313] Firstly, the reliance on a notice of motion to determine what an applicant's cause of action is, is completely misplaced because an applicant does not disclose his or her cause of action or case in the notice of motion. He or she must state his or her case in the founding affidavit and then state in the notice of motion what relief he or she seeks in relation to the cause of action or case made out in the founding affidavit.

[314] Any suggestion that an applicant who does not make out his or her case in his or her founding affidavit may do so in the notice of motion is, in my view, foreign to our law. I know of no rule which says that an applicant's cause of action may be set out in

his or her notice of motion. It is the relief that an applicant is required to set out in his or her notice of motion and such relief must be based on a cause of action to be found in the applicant's founding affidavit. This Court, as the apex Court, should not create such a precedent. This Court should uphold a well-established rule of practice that an applicant must stand or fall by the case in his or her founding affidavit.

[315] Recently, in *Regenesys*[166] this Court had to correct inaccurate statements of law in two of its previous judgments. This Court should be careful not to unnecessarily and unjustifiably deviate from a well-established approach and precedent which may lead to it having to correct itself again in the future. There is no justification for this Court to bend over backwards to accommodate Mr Botha in respect of a case he never included in his founding affidavit but mentioned for the first time in his replying affidavit. Furthermore, Mr Botha has not offered any explanation as to why he did not include his complaint about an alleged infringement of his right to privacy in his founding affidavit in the High Court.

[316] There is also a suggestion in the first judgment that Mr Botha made out his case of an alleged infringement of his right to privacy in the replying affidavit. This suggestion is erroneous once it is accepted that Mr Botha did not base his case in his founding affidavit on an alleged infringement of his right to privacy, because an applicant has no right to make his case in his replying affidavit. When an applicant seeks to make his case in reply, there is no obligation on the part of an innocent respondent to bring an application to strike out. A respondent is entitled to stand on the rule of practice that an applicant may not make out his case in reply. A respondent in such a case – being an innocent party – cannot be penalised to accommodate a party that is in breach of this well-known rule of practice, particularly where the applicant has proffered no explanation as to why he or she did not state his or her entire case in the founding affidavit and who has not sought any indulgence from the Court for acting in breach of this well-established rule of practice.

[166] *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga* [2024] ZACC 8; 2024 (7) BCLR 901 (CC); (2024) 45 ILJ 1723 (CC).

[317] The first judgment relies on the use of words such as "confidential" to suggest that Mr Botha meant that the publication of the information infringed his right to privacy. Confidentiality does not necessarily relate to the right to privacy. Information may be confidential without having anything to do with the right to privacy and Mr Botha did not say anything to the effect that the confidentiality to which he was referring was based on the right to privacy.

[318] The first judgment confuses the rule of practice that in motion proceedings parties stand or fall by their papers which is discussed in the cases referred to above with the rule that, subject to certain exceptions, a party may not raise a point of law in argument that was not foreshadowed in the papers. The first mentioned rule of practice is discussed in cases such as the ones to which I have referred above whereas the second mentioned rule is discussed in cases such as *Barkhuizen*[167] and *Bel Porto*.[168] These are two different rules but the first judgment proceeds as if it is one and the same rule. Accordingly, the first judgment's reliance on *Barkhuizen* and *Bel Porto* is misplaced.

[319] The first judgment also relies on *Smith*[169] but that reliance is also misplaced because *Smith* did not deal with the question of whether, where an applicant does not rely on a certain cause of action in his or her founding affidavit but includes that cause of action in the replying affidavit, the court may adjudicate the case on the basis of the cause of action that is not in the founding affidavit but is in the replying affidavit. *Smith* was about ratification. In *Smith* a Mr Watson instituted proceedings against a Mr Smith.

[320] In instituting those proceedings Mr Watson alleged in his founding affidavit that he was duly authorised to act on behalf of the town council of Kwanonqubela.[170] In other words, Mr Watson's case as set out in the founding affidavit included that he was

[167] *Barkhuizen* above n 26.

[168] *Bel Porto* above n 162.

[169] *Smith* above n 33.

[170] See para 5 of Harms JA's judgment.

acting as an agent of the town council. He was not acting on his own behalf or in his own interest. However, Mr Watson did not prove his authority at that stage by annexing a resolution of the town council to his founding affidavit. In his answering affidavit Mr Smith, as the respondent, challenged Mr Watson's authority to institute those proceedings on behalf of the town council.

[321] When Mr Watson filed his replying affidavit, he attached a resolution of the town council ratifying his conduct in instituting the proceedings. *Smith* was not a case of an applicant seeking to make a case in a replying affidavit which he did not make in his founding affidavit. He had alleged in his founding affidavit that he had authority but Mr Smith wanted proof of that authority. Mr Watson then supplied in his replying affidavit a resolution ratifying his decision to institute the proceedings. In law ratification has the effect that the person was authorised from the beginning even though that authorisation is given after the fact. This is so because ratification is authorisation with retrospective effect.

[322] The first judgment relies upon Harms JA's statement in paragraph 15 of his judgment in *Smith* that the rule against new matter in reply is not absolute and should be applied with a fair measure of common sense to justify its proposition that this case may be adjudicated on the basis of a cause of action contained in a replying affidavit but not in a founding affidavit. In my view, in *Smith* Harms JA was not referring to a case where an applicant includes in the replying affidavit a cause of action that was not included in the founding affidavit. He was referring to a case where an applicant included a new matter in a replying affidavit that supports a cause of action that is in the founding affidavit but which should have been included in the founding affidavit but was not. In my view a reading of the passage in *Juta*[171] to which Harms JA refers in paragraph 15 supports this interpretation.

[171] *Juta & Co Ltd* above n 36.

[323] The second judgment refers to the publication of the Facebook post of Mr Botha which elicited threats to his security and that of his family at their family home and a threat of commercial harm to his insurance and farming businesses through a possible boycott campaign. The second judgment then states that, although these threats were relied upon in the founding affidavit, they were not pertinently pleaded as violation of Mr Botha's right to privacy. The second judgment then says: "[h]owever, the facts relevant to these threats were fully canvassed in the papers". As I understand the second judgment, it seeks to justify allowing the adjudication of the case on the basis of the right to privacy that was only raised for the first time in the replying affidavit on the basis that "the facts relevant to these threats were fully canvassed in [the applicant's] papers".

[324] I am unable to agree with the second judgment that, if the facts relating to the threats were set out in the founding affidavit to pursue case A, for example an interdict against the threats of physical harm, the applicant could in his replying affidavit change his cause of action and seek to rely on an alleged infringement of his right to privacy. It is not enough for an applicant in motion proceedings to set out in his founding affidavit only the facts, without stating which of his right or rights has or have been infringed, on the basis that he will let the respondent file his or her answering affidavit, without knowing what conclusions he asks the Court to draw on those facts and he then comes up with those conclusions in his replying affidavit when the respondent has no opportunity to respond. That is an unacceptable way of pleading. An applicant must make out his or her case fully in the founding affidavit, including disclosing the conclusions of fact and of law that he or she will be asking the Court to make in order to grant the relief he or she seeks.

[325] A good example would be this: A sues B for damages arising out of certain statements made by B to and about A in the presence of other people. One could rely on the fact that those statements that were made constituted an insult and claim damages for insult. On the same facts, A can sue B for defamation. This cannot be allowed because certain defences may be raised against defamation but not against a claim based

on insult and certain defences that are available against an action for defamation are not available in a claim based on insult. As a result of this, if in the founding affidavit or the particulars of claim, it is clear that the claim is based on insult, the respondent or defendant will raise in his or her answering affidavit or plea a defence that is available against a claim based on insult and will not raise a defence relating to defamation. If, therefore, the plaintiff or applicant is later allowed to pursue a case of defamation on the same papers or pleadings as they originally were, the respondent or defendant will not have been given an opportunity to answer the defamation case. That will be a violation of section 34 of the Constitution. The second judgment allows this to happen.

[326] An applicant who seeks to draw certain legal conclusions from facts set out in his founding affidavit must draw those conclusions in the founding affidavit so that the respondent can deal with them in the answering affidavit and, where appropriate, deny that such conclusions can be drawn from those facts or so that the respondent may place before the court other evidence which may show such conclusions to be unjustified. An applicant cannot set out facts in his founding affidavit and not say that, based on those facts, his right to privacy was infringed but, once the respondents have filed their answering affidavit, say in his replying affidavit: "By the way, those facts I set out in my founding affidavit mean that my right to privacy was infringed." The second judgment's approach amounts to saying that this would be permissible. I say that it is not permissible. An applicant must put his full case in the founding affidavit, including what rights he contends have been infringed.

[327] In *Genesis*[172] this Court approved a passage from *Minister of Land Affairs and Agriculture*[173] which provides, in my view, an analogy to this situation. In that passage the Supreme Court of Appeal correctly said:

> ". . . [T]he case argued before this court was not properly made out in answering affidavits deposed to by Andreas. The case that was made

[172] *Genesis* above n 160 at para 171.

[173] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* [2007] ZASCA 153; 2008 (2) SA 184 (SCA).

> out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. *It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted*." (Emphasis added.)

[328] This passage says that a party cannot attach an annexure to an affidavit without saying in the affidavit what point he or she seeks to make with that annexure. In the same vein, a party cannot just set out facts in the founding affidavit without saying which of his rights has been infringed. Obviously, an applicant cannot set out facts in the founding affidavit and say a certain of his right was infringed and then come later in the replying affidavit and say on the basis of those facts a completely different right was infringed.

[329] The second judgment states that the respondents will not be prejudiced if the Court dealt with the matter on the basis that Mr Botha's case was one of an infringement of the right to privacy even though in the founding affidavit Mr Botha may have referred only to threats of physical harm to him and his family. The second judgment says in effect that it is difficult to think what the respondents would have said in their answering affidavit if Mr Botha had stated in his founding affidavit that the threats violated his right to privacy. What the second judgment means in this regard is that the respondents would not have had anything to say in their defence in response to such a claim and that, therefore, that justifies the adjudication of the case on the basis of a cause of action

that Mr Botha did not include in his founding affidavit but only included in his replying affidavit. Indeed, the second judgment says that there will be no prejudice to the respondents. I do not agree. The respondents are prejudiced because the dispute gets adjudicated on the basis of a cause of action in respect of which they have not been heard as they are entitled to in terms of section 34 of the Constitution.

[330] In any event the second judgment effectively relies on the so-called *no difference* rule which was abolished in this country even before the advent of democracy. The *no difference* rule refers to a situation where a functionary who is obliged to comply with the *audi alteram partem* rule before making a decision that may adversely affect someone else decides to make that decision without giving such person an opportunity to be heard because he (i.e. the decision maker) believes that there is nothing that the person concerned may say which would make a difference in terms of the decision that should be taken. The second judgment effectively says the respondent would have had no answer to the privacy claim even if they had been afforded an opportunity to deal with a case based on an infringement of the right to privacy.

[331] In *Zenzile*[174] the Appellate Division said:

> "It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade *Administrative Law* 6 ed puts the matter thus at 533-4:
>
> > 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'

[174] *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A); (1991) 12 ILJ 259 (A).

> The learned author goes on to cite the well-known dictum of Megarry J in *John v Rees* 1970 Ch 345 at 402:
>
> > 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'"[175]

See also the Labour Appeal Court's judgments in *Karras*[176] and *JDG Trading*.[177]

[332] Therefore, when the respondents complain that this matter should not be adjudicated on the basis of the alleged infringement of Mr Botha's right to privacy because they were not given an opportunity to be heard by way of dealing with that claim on affidavit, it is no answer for the second judgment to say to them: I think you are not prejudiced because I do not think that, if you were given an opportunity to file an affidavit to deal with the alleged infringement of the right to privacy, you would have said anything that would have made a difference in the outcome!

[333] In the light of all the above, there is no justification not to enforce in this case the approach of our courts – which has been in existence for well over a century – that in motion proceedings an applicant must make out his or her case in his or her founding affidavit and may not seek to make a new case in the replying affidavit. There is no justification on the papers or in law for not holding the applicant to the case he sought to make out in his founding affidavit. The applicant must suffer the same consequences that every applicant suffers when they seek to make out their case in a replying affidavit and thus deny the respondents the opportunity to refute such a case by way of affidavits.

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[175] Id at 273.

[176] *Karras t/a Floraline v SA Scooter and Transport Allied Workers Union* (2000) 21 ILJ 2612 (LAC) at para 34.

[177] *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* (2000) 21 ILJ 501 (LAC) at para 59.

Conclusion

[334] In my view, the conclusion that the alleged infringement of Mr Botha's right to privacy was not part of his case as set out in his founding affidavit in the High Court is inescapable. For that reason, the applicant was not entitled to pursue that case before the Supreme Court of Appeal nor is he entitled to pursue that case before us. As the alleged infringement of his right to privacy was the only issue that Mr Botha wanted to pursue on appeal in this Court if leave to appeal was granted, the applicant has no prospects of success on appeal. In the circumstances there are no other facts or factors which render it in the public interest to grant the applicant leave to appeal. In the circumstances, leave to appeal should be refused with costs.

[335] I would, accordingly, refuse leave to appeal with costs.

For the Applicant:	M du Plessis SC and T Palmer instructed by Lawrence Masiza Vorster Incorporated
For the First and Second Respondents:	M Blumberg SC and M Adhikari instructed by BDLS Attorneys
For the Amicus Curiae:	C Steinberg SC instructed by Webber Wentzel