

## PRIVACY, FACEBOOK AND YOUR INFO IN THE PUBLIC DOMAIN

### Smuts and Another v Botha (887/2020) [2022] ZASCA 3 (10 January 2022)

When taking part in a cycling event that traversed some farms, a cyclist took photos of a porcupine and baboon that had apparently died because they were left in cages without water. An animal activist became involved and posted the pictures on Facebook, together with details of the owner and the farm location. Unsurprisingly this caused an outcry and the farm owner approached the courts for protection of his rights to privacy, arguing that it was unnecessary to identify him in person. The matter ended in the Supreme Court of Appeal which confirmed that, on the specific facts of this matter, the right to freedom of expression and the public interest would trump the farmer's rights. It was relevant that the farmer's information that appeared in the post was in fact already in the public domain. The judgment explains how our law deals with claims that result from the tension between the right to privacy and the right to freedom of expression.

The Judgment can be viewed [here](#).

### FACTS

In September 2019, in the early hours of the morning, a group of cyclists were participating in an adventure ride organised by Quantum Adventure. During the ride, they traversed the farm Varsfontein belonging to Botha.

Louw, one of the cyclists, noticed two cages on the farm, one containing a dead baboon, the other a dead porcupine. According to his observations, the cages were positioned where there was no shade and water. There were some oranges near the baboon. He formed the view that the animals had died as a result of dehydration whilst trapped in the cages. Incensed by what he saw, he took photographs and sent them to Smuts, a wildlife conservationist, activist and leader in efforts to promote the conservation of indigenous wildlife in South Africa. Smuts is also the founder and executive director of Landmark Leopard and Predator Project–South Africa (Landmark Leopard).

Upon receipt of the photographs, Smuts contacted Botha via WhatsApp who confirmed that he had a valid permit to hunt, capture and/or kill the baboons, porcupines and other vermin.

In October 2019, Smuts posted, on Landmark Leopard's Facebook pages, pictures of the dead baboon and porcupine trapped on Botha's farm. On his Facebook page, Mr Smuts also included a picture of Botha holding his six-month old daughter. Additionally, he posted a Google Search Location of Botha's business, his home address and his telephone numbers. A WhatsApp conversation between Smuts and Botha was also posted. In that post, Botha was asked by Smuts if he had a permit to trap animals to which he responded in the affirmative. Smuts captioned the post with the following commentary:

*'While we spend our efforts trying to promote ecologically acceptable practices on livestock farms to promote ecological integrity and regeneration, we are inundated by reports of contrarian practices that are unethical, barbaric and utterly ruinous to biodiversity. These images are from a farm near Alicedale in the Eastern Cape owned by Mr Herman Botha of Port Elizabeth, who is involved in the insurance industry. The farm is Varsfontein. This is utterly vile. It is ecologically ruinous. Mr Botha claims to have permits to do this – see the Whatsapp conversation with him attached. The images show a trap to capture baboons (they climb through the drum to get access to the oranges – often poisoned – and then cannot get out). See the porcupine in traps too. Utterly unethical, cruel and barbaric.'*

Unsurprisingly, the post generated many comments on Facebook, mostly critical of Botha and the particular practice of trapping animals. People who viewed the post in turn posted slanderous and insulting comments about Botha and

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his practice.

Botha then successfully instituted an urgent application in the Port Elizabeth High Court (the High Court) for an interim interdict prohibiting Smuts and Landmark Leopard from publishing defamatory statements about him. Smuts was ordered to remove the photographs of Botha and certain portions of the Facebook post that made reference to Botha, his business, its location and the name of the farm. Smuts and Landmark Leopard were also prohibited from making further posts making reference to Botha, his family and his business. The photograph of Botha and his daughter was removed by Mr Smuts before the interim order was granted.

On the return date, the interim order was confirmed. The High Court held that although Smuts and Landmark Leopard were entitled to publish the photographs and to comment on them, they were not entitled to publish the fact that the photographs were taken on a farm belonging to Botha. The High Court reasoned that:

- the name of the farm and Botha's identity, as owner of it, constituted personal information protected by his right to privacy;
- Botha had established a clear right to an interdict, and his right to privacy was infringed by the publication of his personal information on Facebook;
- the public interest lay in the topic and not in Botha's personal information; and
- as a result, that Smuts and Landmark Leopard had acted unlawfully in linking Botha to the practice of animal trapping.

This matter deals with the appeal against that ruling.

#### **Question before the Court:**

Does the publication of Botha's personal information (such as his identity and his business and home address) enjoy the protection of the right to privacy? This involves the following, in addition: (i) Is it in the public interest that the personal information of Botha be published?; (ii) Could Smuts inform the public about the activities on Botha's farm without disclosing his personal information? In other words, was it in the public interest to know the exact location of Botha's farm?; (iii) Was the High Court correct in placing emphasis on Botha's personal information despite the fact that this was already in the public domain?

Smuts, in his defence, stated that his intention in publishing the post was not to defame or otherwise harm Mr Botha but rather, to publicise or 'out' his animal trapping practices so as to stimulate the debate on this thorny and controversial issue. Smuts contended that the comments made on his Facebook post constitute protected or fair comment which sought to expose the use of animal traps which, in the opinion of Smuts, are cruel, barbaric, vile and utterly ruinous to biodiversity. Smuts stated that even if his views were extreme or prejudicial, the opinion he holds is one which a fair person might honestly hold.

Botha contended that Smuts' Facebook post infringed on his right to privacy as it disclosed his identity, family, home address and his business address. He further contended that the Facebook post was inflammatory to the extent that it made reference to practices that are unethical, barbaric and utterly ruinous to biodiversity. According to Botha, these comments were intended to undermine his reputation, status, good name, cause harm to his business and endanger his family.

#### **HELD**

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- The issue relates to the tension between the right to privacy and the right to freedom of expression. The answer calls for a delicate balance to be drawn between these two important, competing rights.
- The right to privacy is a fundamental right that is protected under the Constitution. It is a right of a person to be free from intrusion or publicity of information or matters of a personal nature.
- The scope of a person's privacy extends 'to those aspects in regard to which a legitimate expectation of privacy can be harboured'. The right to privacy is most powerfully engaged where the inner sanctum of a person's life is protected from intrusion. But as a person moves into the world of communal, business and social interaction, the scope for the exercise of the right diminishes.
- The right to privacy is not sacrosanct and must be balanced with the rights of other citizens, including the right to freedom of expression. The 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. This includes activists like Smuts who have views to advance that are relevant to public debate about the treatment of animals. It is in the public interest that divergent views be aired in public and subjected to scrutiny and debate.
- The question is then as follows: Can it be said that Botha's (subjective) expectation of privacy is such that society recognizes his expectation as being (objectively) reasonable? The answer is no.
- Violations of privacy are fact specific. The right to privacy must be approached from a people-centered perspective. It is abundantly clear that society cannot countenance the use of traps that expose the animals to cruelty and vile treatment. Doubtless, Botha considered that there were particulars of the posts that offended his expectation of privacy; but society will not agree that his expectation is objectively reasonable.
- In addition, it could not be said that the posts reference the truly personal realm of Mr Botha's life where he could reasonably expect to rely on his rights to privacy. This is because, in this case, the identity of Botha and his farm are matters that he permitted to be placed in the public domain. So too are his practices of animal trapping; he openly admitted his use of animal traps. No effort was made by him to keep this information or his activities private. His discomfort that these practices formed the subject of Smuts' critical posts did not render the information he had made public, now private.
- The High Court accepted that the use of animal traps is a matter of public interest and that voices of activists like Smuts must be heard and engaged but nonetheless, concluded that there was no compelling public interest in the disclosure of Mr Botha's personal information. This was incorrect: the public is entitled to receive information and publicising the truth about Mr Botha's animal trapping activities, to which the public have access and interest, did not trump Botha's right of privacy.

### ***Less invasive posts on facebook and other platforms?***

- It cannot be denied that the public has a right to be informed about the animal practices at Botha's farm. But Botha argued that Smuts could have used more restrictive means when publicizing Botha's animal trapping activities and that it was not necessary to share his personal information. The argument had to fail, because Smuts' right to freedom of expression was, in this matter, extensive and the public interest outweighs Botha's rights to privacy of the personal information. Botha had himself publicized such information in the public domain. In this case, the identity of Botha and his farm are in the public domain. So too are his practices of animal trapping; he openly admitted to the use of animal trappings. As a commercial farmer dealing with animal trappings, Botha had put all his personal information in the public domain. No effort had been made by him to keep this information or activities private.

- It would serve no useful purpose in publishing the photographs without stating where they were taken, by whom the traps were used and naming the farm and identifying its owner. The use of animal traps in the course of commercial farming operation is conducted in public and thus falls outside the realm of protected privacy. In any event, Botha made use of animal traps openly where hunters and cyclists had access. It cannot therefore be contended that it was unlawful for Smuts to publicise the fact that the photographs were taken on a farm belonging to Botha.
- In any event, the information published by Smuts could easily be found in the Deeds Office as well as on Google. Botha's personal information was in the public domain before Smuts published the posts: His ownership of the farm Varsfontein was a matter of public record in the Deeds Registry, his name and occupation as an insurance broker, along with his Port Elizabeth address had been published on the internet by Botha himself thus, his right to privacy was not infringed. Essentially what Smuts did was to give further publicity to information about Botha that was already in the public domain.

## CONCLUSION

There was thus no basis for the interdict against Smuts. The appeal succeeded.