CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 69/05
[2007] ZACC 6

NM	First Applicant
SM	Second Applicant
LH	Third Applicant
versus	
CHARLENE SMITH	First Respondent
PATRICIA DE LILLE	Second Respondent
NEW AFRICA BOOKS (PTY) LTD	Third Respondent
together with	
THE FREEDOM OF EXPRESSION INSTITUTE	Amicus Curiae

Heard on : 9 May 2006

Decided on : 4 April 2007

JUDGMENT

MADALA J:

Introduction

[1] In March 2002 a biography of Ms Patricia de Lille entitled "*Patricia de Lille*" and authored by Ms Charlene Smith was published by New Africa Books (Pty) Ltd.

The names of three women who are HIV positive were disclosed. They alleged that their names had been published in the book without their prior consent having been obtained. The three women claimed that their rights to privacy, dignity and psychological integrity had been violated. A sequel to that publication was an action for damages in the Johannesburg High Court. The High Court dismissed with costs the action against Ms Smith and Ms de Lille.[1]

[2] This is an application for leave to appeal against the judgment and order of Schwartzman J in the High Court which was handed down on 13 May 2005 and an amended costs order handed down on 19 May 2005. The High Court made the following order:

> "1. The Plaintiffs claims against the First and Second Defendant are dismissed with costs;
> 2. The Third Defendant is ordered to pay each of the Plaintiffs an amount of R15 000;
> 3.1 The Third Defendant is, at its cost, directed to delete, from all copies of the book *"Patricia de Lille"* in its possession, the reference at page 170 and 171 to the Plaintiffs names;
> 3.2 Until such deletion is made, the Third Defendant shall not sell any further copies of the book;
> 3.3 To ensure that this part of the court's order has been carried out, the Plaintiffs attorney shall, at any time after 30 June 2005, have the right on 72 hours notice to inspect all copies of the book in the Third Defendant's possession;
> 4. The Third Defendant is to pay the Plaintiffs costs;
> 5. The court file is to be handed to the Registrar of this court, who shall keep it in a safe place and who shall not, without an order from a Judge in Chambers, disclose any part of its content that discloses the name, identity or HIV status of the Plaintiffs."

[1] The matter is reported as *NM and Others v Smith and Others* [2005] 3 All SA 457 (W).

[3] The three women did not seek to appeal against that part of the judgment in terms of which the third respondent was found liable to compensate the applicants for damages suffered by them from the end of April 2002[2] to the date of judgment. Nor did they seek leave to appeal against that portion of the order that the respondents remove the names of the applicants from all unsold copies of the book.

Parties

[4] The first to third applicants are NM, SM and LH respectively. They are unemployed, adult women who live in informal settlements in and around Atteridgeville, Pretoria. Their identities are undisclosed as they are HIV positive and wish to prevent further publication of their identities and HIV status.

[5] The first respondent is Charlene Smith, a journalist and author of the authorised biography of the second respondent. The second respondent, Patricia de Lille, is a Member of Parliament. The third respondent is the publisher of the book.

[6] In time, the Freedom of Expression Institute (FXI) sought to join the fray and applied to be admitted as an amicus curiae. This Court granted the application. We are indebted to counsel for the FXI for well-prepared submissions and argument.

Factual background

[2] The relevance of this date will become apparent later in the judgment.

[7] In August 1999, Dr Marietta Botes, head of the Immunology Clinic in the Medical Faculty of the University of Pretoria (the University), recruited volunteers to participate in clinical trials, known as the FTC 302 trials, directed at determining the efficiency of a combination of drugs that could decrease a patient's HIV level. The volunteers, including the applicants, were required to sign a consent form indicating that they had been informed of the nature, benefits, side effects and the risks of the clinical trials. The trials were conducted at the Kalafong Hospital, Pretoria and ended in 2001.

[8] Soon after the start of the clinical trials, concerns were raised by the participants, including the applicants, regarding illnesses and fatalities on the trials. The gravity of the complaints was noted. On 5 April 2000, the Minister of Health made a statement to Parliament regarding the effects of the drugs and called for a report from the Medicines Control Council, which found that a causal association between the drugs and the deaths was probable. As a consequence the Medicines Control Council halted any further recruitment of study projects while full reports were being compiled on all the serious adverse effects, including the deaths.

[9] Some of the volunteers, in particular the applicants, complained specifically to Father Johan Viljoen, a former priest employed at the centre attached to the Kalafong Hospital while at a support group meeting for people with HIV/AIDS. Father Viljoen was concerned about the fact that so many of the volunteers were getting sick as a result of taking the drugs. He approached the second respondent for assistance with a

complaint in March/April 2000. The second respondent was a Member of Parliament known for her stand in relation to the rights of people living with HIV/AIDS. The second respondent flew from Cape Town to meet with the applicants and to see whether a solution could not be found regarding the complaints raised by them.

[10] On 28 March 2000, the second respondent met with members of the support group. The participants complained that, amongst others, the consent form was never properly explained to them and that Dr Botes was unsympathetic to complaints about the side effects of the drugs, which she attributed to the disease and not to the drugs themselves.

[11] The second respondent and Father Viljoen investigated the complaints and took statements from, among others, the three applicants. A meeting with the Ethics Committee took place on 10 April 2000 in a lecture hall at the Pretoria Academic Hospital. Present at the meeting were Professor Falkson (head of the University Ethics Committee), members of the Ethics Committee, Dr Botes, the second respondent, Miss Vivienne Vermaak (a freelance journalist), other journalists and the South African Broadcasting Corporation. Even though there are disputes of fact regarding these meetings nothing turns on them.

[12] Another meeting took place on 27 April 2000 in a small house in Atteridgeville Pretoria, which the second respondent also attended as well as 10 members of the

support group. Statements were taken by Father Viljoen in English at that meeting. The first and second applicants admitted signing these statements.

[13] On 3 May 2000 the second respondent sent copies of these statements to the Ethics Committee. On 4 May 2000 copies of the statements were also sent to the South African Human Rights Commission. As a result of that the Pretoria Academic Hospital decided to set up an internal investigation to look into the complaints. Dr Freislich was appointed to conduct the investigation. His report was submitted to the Ethics Committee and to Professor Grove (the Registrar of the University) during July 2000. This report, according to the applicants, was sent to the second respondent on 12 October 2000.[3] The second respondent read the report and was aware of the applicants' complaints included and expressed in the report. This report was allegedly filed with other AIDS-related documents in her AIDS file.

[14] During August 2000 the University requested another external enquiry into the matter to complement the report of Dr Freislich. It appointed Professor SA Strauss to enquire into the allegations made in the statements. The second respondent was not invited to this enquiry, but the applicants and a number of other trialists were present. At the enquiry, the three applicants repudiated their statements made at the meeting in Atteridgeville on 27 April 2000 as incorrect. In his report, delivered on 30 May 2001, Professor Strauss exonerated the University and the Medical Faculty, stipulating there was no substance in the statements and no evidence of any improper conduct on the

[3] From the High Court judgment it is clear that Professor Grove undertook to keep the second respondent informed.

part of Dr Botes. Professor Grove also sent the Strauss Report to the second respondent, but without the annexures attached.[4] The second respondent read the report and filed it with other AIDS related documents, and did nothing further regarding the matter. A copy of the report was also sent to Ms Vermaak, the journalist present at the meeting held at the University. A Martin Welz, also a journalist and editor of "Noseweek", obtained a copy.

[15] In the period September to November 2001 Ms Charlene Smith (the first respondent) was commissioned by the publisher to write a biography of Ms de Lille. The book was to include a chapter on Ms de Lille's work in campaigning for the rights of those living with HIV/AIDS. During the trial, Ms Smith stated that although she had the Strauss Report, she did not have the annexures to it which contained the terms of the consent forms signed by the applicants. The consent forms did not permit full public disclosure of the identity of the three applicants and the fact that they are living with HIV/AIDS, but only permitted limited disclosure for the purposes of the University's investigation. She stated that there was nothing in the report nor in the covering letter sent to Ms de Lille that suggested the report was confidential and pointed to the fact that the report had been circulated to two journalists. She confirmed in evidence that she knew that the annexures contained the terms of the consents of the three applicants. She also acknowledged that she knew that media ethics would require her ordinarily not to disclose a person's HIV/AIDS status

[4] According to para 24.3 of the High Court judgment the Strauss Report identifies 49 exhibits. Eight of the exhibits are the consents furnished to Dr Strauss, seven exhibits set out the terms of the informed consents, another eight contained copies of statements that the second respondent sent to the Ethics Committee.

without his/her consent. She also stated that she had tried to obtain the annexures to the report from Professor Grove, but that he did not return her calls and she gave up trying to obtain the annexures. She also stated that though she originally made attempts to meet the three women, she did not succeed in these attempts either.

[16] As stated before, the book was published in March 2002. The second respondent confirmed in evidence that the book is truly an authorised biography of herself. Some 5000 copies of the book were printed. The book was distributed to various bookshops during March 2002. Dr Botes bought a copy and after having read the relevant chapters, informed the applicants that their names and HIV status had been disclosed. The applicants denied consenting to the publication of their names and HIV status in the book.

[17] The applicants were then referred to the University of Pretoria Law Clinic to obtain advice as to what they should do. On the advice from the Law Clinic, they sought to interdict publication of the book in the Pretoria High Court. The respondents opposed the application. The application was ultimately withdrawn, and the respondents did not press for a costs order.

[18] On 26 July 2002, the applicants sent a letter to the respondents' attorneys requesting the removal of their names from the book. The first and the second respondents replied to the letter stipulating that they did not regard themselves

accountable to the applicants and if action was to be taken against them, it would be defended.[5] The third respondent did not reply to the applicants' request.

[19] Approximately six months after the application for the interdict, the applicants sued the respondents for damages. They claimed: (a) a private apology from the respondents; (b) the removal or excision of their names from all unsold copies of the book; (c) payment by the respondents of the sum of R200 000 to each of the applicants, and (d) costs of suit. A pre-trial conference was held on 4 February 2005, but it appears that nothing was resolved there. The trial commenced before the High Court. The applicants applied for and obtained an order to prevent the disclosure of their identities. Judgment was given on 13 May 2005.[6] The applicants appealed to the High Court for leave to appeal to the Supreme Court of Appeal.

[20] On 22 August 2005, the High Court refused leave to appeal to the Supreme Court of Appeal. On 29 November 2005, the Supreme Court of Appeal dismissed with costs an application for leave to appeal without giving reasons.

Issues

[21] The following issues, amongst others, seem to arise from the dispute between the parties:

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[5] On 21 August 2002, the respondents' attorneys sent a letter stating:

> "We act for and on behalf of Ms Charlene Smith and Ms Patricia de Lille. Our clients are not accountable in respect of your clients' concerns in the above matter. Accordingly we have been instructed to advise you that any action contemplated against them will be defended."

[6] See above n 1.

(a) Whether the issues raised in this application are constitutional matters and if so whether it is in the interests of justice to hear them;

(b) Whether the disclosure or publication was of private facts;

(c) Whether the disclosure was wrongful;

(d) Whether the publication was done with knowledge of the wrongfulness of the conduct and with the intention to harm the applicants;

(e) Whether the common law of privacy should be developed so as to impose liability on those who negligently publish confidential information;

(f) If liability is established, what would be the appropriate quantum of damages?

(g) What effect an offer of settlement which was made by the respondents in terms of Rule 34(1) should have on the costs order.

These are considered in the judgment.

Litigation History

In the High Court

[22] In their summons in the High Court the applicants claimed damages based on the *actio iniuriarum* against the respondents jointly and severally for a violation by the respondents of their rights to privacy, dignity and psychological integrity arising from the publication in the book of their names and HIV status without their express authority and consent.[7]

[7] See para 19.

[23] In their plea and in the trial the respondents admitted publication of the names and HIV status of the applicants but denied that the publication was intentional or negligent. More specifically, they pleaded that the HIV status of the applicants was not a private fact at the time of the publication of the book. Furthermore, the respondents pleaded that the publication of the HIV status of the applicants was not unlawful because earlier the applicants had given their consent to their names being included in the Strauss Report which was undertaken at the instance of the University.

[24] In the alternative the respondents pleaded that it was reasonable for any reader of the Strauss Report to assume that the necessary consent had been obtained since nothing in the report indicated that it was confidential. There was accordingly no malice on the part of the respondents in publishing the names of the applicants and their HIV status. The publication of the names would give authenticity to the book.

[25] On the first day of the trial, but before the commencement of the proceedings, the respondents delivered an offer made without prejudice and without acceptance of liability to the applicants in terms of Rule 34(1) and (5).[8] The terms of the offer were that:

[8] Rule 34 of the Rules of Court states:

> "(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.
> . . . .
> (5) Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state—
> (a) whether the same is unconditional or without prejudice as an offer of settlement;
> (b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;

(a) The respondents would pay R35 000 to each of the applicants;

(b) The respondents would make a private apology to each applicant;

(c) The respondents would pay the costs of suit;

(d) The names of the applicants would be deleted from all unsold copies of the book.

[26] The applicants did not accept the offer within the time stipulated in the rules and so the trial proceeded as scheduled and lasted for some 10 days. Judgment followed shortly thereafter, and the matter was decided partly in favour of the applicants and partly in favour of the respondents. It is against that judgment that the applicants now approach this Court on appeal, an earlier appeal to the Supreme Court of Appeal having been dismissed without reasons being furnished.

In this Court

[27] In this Court the applicants complained that the High Court had failed to protect their rights to privacy, dignity and psychological integrity. While these rights are claimed by the applicants under the *actio iniuriarum*, they are also protected under the Constitution.[9] In this case the applicants could not have instituted a constitutional

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(c) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;
(d) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone."

[9] Section 14 of the Constitution states:

"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."

claim directly because of the reasoning of this Court in *Fose v Minister of Safety and Security.*[10]

[28] While the claim falls to be dealt with under the *actio iniuriarum* the precepts of the Constitution must inform the application of the common law.

Is this a constitutional issue?

[29] The applicants approached this Court with the view to vindicate their constitutional rights to privacy, dignity and psychological integrity which, they allege, have been violated by the respondents. Their claim is, however, based on the *actio iniuriarum* and, therefore, falls to be determined in terms of the *actio iniuriarum.*

[30] It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirement that access to this Court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.

[31] The dispute before us is clearly worthy of constitutional adjudication and it is in the interests of justice that the matter be heard by this Court since it involves a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants irrespective of whether it

[10] 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at paras 17-19.

is based on the constitutional law or the common law. This Court is in any event mandated to develop and interpret the common law if necessary.

Privacy

[32] The academic literature on privacy demonstrates the considerable controversy over the definitional nature and the scope of the right. However, it appears common cause in many jurisdictions that the nature and the scope of the right envisage a concept of the right to be left alone.

[33] Privacy encompasses the right of a person to live his or her life as he or she pleases. In *Bernstein and Others v Bester NNO and Others* this Court stated:

> "A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation." [11] (Footnotes omitted.)

Were these private facts and were they wrongfully published?

[34] Private facts have been defined as those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and

[11] 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 77.

intelligence in the same circumstances and in respect of which there is a will to keep them private.[12]

[35] The applicants contended that as a result of the disclosure of their names and HIV status to the public the respondents had wrongfully and intentionally or negligently violated their rights of personality, more particularly their right to privacy, dignity and psychological integrity. They therefore averred that they had suffered damages.

[36] The respondents, denying any liability to the applicants, relied on the fact that the applicants' names had previously been disclosed in the Strauss Report and that the report was not marked "confidential". The applicants argued that the respondents had made public their names and HIV status. As a response to that the respondents contended that the HIV status of the applicants was not a private fact.

[37] The respondents testified that the applicants and others had agreed at a meeting to present their grievances orally to the Ethics Committee in the presence of the media. The motivation was that having the media present would result in the quick resolution of the problems. The respondents contended that the applicants knew that their grievances were likely to be reported and to reach the public because the grievances had been made in the presence of journalists.

[12] *National Media Ltd and Another v Jooste* 1996 (3) SA 262 (A); [1996] 2 All SA 510 (A).

[38] The respondents in their defence stated that the publication of the HIV status of the applicants was already in the public domain when the book was published and that therefore the applicants had no basis for complaining. They had appeared before the various commissions of inquiry including the Strauss inquiry and had brought an application in their own names in the High Court seeking an interdict against the inclusion of their names in the book.

[39] In my view, when they made their application for the interdict in their names, they were not thereby saying their names should be published in a book having a wide circulation throughout South Africa, which would be the position since the second applicant is a national figure. Similarly by attending the various inquiries they were not giving blanket consent to the publication of their status.

[40] Private and confidential medical information contains highly sensitive and personal information about individuals. The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy.

[41] Individuals value the privacy of confidential medical information because of the vast number of people who could have access to the information and the potential harmful effects that may result from disclosure. The lack of respect for private medical information and its subsequent disclosure may result in fear jeopardising an

individual's right to make certain fundamental choices that he/she has a right to make. There is therefore a strong privacy interest in maintaining confidentiality.

[42] The disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure. The affirmation of secure privacy rights within our Constitution may encourage individuals to seek treatment and divulge information encouraging disclosure of HIV which has previously been hindered by fear of ostracism and stigmatisation. The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV/AIDS.

[43] As a result, it is imperative and necessary that all private and confidential medical information should receive protection against unauthorised disclosure. The involved parties should weigh the need for access against the privacy interest in every instance and not only when there is an implication of another fundamental right, in this case the right to freedom of expression.

[44] The assumption that others are allowed access to private medical information once it has left the hands of authorised physicians and other personnel involved in the facilitation of medical care, is fundamentally flawed. It fails to take into account an individual's desire to control information about him or herself and to keep it

confidential from others. It does not follow that an individual automatically consents to or expects the release of information to others outside the administration of health care. As appears from what has gone on before there is nothing on the record to suggest that the applicants' HIV status had become a matter of public knowledge.

[45] This protection of privacy in my view raises in every individual an expectation that he or she will not be interfered with. Indeed there must be a pressing social need for that expectation to be violated and the person's rights to privacy interfered with. There was no such compelling public interest in this case.

[46] The High Court held that the first and second respondent were not liable for any damage suffered at the time of publication of the book. I disagree with this finding of the High Court. The first respondent did not sufficiently pursue her efforts to establish if the necessary consents had been obtained, despite having ample time to do so. More importantly she could have used pseudonyms instead of the real names of the applicants. The use of pseudonyms would not have rendered the book less authentic. The same position applies to the second respondent.

[47] I am, therefore, persuaded that the publication by the respondents of the HIV status of the applicants' constituted a wrongful publication of a private fact and so the applicants' right to privacy was breached by the respondents. The need for access to medical information must also serve a compelling public interest.

Dignity

[48] It is trite that the *actio iniuriarum* under the common law protects both dignity and privacy under the concept of dignitas. There is nothing shameful about suffering from HIV/AIDS. HIV is a disease like any other; however the social construction and stigma associated with the disease make fear, ignorance and discrimination the key pillars that continue to hinder progress in its prevention and treatment. These pessimistic perceptions persist to fuel prejudice towards people living with HIV/AIDS. Living with HIV/AIDS should not be viewed as a violation of one's dignity. Rather, an acceptance that HIV/AIDS should be treated like any other disease would help to destigmatise negative perceptions and pave the right channels to encourage positive change in the lives of those afflicted with HIV/AIDS, as well as in the treatment of the disease. It is, however, an affront to the infected person's dignity for another person to disclose details about that other person's HIV status or any other private medical information without his or her consent.

[49] A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom.

[50] If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. As this Court held in

Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others:

> "The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected."[13] (Footnotes omitted.)

[51] In *S v Makwanyane and Another* this Court observed as follows:

> "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[14]

[52] The applicants contended that the High Court failed to give sufficient weight and importance to the public perception of stigma, degradation and discrimination that

[13] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[14] 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 329C.

often goes with HIV/AIDS. Because of the social difficulties that are attendant upon disclosure of HIV, individuals are not very keen to announce themselves as being HIV positive.

[53] The indignity experienced by the applicants as a result of the disclosure of their names, seems to have been treated lightly by the court a quo. The case of the applicants was reduced to a malady that had befallen "lesser men or women". They were regarded as poor, uneducated, coming from an insignificant informal settlement and their plight disclosed in the book was not likely to spread far beyond the community where they resided. There was, in my view, a total disregard for the circumstances of the applicants and the fact that because of their disadvantaged circumstances their case should have been treated with more than ordinary sensitivity.

[54] I therefore conclude that by the disclosure of the applicants' HIV status the respondents violated the dignity and the psychological integrity of the applicants and that nowhere can it be shown that the disclosure was in the public interest.

The actio iniuriarum *and the development of the common law*

[55] For the common law action for invasion of privacy based on the *actio iniuriarum* to succeed, the following must be proved:

(a) Impairment of the applicants' privacy;

(b) Wrongfulness; and

(c) Intention (*animus iniuriandi).*

Negligence is as a rule, therefore, insufficient to render the wrongdoer liable.

[56] The applicants contended that if the invasion of their privacy by the respondents was not intentional, it was negligent. As a result they raised the constitutional issue whether or not the common law of privacy should be developed so as to impose liability on those who negligently publish confidential medical information (in particular a person's HIV status) by not first obtaining the express informed consent of that person unless the public interest clearly demands otherwise.

[57] Can it be said that the common law deviates in this case from the spirit, purport and objects of the Bill of Rights? It was argued on behalf of the applicants that it does – hence the assertion by the applicants that the common law should have been developed by the Court a quo so as to impose negligence as an element of liability in respect of the *actio iniuriarum*. I do not subscribe to this view. This, in my view, is not an appropriate case for departing from the age-old approach to the *actio iniuriarum*. I do not, by any means, wish to be understood to say the common law should or could never be developed in this regard. In the view I take of this matter it is however unnecessary to reach a conclusion on this point.

Animus iniuriandi

[58] I now look a little closer at the conduct of the respondents. That they are good activists in the field of HIV/AIDS admits of no doubt. They also know all that there is

to know about the private nature of HIV/AIDS and how sensitively these should be treated, in particular obtaining informed consent before disclosing such facts.

[59] I have no doubt in my mind that the first and second respondents were aware that they had not obtained the express informed consent of the applicants to publish their HIV status. The first respondent went ahead and published the information pertaining to the applicants, having made unsuccessful earlier attempts to find the consents. The disclosure of the HIV status of the applicants was done in a book which must naturally have taken time to produce. It was not a question of publishing breaking news such as might happen for the purposes of a newspaper.

[60] Both the first and second respondents assumed, without any enquiry and without a factual basis, that the applicants had given Professor Strauss express informed consent to disclose their names and HIV status to the public at large. This clearly cannot be so. The second respondent failed to take sufficient steps to ascertain whether the applicants had in fact given unlimited consent to Professor Strauss because, in her view, there was no onus or duty on her to find out what was contained in the consent forms. The second respondent conceded in evidence that, at the time of publication of the book, she was unaware of any other person outside the University who had been sent a copy of the report. Both respondents assumed, without any enquiry, that the information contained in the Strauss Report was not confidential. They conceded in evidence that they were not aware, at the time of publication of the

book, of any other publication in which the applicants' names and HIV status had been disclosed to the public at large.

[61] The first respondent conceded in evidence that it is important to err on the side of caution and not to disclose private facts about a person if one is unable to obtain the person's express, informed consent. Yet, she assumed that the applicants had consented to the public disclosure of their names and HIV status because the source of the publication came from a reputable institution. Despite being acutely aware of the option of using pseudonyms in the book, the first respondent deliberately chose to use the applicants' names in order to give the book "authenticity". In my view, the public's interest in authenticity does not outweigh the public's interest in maintaining the confidentiality of private medical facts as well as the right to privacy and dignity that everybody should enjoy.

[62] The second respondent says there was no onus on her to seek out the applicants before publishing. Once they had repudiated her mandate and the complaint statements they had made to her, as was apparent from the Strauss Report which she read, they had to seek and find her. The applicants were in constant contact with Father Viljoen and therefore the respondents could easily have found them through him. She gave the entire AIDS file to the first applicant and read chapter 10 of the manuscript before publication. She allowed publication because nothing in the Strauss Report suggested that the private facts were confidential. She knew of no one else, outside the University, who had the report when the book was published and

admitted that before the book there was no publication of these facts except in the report. She never followed up the blank consents. She accepted that Professor Strauss had the consent to disclose the names and she knew that the first internal report, unlike the Strauss Report did not use actual names and specified that it was confidential.

[63] There are in the case of HIV/AIDS special circumstances which justify the protection of confidentiality bearing in mind that the disclosure of the condition has serious personal and social consequences for the sufferer. For example, such a person stands to be isolated and even rejected by others. In the present case, each of the applicants testified as to the several setbacks which occurred in their lives following the disclosure of their status. The first applicant had her shack burned down by her boyfriend who has since left her and broken off that relationship. The second applicant has withdrawn from society for fear of being ostracised by her family. The third applicant has shied away and has not told members of her family about her condition which depresses her.

[64] Looking at the aforesaid conduct of the respondents and despite their denial of having acted *animo iniuriandi* and their further contention that they acted reasonably, I am satisfied that the respondents were certainly aware that the applicants had not given their consent or at least foresaw the possibility that the consent had not been given to the disclosure. As seasoned campaigners in the field of HIV/AIDS the respondents knew well of the wrongfulness of their conduct and that the disclosure of private facts was likely to invade the privacy rights of the applicants.

[65] I can come to no other conclusion but that the respondents have not rebutted the presumption that the disclosure of private facts was done with the intention to harm the applicants. Therefore the respondents had the requisite *animus iniuriandi*. Their position is exacerbated by their attitude that they wanted the book to have authenticity and credibility by publishing the names of the applicants. The defence of the respondents must accordingly fail.

Freedom of expression

[66] It was submitted by the amicus curiae that freedom of expression is critical to an open and democratic society based on freedom and equality and without freedom of expression, openness is severely compromised and endangered. It cannot be gainsaid that freedom of expression lies at the heart of democracy. This Court has recognised in other cases that freedom of expression is one of a "web of mutually supporting rights".[15]

[67] It was suggested by the respondents and the amicus that if the media were to be held liable for negligent disclosure of private facts they would have an additional burden which would frustrate the right of freedom of expression. The amicus contended that it was neither necessary nor desirable for the common law to be developed to include negligence as a ground of fault under the *animus iniuriarum*. It

[15] See *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC*); Islamic Unity Convention and Others v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC); *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC*); Laugh it Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC).

submitted that such an approach would unjustifiably limit the ambit of the right of freedom of expression and would have a "chilling effect" on the freedom of expression in South Africa.

[68] In particular the amicus was concerned about the effect of holding individual respondents as opposed to media respondents liable on grounds of negligence.

[69] In light of the fact that this judgment is not extending the common law definition of intention to include negligence in relation to the publication of private medical facts, there will be no "chilling effect" on freedom of expression in South Africa and there is no need to pursue this issue any further.

The third respondent's application for leave to cross-appeal

[70] The third respondent appealed the decision of the court a quo in its finding that it was liable to the applicants. The basis of the appeal was that it was alleged that the third respondent had, in publishing the book, revealed private information which proved a violation of their rights after the publication of the book. The appeal was not pursued with any vigour in this Court. I am of the view, as these issues have been dealt with before, it is not necessary to canvass them here again.

Assessment of quantum of damages

[71] In the light of the aforegoing it now remains for me to deal with the question of quantum of damages.

[72] At the end of the trial, the High Court assessed the damages and awarded an amount of R15 000 to each of the applicants. It will be recalled that the applicants had claimed an amount of R200 000 each in damages and that the respondents had offered the amount of R35 000 to each plaintiff in their settlement offer in terms of Rule 34.

[73] The assessment of damages in any case under the *actio iniuriarum* can never be an easy exercise. I have not found it any easier. As was correctly observed by Smalberger JA in *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and Others*:

> "In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a Court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation. Having said that does not detract from the fact that a person whose dignity has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings."[16]

[74] Although such assessment is peculiarly within the province of the trial court there may be situations where the dictates of justice would be better served by interference by an appellate court with regard to the assessment and award made by the High Court. This is such a case. The assessment of damages will be on a different

[16] 2001 (2) SA 242 (SCA) at para 48.

basis from that of the High Court, taking into account that the High Court's assessment was not commensurate with the dignity and privacy which was unlawfully violated by the respondents.

[75] I have noted the reasons for the award made before the High Court based on the circumstances of the applicants, among others, that they are illiterate in English, they claimed no understanding of English, that there is no likelihood of any confrontation in the future by anyone in their community for or about their HIV status and their names being in the book. If the applicants were disadvantaged it does not mean that they should not fight for the restoration of their dignity damaged by the disclosure of their names and HIV status.

[76] The applicants contend that the award by the High Court failed to accord sufficient weight to the fact that the rights violated are enshrined in the Bill of Rights and accordingly the award flouted the spirit, purport and objects of the Bill of Rights.[17]

[77] In assessing damages courts have in the past considered a range of factors arising from the circumstances and facts of the case: the nature and extent of the invasion or violation of privacy; malice on the part of the respondent; rank or social standing of the parties; the absence or nature of the apology; the nature and extent of

[17] Section 39(2) of the Constitution states:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

the publication; and the general conduct of the respondent. The greater the violation of the privacy, the greater the need to protect the applicants and the greater the award of damages.

[78] The first respondent initially tried to establish whether the necessary consent had been obtained from the applicants and when she failed she went ahead and published the names. Her conduct in simply going ahead and publishing the names of the applicants violated the dignity and privacy of the applicants. It was wrongful in the sense that the first and second respondents went ahead to publish the names and HIV status of the applicants without obtaining their necessary express informed consent.

[79] The respondents argued that it might be that in exceptional cases this Court should grant leave to appeal against the quantum of damages awarded, but that this was not in any way a special case. Accordingly, so it was argued, the award was in line with other awards made by our courts in similar situations. They cited *Jansen van Vuuren and Another NNO v Kruger*.[18]

[80] In the present case, highly personal and confidential material had been placed in the book and without the respondents having obtained the express informed consent of the applicants. The consent which the applicants had given earlier in the Strauss Report had pertained to a report and not to the general publication for public

[18] 1993 (4) SA 842 (A).

consumption of the facts in a book. This consent was limited to medical records and if any other publication was envisaged the requisite consent had to be obtained for that particular publication.

[81] The respondents clearly violated the dignity and privacy enjoyed by the applicants and are therefore liable to compensate the applicants in damages. Due to the gravity of the violations, I would consider a higher award reasonable in these circumstances.

[82] Accordingly, I consider a fair assessment of the damage suffered by the applicants at R35 000 for each applicant.

Costs

[83] I now come to the question of costs. In this regard we were invited to consider the position on costs of an offer of settlement on a "without prejudice and without admission of liability" basis. Rule 34[19] deals with the contents of the notice of tender and stipulates a period within which an offer of settlement must be accepted. An offer of settlement must be made timeously and should be responded to promptly. It is made with a view of curtailing the possible escalation of costs.

[84] The offer included: (a) a private apology to each applicant; (b) removing/deleting from all unsold copies of the book, reference to the applicants'

[19] See above n 8.

names and surnames; (c) payment direct to each plaintiff of R35 000; and (d) payment of the claimants taxed costs as between party and party as of date of the offer of settlement. It will be remembered that initially the High Court had entered judgment against the third defendant only to pay each of the applicants the amount of R15 000 together with costs of suit. The terms of the settlement offer were drawn to the attention of the High Court after the hearing. Having heard argument the High Court revised its costs order by directing that the third respondent would pay the costs of the applicants up to and including 14 April 2005, being the day on which the offer was made and that the applicants in turn must pay the respondents' costs from 17 April 2005.

[85] The truth of the matter is that an offer of settlement in terms of Rule 34[20] does not mean that an applicant should keep the respondent waiting for several days, in this case 10 days while the costs mount. Naturally, a respondent should not decide only on the morning of the trial to make an offer and so hope to avoid liability for costs.[21]

[86] In this case the offer was made just before the commencement of the hearing. The offer, in my view, was good, but the applicants were given little time to consider it before the commencement of the trial.

[87] As I understand the law in regard to offers of settlement, any order as to costs incurred subsequent to an offer is in the court's discretion. When exercising that

[20] See above n 8.

[21] See *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 678H.

discretion, the court will take into consideration all relevant factors and will determine whether the applicants acted reasonably in delaying responding to the offer. The respondents had not entered into any negotiations with the applicants but took the applicants off-guard, so to speak, when they made the offer of settlement on the morning of the hearing.

[88] The High Court exonerated the first and second respondents from liability. I disagree with that finding. The second respondent stated in evidence that she supplied the evidence about the applicants. She gave to the first respondent the Strauss Report and knew or ought to have known that the necessary consents had not been obtained. The first respondent did a half-hearted check but soon became tired of the exercise and so decided to go ahead and produce the book without having obtained the consent of the applicants.

[89] Taking into account all the circumstances of this case and the effort made by the respondents to reach an amicable settlement with the applicants, the huge amount claimed by the applicants clearly evidences a poor assessment of damages by their counsel. I therefore consider it fair that each party should pay its own costs in this Court.

Order

[90] In the circumstances I make the following order:

1. The application for leave to appeal is granted;

2. The order in the court a quo is set aside;

3. The following order is made:

3.1 The respondents shall pay to each applicant the sum of R35 000 inclusive of the amount of damages awarded against the third defendant in the High Court as compensation for damage jointly and severally;

3.2 The respondents shall pay costs of the respondents up to the first day of trial;

3.3 The third respondent's application for leave to appeal is dismissed with costs;

3.4 The names of the applicants shall be deleted from all unsold copies of the book "*Patricia de Lille*" by Charlene Smith;

3.5 In this Court each party shall pay its own costs, including the costs in the High Court.

Moseneke DCJ, Mokgoro J, Nkabinde J, Skweyiya J, Yacoob J and Van der Westhuizen J concur in the judgment of Madala J.

LANGA CJ:

[91] I have had the opportunity of reading the judgments of Madala, Sachs and O'Regan JJ. This case raises very difficult questions of both fact and law which do not permit of easy analysis. Hence, while there is much that I agree with in all the judgments, I have found it necessary to plot my own particular approach to this case.

[92] In brief, I agree that the disclosure of the HIV status of the applicants was wrongful and associate myself with the discussions of the rights to privacy and dignity in both Madala and O'Regan JJ's judgments and concur in the spirit and tone of Sachs J's judgment. In particular, I agree that being HIV positive does not in itself impair a person's dignity and that courts must be careful not to stigmatise the disease. I disagree, however, with Madala J that intention has been established on the facts. I agree with O'Regan J that it is necessary to develop the common law, but I find it necessary to clarify the ambit of that development. I also find that the first and third respondents are media defendants and, contrary to O'Regan J, that they were negligent in this case. Finally, I disagree with Madala J's approach to Rule 34 and, as a result, his award of costs.

Intention

[93] Madala J holds that the respondents failed to rebut the presumption of intention. Like O'Regan J, I am not convinced that intention is present. The available facts do not, to my mind, disclose that the respondents subjectively foresaw the possibility of their action causing harm. All the judgments accept,[1] and the record

[1] Madala J at para 64; O'Regan J at para at 164 and Sachs J at para 210.

makes it clear that both the first and the second respondents are active "seasoned campaigners" in the field of HIV/AIDS. O'Regan J highlights a number of heartfelt denials of intention by the first respondent[2] which I find compelling. Although the respondents' denials are not conclusive, they do mean that we would need a great deal of evidence to find that these activists would intentionally infringe the rights of the very people whom they are committed to protect. That evidence is not present. It could well be that the respondents honestly believed the Strauss Report to be a public document and therefore did not think it necessary to take any further steps to ascertain consent. A reasonable media defendant might have investigated further, but that goes to negligence, which I address later. I therefore hold that the respondents did not act intentionally.

Development of the Common Law

[94] I agree with the reasons expressed by O'Regan J for holding the media to a higher standard than ordinary defendants.[3] This Court[4] and the Supreme Court of Appeal[5] have held that the media, as a consequence of their power, bear a particular constitutional responsibility to ensure that the vital right of freedom of expression is not used in a manner that improperly infringes on other constitutional rights. It makes sense that media defendants, who are experts in the field and who routinely distribute facts to vast numbers of people, with a particular air of authority and for commercial

[2] O'Regan J at paras 162-164.

[3] O'Regan J at para 178.

[4] *Khumalo v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 22-24; *South African Broadcasting Corporation v National Director of Public Prosecutions and Others* 2007 (2) BCLR 167 (CC) at para 24.

[5] *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1214F-I.

gain, should be held liable for any disclosures which they should reasonably have foreseen would cause harm. However, to extend that standard to ordinary people, and thus to everyday relationships, would be to extend the law too far into intensely personal space. That is not to say that I approve of negligent disclosures of private facts by individuals, but simply that it is not a matter that is appropriate for the law to regulate. It is therefore constitutionally appropriate that the media should be held to a higher standard than the average person.

[95] I also agree, in general terms, with the nature of the development of the common law suggested by O'Regan J. I wish only to express a minor difference in my understanding of the correct technical construction of that development. As I understand O'Regan J's judgment, the position for a media defendant is that they can rebut unlawfulness by showing that the publication was reasonable; if they fail on that count, there is a presumption of negligence which they must rebut; and, finally, if they succeed in rebutting negligence, they will still be liable if they acted with intention. To the extent that the first defence of reasonableness extends what is already part of the lawfulness inquiry, I disagree.

[96] Lawfulness is an ex post facto inquiry into whether the action is compatible with the *boni mores*. It is important that when we determine lawfulness we are not concerned with the facts that were known to the defendant, but with the facts that are now available to the Court. It is also important that we operate on the basis that the act in question was done either negligently or intentionally. To do otherwise would

defeat the purpose of the lawfulness inquiry as the *boni mores* would never condemn a blameless act. In the context of the disclosure of private medical facts this means that the reasonableness of a defendant's averment that they thought they had consent is irrelevant if the consent was in fact absent. Reasonableness in the lawfulness inquiry will be relevant, for example, where it is unclear whether, objectively and ex post facto, there was consent or not, or where publication might have conformed to public policy despite the absence of consent.

[97] Negligence, on the other hand, relates specifically to the circumstances of the case and its determination is based on the facts known to the defendant at the time. It is at this stage that media defendants can argue, as the respondents do in this case, that it was reasonable to assume that consent was present. This is a separate inquiry that in my view should be kept distinct from the inquiry into wrongfulness. This approach in no way alters the substance of the various tests, but simply re-assigns various questions to what I consider to be their correct position.

Media defendants

[98] The next question is whether the respondents qualify as media defendants. The first and third respondents are professionals involved in the distribution of information for commercial gain. Although they do not meet the traditional image of a media defendant as a newspaper editor, they clearly meet the concept of media defendants which motivate setting higher standards for the media.[6]

[6] See above at para 94.

[99] The second respondent on the other hand, although she was undoubtedly involved in the process, is not a professional journalist and was more the subject of the book than its creator. While she maintained control over the content of the book, as a layperson that control would relate to the factual correctness of the book rather than the legality of its publication. Although the second respondent would still bear responsibility if she had acted intentionally, I cannot find that she is a media defendant and she therefore avoids liability.

Negligence

[100] The traditional test for negligence is axiomatic but still bears the briefest repetition: negligence is established if a reasonable person in the position of the defendant would have foreseen the harm, the reasonable person would have taken steps to prevent it and the defendant failed to take those steps.[7] When we are dealing with professionals acting in their professional field, the relevant benchmark is not the ordinary reasonable person but the relevant reasonable professional person.[8] In this case, we must compare the conduct of the respondents to that of a reasonable journalist and publisher.

[7] For the classic statement of negligence, see *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E.

[8] See, for example, *Van Wyk v Lewis* 1924 AD 438 at 444 cited with approval in *Durr v ABSA Bank Ltd and Another* 1997 (3) SA 448 (SCA) at 460H-461I.

[101] The applicant led the evidence of Professor Harber (Harber) as to what is expected of a journalist in the circumstances. Harber made it quite clear that ethical reporting of HIV/AIDS requires that:

> "The identity of a person with HIV/AIDS should not be disclosed without the explicit permission of that person and the onus is on the journalist/publisher to ensure that such permission has been granted."

He also testified that the consent must be informed consent which requires that it is obtained in the individual's own language and that they are informed of the potential ramifications of publication and the context in which their name would be used. He stressed that a journalist cannot assume that consent has been given. This evidence was not seriously challenged by the respondents.

[102] Both the High Court and O'Regan J largely discount Harber's evidence as they regard the Strauss Report as a public document. While I agree with the general proposition in O'Regan J's judgment that journalists should not be forced to verify disclosures made by reputable organisations, that principle does not, to my mind, create any hard-and-fast rules. Whether it is reasonable to rely on another document will depend on the nature of the document, the nature of the institution that produced the document, the importance of the interests involved and the relevant circumstances of the case. It is not, for example, sufficient to rely simply on the absence of a distinct proclamation of confidentiality as automatically justifying reliance on an otherwise untested document.

[103] That this is the appropriate standard appears very clearly from Harber's evidence. During cross-examination Harber was asked whether, if a commission of enquiry had been established and the report had been given to him, with no reference to its confidentiality or anything to suggest that it were secret, he would publish the report. Harber responded:

> "I would say you would say to yourself is there any reason I cannot publish this, is it illegal, are there contents that can cause me problems of defamation or invasion [of] privacy or you would ask yourself a range of questions and if the answers to those were no, then you would publish. . . . You would be very foolish if as a journalist and editor you did not establish first whether for example you were being defamatory and whether or not that was a risk you should and wanted to take."

The hypothesis was extended to a situation where it was an official report from the Minister to which Harber responded: "I am not sure why that would protect you if you carried defamatory material."

[104] To my mind these responses make it clear that a journalist cannot rely on governmental or private institutions to publish only information that would be appropriate for a journalist to publish. Journalists have their own standards and bear an independent duty to ensure that they have been met.

[105] The question then is whether the reasonable journalist described above would have foreseen the possibility of the absence of consent under these circumstances. There are a number of important considerations on this score. Firstly, Professor Strauss explains on the second page of his report that "[r]ight at the outset [he]

insisted upon each patient . . . giving consent to [him] in writing, the terms of which consent appear in exhibits 'A-1' through 'A-8'". The importance of this passage, so early in the report, is that it makes clear that the consent has been given with certain "terms" attached to them. Having been alerted to the fact the consent was limited, a reasonable media defendant would have foreseen that the consent would not cover publication outside the report itself. When asked whether she knew the exact terms of the consent in the Strauss Report, the first defendant responded: "Not the exact terms, that is why I contacted the University." This indicates that Smith herself realised that the reference to terms of consent meant the consent was not unrestricted. Although it is not enough to convince me she acted with intent, it shows very clearly that anybody who read the report would realise the consent given by the applicants was limited. A reasonable journalist would have then made certain that they determined the exact terms of the consent by obtaining the annexures.

[106] The first respondent's uncertainty is compounded by her concession that the applicants

> "were patients who had consistently changed their minds about whether or not they had a problem or did not have a problem, whether or not they felt free to speak out or did not feel free to speak out."

With that knowledge it should have been even more obvious to her that she should determine with certainty what the applicants' attitudes were to disclosure in her book and at that time.

[107] The Strauss Report was an internal University report made in response to allegations of irregularities. It was compiled by a lawyer, not a journalist. This point was pertinently made during Ms Smith's cross-examination, when she was read the following principle of journalistic ethics:

> "'No reporter or photographer should allow publication of material which can put informants at risk of losing their positions, injury or death. In particular, ordinary people are sometimes unaware of the possible consequences of talking to the media. In these cases it is incumbent on the reporter or photographer to establish informed consent by spelling out to the informant what the likely dangers are.'
>
> Are you aware of that principle? – I am aware of this and this is precisely what Professor Strauss should have applied.
>
> COURT: Is he a journalist – No he is not".

[108] In addition, the Strauss Report was not a public document and was not intended for widespread public consumption. The report was not publicised and as far as the first respondent was aware when the book was published, had not been disclosed to any other reporters. Again, the cross examination is telling:

> "When you wrote and published your book you were not aware of a single report anywhere in the media where any of the plaintiffs' names or faces had been published. Correct? – Correct".

[109] The report was also not widely distributed. Professor Grove made clear that, outside the University, the report was only sent to Ms de Lille, a Ms Vermaak who assisted during the Strauss inquiry and possibly the Medical Research Council. The first respondent was unaware of this distribution, but admitted that the only effort she

made to determine the extent of the distribution were three wholly unproductive phone calls to the Registrar's office.

[110] The reasonable media defendant would therefore, and keeping in mind the evidence of Harber, not have relied on the Strauss Report as a document that removed their duty to ensure informed consent had been obtained.

[111] The inescapable conclusion is that a reasonable journalist or a reasonable publisher would have foreseen the possibility that there was not consent. Because the possible harm was great, the effort necessary to avoid that harm minimal and the benefit of publishing the names negligible, a reasonable journalist or publisher would have taken steps to avoid that harm. Those steps could have involved, for example, finding the annexures, contacting the applicants directly or using pseudonyms. Whatever course they chose the defendants, to use the words of Sachs J, "should have left no stone unturned in [their] pursuit of verification." The fact that they left those stones unturned renders them negligent.

[112] A word should be said about the third respondent's liability. As a publisher it bears a separate responsibility to ensure that everything it publishes is lawful. It cannot abandon that responsibility to those whose work it chooses to disseminate. It is therefore negligent for the same reasons as the first respondent.

Damages

[113] I agree with Madala J's assessment of damages at R35 000.

Cross-appeal

[114] On my approach it is unnecessary to consider the cross-appeal and I turn to the final issue: the settlement offer in terms of Rule 34.

Rule 34

[115] On the morning of the trial, 14 April 2005, the respondents made an offer without prejudice to the applicants. The offer included payment of R35 000 to each applicant, a private apology and the removal of the applicants' names from all copies of the book. It did not include an admission of liability. The applicants rejected the offer and were subsequently awarded R15 000 each. The offer was disclosed to the High Court immediately after judgment was given. The High Court held that the applicants' refusal entitled the respondents to the costs from 17 April 2005 and the majority of this Court has held that each party should pay their own costs in this Court.

[116] The applicants argued that they should not have been mulcted in costs as an offer without prejudice did not sufficiently vindicate their constitutional rights. Only an unconditional offer or an order of court could, according to the applicants, vindicate a constitutional right.

[117] On the other side, the respondents contended that the very basis of civil litigation is that money satisfies rights. To hold otherwise would undermine the very purpose of Rule 34: to avoid unnecessary trials. Defendants who honestly believe they are not liable would have no choice but to continue with an expensive trial or make an unconditional offer.

[118] The decision to award costs following the disclosure of a settlement offer is in the discretion of the Court.[9] This Court has made it clear that an appellate court should generally only interfere in the exercise of a discretion by a lower court if the discretion is not exercised judicially, or is based on wrong principles or a misapprehension of the facts.[10] The question then is whether the High Court has committed such a misdirection.

[119] While I accept that, as the respondents contend, Rule 34 serves an important purpose and undermining the potential to save costs would remove any impetus to make offers of settlement, different principles apply to cases involving constitutional rights. This case is about the essential constitutional rights of dignity and privacy of some of the most vulnerable people in society. Money may help to alleviate the applicants' pain, but as has been noted in the context of defamation,

> "[t]he true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away

[9] Rule 34(12).

[10] *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) at para 23 and *SABC* above n 4 at para 41.

> with head high, knowing that even the traducer has acknowledged the injustice of the slur."[11]

No matter the value of the offer, it does not give the acknowledgement of wrong-doing that is often far more valuable than any money could be. Contrary to what the respondents suggest, that is not the case in all civil claims as many civil disputes revolve entirely around money, not principle.

[120] This case is also about broad questions of the responsibilities of journalists and the protection of privacy in the media. These are important and difficult questions and, in my view, the common law presently falls short of the "spirit, purport and objects of the Bill of Rights"[12] and must be transformed. There is a danger that the risk of adverse costs orders, despite ultimate success, might permit rich and powerful defendants to prevent the law from adapting to meet constitutional imperatives by throwing money at plaintiffs who cannot afford to take that chance. It already takes immense courage for ordinary people to take large powerful defendants to court and the additional peril of an adverse costs order will mean even fewer plaintiffs get their day in court. That could easily have happened in this case and the liability of media defendants for disclosing private medical facts would have remained unquestioned. The achievement of our constitutional vision should not be obstructed by the vested interests of those who have the money to protect them.

[11] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at para 109 (Sachs J).

[12] Section 39(2) of the Constitution.

[121] The above reasoning does not dictate that a costs order will never be appropriate when a constitutional right is involved; the award of costs remains a matter of discretion. It does mean that the involvement of a constitutional right seriously alters the framework within which that discretion must be exercised. The failure of Schwartzman J to properly consider the impact of the Constitution means that it is appropriate for this Court to interfere with his award of costs. On the peculiar facts of this case, I would alter the award of costs. I would, accordingly, order the first and third respondents to pay all the applicants' costs in both the High Court and this Court.

O'REGAN J:

[122] I have had the opportunity of reading the judgment prepared in this matter by Madala J. Unfortunately, I cannot concur with it for the reasons set out here.

[123] This litigation arose from the publication of an authorised biography ("the book") written by Ms Charlene Smith, the first respondent, about Ms Patricia de Lille, the second respondent. The publisher of the book, New Africa Books (Pty) Ltd, is the third respondent. In the book, the three applicants are named as persons who are living with HIV. The applicants did not consent to their names being published in this way. All of this is common cause. The fuller facts appear from the judgment of Madala J and I do not repeat them here save where necessary.

[124] The applicants issued summons in the High Court in Johannesburg alleging that the respondents had acted wrongfully with the intention of injuring the applicants in their rights of personality, particularly their rights to privacy, dignity, psychological integrity and mental and intellectual wellbeing. In the alternative, the applicants alleged that the respondents acted negligently in publishing the names of the applicants with the same consequences. The applicants also alleged, in the alternative, that the first respondent knew or ought reasonably to have known that the applicants had not consented to the publication of their names. After hearing evidence, the court concluded that the applicants had not established the case as pleaded and dismissed their claim.

[125] The case raises complex issues. My primary disagreement with Madala J relates to his finding on the facts (contrary to the finding of the High Court) that the first and second respondents published the names of the applicants having actually known that the applicants had not consented to publication of their names, or alternatively, having foreseen the possibility that they did not consent and in reckless disregard of that possibility. Such a finding results in the conclusion that the respondents did act intentionally, either directly or under the specific form of intention called *dolus eventualis.* I do not think this case has been made out on the facts. In addition, I should add that the High Court concluded that such a case had not been made out on the facts. Nor do I think that the respondents have failed to dislodge a presumption that they acted either intentionally or, having foreseen the possibility that the applicants may not have consented to the publication of their names, acted

recklessly despite that foresight. My conclusion on the facts requires a consideration of the alternate causes of action pleaded by the applicants, in particular, the question whether in our law unreasonable mistake or negligence can found liability for breach of privacy as alleged here. And if it does, whether it has been established on the facts of this case. Before turning to these complex issues, however, it is necessary to discuss briefly the constitutional rights in issue in this case.

The right to privacy

[126] The constitutional basis for the applicants' claim is the right to privacy protected in section 14 of the Constitution which provides:

> "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."

[127] The applicants assert that their right to privacy entitles them not to have their private medical information disclosed without their consent to the public. In *Bernstein and Others v Bester NO and Others,* Ackermann J recognised that privacy is an elusive concept that has been the subject of much debate by scholars.[1] It has troubled lawyers too since at least the end of the nineteenth century.

[128] In a seminal article written by Samuel Warren and Louis Brandeis in 1890 in the Harvard Law Review, in language that resonates today, the authors argued that:

[1] 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 65.

> "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. . . . Of the desirability – indeed of the necessity – of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."[2] (Footnotes omitted.)

[129] The statement by the authors that privacy needs protection seems intuitively to be correct. However, in the context of a Constitution, which values not only privacy, but also freedom of expression, more careful consideration of this apparent intuitive truth needs to be undertaken. The important question to be considered is why we protect the right to privacy in our constitutional order. There are at least two inter-related reasons for this protection.[3] The first flows from our constitutional conception of what it means to be a human being; and the second from our constitutional conception of the state.

[2] "The Right to Privacy" (1890) 4 *Harvard Law Review* at 195-196.

[3] The literature on the philosophical and jurisprudential nature of privacy as a human right is vast. See for example Henry (ed) *International Privacy, Publicity and Personality Laws* (Butterworths, Durban 2001); DeCew *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (Cornell University, New York 1997); Rosen *The Unwanted Gaze: The Destruction of Privacy in America* (First Vintage Books, New York 2001); Markesinis (ed) *Protecting Privacy: The Clifford Chance Lectures* 4 ed (Oxford University Press, Oxford 1999); Colvin (ed) *Developing Key Privacy Rights* (Hart Publishing, Oxford 2002); and Post "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 *California Law Review* at 957-1010.

[130] Underlying our Constitution is a recognition that, although as human beings we live in a community and are in a real sense both constituted by and constitutive of that community, we are nevertheless entitled to a personal sphere from which we may and do exclude that community. In that personal sphere, we establish and foster intimate human relationships[4] and live our daily lives. This sphere in which to pursue our own ends and interests in our own ways, although often mundane, is intensely important to what makes human life meaningful.

[131] The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing.[5] We value privacy for this reason at least – that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows

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[4] See the statement by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 32: "Privacy recognises that we all have a right to a sphere of personal intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community."

[5] See, for a discussion of the relationship between privacy and dignity, *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as* Amici Curiae*)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at para 81, where, in a minority judgment, the following comments were made: ". . . the constitutional commitment to dignity invests a significant value in the inviolability and worth of the human body. The right to privacy, therefore, serves to protect and foster that dignity." (Per O'Regan J and Sachs J). The judgment held that a criminal prohibition on prostitution did invade privacy. See also the judgment of Langa DP in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 18, where he reasoned as follows:

> ". . . privacy is a right which becomes more intense the closer it moves to the personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows . . . from the value placed on human dignity by the Constitution."

from our recognition of individual human worth, presupposes personal space within which to live this life.

[132] This first reason for asserting the value of privacy therefore lies in our constitutional understanding of what it means to be a human being. An implicit part of this aspect of privacy is the right to choose what personal information of ours is released into the public space. The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That decision should not be made by others. This aspect of the right to privacy must be respected by all of us, not only the state. As was pointed out in the minority judgment in *S v Manamela and Another (Director-General of Justice Intervening)*:

> "Such an exhortation recognises that the protection of individual rights depends not only on the actions of the State, but on the actions of fellow citizens. The conduct of each individual can and will contribute to a climate in which the rights of others are respected. Our society asserts individual moral agency and it does not flinch from recognising the responsibilities that flow from it."[6]

The right to privacy is therefore one of those rights which will often bind natural and juristic persons[7] and individuals need to be furnished with appropriate remedies to protect their right against its invasion by others. The recognition by others of our right

[6] 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 100 (per O'Regan J and Cameron AJ). The judgment continues by quoting from Honoré *Responsibility and Fault* (Hart, Oxford 1999) at 125. A portion of that quote reads as follows: "At the same time, it [asserting the possibility of moral agency] makes possible a sense of personal character and identity that is valuable for its own sake".

[7] See section 8(2) of the Constitution which provides that: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

to an area of privacy is one of the bases upon which our community itself is built.[8] The proper protection of a person's privacy depends in a significant way on its being respected by others.

[133] Secondly, we value privacy as a necessary part of a democratic society and as a constraint on the power of the state. It is not surprising, given our authoritarian past, that the incidents of privacy listed in section 14 of our Constitution[9] protect individuals from searches of their home, person, property and communications. In authoritarian societies, the state generally does not afford such protection.[10] People and homes are often routinely searched and the possibility of a private space from which the state can be excluded is often denied. The consequence is a denial of liberty and human dignity.[11] In democratic societies, this is impermissible.

[134] This is not to say, however, that there are no limits to the inviolability of an individual's entitlement to privacy. There are times when it will be legitimate for the state to invade private space. For example, violence against women often lurks in the shadows of the home and historically state officials have refused to intervene to protect women on the basis of the inviolability of the home. Such a refusal can no

[8] See Post above n 3 at 964-965.

[9] See para 126 above.

[10] See the discussion by Sachs J in *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) at para 25; 1998 (7) BCLR 880 (CC) at para 18.

[11] See Rosen above n 3 at 12:

> "Freedom is impossible in a society that refuses to respect the fact that 'we act different in private than in public', Kundera argues, a reality that he calls 'the very ground of the life of the individual'. By requiring citizens to live in glass houses without curtains, totalitarian societies deny their status as individuals, and 'this transformation of a man from subject to object is experienced as shame."

longer be tolerated under our Constitution which asserts that everyone has the right to be free from both public and private violence.[12] The corollary of this right is an obligation borne by the state, and others, to provide protection to those at risk of violence even in traditionally private environments such as the home.[13] Recognition of legitimate limits on the inviolability of personal space, however, does not mean that the space is not worthy of protection. The Constitution seeks to ensure that rights reinforce one another in a constructive manner in order to promote human rights generally. At times our Constitution recognises that a balance has to be found to provide protection for the different rights.

[135] The breach of privacy relied upon by the applicants in this case is the disclosure of the fact that they are living with HIV. This is private medical information which the applicants may ordinarily choose to keep private. In *Bernstein*, Ackermann J found that determining whether the right to privacy has been breached requires us to recognise that the concept should be seen as having a core and a periphery. He reasoned:

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[12] Section 12(1)(c) of the Constitution states: "Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources." See also *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 18 where Sachs J reasoned as follows:

> "The involvement of the courts in this realm [domestic violence] represents an extension of the law into an area where lawlessness has long been sustained by interlaced notions of patriarchy and domestic privacy. It encourages recourse to law for spouses who might otherwise suffer mutely because of unwillingness to invoke more drastic criminal proceedings."

See also *Omar v Government of Republic of South Africa and Others (Commission for Gender Equality* Amicus Curiae*)* 2006 (2) SA 289 (CC); 2006 (2) BCLR 253 (CC); 2006 (2) SACR 359 (CC) at para 18.

[13] See *Baloyi* above n 12 at para 11-13. See also *Omar* above n 12 at para 17.

> "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."[14]

[136] In cases since *Bernstein,* this Court has sought to locate the particular infringement complained of as either a core or peripheral complaint.[15] In this case, the applicants argue that their private medical information was disclosed without their consent. There can be no doubt that private medical information, of whatever nature, but particularly where it concerns a life-threatening disease, is personal information, which is protected by the right to privacy. Moreover, it is information which the person concerned has the right to decide whether to disclose. If the person does decide to disclose it, he or she is entitled to determine in what circumstances and to whom. These choices are personal choices and must be respected not only by the state but by others. Of course, doctors and other medical personnel may need to know, and at times disclose, the information for privileged reasons, but they are not entitled to disclose it outside of their professional circumstances without consent.[16]

[137] In *National Media Ltd and Another v Jooste*, the Appellate Division held that liability would only arise in respect of disclosure of those private facts when the general sense of justice of the community would expect protection because disclosure would "cause mental distress and injury to anyone possessed of ordinary feelings and

[14] *Bernstein* above n 1 at para 67.

[15] See for example *Jordan* above n 5 at para 80; *Hyundai* above n 5 at para 15-16*; Mistry* above n 10 at para 23; *Magajane v Chairperson North West Gambling Board and Others* 2006 (5) SA 250 (CC); 2006 (2) SACR 447 (CC) at para 42.

[16] As our common law recognises, see *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A).

intelligence".[17] It is not necessary for the purposes of this case to consider whether this test is the appropriate test under our Constitution for determining whether a fact is private or not. For it is clear that the publication of otherwise confidential information about a life-threatening illness is likely to cause distress to the person concerned. The question of whether it is only in such circumstances that an action for breach of privacy will lie can therefore be left for another day.

HIV/AIDS and privacy

[138] It is important to add here that HIV/AIDS should not be seen as different from other life-threatening diseases for the purposes of the breach of privacy. It is true that our society stigmatises those living with HIV/AIDS. The result of this stigma is that disclosure causes not only personal pain for those living with HIV/AIDS, but at times a reasonable fear that their lives and safety are at risk because of the attitudes of some in our community towards those living with HIV/AIDS.

[139] It needs to be said clearly that the stigma attached to those living with HIV/AIDS is inconsistent with the constitutional value of human dignity. Disclosing that a person is living with HIV/AIDS cannot therefore be an infringement of dignity on the grounds that members of the community may improperly think less of them because they are suffering from this frightening illness. It does undermine their dignity to the extent that it denies those living with HIV/AIDS the right to determine

[17] 1996 (3) SA 262 (A) at 270I-J; [1996] 2 All SA 510 (A) at 515E-F, citing with approval "Privacy" *American Jurisprudence* 2d at para 40.

to whom and when their illness should be disclosed, which is itself an aspect of the right to privacy, as already discussed.

[140] HIV/AIDS therefore is not to be treated specially for the purposes of establishing a breach of privacy. It may well be that the effect of the stigma the illness currently attracts is relevant to the determination of damages appropriate to remedy the wrongful disclosure. This is a matter that for the reasons that follow does not need to be determined in this case.

[141] In dealing with cases concerning people living with HIV/AIDS, courts and lawyers must take care not to develop rules that will strengthen rather than diminish the stigma attached to HIV/AIDS. In time, we should hope that those living with HIV/AIDS should be seen merely as members of our community who have a disease for which treatment exists. Nothing in our law or legal system should undermine the achievement of that state of affairs.

Was the applicants' HIV status a private fact?

[142] The respondents sought to raise, as a defence, the fact that before the book was published it was already no longer a private fact that the applicants were living with HIV. In this regard, they relied, in particular, on the fact that the applicants had, as three of a group of people undergoing treatment as part of a medical trial staged by the University of Pretoria, agreed to meet to present their grievances orally to the University Ethics Committee. The meeting was held in April 2000, and the media

were invited and attended. However, the April meeting did not deal with the grievances of the applicants and others because the person chairing the meeting ruled that formal written complaints concerning the trials should be lodged and that the grievances should not be aired at the meeting. There is a dispute of fact on the record as to whether the applicants in fact attended either of these meetings but the High Court held that nothing turned on this dispute. What is clear, however, is that no actual disclosure took place at the meeting in April 2000.

[143] The respondents argue that if the applicants attended the meeting in March 2000, where it was decided that the Ethics Committee should be approached in public to raise grievances about the conduct of the clinical trial, at that stage the applicants indicated an intention no longer to keep their HIV status confidential. Accordingly, the respondents argue that the subsequent publication of the applicants' status in the book did not breach their privacy. This argument cannot be accepted. I agree that nothing turns on whether or not the applicants did in fact attend the meetings of March and April. What is clear is that, as a matter of fact, the outcome of those meetings was not such as to render the applicants' HIV status a matter of public record. As a matter of fact, their status remained private after that meeting. Whatever the intention of the applicants may have been, the fact of their HIV status did not become public knowledge. In reaching this conclusion, it should be emphasised that a court should not lightly conclude that what is a private fact has been rendered a public fact simply because a small number of people may have come to know of it. The question will be one of fact, in particular, whether the fact has been disclosed to such an extent that,

viewed objectively, it can no longer genuinely be considered to be private. In this case, I conclude that the respondents published private medical information of the applicants without their consent.

Privacy and freedom of expression

[144] In understanding the scope of privacy, it is important to recognise that, at times, the right to privacy might suggest that certain facts should not be published while at the same time the right to freedom of expression might suggest that those same facts should be able to be published. As this Court has held, freedom of expression is an important right in a democracy.[18] It is important because it enables the free and open exchange of ideas[19] that is the anchor of any modern democracy as Brandeis J noted in his powerful concurrence in the early case of *Whitney v California* −

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its

[18] See *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7; *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC); 2001 (11) SACR 686 (CC) at para 37; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 21.

[19] See for example *Mamabolo* above n 18 at para 37.

> infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[20] (Footnote omitted.)

[145] Freedom of expression is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible, but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy. Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them. As Scanlon described in his seminal essay on freedom of expression, an autonomous person –

> ". . . cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence."[21]

[20] 274 US 357, 375-376 (1927).

[21] Scanlon "A Theory of Freedom of Expression" (1972) 1 *Philosophy and Public Affairs* 204 at 216.

[146] Our Constitution seeks to assert and promote the autonomy of individuals in the sense contemplated by Scanlon. Freedom of expression is key to this purpose. It does not mean however that freedom of expression is without limit. This Court has already held that there are legitimate limits on freedom of expression.[22] At times, the limit on freedom of expression will arise from the need to protect another constitutional right, such as the right to privacy.

[147] Seeking the appropriate balance between privacy and expression requires the legal rules which provide for redress for breaches of privacy to be developed in a manner that recognises both the importance of privacy and the importance of freedom of expression. The basis for a claim for breach of privacy in our common law is the *actio injuriarum*. It is that remedy which primarily must contain rules to regulate the relationship between the right to privacy and the right to freedom of expression.

[148] In developing and applying the rules of the *actio injuriarum*, both the right to privacy and freedom of expression need to be borne in mind. In determining appropriate limits on freedom of expression, ethical rules developed by journalists themselves will be of importance. In this case, a leading South African journalist, Professor Anton Harber, gave evidence at the trial concerning the accepted practice for journalists wishing to publish the identity of a person living with HIV/AIDS. It will be useful to describe his evidence briefly.

[22] See for example *Mamabolo* above n 18; *Khumalo* above n 18.

[149] Professor Harber identified four principles guiding journalists in their work: the obligation to tell the truth; the obligation to remain independent; the obligation to minimise harm; and the accountability of journalists to explain and defend their work. In regard to HIV/AIDS, the summary of his evidence stated that because people with HIV/AIDS often face stigmatisation and persecution, the identity of a person should not be disclosed without their explicit permission. He helpfully placed in evidence a series of codes of ethics, some from South African media organisations and some from abroad, setting out the ethical responsibilities of journalists. Codes of media ethics will often be useful in considering the question of how privacy and freedom of expression should be balanced in our law. Most of the codes of conduct on the record emphasise the importance of privacy, but also recognise the possibility of overriding privacy in the public interest or where there is informed consent.[23] He did not give evidence on the question that arises in this case − the responsibility of journalists when faced with a publication from a reputable source that discloses the identities of people living with HIV/AIDS.

[23] *The Star's* Code of Ethics for example provides as follows: "*The Star* respects the individual's right to privacy, except where it conflicts clearly with the public interest"; the Ethical Guidelines in Reporting on HIV and AIDS for the South African Media prepared by *Journ-AIDS* provide: "The HIV status of an individual is private unless indicated otherwise"; the *Mail and Guardian* Media's Professional Code provides: "No reporter or photographer should allow publication of material which can put informants at risk of losing their positions, injury or death. In particular, ordinary people are sometimes unaware of the possible consequences of talking to the media. In these cases, it is incumbent on the reporter or photographer to establish informed consent by spelling out to the informants what the likely dangers are"; and the Code of Ethics of the Broadcasting Complaints Commission of South Africa (BCCSA) provides that: "The electronic media shall exercise exceptional care and consideration in matters involving the private lives and dignity of individuals, bearing in mind that the right to privacy and dignity may be overridden by a legitimate public interest."

[150] I turn now to consider that question in the context of the *actio injuriarum,* bearing in mind the aforegoing discussion of the constitutional rights at issue in this case.

The actio injuriarum

[151] The right to privacy finds protection in the law of delict and, specifically, in the *actio injuriarum.* This cause of action, recognised since the classical Roman period,[24] protects a range of personality rights under the Latin terms *corpus*, *fama* and *dignitas* – which can loosely be translated respectively, as physical and mental integrity, good name and dignity understood in a broad sense.[25] Privacy has been protected under the rubric of *dignitas*.[26] The elements of the *actio injuriarum* are the intentional and wrongful infringement of a person's *dignitas*, *fama* or *corpus*.[27]

[152] The most common use of the *actio injuriarum* in our law is in relation to defamation. Special rules have developed in defamation, particularly in relation to which party bears the onus of establishing or disproving the facts relevant to the different elements of the delict. So, in defamation, it is clear that if a plaintiff

[24] See the full discussion in Neethling et al *Neethling's Law of Personality* (Butterworths, Durban 1996) 47-50.

[25] The precise meaning of *dignitas* has given rise to some comment. See *O'Keeffe v Argus Printing and Publishing Company Ltd and Another* 1954 (3) SA 244 (C) at 247E-248H and commentary in Neethling above n 24 at 56.

[26] Neethling et al *Law of Delict* 4 ed (Butterworths, Durban 2001) 354. See also *Bernstein* above n 1 at para 68 (and authorities cited therein) and *O'Keeffe* above n 25 at 249.

[27] Voet *Commentary on the Pandects* 47 10 1. See also Innes CJ in *R v Umfaan* 1908 TS 62 at 66:

> "[An *injuria* is] a wrongful act designedly done in contempt of another, which infringes his dignity, his person or his reputation. If we look at the essentials of *injuria* we find . . . that they are three. The act complained of must be wrongful; it must be intentional; and it must violate one or other of those real rights, those rights *in rem*, related to personality, which every free man is entitled to enjoy."

establishes the publication of a defamatory statement, that will constitute prima facie proof of the wrongfulness of the publication and prima facie proof that the defendant intended to defame the plaintiff. The defendant will then bear a legal burden to disestablish either wrongfulness or intention in order to avoid liability.[28]

[153] It is not clear whether those rules relating to onus apply also to the use of the *actio injuriarum* in relation to the right to privacy.[29] There does not seem to be any reason why, as a matter of principle, proof of the publication of a private fact in breach of a plaintiff's right to privacy should not give rise to presumptions both of wrongfulness and intention which the defendant must rebut. Both defences will ordinarily fall within the peculiar knowledge of the defendant. However, it is not necessary on the view I take of the facts of this case to resolve that question now. As it concerns the common law, it would be desirable for the Supreme Court of Appeal to resolve this question.

[154] It is not necessary to decide the question on the burden of proof in relation to wrongfulness for the following reason. The respondents did not seek to raise, as a defence, that the publication was not wrongful. The main defences to wrongfulness in these circumstances would be that the publication was in the public interest or that express informed consent had been rightly given. Both these defences to

[28] See discussion in Neethling above n 24 at 153-155 and 178-182.

[29] In *Jansen van Vuuren* above n 16 at 849C the Appellate Division held that a plaintiff must aver that the defendant acted *animo injuriandi*. It did not discuss the incidence of the burden of proof in relation to that averment. On the other hand in *Kidson and Others v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W) at 468E-F the court held that once it was established that the publication of information was intentional in itself, the existence of *animus injuriandi* to cause the damage that followed must be presumed.

wrongfulness are recognised in the codes of ethics referred to by Professor Harber.[30] The respondents did not assert that publication of the names in this case, the applicants who are private citizens, was in the public interest. Nor did they allege that the applicants had given them express informed consent to publish their names. Their defence was firstly that the HIV status of the applicants was no longer a private fact. I have dealt with that argument above. Secondly, they argued that even if the applicants' status was still a private fact, that they did not know this and had mistakenly thought that it was no longer a private fact. This second defence goes to the *animus injuriandi*. If the respondents genuinely considered the applicants to have consented to the publication of their HIV status, they did not act intentionally in disclosing that status.

Did the respondents have animus injuriandi*?*

[155] The next question that arises is whether the respondents did act *animo injuriandi* in publishing the information about the applicants. It should be stated at the outset that it is necessary in our law for plaintiffs to aver that the infringement of privacy was *animo injuriandi.*[31] And there is at least some authority to suggest that where the publication of a private fact is established a presumption that the publication was intentional will arise.[32] I deal with the facts of this case on the assumption that the respondents needed to rebut a presumption that they acted intentionally, and as will appear below, I conclude that on the evidence they have in

[30] See para 149 above.

[31] See *Jansen van Vuuren* above n 16.

[32] See *Kidson* above n 29 at 468E-F.

fact established that they did not act intentionally. Nothing turns therefore, for the purposes of my judgment, on where the onus lies in relation to intention.

[156] The question that arises is whether the defendants have rebutted the fact that the publication of a private fact was intentional. Because Madala J reaches a different conclusion to me on the same record, I consider it necessary to spend some time recounting the evidence given by the first and second respondents in this regard. Ms Smith, the first respondent, who is the author of the book, gave evidence that she was approached by the publisher and asked to do the book. Having agreed to do so, she met Ms de Lille about whom the book was to be written and sketched the chapter outlines. It was agreed at an early stage that one of the chapters in the book would discuss the work Ms de Lille had done in respect of HIV/AIDS.

[157] According to Ms Smith, Ms de Lille made all her files available to Ms Smith for the purposes of the book. In these files was a document called the Strauss Report which had been sent to Ms de Lille by the University of Pretoria. This was the report of an independent commission of enquiry established by the University of Pretoria and chaired by Professor Strauss to investigate the complaints about the medical trial in which the applicants participated. In the report, the names of the applicants are given and it is stated that they are living with HIV and are three of those participating in the trial under investigation.

[158] It is the fact that this report included the names of the applicants without any express indication that their names were to be kept confidential, either in the text of the report, or in the covering letter under which it was sent to Ms de Lille, which Ms Smith relies upon as the grounds for her belief that the applicants had consented to the publication of their HIV status in the book. However, when Professor Strauss interviewed the three applicants he obtained a consent form in limited terms. That consent form authorised disclosure of their HIV status only to a limited number of people including Ms de Lille. Ms Smith therefore was mistaken in this regard.

[159] Ms Smith gave evidence that she was not aware of the terms of the limited consent given to Professor Strauss. The introductory section of the report states that the applicants' names were published in terms of consent forms received from them, copies of which are annexed to the Report, but the copy of the report sent to Ms de Lille did not contain copies of the annexures. Nor did the text of the report indicate that the consent given was qualified in any way.

[160] During cross-examination, Ms Smith was asked whether she had tried to obtain copies of the missing annexures. She stated that she had sought to obtain copies of the annexures to the Strauss Report. To do so, she contacted the University of Pretoria on three different occasions and sought to speak to the Registrar. She left messages which were not returned. She also phoned the doctor in charge of the medical trial without success. She also phoned Professor Strauss but he did not return her calls either. It is to these steps that Madala J adverts in support of his conclusion that Ms

Smith subjectively contemplated the possibility that the applicants had in fact not consented to their names being published, and that that was the reason she was seeking to obtain the annexures to the report. This conclusion, however, does not in my view accord either with this aspect of Ms Smith's evidence or with her evidence as a whole.

[161] When tested as to whether she made the attempts to obtain copies of the annexures, she observed that she was interested not only in the consent forms given to Professor Strauss but to the original consent forms for the medical trials, as well as the other annexures for the sake of completeness. This interest in the medical trials and the basis upon which they were conducted rings true in the light of the interest Ms de Lille had in those trials. Her interest in the annexures seems quite explicable in the light of this interest and it also explains why, when after many attempts they were not forthcoming, she did not consider it necessary to pursue them. On her evidence as a whole, it is hard to conclude that if Ms Smith wanted the annexures to establish whether in fact the applicants had consented to the publication of their names that she would have given up before obtaining them, or otherwise establishing whether the applicants had consented, or not, as I shall explain.

[162] When asked why she assumed that Professor Strauss would have obtained consents from the applicants before publishing their names, she responded emphatically as follows:

> "To me it would be unbelievable if a legal person had spoken to HIV positive people and had written a report with those people and reporting on his discussions with those people and had failed to obtain consent to use their names, to me that would have been an unbelievable situation in South Africa today."

[163] Ms Smith pointed to three facts which grounded her belief that Professor Strauss had obtained general consents from the applicants for the publication of their names. The first was that Professor Strauss conducted a commission of inquiry enquiry which, according to Ms Smith, at least one journalist was permitted to attend. Secondly, that a copy of the Strauss Report was sent not only to Ms de Lille but also, according to Ms Smith, to other journalists. Thirdly, when it was sent to Ms de Lille there was nothing said expressly about the limited consent given by the applicants. As Ms Smith reasoned in evidence:

> "I used their names because they are mentioned in the Strauss Report. The Strauss Report came from an eminent institution, conducted by an eminent individual and I would have imagined that someone of the eminence of Professor Strauss if the names of those people were meant to be confidential, if they had asked him for their names to remain confidential, he either would not have used their names, he would have referred to them as Ms M, or Mr X or whatever, or would have referred to them by alternative names. But he was quite explicit in using their full names and he also gave no confidentiality or circulation disclosures on the report, in fact basically he should not have used the names if they were not meant to be used."

[164] Moreover, Ms Smith also made it clear that she is a journalist of many years' standing who writes on issues relating to HIV/AIDS and that if it had entered her mind that the applicants had not consented to the disclosure of their HIV status, she

would not have published their names. Under cross-examination, her evidence on this point was as follows:

> "In twenty years of reporting on HIV I have never, ever seen the need to publish the name of anyone who did not want their name to be used. I would not start now. I know the names of famous people who are HIV infected and I do not reveal it. Why should I? I know the names of poor people [with HIV] and I do not reveal it. Why should I? Why should an exception have been made in twenty years, why would I have risked ruining a very good reputation by either foolishly or maliciously, as you imply, publishing the names of people? I did not publish their names. The first publication came from Professor Strauss and Pretoria University. I as a journalist was relying on information that came from a credible source. . . . I had no reason to believe that Pretoria University had not cared about these people".

[165] Throughout her evidence, therefore, the persistent theme is that given her understanding of HIV/AIDS, it was impossible to believe that Professor Strauss would have published his report without full consent from the applicants, or without clearly setting out the limited nature of the consent. Ms Smith emphasises that there was little for her to gain and much for her to lose, particularly her reputation as a journalist and human rights activist in the industry, by publishing the names knowing that the applicants had not consented or recklessly disregarding whether they had consented or not.

[166] Her version is consistent with the text of the book as published. In the chapter concerned, Ms Smith recounts the story of the clinical trial. She then points to the fact that details of the applicants' complaints were originally published in the *New York Review of Books*, though under pseudonyms. She then points to the fact that

pseudonyms were not subsequently used in the Strauss Report but that the real names were given and she uses the real names. The chapter itself therefore suggests that she thought that after the *New York Review of Books* article had been published, the applicants had consented to the publication of their names by Professor Strauss and that that consent was a general consent on which she could rely.

[167] Ms de Lille's evidence was far briefer. She authorised the writing of the biography, worked closely with Ms Smith in both its conception and execution, and read the final version of each chapter before it was published. Her liability as a person who participated in disseminating private information therefore arises from her having participated actively in the process of publication. She had a veto over the writing process and chose not to exercise it.

[168] As far as the issue of whether the publication of the names and status of the applicants was intentional or not, she simply repeated that the issue of whether the applicants had consented to their HIV status being disclosed had never been an issue. Once she saw the Strauss Report, she assumed that they had consented to the publication and the matter never came up for discussion between her and Ms Smith. This approach is consistent with the conclusion that neither the first nor the second respondent had formed *animus injuriandi*. It is also consistent with the fact that neither of them ever contemplated that the applicants had not given full consent to disclose to Professor Strauss. In my view, this is the inescapable conclusion of fact to be drawn from the record.

[169] It is important to emphasise that this is the conclusion which the High Court reached after the trial. An appellate court should be slow to interfere with the conclusion of a trial court on the facts unless the record clearly suggests that the trial court erred. Nothing on this record is suggestive of such error. It is also relevant, in my view, that by and large the applicants did not argue that *animus injuriandi* had been established on the record, either directly or in the form of *dolus eventualis*, and they did not argue on the basis that the respondents had unsuccessfully rebutted a presumption that they had acted *animo injuriandi*. Instead, the main argument on behalf of the applicants was that the common law of delict needed to be developed to impose liability for the negligent publication of private information in the breach of the constitutional right to privacy. For all these reasons, I cannot agree with the conclusion of the majority that it has been established that the respondents acted *animo injuriandi* in this case. I now turn to the applicants' argument that the law of delict needed to be developed in this case.

The development of the common law

[170] On the existing common law, a conclusion that the respondents did not act *animo injuriandi* would be the end of the matter, but the applicants pleaded and argued that the common law should be developed. On their pleadings and in argument before us they argued that the constitutional right of privacy requires more protection than the *actio injuriarum* currently provides. In particular, they argued that the intention requirement of the *actio injuriarum* should be developed to include not

only actual intention, but also negligence. This would mean that a person who negligently discloses a private fact about another will be liable in delict. In the alternative, they argued, somewhat more narrowly, that a defendant who wishes to rebut a presumption of intention may not simply show that he or she made a mistake, but must also show that the mistake was reasonable on the facts of the case.

[171] In this regard, the suggested development of the common law has some similarities to the manner in which the liability of the media[33] in the law of defamation, also based on the *actio injuriarum*, has developed in recent years. One of the difficulties in this case is the extent to which developments in the *actio injuriarum* in relation to defamation are or should be mirrored in the *actio injuriarum* in relation to privacy. Once again, this is a matter which ideally should be first considered by the Supreme Court of Appeal. Unfortunately, given that the matter has now arisen for decision in this case, that is not possible. I should note here that the Supreme Court of Appeal refused leave to appeal in this matter.

[172] The relevant developments in the law of defamation are as follows. In *Pakendorf en Andere v De Flamingh,* the Appellate Division held that the media would be held strictly liable for the wrongful publication of defamatory material.[34] However, in *National Media Ltd and Others v Bogoshi,* the Supreme Court of Appeal held that a defence by the press of reasonable publication of false defamatory

[33] The media is defined as the owner, printer and editor of a newspaper in *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A) at 154 and following pages. See also *Suid-Afrikaanse Uitsaai Korporasie v O'Malley* 1977 (3) SA 394 (A) at 407D-G; but see dictum in *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1202E-F; 1999 (1) BCLR 1 (SCA) at 4D-E, doubting whether printers should be included in this list.

[34] *Pakendorf* above n 33 at 157E-F.

allegations exists in our law.[35] In the same case, the Court overturned the decision in *Pakendorf*, holding that it was wrong.

[173] However, the Court at the same time held that the press could not rebut the presumption of intention that arises upon proof of publication of defamatory material by simply showing the absence of knowledge of unlawfulness (more simply understood as subjective mistake). The press would in addition have to establish the absence of negligence.[36] In so doing, the Court established that a media defendant could not avoid liability for defamation unless it could show that it had not acted negligently. This was a new development in the *actio injuriarum*. In his judgment on behalf of a unanimous court, Hefer JA held that there are important reasons for distinguishing the media from ordinary citizens in relation to intention in the context of defamation. He relied on reasoning adopted by the High Court of Australia in the following terms:

> "As the High Court of Australia pointed out . . . the law of defamation did not, in its initial stages, deal with publications to tens of thousands, or more, of readers, listeners or viewers, but with publication to individuals or a small group of persons. The Court proceeded to state that 'the damage that can be done when there are thousands of recipients of a communication is obviously greater than when there are only a few recipients and for this reason held that it is not inconsistent with the implied freedom of communication of the Australian Constitution to place an additional burden upon the media in order to escape liability for defamation . . . . Taking into account what I said earlier about the credibility which the media enjoys

[35] *Bogoshi* above n 33 at 1212G.

[36] Id at 1214C-F.

> amongst large sections of the community, such an additional burden is entirely reasonable."[37]

The rules as developed in *Bogoshi* were unsuccessfully challenged on constitutional grounds before this Court in *Khumalo*.[38] This Court held that the rules as established in *Bogoshi* were not inconsistent with the Constitution.

[174] The applicants argued both in the High Court and on appeal that the *actio injuriarum* in respect of a breach of privacy should be developed to found liability in circumstances where the breach of privacy occurs negligently. In this regard, it should be borne in mind that the High Court dealt with the case on the basis that the principles set out in *Bogoshi* and as considered in *Khumalo and Others v Holomisa* and also in *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* apply.[39] The court assumed therefore that the respondents would be liable if they could not establish that the publication of the names of the applicants in the book was reasonable or that the respondents had not acted negligently in publishing the names.

[175] The law, as developed in *Bogoshi* and *Khumalo,* is not automatically applicable in this case. First, this case deals with an infringement of the right to privacy, and not to damage to the reputation of the applicants. In argument before us, counsel for the applicants expressly disavowed any suggestion that the publication of the applicants'

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[37] Id at 1214G-I.

[38] Above n 18.

[39] See *NM and Others v Smith and Others* [2005] 3 All SA 457 (W) at para 36; see also *Bogoshi* above n 33; *Khumalo* above n 18; *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329; 2004 (11) BCLR 1182 (SCA).

HIV status was defamatory of them and it is clear from the pleadings that this was never the argument of the applicants. While it may be that the *actio injuriarum* in respect of privacy should be developed in the same way as the law of defamation, this is not a matter that has yet been addressed by the Supreme Court of Appeal or by this Court.[40]

[176] Secondly, it is not immediately clear that the respondents in this case constitute media defendants as contemplated by the *Bogoshi* judgment. Media defendants in that case clearly involved print, broadcast and electronic media.[41] In this case, we are dealing with an author, a person who has consented to be the subject of an authorised biography and a book publisher. Such people do not, on its ordinary meaning, fall within "the media".[42] This is a matter to which I return in a moment.

[177] For the purposes of this case, I accept that the legal principles developed in *Bogoshi* should apply not only in the law of defamation but also to the infringement of privacy rights by the media. I take this view for the following reasons. First, the reason in *Bogoshi* and other cases[43] given for distinguishing between the media and other citizens in respect of their liability for defamation lies in the power that the media have to cause harm by publication of defamatory material. It is this potential

[40] Some inconclusive comments in this regard were made in this Court's judgment in *Khumalo* above n 18 at para 27.

[41] See *Bogoshi* above n 33, involving a newspaper editor and publisher. See also *Khumalo* above n 18 at para 22.

[42] See n 33 above setting out the definition of the media.

[43] See *Bogoshi* above n 33 at 1214E-I; *Khumalo* above n 18 at para 24; *Mthembi-Mahanyele* above n 39 at paras 41-42.

harm to which Warren and Brandeis refer in the quotation included earlier in this judgment.[44] Modern electronic, print and broadcast media are immensely, and indeed, increasingly powerful. Publications often reach hundreds of thousands of readers, viewers and listeners. It is accordingly appropriate, given the scale of damage to an individual that can be caused by such widespread publication, to confer special obligations upon the media in respect of publication. In so doing, we recognise that the media are not only bearers of rights under our constitutional order, but also bearers of obligations.[45]

[178] The nature of obligations imposed however is merely a requirement that the media establish that the publication is reasonable in the circumstances or that it is not negligent. Such obligations require the media to consider the constitutional rights at play and be persuaded that publication is nevertheless appropriate. The effect on the media, therefore, is to require them to act in an objectively appropriate fashion. In determining whether they have so acted, a court will bear in mind the particular constraints under which the media operate and will not impose a counsel of perfection in circumstances where it would not be realistic. The effect of such a rule would be to require editors and journalists to act with due care and respect for the right to privacy, prior to publishing material that infringes that right. It will require them to ask the question: is the publication of this information, although it is private information, nevertheless reasonable in the circumstances?

[44] See para 128 above.

[45] *Khumalo* above n 18 at para 22.

[179] Such an obligation will provide some real protection for important constitutional rights. Accordingly, I conclude that it is appropriate to require the media when publishing private facts without consent to establish either that the publication is reasonable in the circumstances, in which case they will rebut wrongfulness, or that they have not acted negligently in the circumstances in which instance they will need to rebut the requirement of intention.

[180] This conclusion is not the end of the matter for the present case. The next question that arises is whether the respondents in this case constitute "the media". There are important reasons for differentiating between ordinary citizens not engaged as part of their business or profession in the dissemination of information and those citizens and institutions that are so engaged. It is appropriate to impose additional obligations on those who disseminate information for professional and commercial purposes while not imposing such obligations on those who do not.

[181] Professional and commercial purveyors of information are well placed to ensure that appropriate systems prevent the unreasonable disclosure of private facts and the negligent disclosure of those facts. This is not the case for ordinary citizens. Moreover, generally, disclosure by ordinary citizens will not be as widespread as disclosure by those involved in the professional or commercial dissemination of information. This is not to say that at times targeted disclosure of information, albeit to a small community, may nevertheless be very harmful. Once again, this is an issue

which does not arise on the facts of this case and does not require further consideration here.

[182] The respondents here were not acting as ordinary private citizens. They were engaged in the publication of a book. The first respondent is an author and a journalist who is fully aware of the ordinary constraints upon the publication of private information. The third respondent is a book publisher, engaged therefore in disseminating information for commercial reasons. It seems to me, to be appropriate to include both the first and third respondents within the concept of the media for the purposes of the expanded principles for liability under the *actio injuriarium* described above. But not the second respondent, who is neither an author nor publisher. As will become clear, nothing ultimately hangs on the conclusion that the first and third respondents do fall within "the media" while the second respondent does not. I should emphasise that there are sound reasons why publication of private information through the process of written or verbal comment in a private setting should not be subjected to the same test for liability.

Did the respondents act negligently?

[183] The next question that arises, therefore, is whether it has been established on the facts of this case that the first and third respondents acted negligently. The evidence of the first and second respondents, described in some detail above, makes plain the following. The first respondent based her use of the names of the applicants when disclosing their status on the fact that their names and status had been disclosed

in the Strauss Report. She viewed the Strauss Report as being the report of an eminent lawyer versed in the principles of the Constitution on behalf of a leading university. She assumed that neither Professor Strauss nor the University would have disclosed the names of the applicants as people living with HIV without their consent. There was nothing in the report, or in the letter under cover of which the Report was sent, to suggest that there was any reason to doubt that the applicants had consented to the publication of their names. She points to the fact that ordinarily, where confidentiality is claimed for information, the disseminator of information claims that confidentiality clearly on the face of the report containing it, or within the text itself, close to where the information appears. This was not the case in relation to the publication of the names of the applicants.

[184] Accordingly, it appears from the evidence that the respondents simply did not entertain the possibility that either the University of Pretoria or Professor Strauss would have sent a report to a Member of Parliament in circumstances where the consent given was only of a limited variety in a publication that did not draw attention to that fact.

[185] The question that arises is whether in republishing the names of the applicants, the first and third respondents acted negligently. I cannot find that they did. To hold that in the circumstances as outlined above they were under a further duty to contact either the University or the applicants to ensure that they had in fact consented to publication of their names would impose a significant burden on freedom of

expression. The result of such a finding would be that where personal private facts have been published already by a reputable organisation, another organisation may not rely on that publication as having been done lawfully and without infringement of privacy. Not one of the codes of conduct placed before the Court by Professor Harber suggested that this should be the case. The emphasis in the codes is on the need for journalists at first instance either to obtain an informed consent or, alternatively, not to disclose the identity of a person unless there is a clear public interest in so doing.[46] They do not answer the question of what the responsibility of a journalist is when a reputable source has already published the information. In this case, the first respondent assumed that the reputable source had applied the accepted principle that the names should not be disclosed without proper consent. She thus assumed that there had been consent.

[186] To hold the first and third respondents liable, one would either have to find that wherever a reputable source has published identities, secondary publication may not take place without the existence of informed consent having been independently verified, so that in each case, the subsequent publisher would have to re-ascertain the facts. In my view, this would result in unacceptable burdens being imposed on the dissemination of information and have a significantly deleterious effect on freedom of speech.

[46] See para 149 above.

[187] Journalists must be entitled to publish information provided to them by reliable sources without rechecking in each case whether the publication was lawful, unless there is some material basis upon which to conclude that there is a risk that the original publication was not lawful. If there is a reasonable basis for suspecting that the publication of private information was without consent, a journalist will, of course, bear an obligation to check. If there are no grounds for such suspicion, it cannot be said that a journalist acts negligently in not checking.

[188] Of course, if it turns out subsequently that the original publication was without consent and the disclosure was made wrongfully, the source of the harm will be the original publisher. The cause of action in such circumstances therefore lies against the original publisher of the private information, not all subsequent publishers. Those who have been harmed by the publication must therefore have a remedy – damages against the first publisher. In this case, neither Professor Strauss nor the University were cited as respondents in this case and nothing further can be said on that score.

[189] In my view, I conclude that, even on the assumption that it is appropriate that the *actio injuriarum* be developed to found liability against defendants such as the first and third respondents in circumstances where they publish private facts negligently, the applicants have not established that the respondents should be liable for the disclosure of their names and HIV status in the book.

The third respondent's appeal

[190] One of the final issues to be considered in this case relates to the third respondent's appeal. The High Court found that the third respondent's failure to have the book withdrawn and the names of the applicants deleted from it, once it discovered that the applicants had not consented to publication, rendered it liable to the applicants in respect of that failure. The third respondent seeks leave to appeal against that decision. The grounds for that appeal are, in effect, two-fold: first, counsel for the third respondent argues that because the applicants withdrew their initial application it was entitled to consider the matter to have been resolved and no further action was required by it; and secondly, that the issue of the failure to withdraw books was never pleaded. The second ground can be dealt with quickly. Although it may be that the pleadings did not specifically raise this issue, the issue was fully traversed in the evidence. The third respondent could have chosen to lead evidence to deal with the issue but chose not to, although both the first and second respondents were asked questions in relation to it. It is clear from the evidence, that it was not an issue in the case, and I agree with the High Court that the third respondent cannot avoid this liability on the basis of an express averment in the pleadings relating to it.

[191] On the first issue, the question of the effect of the withdrawal of the original proceedings, it is undeniable that the third respondent was notified of the fact that the applicants did not consent to the publication of their names and HIV status. Nothing occurred in the process of withdrawal of the proceedings which contradicted that fact. The simple fact that the applicants had not consented to the publication of their names

should have alerted the third respondent to the wrongfulness of the publication in the book. The continued failure by the third respondent to take steps to prevent further wrongful publication is not explained anywhere on the record. The only possible conclusion is that the third respondent's conduct in persisting with the publication of private facts was at that stage *animo injuriandi*. In the circumstances, the third respondent's appeal must fail.

[192] A further issue needs to be mentioned: the applicants did not seek to argue that the first and second respondents carried any separate actionable responsibility for the manner in which they responded once it came to their attention that the applicants had not in fact consented to the disclosure of their HIV status by Professor Strauss or the University of Pretoria. The facts of what transpired can be told quickly.

[193] Ms de Lille was initially sent a letter of demand by the applicants' former attorneys requesting that she arrange for copies of the book to be withdrawn from bookshops. She was made aware of this letter though the first respondent was not aware of it. The response of Ms de Lille's attorneys, apparently with her approval, was that Ms de Lille "was not accountable in respect of your clients' concerns in the above matter."

[194] One of the reasons Ms de Lille gives for the writing of this letter was that the request to remove books from the shelves should have been directed to the third respondent and not her. It may be that, in the first instance, as the publisher of the

book, it is the third respondent who could have taken steps to remove the book from bookshops and have the names of the applicants deleted. But on her version, Ms de Lille concedes that she made no attempt to contact the publishers or request them to have the books withdrawn. Her response in this regard can only be described as lamentable.

[195] Similarly, the first respondent, although she was not aware of the original letter of demand, was aware of the initial aborted proceedings brought by the applicants to have the books removed from the shelves until the names of the applicants were deleted from them. In this regard, in her evidence she stated that she took no steps to have the books withdrawn from the shelves because it was a matter for the publisher and not the author.

[196] There can be no doubt that both the first and second respondents were correct in assuming that the responsibility for the removal of the books lay primarily with the publisher. But one is left with the concern that the actions they took when faced with the fact that the applicants did not consent to the publication of their names and status falls short of what is desirable of those engaged in the dissemination of information. Nothing more need be said on this score, given that the applicants did not seek to establish any separate liability in this regard. Moreover, it is clear that as the third respondent must pay the damages that the applicants suffered in this regard, any liability that the first and second respondents might have borne would have been shared jointly and severally with the third respondent.

[197] One last thing needs to be said. It is clear from the record that throughout the relevant events, the applicants have been vulnerable and at risk. But the record leaves some uncomfortable questions unanswered. The applicants are women living in poverty with HIV in a sprawling township in Gauteng. When the clinical trial commenced at the University of Pretoria, they were living with HIV and had no possibility of obtaining medication for their illness outside of the context of the clinical trial, given that the public health sector did not commence with a treatment programme for HIV/AIDS until several years later. Their participation in that programme initially caused them anxiety and dissatisfaction. The second respondent came to meet them when news of their anxieties concerning the clinical trial reached her. Inevitably, as a high-profile politician, the attention she focussed on the clinical trial was distressing to those engaged in it professionally.

[198] Some time after they had made their initial complaints about the trial, the three applicants dropped their complaints. Nowhere on the record is the explanation for this about-turn provided. It may be explained, as the High Court suggests, that after initial difficulties with the medication, their health improved and their anxieties subsided. We do not know and cannot tell. The independent enquiry into the medical trial by Professor Strauss at the instigation of the University of Pretoria vindicated the trial. The applicants' attention to the publication of their names in the book was drawn by one of the medical doctors involved in the trial who also advised them to contact lawyers at the University Legal Aid Clinic.

[199] This case reminds one of the profound vulnerability of those in the situation of the three applicants in many respects but not least in relation to their ability to gain access both to medical care and legal advice. Without suggesting the contrary has occurred, the facts of this case serve as a reminder of the need to ensure that medical care and legal advice be tendered to those who are as vulnerable as the applicants, in the best interests of those to whom it is provided, and with scrupulous attention to the demands of professional ethics at all times.

[200] For the reasons given above, I would dismiss both the appeal of the first to third applicants and the third respondent. I would make no order as to costs.

SACHS J:

[201] In many industrialised states privacy law has been advancing by leaps and bounds. The rich and famous seek legally to restrain the voracious mass media that swallow up and regurgitate trivial and hurtful information about their private lives.[1] In our country privacy law has been invoked in quite a different context. It is to provide balm for the traumatised dignity of people living in the harshest of social conditions and afflicted with the most serious of ailments. It is in this human rights context that the competing interests at stake in the present matter must be dealt with.

[1] See for example *Von Hannover v Germany* (2005) 40 EHRR 1 (Princess Caroline of Monaco); *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776; *Douglas v Hello! Ltd (No 6)* [2006] QB 125 (Michael Douglas and Catherine Zeta-Jones); *Campbell v MGN Ltd* [2004] UKHL 22 (Noami Campbell).

[202] In a fittingly accessible manner, Madala J has indicated how in the particular circumstances of this case competing needs with respect to human dignity, on the one hand, and freedom of expression, on the other, should be reconciled.[2] I support his reasons and conclusions, and wish to add the following observations.

[203] In *Bogoshi*[3] the SCA developed in a way that was sensitive to contemporary concerns and realities, a well-weighted means of balancing respect for individual personality rights with concern for freedom of the press. Though the case related to the law of defamation, the principles developed in it are eminently transportable to the law of privacy. The SCA ensured the continued protection of individual rights of reputation by re-affirming the traditional common law principle that once the injurious statement was proved, intent to injure would be presumed, and a defendant would escape liability only by establishing truth and public benefit. But to pre-empt the undue chilling effect of huge potential claims for damages following on honest error, it added that even if aspects of a publication turned out to be untrue, a showing that the media concerned had taken reasonable steps to ensure the veracity of the relevant information would establish a good defence to the unlawfulness of the publication. What mattered was the reasonableness of the publication in the circumstances.[4]

[2] The dispute arose out of the publication by the respondents of the fact that the three applicants, who were mentioned by name, were living with HIV, in the mistaken belief that the three had placed their HIV status in the public domain. The facts are fully dealt with in the judgments of Madala J and O'Regan J.

[3] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (SCA); 1999 (1) BCLR 1 (SCA).

[4] Id at 1212A-B, G-I.

[204] The *Bogoshi* approach has two principal virtues. Firstly, it seeks to harmonise as much as possible respect for human dignity and freedom of the press, rather than to rank them in terms of precedence. The emphasis is placed on context, balance and proportionality, and not on formal and arid classifications accompanied by mantras that favour either human dignity or press freedom. The more private the matter, the greater the call for caution on the part of the media, while conversely, the more profound the public interest, the more heavily will it weigh in the scales. Secondly, by stressing the need for the media to take reasonable steps to verify the information to be published, it introduces objective standards that can be determined in advance by the profession and then evaluated on a case-by-case basis by the courts. The result is the creation of clearly identifiable and operational norms, and the fostering in the media of a culture of care and responsibility.[5]

[205] I feel that both of these elements are relevant as to how the tension between privacy rights and press freedom should be handled in the present matter. There is nothing to suggest that Ms Smith, an experienced journalist, was unaware of the

[5] In this case evidence of the standards of reasonable reporting that media professionals set for themselves was given by Professor Anton Harber. He states that since legal control over the media is prone to stifle its freedom of expression unduly, most democracies have opted for as much self-regulation as possible. It is a pervasive principle of journalistic practice that the identity of a person with HIV should not be disclosed without the explicit permission of that person. The onus is on the journalist or publisher to ensure that such permission has been granted. A journalist cannot merely assume that consent to publication has been given. Especially in our society, where many people are naïve and ignorant and therefore fail to appreciate the power of the media, journalists should take extra care when publishing personal information. Accordingly, the clear default position pertaining to the naming of people living with HIV is that a journalist should not name individuals in publications without informed consent, or, arguably, may only do so if there is an overwhelming public interest in publication without prior authorisation.

It was not for Professor Harber himself to determine whether, as a matter of law, Ms Smith and the publishers had taken reasonable steps to ensure that the names and status of the applicants were in the public domain. It was, however, helpful to be informed as to what the professional norms and standards were in relation to the publication of a person's HIV status.

norms of her profession, and there is no reason to doubt the genuineness of her belief (in fact erroneous) that the applicants had indeed placed their medical status in the public domain. Nevertheless, given the extreme sensitivity of the information involved, she should have left no stone unturned in her pursuit of verification. Of even greater importance, if the slightest doubt existed, there was no need to publish the actual names of the applicants.

[206] There might be some cases where the need for verisimilitude, a sense of actuality, may be overwhelming. Indeed, in the case of film stars, models and titled personalities, it is precisely their celebrity that establishes their newsworthiness. This case is not one of those. We are not dealing with famous people who simultaneously crave and decry extreme public attention. We are concerned with people whose lives are dominated by anxiety and who are only slowly beginning to break through intense barriers of community prejudice. Hardly a day goes by without one reading in one publication or another the name of someone living with HIV, where an asterisk is attached to indicate that the name is not real.

[207] In the present matter the publishing of the actual names of the applicants could have added only minimally to the vibrancy and texture of the story, if at all. At the same time it was devastating to the applicants. When the expressive interests are balanced against the privacy interests, the scales come down with a clang on the side of privacy. In the result, the steps taken by Ms Smith, Ms de Lille and the publishers

to avoid unwitting damage through unauthorised disclosure of private medical facts, did not meet the standard of reasonableness.

[208] Ms Smith and Ms de Lille both have an honourable history of raising public awareness of the need to deal sympathetically and efficaciously with the pandemic. The fact that persons with their record are being called to account for failure to ensure that highly sensitive private medical facts about identified individuals were not inappropriately revealed, serves to underline the need to hold firmly to stringent standards of respect for privacy in this area. These are standards that the profession has set for itself, and that the law demands of all.

[209] From a legal point of view, then, the moral of the story is that unless overwhelming public interest points the other way, publishers should refrain from circulating information identifying the HIV status of named individuals, unless they have the clearest possible proof of consent to publication having been given, or that the information is in the broad public domain.

[210] At its heart this case was never about money. It was about defining appropriate journalistic and publishing standards in a murky and undeveloped area of our law. In this context it is a matter of regret that parties that shared a deep concern about the need to develop a humane and sympathetic approach to people living with HIV, found themselves increasingly at loggerheads. The trial was acrimonious and argument in our Court at times became strident. Yet the law has been clarified in ways that

hopefully will be helpful to all concerned. Forensic closure has finally been achieved. It is to be hoped that in an appropriate spirit of healing, the offer of a private apology made at an earlier stage by Ms Smith, Ms de Lille and the publishers, will now be generously renewed by them, and generously accepted by the applicants.

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For the Respondent:	Advocate JWG Campbell SC and Advocate S Budlender instructed by Webber Wentzel Bowens.
For the Amicus Curiae:	Advocate GJ Marcus SC, Advocate AD Stein and Advocate N Rajab - Budlender instructed by the Freedom of Expression Institute.