THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 887/2020

In the matter between:

BOOL SMUTS	**FIRST APPELLANT**
LANDMARK LEOPARD AND PREDATOR PROJECT – SOUTH AFRICA	**SECOND APPELLANT**

and

HERMAN BOTHA	**RESPONDENT**

Neutral Citation: *Bool Smuts and Another v Herman Botha* (887/20) [2022] ZASCA 3 (10 January 2022)

Coram: ZONDI, MATHOPO, PLASKET and MBATHA JJA and UNTERHALTER AJA

Heard: 23 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 10 January 2022.

Summary: Right to privacy – the right to freedom of expression – public disclosure of personal information by owner – whether such personal information protected by right to privacy – personal information ceases to be private once released to public domain by owner – appeal upheld.

ORDER

On appeal from: The Eastern Cape Division of the High Court, Port Elizabeth (Roberson J sitting as court of first instance):

1 The appeal is upheld with costs including costs of senior counsel.

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

‘(a) The rule *nisi is* discharged with costs.

(b) The application is dismissed with costs.’

JUDGMENT

Mathopo JA (Zondi JA, Plasket JA, Mbatha JA and Unterhalter AJA concurring):

[1] On the 23 September 2019, in the early hours of the morning, a group of cyclists were participating in an adventure ride organised by Quantum Adventure. During their ride, they traversed the farm Varsfontein belonging to the respondent, Mr Herman Botha (Mr Botha). Nicholas Louw, one of the cyclists noticed two cages on the farm, one containing a dead baboon, the other a dead porcupine. According to his observations, the cages were positioned where there was no shade and water. There were some oranges near the baboon. He formed the view that the animals had died as a result of dehydration whilst trapped in the cages. Incensed by what he saw, he took photographs of the cages containing the dead animals and sent them to the first appellant, Mr Smuts, a wildlife conservationist and activist who for the past 17 years has been a leader in efforts to promote the conservation of indigenous wildlife in South Africa, particularly in the Eastern, Western and Northern Provinces.

He is also the founder and executive director of the second appellant, Landmark Leopard and Predator Project–South Africa (Landmark Leopard).

[2] Upon receipt of the photographs, Mr Smuts contacted Mr Botha via WhatsApp and Mr Botha confirmed that he had a valid permit to hunt, capture and/or kill the baboons, porcupines and other vermin. On the 9 October 2019, Mr Smuts posted, on Landmark Leopard's Facebook pages, pictures of the dead baboon and porcupine trapped on the farm owned by Mr Botha. On his Facebook page, Mr Smuts also included a picture of Mr Botha holding his six-month old daughter. Additionally, he posted a Google Search Location of Mr Botha's business, his home address and his telephone numbers. A WhatsApp conversation between Mr Smuts and Mr Botha was also posted. In that post, Mr Botha was asked by Mr Smuts if he had a permit to trap animals to which he responded in the affirmative. Mr Smuts captioned the post with the following commentary:

'While we spend our efforts trying to promote ecologically acceptable practices on livestock farms to promote ecological integrity and regeneration, we are inundated by reports of contrarian practices that are unethical, barbaric and utterly ruinous to biodiversity.

These images are from a farm near Alicedale in the Eastern Cape owned by Mr Herman Botha of Port Elizabeth, who is involved in the insurance industry. The farm is Varsfontein.

This is utterly vile. It is ecologically ruinous. Mr Botha claims to have permits to do this – see the Whatsapp conversation with him attached.

The images show a trap to capture baboons (they climb through the drum to get access to the oranges – often poisoned – and then cannot get out). See the porcupine in traps too. Utterly unethical, cruel and barbaric.'

[3] The post generated many comments on Facebook, which were mostly critical of Mr Botha and the particular practice of trapping animals. People who viewed the post in turn posted slanderous and insulting comments about Mr Botha and his practice. One user suggested that, 'he should be in that cage' and another user suggested that Mr Botha should be 'paid a visit'. One person suggested that Mr Botha's business should be boycotted and a campaign launched to name and shame him and his insurance brokerage business.

[4] Unhappy with the posts and the publicity it generated, Mr Botha instituted an urgent application in the High Court of the Eastern Cape Division, Port Elizabeth (the high court) for an interim interdict prohibiting Mr Smuts and Landmark Leopard from publishing defamatory statements about him. Mullins AJ granted a rule *nisi,* in terms of which Mr Smuts and Landmark Leopard were ordered to remove the photographs of Mr Botha and certain portions of the Facebook that made reference to Mr Botha, his business, its location and the name of the farm. Mr Smuts and Landmark Leopard were also prohibited from making further posts making reference to Mr Botha, his family and his business. The photograph of Mr Botha and his daughter was removed by Mr Smuts before the interim order was granted.

[5] On the return date, the rule *nisi* was confirmed by Roberson J. The high court held that although Mr Smuts and Landmark Leopard were entitled to publish the photographs and to comment on them, they were not entitled to publish the fact that the photographs were taken on a farm belonging to Mr Botha. The high court reasoned that the name of the farm and Mr Botha's identity, as owner of it, constituted personal information protected by his right to privacy. It held that Mr Botha established a clear right to an interdict, and his right to privacy was infringed by the publication of his personal information on Facebook. It adopted an approach that the public interest lay in the topic and not in Mr Botha's personal information. As a result, the high court concluded that Mr Smuts and Landmark Leopard had acted unlawfully in linking Mr Botha to the practice of animal trapping. This appeal is with the leave of the high court.

[6] The question to be answered is whether the publication of Mr Botha's personal information such as Mr Botha's identity and his business and home address enjoys the protection of the right to privacy. This issue raises a number of interconnected questions. First, whether it is in the public interests that the personal information of Mr Botha be published. Second, whether Mr Smuts could inform the public about the activities on Mr Botha's farm without disclosing his personal information. In other words, was it in the public interest to know the exact location of Mr Botha's farm? Third, was the high court correct in placing emphasis on Mr Botha's personal information despite the fact that this was already in the public domain.

[7] At the centre of this appeal is whether the publication of the Facebook posts by Mr Smuts is protected by the right to freedom of expression. In essence, what is implicated in this appeal is the tension between the right to privacy and the right to freedom of expression. This calls for a delicate balance to be drawn between these two important, competing rights.

[8] The right to privacy is a fundamental right that is protected under the Constitution. It is a right of a person to be free from intrusion or publicity of information or matters of a personal nature. It is central to the protection of human dignity, and forms the cornerstone of any democratic society. It supports and buttresses other rights such as freedom of expression, information and association. It is also about respect; every individual has a desire to keep at least some of his/her information private and away from prying eyes. Another individual or group does not have the right to ignore his wishes or to be disrespectful of his desire for privacy without a solid and reasoned basis.

[9] In *Bernstein v Bester NO*[1], Ackermann J, writing for the majority, provided a rich account of the right to privacy. Although the judgment interpreted the right to privacy in the interim Constitution, its interpretation remains of durable value to an understanding of the right to privacy in s14 of the Constitution. Ackermann J put the matter this way: the scope of a person's privacy extends 'to those aspects in regard to which a legitimate expectation of privacy can be harboured' A legitimate expectation of privacy has two component parts: 'a subjective expectation of privacy…that society has recognized…as objectively reasonable'.[2] This rather abstract formulation is made more concrete by the adoption of the concept of a continuum of privacy interests.[3] The right to privacy is most powerfully engaged where the inner sanctum of a person's life is protected from intrusion. But as a

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[1] *Bernstein v Bester NO* 1996 (2) SA 751 (CC).

[2] At para 75.

[3] A phrase coined by Sachs J in *Ministry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) at para 27.

person moves into the world of communal, business and social interaction, the scope for the exercise of the right diminishes.[4]

[10] Privacy enables individuals to create barriers and boundaries to protect themselves from unwarranted interference in their lives. It helps to establish boundaries to limit who has access to their space, possessions, as well as their commercial and other information. It affords persons the ability to assert their rights in the face of significant imbalances. It is an essential way to protect individuals and society against arbitrary and unjustified use of power by reducing what can be known about, and done to them. The right to privacy is not sacrosanct, it must be balanced with the rights of other citizens.

[11] In *South African National Defence Union v Minister of Defence and Another*, the Constitutional Court stated that:

'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.' [5]

[12] There is an illuminating discussion on the meaning of freedom of expression by Kriegler J in *S v Mamabolo,* where he said the following:

'Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm.'[6]

[13] In *Khumalo v Holomisa*, the Constitutional Court, discussing the link between the right to freedom and human dignity, held that:

'Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of

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[4] *Bernstein* at para 67.

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

[6] *S v Mamabolo* 2001 (5) BCLR 449 (CC); 2001 (3) SA 409 (CC) para 37.

citizens to make responsible political decisions and to participate effectively in public life would be stifled.'[7]

[14] Although this case dealt with the rights of the media to disseminate information and ideas, the remarks of the court apply with equal force in respect of activists like Mr Smuts who have views to advance that are relevant to public debate about the treatment of animals. I hasten to say it is in the public interest that divergent views be aired in public and subjected to scrutiny and debate. Mr Smuts, in his defence, stated that his intention in publishing the post was not to defame or otherwise harm Mr Botha but rather, to publicise or 'out' his animal trapping practices so as to stimulate the debate on this thorny and controversial issue.

[15] Mr Smuts contended that the comments made on his Facebook post constitute protected or fair comment. The comments sought to expose the use of animal traps which, in the opinion of Mr Smuts, are cruel, barbaric, vile and utterly ruinous to biodiversity. The argument advanced on behalf of Mr Smuts is that even if his views are extreme or prejudicial, the opinion he holds is one which a fair person might honestly hold. To buttress his case, he relied on the judgement of the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority*,[8] where the court, quoted with approval the European Court of Human Right, which stated that the public interest in free speech applies 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb…Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'.

[16] Mr Botha contended that Mr Smuts' Facebook post infringed on his right to privacy as it disclosed his identity, family, home address and his business address. He further contended that the Facebook post is inflammatory to the extent that it makes reference to practices that are unethical, barbaric and utterly ruinous to biodiversity. He submitted that the posts suggest that Mr Botha only purports to have

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[7] *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC); 2002 (5) SA 401 (CC) para 20.
[8] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (2) SA 294 (CC); 2002 (2) BCLR 433 (CC) para 26.

a permit whereas in truth and fact, he is acting unlawfully. According to Mr Botha, these comments were intended to undermine his reputation, status, good name, cause harm to his business and endanger his family.

[17] Mr Botha conceded that, although freedom of expression is an important fundamental right, he is entitled to the protection of his personality right to privacy under circumstances where the offensive publication is defamatory of, and concerning him. It was further submitted that references in the posts that are said to be unethical, barbaric and utterly ruinous to biodiversity is a reference to his conduct. This, he argued, does not constitute an opinion and could not have been understood by a reasonable reader to be a mere opinion. He urged upon us to accept that the post exceeded what could reasonably have been expected under the circumstances and thus breached his rights to privacy.

[18] In support of his case, Mr Botha relied on the remarks made by Neethling *et al* regarding personality rights, where the authors said the following:

'Privacy is an individual condition of life characterized by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept in private.' [9]

[19] The issue resolves itself thus, following the formulation of the right to privacy in *Bernstein v Bester NO*: can it be said that Mr Botha has the subjective expectation of privacy that society recognises as objectively reasonable. Objectively speaking, the answer is in the negative. Violations of privacy are fact specific. The right to privacy must be approached from a people-centred perspective. It is abundantly clear, as correctly found by the high court, that society cannot countenance the use of traps which exposes the animals to cruelty and vile treatment. Doubtless Mr Botha considered that there were particulars of the posts that offended his expectation of privacy. But would society concur that his expectation is objectively reasonable? And, more particularly do the posts reference the truly personal realm of Mr Botha's life, where the expectation of privacy is more likely to be considered reasonable?

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[9] J Neethling, J M Potgieter & A Roos *Neethling on Personality Right.* (2019) at 45.

[20] Where does the personal information concerning Mr Botha lie on the continuum of private interests? In this case, the identity of Mr Botha and his farm are matters that he permitted to be placed in the public domain. So too are his practices of animal trapping; he openly admitted his use of animal traps. No effort was made by him to keep this information or his activities private. His discomfort that these practices formed the subject of Mr Smuts' critical posts did not render the information he had made public, now private. The commercial farming activities of Mr Botha and the practices used by him to carry out these activities carry a very modest expectation of privacy from the perspective of what society would consider reasonable.

[21] The high court accepted that the use of animal traps is a matter of public interest and that voices of activists like Mr Smuts must be heard and engaged. Nonetheless, it found that there was no compelling public interest in the disclosure of Mr Botha's personal information. In my view, the high court erred in three respects. Firstly, it disregarded the content of Mr Smuts' post and focused on the response by members of the public. This approach, has far-reaching implications on activists like Mr Smuts because it stifles the debate and censors the activists' rights to disseminate information to the public. In so doing, it denies citizens the right to receive information and a platform for the exchange of ideas, which is crucial to the development of a democratic culture. Secondly, it interferes with the right of freedom of expression and activism and fails to strike a proper balance between personal information and the right to privacy. Thirdly, it failed to recognise that publicising the truth about Mr Botha's animal trapping activities, to which the public have access and interest, does not trump his right of privacy.

[22] The effect of limitation which the high court imposed in this case is substantial, affecting as it does, the right of activists such as Mr Smuts and that of the public to receive information, views and opinions. It cannot be denied that the public has a right to be informed about the animal practices at Mr Botha's farm. The question to be asked is whether Mr Smuts could use less restrictive means to achieve the purpose of 'outing' Mr Botha's animal trapping activities without publicising his personal information. I think not. It is clear that the inroads postulated

by Mr Botha on Mr Smuts' right to freedom of expression are by far too extensive and outweighed by the public interest in the matter. It can scarcely lie in the mouth of Mr Botha that the publication of his personal information should be protected when he has posted such information in the public domain.

[23] Mr Botha's reliance on Neethling's article is misplaced. For the test of privacy to succeed, the facts must be excluded from the knowledge of outsiders, such information must be private and having been kept from outsiders by the individual concerned (in this case Mr Botha). The right to privacy is most simply the right of a person to be left alone, to be free from unwarranted publicity and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned. However, in this case, the identity of Mr Botha and his farm are matters that he has placed in the public domain. So too are his practices of animal trapping; he openly admitted to the use of animal trappings. As a commercial farmer dealing with animal trappings, Mr Botha has put all his personal information in the public domain. No effort has been made by him to keep this information or activities private. The public interests in the treatment of animals apart from the lawfulness of the trapping must accordingly enjoy protection over his personal information. To give context to this matter, the issue relates to the ethics, cruelty and vile treatment of the animals. Apart from the unlawfulness, the public has a right to know about the activities of his business that directly impact animals.

[24] It is axiomatic that animals are worthy of protection not because of the reflection that this has on human values but because, as Cameron JA held in *National Council of Societies for the Prevention of Cruelty to Animal v Openshaw,*[10] 'animals are sentient beings that are capable of suffering and of experiencing pain' and unfortunately, 'humans are capable of inflicting suffering on animals and causing them pain'. What Mr Louw, the cyclist, observed at Mr Botha's farm must have left him with a sense of revulsion hence he took it upon himself to take the photographs of the dead animals and send them to Mr Smuts for his intervention as an activist

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[10] *National Council of Societies for the Prevention of Cruelty to Animal v Openshaw* [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) para 38.

and conservationist. It seems to me clear that Mr Smuts was rightly impelled to action when he noticed the condition of the dead animals.

[25] In my view, the right to freedom of expression in s 16 of the Bill of Rights protects every citizen to express himself or herself and to receive information and ideas. The same right is accorded to activists to disseminate information to the public. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions freely, on a wide range of topics. Honest information and publication of animal trappings is no exception. Mr Smuts had a right to expose what he considered to be the cruel and inhumane treatment of animals at Mr Botha's farm. This was a fair comment and the public interests is best served by publicising the truth rather than oppressing it. The public has a right to be informed of the humane or inhumane treatment of animals at Mr Botha's farm. Members of the public have the freedom to decide which commercial enterprise they support and which they do not. That freedom of choice can only be exercised if activities happening at Mr Botha's farm are laid bare for the public.

[26] I agree with Mr Smuts that it would serve no useful purpose in publishing the photographs without stating where they were taken, by whom the traps were used and naming the farm and identifying its owner. Mr Botha's claim to privacy is unsustainable. The use of animal traps in the course of commercial farming operation are conducted in public and thus fall outside the realm of protected privacy. What is damning for Mr Botha is that he makes use of animal traps openly where hunters and cyclists have access. I fail to understand how it can be contended that it was unlawful for Mr Smuts to publicise the fact that the photographs were taken on a farm belonging to Mr Botha. It is telling that Mr Botha did not allege that Mr Smuts' publication of the fact that the photos were taken on his farm, which publicly linked him to the use of animal traps, damaged his reputation.

[27] A further difficulty facing Mr Botha is that the information published by Mr Smuts can easily be found in the Deeds Office as well as on Google. This is not information which Mr Botha can legitimately exclude from the public. The fact that he disclosed his personal information strips him of the right to claim privacy in respect

of that information. In *Bernstein v Bester*,[11] the Constitutional Court said the following:

'The scope of privacy has been closely related to the concept of identity and it has been stated that "rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity".

. . .

The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.'[12]

[28] It is conceptually flawed that such information can remain private when it has been made public by Mr Botha himself. The fact that he is a commercial farmer who uses animal traps is not a matter that he should keep private at all. There is no suggestion in the posts that Mr Botha is acting unlawfully. What the posts asserted is that he is acting unethically and thus the public have a right to know of such practices. The purpose of the public debate is to say things that others find different and difficult. Public debate does not require politeness. What Mr Botha seeks to do is to unjustifiably limit Mr Smuts' right to freedom of expression and his entitlement to make a fair comment on the facts that are true and related to matters of public interests.

[29] The high court, in recognising Mr Smuts' right to freedom of expression, erred in two respects. First, it considered Mr Botha to have a right to privacy of comparable importance. That is not so because the information was in the public domain, and Mr Botha consequently had a weak right to privacy in respect of that information. Second, the high court approached the matter by asking whether Mr

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[11] *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC).
[12] Ibid paras 65 & 67.

Smuts could have exercised his right to freedom of expression with greater restraint so as to afford Mr Botha's right to privacy greater protection. That is not the correct way to look at the matter. A court should not act as a censor to determine how best persons might speak. In this case, Mr Smuts enjoyed the right to air his views as to animal cruelty and attribute to Mr Botha the practice of trapping. After all, that information was true, never denied by Mr Botha, nor hidden by him. In these circumstances, the test is not whether Mr Smuts could have posted more cautiously, the question is whether Mr Botha had any claim to privacy in respect of the information posted. His claim, as I have explained, was weak.

[30] The contention by Mr Botha that the Facebook post suggested that Mr Botha acted unlawfully when he trapped the baboons and porcupine in cages and that he allegedly poisoned the captured animals has no merit. The Facebook post merely states that Mr Botha claims to have a permit. Nowhere in the post is it suggested that he is acting unlawfully. In the answering affidavit, Mr Smuts stated that he was not concerned with the legality of Mr Botha's actions, but rather their ethics. A reading of the post indicates clearly that reference to poisoned oranges is not a reference to how Mr Botha entrapped animals but to how animals are lured and trapped in the cages in general.

[31] In sum, Mr Botha's personal information was in the public domain before Mr Smuts published the posts. His ownership of the farm Varsfontein was a matter of public record in the Deeds Registry, his name and occupation as an insurance broker, along with his Port Elizabeth address had been published on the internet by Mr Botha himself thus, his right to privacy was not infringed. Essentially what Mr Smuts did was to give further publicity to information about Mr Botha that was already in the public domain. That said, there was no basis for the interdict against Mr Smuts. The appeal must be upheld.

[32] In the result, the following order is made:

1 The appeal is upheld with costs including costs of senior counsel.

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

'(a) The rule *nisi is* discharged with costs.

(b) The application is dismissed with costs.'

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R S Mathopo

Judge of Appeal

APPEARANCES:

For appellant:	Matthew Blumberg SC (with him Mushahida Adhikari)
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