REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **42041/16**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

2025/02/17
DATE SIGNATURE

In the matter between:

NICOLAAS J DE JAGER **PLAINTIFF**

and

NETCARE LIMITED **DEFENDANT**

and

PROFESSOR DONRICH THALDAR **1st *AMICUS CURIAE***

PROFESSOR SIZWE SNAIL KA MTUZE **2nd *AMICUS CURIAE***

JUDGMENT

MOTHA, J

Introduction

[1] Following the order to comply with Rule 16A of the Uniform Rules of Court, in the judgment handed down on 23 May 2024, three parties sought to be admitted as *amici curae* to these proceedings; and one (The Association of Certified Fraud Examiners), subsequently, fell by the wayside. The remaining two *amici curae* - Professor Donrich Thaldar (the first *amicus)*, from the School of Law, University of Kwazulu-Natal and Professor SSK Mtuze (the second *amicus*), from the Department of Mercantile Law, Nelson Mandela University - were admitted by the court and made invaluable submissions. To balance the apparent conflict between protecting the right to privacy and the public interest to discover the truth,[1] their incisive input was just what the doctor ordered.

[2] As adumbrated in the afore-mentioned judgment, the issue of privacy implicates the constitutionally protected and enshrined rights. A lot has been authored by scholars about the right to privacy. To unpack this topic, the second *amicus* referred to the writings of Tracy Cohen who interpreted this right to include freedom from unauthorized disclosures of information about one's personal life.[2]

[3] This unwieldy topic has captured the attention of the courts, and in *Bernstein and Others v Bester and Others NNO*[3] the court held: "The concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate."[4]

[4] Examining this topic further, the court in the matter of *National Media Ltd and Another v Jooste,*[5] stated:

> "A right to privacy encompasses the competence to determine the destiny of private facts. The individual concerned is entitled to dictate the ambit of disclosure, for example to a circle of friends, a professional adviser, the public. He may prescribe the purpose and method of the disclosure. Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public. A contrary

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[1] *City of Cape Town v South African National Roads Authority Limited and Others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA); 2015 (5) BCLR 560 (SCA) at para 37.

> "But while there is an interest in protecting privacy there is also the public interest in discovering the truth."

[2] Cohen "'But for the nicety of knocking and requesting a right of entry' Surveillance law and privacy rights in South Africa" (2000) The Southern African Journal of Information and Communication (SAJIC) Issue 1.

[3] [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751.

[4] Id at para 65.

[5] [1996] ZASCA 24; 1996 (3) SA 262 (SCA); [1996] 2 All SA 510 (A).

view will place undue constraints upon the individual's so-called 'absolute right of personality'."[6] (References omitted)

The issue in contention

[5] The pivotal question confronting this court is whether the plaintiff's objection to the evidence of Mr. Dion Pienaar falls within the legislation which codifies privacy law, namely: The Protection of Personal Information Act 4 of 2013, (POPIA). An affirmative answer to this question would, therefore, *a fortiori*, have a debilitating and deleterious effect on the plaintiff's case because of the principle of subsidiarity. Litigants tend to pay lip service to this principle; however, courts cannot afford to do that. Properly understood, this principle fosters a bottom-to-top approach; thereby making the law accessible to ordinary folks. As is the case in this matter and often the case in administrative law matters, this principle is neglected by litigants, and yet it packs a devastating punch in a hierarchical court battle. It is now trite that, this Roman-Catholic rule about raising children, a litigant who seeks to assert a constitutional right should in the first place base his or her case on any legislation enacted to regulate the right, and not the Constitution.[7]

[6] In *Mazibuko and Others v City of Johannesburg and Others*[8] the court held:

> "[W]here legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."[9]

[7] Reiterating this principle, the Constitutional Court in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*[10] held:

> "The principle of subsidiarity, repeatedly recognised by this Court, has a number of applications. One application of the principle is that a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right. The

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[6] Id at 271G – 272B.
[7] *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC); [2007] 9 BLLR 785 (CC); (2007) 28 ILJ 1909 (CC).
[8] [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).
[9] Id at para 73.
[10] [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC).

litigant must either challenge the constitutionality of the legislation so enacted or rely upon the legislation to make its case."[11]

[8] In *casu*, the plaintiff relied on s 14 of the Constitution in mounting his attack against the admission of Mr. Dion Pienaar's report. Not once did he mention nor challenge the constitutionality of POPIA. Having done neither of what is referred to in *Eskom* case, the plaintiff cannot be permitted to vindicate his privacy right by directly invoking sections of the Constitution, instead of relying on POPIA, which allows for the lawful processing of information if certain grounds are met.

[9] To underscore this point, it bears mentioning the matter of *South African National Defence Union v Minister of Defence and Others*,[12] in which the court, dealing with this very principle, said:

> "Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. The proper approach to be followed should legislation not have been enacted as contemplated by section 23(5) need not be considered now."[13]

[10] Seeing that neither of the litigants to this matter was alive to this principle, nor referred to it, this court relied heavily on the submissions of the *amici curiae.* To be frank, this court is indebted to the *amici curiae*'s illuminating submissions. Verily, when judges adjudicate cases, they are inadvertently put on trial, and their success depends largely on the quality of the submissions.

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[11] Id at para 149.
[12] [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC); [2007] 9 BLLR 785 (CC); (2007) 28 ILJ 1909 (CC).
[13] Id at para 52.

Submissions by amici curiae and counsel

[11] Right from the starting blocks, both the *amici curiae* were *ad idem* that POPIA finds application in this matter. Furthermore, to prove that POPIA is germane to this matter, the first *amicus* referred to the purpose statement of the Act which is encapsulated under s 2 of POPIA, and reads:

> "Purpose of Act
>
> 2. The purpose of this Act is to —
>
> (a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at—
> (i) balancing the right to privacy against other rights, particularly the right of access to information; and
> (ii) protecting important interests, including the free flow of information within the Republic and across international borders;
>
> (b) Regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;
>
> (c) ..."

[12] From the purpose statement, it is patent that POPIA is the codification of this country's informational privacy law. With that backdrop in mind, the first *amicus* submitted that the plaintiff's invocation of s14 of the Constitution, instead of the provisions of POPIA, should imperil his case. This submission finds resonance with this court.

[13] Having denounced what he called spying and submitted that Pienaar's report cannot be lawful under POPIA, counsel for the plaintiff also submitted that POPIA is applicable in this case. *Cadit quaestio*! POPIA was not pleaded by the plaintiff. Consequently, the plaintiff's objection to the evidence of Mr. Dion Pienaar falls to be

dismissed. However, there is an ancillary question appended to this issue of subsidiarity, namely: would the implicated evidence pass muster under POPIA?

[14] Before I venture an answer to that question, one needs to mention that the defendant's counsel threw a spanner in the works and referred to the exclusions in s6(1)(e) of POPIA. His submission dovetails with the first *amicus*' open invitation to this court to clarify the exclusion in POPIA that the legislature carved out for the processing of personal information relating to the judiciary functions of a court[14]. This exclusion, for our purposes, reads:

> "6(1) This Act does not apply to the processing of personal information-
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) relating to the judicial functions of a court referred to in section 166 of the Constitution.

[15] To my mind, the administration of justice would be stymied and hampered without s 6 exclusion. Hence, it would be shortsighted to constrain the exclusion to a restrictive interpretation. The grammatic reading of "does not apply" "to the judicial functions", in my view, refers to a broad approach which allows the processing of personal information for as long as it is located within the courts' functions, and courts in terms of s 166 of the Constitution means:

"(a) the constitutional court;

(b) the Supreme Court of Appeal;

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[14] The first amicus' heads of argument at para 44

(c) the High Court of South Africa and any high court of appeal that may be established by the Act of Parliament to hear appeals from any court of status similar to the High Court of South Africa;

(d) the Magistrates' Courts; and

(e) any other court established or recognized in terms of an Act of Parliament including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts"

[16] Interpretation of a statute is an art of putting words under a microscope for the magnification of their meaning. It is trite that: "The 'inevitable point of departure is the language of the provision itself',- read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[15] Until a suitable case is serving before me, I remain persuaded that a narrow approach is not called for.

Under POPIA, would the evidence pass muster?

[17] Had the plaintiff relied on POPIA in his pleadings, the first *amicus* submitted that he would still have not succeeded. In terms of s 9 of POPIA, the processing of personal information is lawful on certain grounds, namely:

"Personal information must be processed-

(a) lawfully; and

(b) in a reasonable manner that does not infringe the privacy of the data subject."

[18] The first *amicus* submitted that the processing of personal information would be lawful, because it complies with s11(1)(f) of POPIA. For our purposes, this section reads:

[15] *Natal Municipal Pension Fund v Endumeni Municipality*,2012 (4) SA 593 (SCA).

"Consent, justification and objection

11.(1) Personal information may only be processed if –

(a)…

(b)…

(c)…

(d)…

(e)…

(f) processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied."

[19] In this case, the first *amicus* submitted, the defendant was pursuing a legitimate interest to discover the truth about the health of the plaintiff. I am uncertain of the meaning of legitimate interest. Does this interest trump the right to privacy? Since the legitimate interest is not defined in POPIA, perhaps, in balancing the legitimate interest and the right affected, one must look to s36 analysis. Therefore, one needs to pose the question whether in an open and democratic society based on human dignity, equality and freedom, and considering the five elements of s 36 of the Constitution, is the legitimate interest lawful and reasonable to allow the lawful processing of personal information? To arrive at an answer, s 36 analysis must be undertaken.

[20] The nature of the right.

The plaintiff's right not to have his photos and videos taken without his consent and knowledge, in short, his right to privacy is implicated.

[21] **The importance of the purpose of the limitation**.

The defendant wants to vindicate its legal right by gathering important evidence to use at trial. To discover the truth about the actual health of the plaintiff, the defendant had to undergo this process.

[22] The nature and extent of the limitation.

The question of reasonableness comes into the fore. In this case the more public the undertaking, the more attenuated the right to privacy and less intense any possible invasion.[16]The fact that these pictures were taken in a public setting should lessen the otherwise egregious invasion of privacy.

[23] **The relation between the limitation and its purpose**.

The rational link between the taking of the pictures and the need for evidence that exposes the truth about the plaintiff's state of health.

[24] Less restrictive means to achieve the purpose.

I cannot conceive of anymore less restrictive means to achieve the defendant's goal other than taking pictures in public settings, such as at a filling station.

[25] I am mindful of the fact that the plaintiff's health is at the heart of this case. Consequently, this amounts to the processing of special personal information. The distinction between the processing of personal information and the processing of special personal information is not made *per incuriam.* This distinction is accentuated by the definitions appended to these words. Special personal information is defined in s 26 of POPIA and differs in all material respects from personal information, as defined in s 1 of POPIA. The processing of special personal information requires another layer of protection and is circumscribed to the processing of only ten special personal information, viz:

- The religion
- philosophical beliefs
- race
- ethnic origin
- trade union membership
- political persuasion
- health

[16] Gaertner and others v Minister OF Finance and Others 2014(1) SA 442(CC) para 58

- sex life
- biometric information
- criminal behaviour.

[26] In contrast to these ten, the processing of personal information does not have a numerus *clausus*. When processing special personal information, s 26 shares the centre stage with s 27 of POPIA. Like Siamese twins, ss 26 and 27 must be read together. First, s 26 of POPIA reads:

> "Prohibition on processing of special personal information.
>
> 26. A responsible party may, subject to section 27, not process personal information concerning-
>
> (a) the religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information of a data subject; or
>
> (b)..."

[27] Second, s 27 of POPIA reads:

> "General authorisation concerning special personal information.
>
> 27. (1) The prohibition on processing personal information, as referred to in section 26, does not apply if the-
>
> (a)...
>
> (b) Processing is necessary for the establishment, exercise or defence of a right or obligation in law;
>
> (c)...
>
> (d)...
>
> (e)...
>
> (f)..."

[28] For the sake of completeness, the word "processing", as defined in s 1 of POPIA, reads:

> "means any operations or activity or any set of operations, whether or not by automatic means, concerning personal information including-
>
> (a) the collection, receipt, recording, organization collation storage, updating or modification, retrieval, alteration, consultation or use;
>
> (b) dissemination by means of transmission, distribution or making available in any other form; or
>
> (c) merging, linking, as well as restriction, degradation, erasure or destruction of information..."

[29] Section 3(4) of POPIA defines automated as:

> "(4) 'Automated means', for the purposes of this section, means any equipment capable of operating automatically in response to instructions given for the purpose of processing information."

[30] The first *amicus* submitted that the defendant was defending a right in law, following the issuance of summons. To procure evidence that is relevant to the *facta probanda* in defence of their right in law, it was necessary to conduct this surveillance. Put differently, the surveillance was entirely lawful in terms of s 27(1)(b) of POPIA. I find this submission persuasive, not least because of the pictures were taken in the public sphere, when the plaintiff was at a filling station, at a park walking. I do not think s 27(1)(b) would extend to the taking of pictures of the plaintiff inside his house, bedroom, and bed. This would, without a doubt, be tantamount to an unlawful and egregious invasion of privacy. This is certainly not the case.

[31] Save for the convergence on that POPIA finds application in this case, the *amici* are poles apart. The second *amicus* submitted that the evidence should not be admitted. The substratum of his submission was that consent should have been sought. Quoting professor Neethling, whom he referred to as uthixo (god) of privacy,

the second *amicus* submitted that "a person's right to privacy includes a person having control over his or her personal affairs and being reasonably free from unsolicited intrusion",[17] (*Informationelle Selbstbestimmung*), a German equivalent term. Proceeding with Prof Neethling, he mentioned that privacy is a personality interest and in turn, a personality interest is a non-patrimonial interest that cannot exist separately from an individual affair.

[32] He referred to the matter of *Gaertner and Others v Minister of Finance and Others*[18] in which Madlanga J said: "Privacy, like other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks... What it means is that the right is attenuated, not obliterated."[19]

[33] Notwithstanding that, he rhetorically enquired whether the *boni mores* of a democratic South Africa permit surveillance, especially after the nightmare of apartheid, in which a police state through spying resulted in the disappearance and demise of thousands. By way of an example, he referred to the matter of *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Sooknunan t/a Glory Devine World Ministries*[20] where the court said:

> "I consider it a gross invasion of privacy to furnish an individual's personal contact details on a public forum such as this Facebook wall. It exposes the recipient to unsolicited and unwanted messages. It interferes with the recipient's normal communications to others. It is private information which only Van Rooyen or Engelbrecht have the right to impart or make public."[21]

[34] Having referred to the matter of *Smuts and Another v Botha*[22] (which is still before court), he questioned the reasonableness of the surveillance conducted by the defendant and reminded the court of the minimality principle in s 10 of POPIA. This section simply states that: "Personal information may only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive." Even

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[17] Neethling et al. *Neethling's Law of Personality* 2nd ed (LexisNexis Butterworths 2005).
[18] 2014(1) SA 442 (CC).
[19] Supra para 49
[20] [2012] ZAGPJHC 97; 2012 (6) SA 201 (GSJ); [2012] 3 All SA 322 (GSJ).
[21] Id at para 78.
[22] [2022] ZASCA 3; 2022 (2) SA 425 (SCA).

when consent has been granted, the defendant's action, in sharing the information, must be compatible with the purpose for which it was processed.

[35] He submitted that the defendant should have complied with s 18 of POPIA. This section deals with Notification to the data subject – the person to whom personal information relates- when collecting personal information. As already stated, consent is at the heart of the second *amicus*'s case. Whilst I share the antipathy to special personal information being gathered surreptitiously, I found his submission that consent ought to have been sought and s 18 complied with, with respect, puzzling. I would have thought that the sting in any surveillance is in the elements of surprise and surreptitiousness. If the plaintiff had been warned, he would have organised his affairs accordingly. As the saying goes to be forewarned is to be forearmed. Moreover, s18(4)(c)(iii) of POPIA reads: "It is not necessary for a responsible party to comply with the subsection (1) if-

> (c) non-compliance is necessary-
>
> (i)...
>
> (ii)...
>
> (iii) for the conduct of proceedings in any court or tribunal that have been commenced or are reasonably contemplated;.."

[36] When asked by the court about the submission that s 27(1)(b) of POPIA covers the defendant in that the processing of special information was necessary for the defendant's defence against a hefty lawsuit that involves the sum of R 24 887 600.64, alternatively R 25 737 600.64, the second *amicus* was demure and protested that he was not arguing for the defendant or the plaintiff. Does the defendant have a right to do what it did in the context of the plaintiff's right to privacy? He asked. Certainly, if s 27 of POPIA did not come to the defendant's rescue, as it does not in case of certain television programmes, I would have accepted his submission. However, that is not the case.

[37] In an epic epilogue, the second *amicus* elucidated why the golden age of developing Afro-centric legal concepts is not on the horizon in South Africa. He unpacked how, even when developing a completely new field of law, such as POPIA, South African lawmakers model the laws that govern South Africans on the laws of our former Colonizers, under the guise of best international practices. Indeed, this immediately begs the question of what the role of South African and African academics, scholars and traditional leaders is. With this mindset, there is no hope of getting the monkey of colonialism off our backs, certainly not in this lifetime. Strictly speaking, there is nothing wrong with the sharing of ideas, but the emphasis must be on the sharing. As pointed out by the first *amicus* in reply, some African states look to South African courts to model their countries' laws on topics such as privacy. Consequently, these Africans get poisoned with the colonial view of the law on these topics and, thus, continue to encourage rather than disparage living under a colonial legal system.

[38] Having emphatically and categorically agreed with his counterpart that POPIA finds application in *casu,* the second *amicus* submitted that POPIA is modelled on the European Union's (EU) 1995 Data Protection Directive. The General Data Protection Regulation (GDPR) of 2018 is law in the entire EU. He submitted that the EU Data protection law was modelled on the German Data protection law. Thus, if one is looking for jurisprudence in this field, one needs to look no further than Germany, France and all EU member states. In reply, the first *amicus* submitted that, as a matter of necessity, South African law needs to be decolonised. I could not agree more, but this advice must be heeded by all and sundry, starting from law lecturers in South African Universities to lawmakers in Parliament and jurists in South African courts. Otherwise, to most South Africans, the law will remain elitist, foreign and devoid of Kasi-flavour.

Conclusion

[39] In the result, I find that, in this case, it is in the interest of justice to admit the evidence obtained using surveillance. Furthermore, I am persuaded by the first

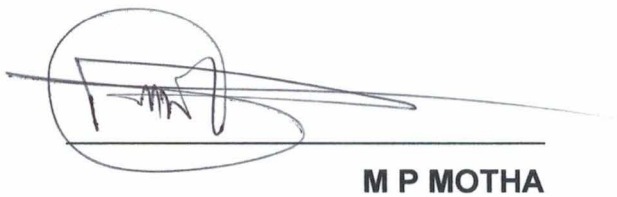
amicus' submission that, even under POPIA, the processing of the evidence through surveillance would have been lawful under s 27(1)(b) of POPIA. I must register this court's displeasure at the processing of personal information of children and non-data subjects. What is more, s 34 of POPIA prohibits the processing of personal information of children, subject to s 35. To ameliorate the harm visited on the child and those family members of the plaintiff who are not data subjects, their photos, videos, or the information on them must be redacted with immediate effect.

Costs

[40] Both parties agreed that there should be no order as to costs in this matter, and, as such, there is none.

Order

1. The application is dismissed.
2. Mr. Dion Pienaar's evidence obtained through surveillance is relevant to the *facta probanda* of the case and is admitted into evidence.
3. All the information, photos and videos of those who are not the data subject, including the children, must be redacted forthwith.
4. No order as to costs.



M P MOTHA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Plaintiff:	B P GEACH (SC), W BOTHA and D SEKWAKWENG instructed by VAN NIEKERK ATTORNEYS INC.
For the Defendant:	S. JOUBERT (SC) instructed by WHALLEY VAN DER LITH ATTORNEYS
1st Amicus curiae	PROFESSOR DONRICH THALDAR
2ND Amicus curiae	PROFESSOR SIZWE SNAIL KA MTUZE

Date of hearing: 25 September 2024

Date of judgment: 17 February 2025