PRIVACY, PUBLIC INTEREST, AND THE PURPOSES OF THE INTERNET

LEO BOONZAIER[†]
Associate Professor, Department of Private Law, Stellenbosch University

This article analyses the Constitutional Court's judgment in Botha v Smuts, *which now ranks as our leading judgment on civil claims for the infringement of informational privacy. The case involved a condemnatory social media post in which the defendant publicised the plaintiff's name and addresses, provoking threatening third-party responses. A majority of the court held the defendant's post to be (in part) unlawful, because it unjustifiably infringed the plaintiff's right to privacy. The article situates the* Botha *judgment historically and comparatively and critiques its various developments of the common law. In setting out the applicable framework, the court favours a flexible public interest defence, which is influenced by Anglo-American law and constitutional balancing tests. In applying its framework, the court does two notable things. First, it sharpens the distinction between purely business addresses and home addresses, giving the latter robust privacy protection. Secondly, and more remarkably, it holds that individuals may retain a reasonable expectation of privacy in information they themselves have chosen to publish widely. This finding suggests a new role for informational privacy claims and may, unless moderated, mark a newly tough regime for free expression on the Internet.*

Delict – privacy – public interest – freedom of expression – social media

I INTRODUCTION

Civil remedies for infringements of privacy, especially for the disclosure of private information,[1] have seen prodigious recent development across many legal systems. According to one account, art 8 of the European Convention on Human Rights, which enshrines a right to respect for private and family life, triggered a kind of 'mini-revolution' in the jurisdictions subject to it.[2] England and Wales followed suit, despite the common law's historical unwillingness to recognise a general right to privacy.

[†] BSocSc LLB (UCT) BCL DPhil (Oxon). Formerly Senior Lecturer in the Department of Private Law at the University of Cape Town. *https://orcid.org/0000-0001-6699-1167*. I wrote much of this article during a rewarding visit to the Cambridge Law Faculty. I thank my host, Helen Scott, and for financial support the International Alliance of Research Universities.

[1] In South Africa and elsewhere, two main types of privacy infringement are recognised (thanks to the classic analysis in William L Prosser 'Privacy' (1960) 48 *California LR* 383). Public disclosures of private facts about a person are distinguished from 'intrusions' into their private space or communications, for example by spying, eavesdropping, or police searches. This article discusses only the first type, which I loosely refer to as 'informational privacy'.

[2] Colm O'Cinneide et al 'Privacy' in J Smits (ed) *Elgar Encyclopedia of Comparative Law* (2006) 554 at 554.

https://doi.org/10.47348/SALJ/v142/i3a6

The protections developed by these jurisdictions are very often relied upon in practice, with mass media and the Internet begetting new forms of unwanted publicity. And related developments have occurred in other jurisdictions, such as Australia and New Zealand. The leading cases are some of the most eye-catching and widely discussed in modern Anglophone tort law.[3]

South Africa has been late to join this party. True, delictual claims for infringements of privacy, including informational privacy, have deeper roots in South African law than elsewhere in the Commonwealth. Within the flexible principles of the actio iniuriarum, bequeathed by our civilian heritage, our courts have awarded delictual remedies for wrongful disclosures since at least the 1950s.[4] To that extent, we had less need for a 'revolution'. Yet our privacy claim has over recent decades been surprisingly neglected, occupying a sleepy corner of the law of delict. Its contours have not been rigorously defined. Nor has human-rights discourse made inroads in the way that it has elsewhere: though we have had a constitutional right to privacy for thirty years,[5] and though our Constitutional Court has made ambitious attempts to constitutionalise some parts of the law of delict, the right to privacy has had few private-law effects. To be sure, in *NM v Smith* the court was presented with a high-profile opportunity to expand the fault requirement under the actio iniuriarum in a case involving the disclosure of private information.[6] But the majority refused to take it up.[7] Hence, we had no leading Constitutional Court judgment reconsidering civil claims for the right to privacy's breach. Or so it seemed — until now.

II FACTS

Botha v Smuts is about a controversial Facebook post. Mr Smuts, the defendant, is a conservationist and animal rights activist. Mr Botha, the plaintiff,[8] works primarily as an insurance broker in Gqeberha. But he also owns a farm near Alicedale, and has an evident interest in keeping

[3] For example *ABC v Lenah Game Meats* [2001] HCA 63; *Campbell v MGN Ltd* [2004] UKHL 22; *Douglas v Hello! Ltd* [2007] UKHL 21; *Hosking v Runting* [2004] NZCA 34. See also the European Court of Human Rights judgment in *Von Hannover v Germany* (2004) 40 EHRR 1. A recent conspectus is provided in P Wragg & P Coe (eds) *Landmark Cases in Privacy Law* (2023).

[4] *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C). See further David McQuoid-Mason *The Law of Privacy in South Africa* (1978); J Neethling, J M Potgieter & A Roos *Neethling on Personality Rights* 3 ed (2019) ch 8.

[5] Section 13 of the Constitution of the Republic of South Africa, Act 200 of 1993; s 14 of the Constitution of the Republic of South Africa, 1996.

[6] 2007 (5) SA 250 (CC).

[7] Langa CJ and O'Regan J, in their minority judgments, would have undertaken that development.

[8] Technically, Mr Botha was an 'applicant', since his case was decided in motion proceedings. Throughout this article I prefer the more indicative term 'plaintiff'.

https://doi.org/10.47348/SALJ/v142/i3a6

wild animals away from his cattle. In September 2019, a cyclist traversed Mr Botha's farm on a road that was open to the public. He noticed cages containing the corpses of two animals: the one a baboon, the other a porcupine. It was apparent to the cyclist, and not in dispute in the litigation, that the cages were traps: the animals had been lured into the cages by the presence of food, but could not then get out, and died from dehydration and exposure (or, perhaps, from poison that had been put into the food). The cyclist took photographs and sent them to Mr Smuts, who in turn posted them on a Facebook page that he controlled. He included alongside them other pieces of information, which he found by making enquiries from his contacts and by scouring the Internet: (i) Mr Botha's name; (ii) the name and location of his farm, which was identified as the scene of the photographs; (iii) the name and address of his insurance brokerage in Gqeberha; (iv) a picture of Mr Botha holding his six-month-old daughter, which Mr Smuts had acquired from Mr Botha's WhatsApp profile; (v) a screenshot of a WhatsApp conversation between Mr Smuts and Mr Botha in which the latter stated that he had had a valid permit to trap the animals (thus impliedly accepting that he had done so); and (vi) a strongly worded condemnation of Mr Botha's trapping practices, which Mr Smuts described, inter alia, as 'unethical, barbaric', 'cruel', 'utterly vile', and 'ecologically ruinous'.

Mr Smuts's post drew a predictable response. Highly critical comments were made about Mr Botha by over 200 other Facebook users. Some called for a campaign against Mr Botha's business. Some were more threatening.

Mr Botha sued Mr Smuts, seeking first an interim and then a final interdict ordering him to remove his post and to refrain from similar posting in future. His initial cause of action was poorly formulated, but in reply he explained that he was seeking to vindicate his 'right to privacy'. Even before Mr Botha instituted litigation, Mr Smuts had removed the photograph of Mr Botha and his daughter (see (iv) above) on the advice of his lawyers. In respect of the other components of his post, Mr Smuts's main argument was, first, that all of the information about Mr Botha and his addresses (that is, (i) to (iii) above) had already been in the public domain and hence it was not private. Indeed, Mr Botha had himself made his business address widely known. Secondly, Mr Smuts argued that the post served an important public interest — to raise awareness about animal trapping and make legitimate criticisms about the ethics of it — and was therefore a protected exercise of his freedom of expression.

In respect of the Gqeberha address, there was a final twist. It turned out that Mr Botha operates his insurance brokerage from his house. Hence, by publicising his business address, Mr Smuts was thereby also unknowingly publicising the address where Mr Botha and his family lived.

https://doi.org/10.47348/SALJ/v142/i3a6

III JUDGMENTS

The High Court (Roberson J) found in Mr Botha's favour and granted the interdict.[9] It accepted that Mr Smuts's critical assessment of Mr Botha's trapping practices could not attract liability, since it was protected by the defence of fair comment. It also took it as obvious that the photographs of the cages, on land accessible by the public, had been lawfully taken by the cyclist. And it recognised the important fact that much of the information was already available to the public before Mr Smuts posted it; indeed, it had been made public by Mr Botha himself. Nevertheless, the High Court held that Mr Smuts's post was an unlawful infringement of Mr Botha's right to privacy. Viewed in its full context, and given the purpose of Mr Smuts's post, it was unjustifiable for him to broadcast on Facebook the identifying details about Mr Botha and the addresses of his property. Although there was a strong public interest in Mr Smuts's alerting the public to the ongoing trapping practices, and in frankly expressing his negative assessment of them, this public interest did not extend to the inclusion, along with them, of (i) to (iii). 'The public interest lay in the topic', wrote Roberson J, 'not in [Mr Botha's] personal information'.[10] The interdict was tailored to require the removal only of this personal information.

On appeal, however, the Supreme Court of Appeal ('SCA') (per Mathopo JA; Zondi, Plasket and Mbatha JJA and Unterhalter AJA concurring) unanimously overturned the High Court order and dismissed Mr Botha's claim.[11] The SCA insistently affirmed Mr Smuts's main arguments and regarded them as conclusive. His Facebook post used only information that had already been placed in the public domain by Mr Botha himself, and thus could not constitute a privacy infringement. Moreover, the post contributed to a debate of legitimate public interest about animal trapping and therefore, in light of the importance of freedom of expression — which, like the right to privacy, is given constitutional status[12] — it plainly had to be judged permissible.

Mr Botha appealed to the Constitutional Court, where the case acquired a higher profile. The legal teams grew, and the Campaign for Free Expression joined as an amicus curiae. The case came to be recognised for what it is: an important vehicle for South Africa to engage with problems that characterise the Internet age and have been confronting other jurisdictions. Can 'doxing' be unlawful?[13] Will private law act to curtail

[9] *Botha v Smuts* [2020] ZAECPEHC 19.

[10] Ibid para 37.

[11] *Smuts v Botha* 2022 (2) SA 425 (SCA) ('*Smuts* (SCA)').

[12] Section 16 of the Constitution.

[13] 'Doxing' (alternatively, 'doxxing') is a neologism meaning the non-consensual publication, typically on the Internet, of identifying information about a person, such as their (real) name or address.

https://doi.org/10.47348/SALJ/v142/i3a6

social media mobs? And will it finesse its privacy protections to prevent the wide and perhaps ill-intentioned broadcasting, across social media platforms, of even publicly available information? The SCA's implicit answer to all of these questions had been negative, leaving the existing law unchanged in the name of freedom of expression. In taking this stance, it kiboshed the High Court's attempt to finesse and expand the bounds of liability.

The Constitutional Court gave judgment on 9 October 2024.[14] Broadly speaking, it has come down closer to the High Court's side of things, and in a crucial respect upheld Mr Botha's claim. But its judgment is complex. And it is beset by a four-way split.

Kollapen J gave the first, longest, and most important judgment. It was concurred in by three of his colleagues (Dodson AJ, Mhlantla J and Tshiqi J) and thus represents the view of half the eight-judge bench. It found that Mr Smuts's post was unlawful to the extent that it included Mr Botha's Gqeberha address (see (iii) above). Chaskalson AJ wrote separately, deciding the case on a narrower basis. He did so because of limitations in the way the case was pleaded, and therefore in what issues were, in his view, properly before the court. The gist of Mr Botha's pleaded claim, as Chaskalson AJ understood it, was that he feared unlawful intrusion and harassment at his family home, which Mr Smuts had made more likely by his refusal to take down the Facebook post. Despite these differences, Chaskalson AJ concurred in Kollapen J's order. Rogers J also wrote separately (with Schippers AJ concurring). He itemised his various areas of agreement with Kollapen J.[15] Importantly, these include the legal framework set out by Kollapen J in its entirety. In the application of that framework, however, Rogers J disagreed with Kollapen J, and would have dismissed Mr Botha's claim. Finally, Zondo CJ wrote a lone dissent in which he said that leave to appeal should have been refused because the issue of privacy was not properly pleaded. His judgment is not considered further.

IV THE LEGAL FRAMEWORK

The Constitutional Court judgment in *Botha v Smuts* is 335 paragraphs long — this for a case whose facts are simple and non-technical, and which the High Court and SCA each managed to resolve in about one-tenth of that length. Kollapen J's main judgment, by itself, is 179 paragraphs. This does not seem ideal. Of course, apex courts must sometimes provide fuller statements of legal principle than lower courts, which do not have their same guidance function. Yet *Botha*'s verbiage seems to dilute its main

[14] *Botha v Smuts* 2025 (1) SA 581 (CC) ('*Botha* (CC)').
[15] Ibid para 244.

https://doi.org/10.47348/SALJ/v142/i3a6

messages, rather than clarify them. The court does make some attempt to be helpful: as it often does in cases with complex splits, it provides a prefatory summary to guide the reader through *Botha*'s differing opinions. On my understanding, however, that summary is gravely misleading,[16] and tends to make the judgment less user-friendly, not more.

The silver lining of all this, I suppose, is that *Botha* leaves academic lawyers with plenty to keep them occupied. This article will spend some time exploring and critiquing the most significant aspects of the judgment. And it will seek to connect them to the comparative developments mentioned in my introduction. In part IV, I will comment on the legal framework, abstractly stated. By way of preview, my main themes may be summarised thus: the *Botha* judgment evinces the twin influences of constitutional adjudication and of Anglo-American law on civil privacy claims in South Africa; this culminates in the affirmation of an overarching and self-sufficient 'public interest' defence, and contrasts subtly but significantly with the South African law of defamation.

(a) Delict and Constitution, subjective and objective

In previous work, I have argued that recent judgments of our appellate courts exhibit 'common-law avoidance'.[17] That is, they opt to use newly devised constitutional mechanisms to decide the case before them, instead of the longstanding mechanisms available within the private common law. The Constitutional Court's judgment in *Botha* is consistent with this trend.

It is trite, or so I always thought, that civil claims for privacy in South African law are based upon the actio iniuriarum, our general remedy for harms to personality rights which derives from Roman times.[18] The right to privacy, like many personality rights, now has constitutional status. But the proper way to protect that right is to use the existing law of delict, including if necessary by developing it, rather than to create a new

[16] The summary states that a majority of the court, led in each case by Kollapen J, had concluded that (i) 'Mr Botha had a reasonable expectation of privacy over his home address' and that (ii) 'Mr Botha did *not* hold a reasonable expectation of privacy in respect of his insurance brokerage address' (emphasis supplied). The conjunction of these conclusions is patently nonsensical, however, since it is an elementary feature of the case that Mr Botha's home address and his insurance brokerage address were one and the same (as was already explained in part I). And the justification given in the court's summary for conclusion (ii), namely that Mr Botha 'published the information himself with the purpose of bringing public attention towards his insurance brokerage', is not a remotely accurate account of the majority's reasoning (as we shall see in part V(b)(ii)).

[17] Leo Boonzaier 'Common-law avoidance' (2024) 141 *SALJ* 213.

[18] *O'Keeffe* supra note 4; *Jansen van Vuuren NO v Kruger* 1993 (4) SA 842 (A) at 849; McQuoid-Mason op cit note 4 at 34, 86; Neethling et al op cit note 4 at ch 2.

https://doi.org/10.47348/SALJ/v142/i3a6

constitutional delict in parallel.[19] Indeed, in *NM v Smith*, the Constitutional Court affirmed that the actio iniuriarum was the correct means by which to provide the plaintiffs with a civil remedy for infringements of their constitutional privacy rights, and that it would have been inconsistent with the court's jurisprudence for them to 'institute a constitutional claim directly'.[20]

But the actio iniuriarum is not mentioned in *Botha* at all. The word 'delict' and its cognates never appear. On occasion, leading delict cases are cited, but the uninitiated reader of the judgment would not be aware that this is what they are. They are placed alongside and presented as interchangeable with cases that involve quite different legal contexts and causes of action (though they, too, relate to privacy interests). Most prominently, the judgment draws upon classic Constitutional Court cases such as *Bernstein v Bester NO*[21] and *Mistry v Interim Medical and Dental Council*,[22] as well as recent ones such as *Minister of Justice and Constitutional Development v Prince*[23] and *Arena Holdings (Pty) Ltd v South African Revenue Service*,[24] all of which are about the constitutional review of legislation. But of course Mr Botha was not seeking to invalidate a statute. He was seeking an interdict — an ordinary civil remedy for wrongful disclosures of private information[25] — against another private party. The existing law of delict therefore seemed obviously apposite. Yet the court unreflectively applied the tests for privacy infringements developed in the context of Bill of Rights litigation. This does not take account of what the court said in *NM v Smith*. Nor does it sit well with *Greater Tzaneen Municipality v Bravospan 252 CC*, decided the week before *Botha*, in which Bilchitz AJ cautioned that 'the Constitution … does not seek to replace the entire edifice of the common law with separate constitutional actions'.[26]

Fortunately, it is quite possible to do what the court itself did not, and reconcile its reasoning in *Botha* with the existing delictual framework.

A key step in the logic of *Botha* is to apply *Bernstein*'s famous two-stage test for a privacy infringement in this civil context. According to it, a party seeking to establish a privacy claim must show that the party had a 'reasonable expectation of privacy' in respect of the published information,

[19] Cf David McQuoid-Mason 'Privacy' in Stu Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2013) 38.2; Khomotso Moshikaro 'Privacy' in Jason Brickhill et al (eds) *South African Constitutional Law* (2023) 23.5.

[20] *NM v Smith* supra note 6 para 27.

[21] 1996 (2) SA 751 (CC).

[22] 1998 (4) SA 1127 (CC).

[23] 2018 (6) SA 393 (CC).

[24] 2023 (5) SA 319 (CC).

[25] Neethling et al op cit note 4 at 350. See further note 83 below.

[26] 2025 (1) SA 557 (CC) para 27.

https://doi.org/10.47348/SALJ/v142/i3a6

which 'comprises two questions'.[27] First, this party must establish 'that he or she has a *subjective expectation* of privacy'; second, he or she must show that society recognises this expectation 'as *objectively reasonable*'.[28] Ackermann J based this test on United States and Canadian constitutional law. But in fact it is little different from the test applied by the South African law of delict, which can be traced to the start of the twentieth century[29] and which, in its modern form, has two well-settled requirements, conventionally grouped under the element of wrongfulness.[30] The first requirement is subjective, testing whether the defendant's conduct was in fact experienced by the plaintiff as an affront. The second boils down to whether the defendant's conduct is contra bonos mores in the view of the court. Put differently, whether a publication by the defendant is wrongful depends, ultimately, on the court's objective assessment of the proper bounds of liability. But there is no objective reason to prohibit publication of a statement that the plaintiff had no wish to keep private: hence the subjective limb of the test.

The Appellate Division discussed and affirmed this two-legged approach in *National Media Ltd v Jooste*.[31] It is strikingly similar to the test from *Bernstein*, which the Constitutional Court decided the following day. Both ask, first, whether the plaintiff as a matter of fact expected the matter in question to remain private. Then they ask, secondly and more substantially, whether the law should endorse and reinforce that expectation by exposing to liability those who act contrary to it. The similarity of the two tests has been widely remarked upon[32] and is not coincidental: they have some shared sources and inspirations in United States privacy law,[33] Ackermann J was well aware of our pertinent delict sources in *Bernstein*,[34] and his judgment, in turn, has come to influence the law of delict. There, too, it must be asked whether the information of whose disclosure the plaintiff complains was indeed 'private' and thus capable of grounding liability, and *Bernstein*'s guidelines are widely assumed by delict scholars to be apposite.[35] Of special importance here is Ackermann J's globally famous

[27] *Bernstein* supra note 21 para 76.

[28] Ibid para 75 (emphasis in the original).

[29] Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) 27; *R v Umfaan* 1908 TS 62 at 66.

[30] McQuoid-Mason op cit note 4 at 116–30; Neethling et al op cit note 4 at 194–5, 221. See also *De Lange v Costa* 1989 (2) SA 857 (A) at 862.

[31] 1996 (3) SA 262 (A).

[32] For example McQuoid-Mason op cit note 19 at ch 38-4; Neethling et al op cit note 4 at 311.

[33] *O'Keeffe* supra note 4, though famous for its use of deeper-lying Roman-Dutch principles, had drawn pointedly upon American law. See also notes 62 and 94 below.

[34] *Bernstein* supra note 21 paras 68–9.

[35] Daniel Visser 'Delict' in François du Bois (gen ed) *Wille's Principles of South African Law* (2007) 1201–2; F D J Brand 'Privacy' in Elspeth Reid & Daniel Visser (eds)

https://doi.org/10.47348/SALJ/v142/i3a6

(if partly question-begging) spectral metaphor, according to which privacy protections cover only the 'inner sanctum of a person, such as his/her family life, sexual preference and home environment' — in other words, 'the truly personal realm' — but typically not that person's 'communal relations and activities such as business and social interaction'.[36]

So there is nothing new, and nothing objectionable, about cross-pollination between constitutional and delictual privacy law.[37] What is new about *Botha* is specifically the court's failure to acknowledge or appreciate that the basic nature of Mr Botha's claim is delictual. This means the court wrongly perceives a vacuum that other norms must fill. And it means certain delictual principles end up being rough-handled, as we shall see. But the starting point, in restoring order, is to accept that the two parallel streams have decisively merged: the delictual wrongfulness element, we should now accept, asks the same two questions that Ackermann J asked in *Bernstein*.

(b) The public interest defence

Importantly, however, those are not the only questions that must be asked. *Botha* goes on to add a third. This third question is whether, assuming the defendant disclosed the plaintiff's private information and thus invaded his privacy, his doing so was nevertheless justified by 'the public interest' in the receipt of that information.[38] Kollapen J adds that, when a court assesses the public interest question, it must 'balance' the plaintiff's right to privacy against others' right to freedom of expression.[39]

These statements may sound trite. We are used to hearing similar things in the context of defamation, where it is well-known that the law seeks to balance the plaintiff's dignitarian rights against the importance of free expression, and that it does so primarily at the defences stage, when the defendant is called upon to show that his publication of the statement in question, despite being injurious to the plaintiff, was justified.[40] Nevertheless, the approach taken in *Botha* is significant, and in fact marks a divergence from the law of defamation.

Private Law and Human Rights (2013) 162; J C van der Walt & J R Midgley *Principles of Delict* 4 ed (2016) para 102; Neethling et al op cit note 4 at 311–12; also *NM v Smith* supra note 6 paras 33, 135–6.

[36] *Bernstein* supra note 21 para 67.

[37] See also *NM v Smith* supra note 6 para 34, in which the Constitutional Court used *Jooste* supra note 31 to flesh out the framework supplied by *Bernstein*.

[38] *Botha* (CC) supra note 14 paras 99, 147–8.

[39] Ibid paras 108, 148.

[40] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 28; *Le Roux v Dey* 2011 (3) SA 274 (CC) paras 123–5, 171.

https://doi.org/10.47348/SALJ/v142/i3a6

South African defamation law has a well-established list of defences: justification, fair (or protected) comment, privilege, and so on.[41] They have existed for many decades, in some cases centuries. Their sub-rules are well-settled. Their purpose, we can agree, is to protect defendants from liability in appropriate circumstances, and thus to strike an appropriate balance between their freedom of speech and plaintiffs' right to reputation — that is the point our courts often make. But it does not follow, nor do these authorities remotely suggest, that the law of defamation invites judges to strike that balance by attending to it directly in particular cases. That is because there is a difference between a rule and the reason for it.[42] Though the reason for having defamation defences is to provide adequate protection for a defendant's free expression, they protect it by requiring the court to answer various questions that do not themselves call for a judgement about the proper balance between the rights to reputation and free speech: was the defendant's statement true? Was it an opinion genuinely held by him? And so on.[43]

True, the distinction between rules and their rationales should not be overdrawn. It is sometimes porous. Indeed, many legal rules direct courts to consider the so-called substantive reasons that underlie them. In the theoretical literature, these are called 'standards'.[44] Defamation defences regularly deploy them. The defences require courts to ask themselves not only questions like, 'Was the statement true?' or 'Did the defendant have a genuine belief that *p*?', but also straightforwardly evaluative ones like, 'Was the defendant's publication of this statement in the public interest?' In the South African law of defamation, this express 'public interest', or 'public benefit', question appears within both the justification defence and the defence of fair comment.[45] And it is established law that, when this question arises, it invites courts to weigh up the plaintiff's dignitarian right and the defendant's (and the wider public's) right to receive and to impart information.[46] So understood, defamation defences are intricate sets of sub-rules that direct courts partly to factual or conceptual questions and partly to open-ended substantive ones.

Over the course of our legal development, the balance between the two has tipped back and forth. At certain stages, the stereotyped defences

[41] Neethling et al op cit note 4 at 215–38; F D J Brand 'Defamation' in W A Joubert (founding ed) *The Law of South Africa* vol 14(2) 3 ed (2017) paras 122–35.

[42] *Carter v McDonald* 1955 (1) SA 202 (A) at 211H (Schreiner JA).

[43] See, to similar effect, *Hardaker v Phillips* 2005 (4) SA 515 (SCA) para 15.

[44] Pierre Schlag 'Rules and standards' (1985) 33 *UCLA LR* 379; Frederick Schauer *Thinking Like a Lawyer* (2009) ch 10.

[45] Brand op cit note 41 paras 124, 130.

[46] For example *Independent Newspaper Holdings Ltd v Suliman* 2005 (7) BCLR 641 (SCA) para 44.

https://doi.org/10.47348/SALJ/v142/i3a6

seemed inadequate in protecting press freedom and caused understandable discontent. Moves were therefore made, at the end of the apartheid era, to instate a more elastic approach — whether by broadening existing defences so that they approximated a general 'public interest' question, or by inviting courts to attend directly to the values of reputation and press freedom and strike the proper balance case by case.[47] But this approach did not prevail. Instead, the problem was solved by creating, alongside the existing stereotyped defences, a now famous additional defence of 'reasonable publication' in *National Media Ltd v Bogoshi*.[48] The *Bogoshi* defence requires the court to decide whether the defendant, in publishing the statement, behaved reasonably, which is certainly an elastic and circumstance-sensitive test. And, again, its purpose is to protect the public interest in the free flow of information.[49] Accordingly, some have seen the creation of the *Bogoshi* defence as a staging post on the journey to an expansive all-purpose 'public interest' defence in the law of defamation.[50] But that is not where we are yet. It is at least arguable that *Bogoshi* turns, to an important extent, on the factual content of the defendant's beliefs.[51] In addition, the defence is still available only to media defendants, and thus in only a subset of defamation cases.[52] And finally, the stereotyped defences continue to have considerable practical importance alongside it.

All of which is to say: the South African law of defamation, as it stands, has a number of settled defences and crystallised sub-rules, which, though at times they direct courts to answer value-laden questions, are not reducible to an unadorned 'public interest' or 'public policy' defence. The choice has been made to keep a more intricate and rule-like structure. That is why, in *Bernstein*, Ackermann J cautioned against the assimilation of the actio iniuriarum's justification question to a general balancing enquiry in the style of constitutional adjudication.[53] Something would be lost, in his view, if thenceforth the lawfulness of an injurious statement were judged, not by application of the established defences and their sub-rules, but by the court asking itself whether, in the particular case, prohibiting the defendant's publication of the statement would strike an appropriate balance between reputation and free expression. It would mean, in effect, that the structure provided by the stereotyped defences would be wiped away.

[47] For example *Zillie v Johnson* 1984 (2) SA 186 (W); *Gardener v Whitaker* 1995 (2) SA 672 (E).

[48] 1998 (4) SA 1196 (SCA).

[49] Ibid at 1207.

[50] Van der Walt & Midgley op cit note 35 para 133.

[51] Cf Anton Fagan 'Wrongfulness in the South African law of defamation' (2023) 140 *SALJ* 285 at 313–15.

[52] See most recently *Economic Freedom Fighters v Manuel* 2021 (3) SA 425 (SCA).

[53] *Bernstein* supra note 21 para 71.

https://doi.org/10.47348/SALJ/v142/i3a6

But what about grounds of justification in the law of privacy? These are not as well-developed as defamation defences. They do not have the same history behind them. So how should our legal system go about deciding whether a defendant's disclosure of private information is justified?

Broadly speaking, there are two ways to make progress on this question, and our sources make use of both. One way is to draw an analogy with the law of defamation.[54] Since both privacy and defamation claims are instances of the actio iniuriarum, one may assume that, 'in general, the principles formulated in the context of … the law of defamation ought to apply' in privacy contexts too.[55] By carrying defences over from defamation to privacy, we can try to fill the latter's gap.

This approach has clear limits, however. It is in fact rather doubtful that defamation defences are apposite in the law of privacy.[56] Many defamation cases pivot on the question whether the published statement is true: if it is, then (generally speaking) the defendant will escape liability. Others pivot on the question whether the published statement is fact or opinion: if the latter, then (again, generally speaking) the defendant will escape liability. But informational privacy cases are decisively different. They are about the publication of true facts.[57] Indeed, that is why one needs civil privacy claims in the first place: to protect what defamation law does not. The privacy claim comes to life, in other words, precisely where and because the defendant's statement was a true statement of fact.[58] This being so, it would make no sense to allow a defendant to escape liability by showing that the statement was of this kind. At least two quintessential defamation defences, namely justification and fair comment, are therefore inapt. The gap remains.

[54] Compare Chittharanjan Amerasinghe *Aspects of the Actio Iniuriarum in Roman-Dutch Law* (1966) 192–8; McQuoid-Mason op cit note 4 at 217–18; McQuoid-Mason op cit note 19 at 38.2(c); Brand op cit note 35 at 166–7; Max Loubser & J R Midgley (eds) *The Law of Delict in South Africa* 3 ed (2017) ch 31; also *NM v Smith* supra note 6 para 177 (O'Regan J).

[55] *Jansen van Vuuren* supra note 18 at 850.

[56] See, in a slightly different context, Helen Scott 'Liability for the mass publication of private information in South African law' (2007) 18 *Stellenbosch LR* 387, who exposes the shortcomings of the analogical approach as it was applied in *NM v Smith*.

[57] Samuel D Warren & Louis D Brandeis 'The right to privacy' (1890) 4 *Harvard LR* 193 at 218; Brand op cit note 35 at 167; Neethling et al op cit note 4 at 348.

[58] To be sure, claims for 'false privacy' are conceptually possible (and indeed so-called 'false light' claims are conventionally classified as a kind of privacy claim), but they are certainly not typical: see further David Rolph 'The interaction between defamation and privacy' in Kit Barker et al (eds) *Private Law in the 21st Century* (2017) 474–5. The pivotal point here is that privacy law undoubtedly seeks to prohibit the publication even of many true facts.

https://doi.org/10.47348/SALJ/v142/i3a6

Perhaps for this reason, our sources have at other times favoured a more direct approach. They have cut to the chase and gone straight to the 'public interest' question — not as a mere component within some other defence, a la defamation, but as an overarching defence of its own. They have asked straightforwardly: given that the defendant's act of disclosure infringed the plaintiff's right to privacy, is it nevertheless excused on the basis that it advanced the public interest? Hence Warren & Brandeis, in their pioneering article, stated that the first limitation on the right to privacy is that it 'does not prohibit any publication of matter which is of public or general interest'.[59] This primeval defence became entrenched in United States law, in the form of a negative requirement that the disclosure was 'not of legitimate concern to the public'.[60] And from there it found its way to us. In *Rhodesian Printing v Duggan*, the Rhodesian Appellate Division was faced with a case in which the defendant newspaper intended to publish information about the plaintiffs' family life — which might ordinarily enjoy privacy protection — but which in the circumstances amounted to the exposure of the plaintiffs' wrongdoing. In deciding that the publication was, to this extent, lawful, Beadle CJ applied a general test, based on United States law, of whether there was a legitimate public interest in receiving the information.[61] Around the same time, Johann Neethling was conducting his foundational postgraduate research on South African privacy law with close attention to Anglo-American examples[62] and came to favour — and continues to favour — a broad public interest defence of the kind he found there.[63]

Most importantly, this approach is now well-reflected in the practice of our courts. The Appellate Division foregrounded the public interest question in the famous case of *Financial Mail (Pty) Ltd v Sage Holdings*.[64] Corbett CJ prominently accepted that, even where information was obtained by an unlawful intrusion, 'there may nevertheless still be overriding considerations of public interest which would permit of it being published'.[65] This overarching defence acquired further prominence

[59] Warren & Brandeis op cit note 57 at 214.

[60] *Restatement (Second) of Torts* (1977) § 652D.

[61] 1975 (1) SA 590 (RA) at 592–4, discussed in D J McQuoid-Mason 'Public interest and privacy' (1975) 92 *SALJ* 252. Cf also Beadle CJ's remarks in *S v I* 1976 (1) SA 781 (RA) at 788–9.

[62] J Neethling *The Right to Privacy: Comparison of American and English Law* (LLM thesis, McGill University, 1972); J Neethling *Die Reg op Privaatheid* (LLD thesis, UNISA, 1976).

[63] Neethling (1976) ibid at 337–47; Neethling et al op cit note 4 at 338–46.

[64] 1993 (2) SA 451 (A).

[65] Ibid at 465, drawing an analogy with English cases on breach of confidence. See further J Neethling & J M Potgieter 'Die reg op privaatheid' (1993) 56 *THRHR* 704.

https://doi.org/10.47348/SALJ/v142/i3a6

in the post-constitutional case law.[66] Perhaps the clearest illustration is *Tshabalala-Msimang v Makhanya*, in which the *Sunday Times* published the then Minister of Health's medical records, which revealed that she had been 'booz[ing]' while in hospital for surgery.[67] Even though a person's medical records would usually be considered paradigmatically private, and even though the *Times* had obtained the Minister's records unlawfully, the High Court found substantially in the newspaper's favour. This was because there was an 'overwhelming public interest' in learning the truth about the Minister's conduct, given her status as a public figure who had been making controversial and seemingly hypocritical claims about the dangers of alcohol abuse by others.[68]

In applying this overarching public interest defence, our courts held that they must weigh up the plaintiff's right to privacy against the right to freedom of expression, and in particular the wider public's interest in the free flow of information and ideas.[69] Indeed, it was said in *Prinsloo* that this exercise, in which two constitutional rights must be balanced, now lies at the 'core' of privacy disputes.[70]

This, then, is a second and more dramatic way in which considerations of public interest may defeat a civil privacy claim: by the creation of a standalone super-defence that takes us straight to that very question.

Significantly, this second approach was consummated by the appeal courts in *Botha*. In the SCA, Mathopo JA expressly put the public interest front and centre. In his view, the first and cardinal question in the case was, '[w]hether it is in the public interests [sic] that the personal information of Mr Botha be published'.[71] And Mathopo JA overturned Roberson J because he reached the opposite answer to this question. Freedom of expression had to prevail, Mathopo JA held, particularly in circumstances where the information circulated by the defendant had already been placed in the public domain by the plaintiff and concerned a matter of legitimate public debate. On further appeal to the Constitutional Court, the countervailing public interest again received close attention in Kollapen J's main judgment. As we saw, it arose as the third question to be asked by the court, once the plaintiff's subjective expectation of privacy has been established in evidence and determined to be objectively reasonable. Moreover, the court held that the assessment of the public interest in publication was to

[66] See eg D Milo, G Penfold & A Stein 'Freedom of expression' in Woolman et al (eds) op cit note 19 at 42.9(b)(ii).

[67] 2008 (6) SA 102 (W).

[68] Ibid para 50.

[69] *MEC for Health, Mpumalanga v M-Net* 2002 (6) SA 714 (T) para 28; *Tshabalala-Msimang* supra note 67 paras 38–43; cf *Financial Mail* supra note 64 at 462–3.

[70] *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T) at 466. See also *NT v Kunene* [2017] 4 All SA 865 (GJ).

[71] *Smuts* (SCA) supra note 11 para 6.

https://doi.org/10.47348/SALJ/v142/i3a6

be made by balancing the affected constitutional rights. 'Our task', wrote Kollapen J, citing *Financial Mail* and *Prinsloo*,[72] 'is to balance two rights: [the plaintiff's] right to privacy and [the defendant's] right to freedom of expression'.[73] Kollapen J had made very similar remarks about the centrality of rights-balancing in *Arena Holdings*,[74] a case about the 'public interest override' in legislation regulating informational disclosure,[75] and it seems almost certain that his reasoning in *Botha* was partly inspired by the approach he had taken there.

The Constitutional Court's confirmation of this approach to civil privacy claims is important. We now have a leading judgment of the highest authority that treats the broad public interest defence as our law's approach to the justification of privacy infringements. True, this does not strictly rule out the possibility of defendants raising other defences, whether borrowed from defamation law or elsewhere.[76] But Kollapen J, for his part, appears to treat it as self-sufficient — as the *only* question that he needs to ask to determine whether publishing the private fact was justified — and, given its breadth, it is likely to cover most cases. Hence it largely pre-empts a catalogue of defences, with fine-grained rules, of the kind that exists in the law of defamation. It takes the step that our defamation law has decided not to take. And whereas Ackermann J in *Bernstein*, as we saw, had rejected the idea that the actio iniuriarum's justification question is akin to the balancing exercise licensed by s 36 of the Constitution, Kollapen J in *Botha* draws an express analogy between the two.[77] Defences to civil privacy claims, he writes, should now be 'broadly guided by the principles [s 36] contains'.[78] If this is taken seriously, then the third and final step in the delictual wrongfulness enquiry will be settled by the discourse of rights-balancing — whose well-known disadvantages will be discussed again in a moment.

(c) The framework in a nutshell

After *Botha*, we have a tolerably clear general framework. An alleged infringement by the defendant of the plaintiff's right to informational privacy will be unlawful, all things considered, if:[79]

[72] *Financial Mail* supra note 64; *Prinsloo* supra note 70.
[73] *Botha* (CC) supra note 14 para 148.
[74] *Arena Holdings* supra note 24 paras 129–46.
[75] Sections 46 and 70 of the Promotion of Access to Information Act 2 of 2000.
[76] Compare the approach of Neethling et al op cit note 4 at 347–8.
[77] *Botha* (CC) supra note 14 para 99.
[78] Ibid.
[79] Ibid para 98.

https://doi.org/10.47348/SALJ/v142/i3a6

(i) the plaintiff had a subjective expectation that the published information would be kept private;

(ii) the plaintiff's expectation of privacy is objectively reasonable;

and, in addition,[80]

(iii) there is no consideration of public interest, such as the value of free expression, sufficient to outweigh the plaintiff's reasonable expectation of privacy and justify its contravention by the defendant.

All three requirements should be thought of, as I suggested, as aspects of our law of delict's wrongfulness element, adapted to the privacy context. And though the court in *Botha* nowhere addresses this issue, requirements (i) and (ii) ought to be established by the plaintiff, whereas for requirement (iii), the public interest defence, the onus is on the defendant. This corresponds with the orthodox position,[81] affirmed in an analogous context in *Khumalo v Holomisa*.[82]

Where, as in *Botha*, the relief claimed by the plaintiff is an interdict ordering the defendant to remove the published content, these three requirements appear to be sufficient.[83] Where damages are claimed, they are not: fault on the part of the defendant is also required.[84]

[80] Ibid para 99.

[81] *Mabaso v Felix* 1981 (3) SA 865 (A).

[82] Supra note 40.

[83] The general rule is that a final interdict will be granted only if the plaintiff shows, in addition to an unlawful right-infringement, that he has no other satisfactory remedy (*Setlogelo v Setlogelo* 1914 AD 221; L T C Harms 'Interdict' in W A Joubert (founding ed) *The Law of South Africa* vol 11 2 ed (2008) paras 396, 399). In delictual contexts, a damages award very often provides a satisfactory alternative. However, in cases where the plaintiff is seeking an interdict ordering the defendant to remove or delete the private information that he has published, our courts have tended either to accept that damages are not in fact adequate (eg *Heroldt v Wills* 2013 (2) SA 530 (GSJ) paras 30–9, supported on this point by Emile Zitzke 'Realist evolutionary functionalism and extra-constitutional grounds for developing the common law of delict: A critical analysis of *Heroldt v Wills*' (2016) 79 *THRHR* 103; *Munetsi v Madhuyu* [2024] ZAWCHC 209 para 15) or to simply ignore this further question, awarding the interdict upon proof that the publication was ultima facie unlawful (eg *Kunene* supra note 70 paras 41–3). The Constitutional Court does the same in *Botha*, effectively treating an interdict as the automatic or at least presumptive remedy in such cases. (Note, however, that certain sources suggest that other considerations apply where the plaintiff seeks a remedy to prevent prospective publication of the information, since prior restraint is particularly damaging to free speech: see again *Heroldt* paras 40–1.)

[84] See further part V(b)(i) below.

https://doi.org/10.47348/SALJ/v142/i3a6

(d) Testing the framework's borders

This framework is very similar indeed to that which is applied in other systems. In English law, the foundational question in a civil claim for the misuse of private information is whether the plaintiff 'had a reasonable expectation of privacy' in respect of the information published.[85] This is much like the central question from *Bernstein* and now *Botha*. Importantly, however, even if the plaintiff is judged to have a reasonable expectation of privacy, this 'is not the end of the story':

> 'Once the information is identified as "private" in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail.'[86]

It is in fact this public interest question, and in particular the balance to be struck between privacy and press freedom, that is now recognised to be 'the critical issue' in most informational privacy cases.[87] In respect of the right to free expression, a consideration of special importance is whether the dissemination of the information by the defendant 'contribut[ed] to a debate of public interest'.[88] This basic pattern is reproduced elsewhere, such as New Zealand, where the leading case of *Hosking* held as follows:

> 'It is actionable as a tort to publish information or material in respect of which the plaintiff has a reasonable expectation of privacy, unless that information or material constitutes a matter of legitimate public concern justifying publication in the public interest.'[89]

To be sure, the historical differences between the South African and Commonwealth law should not be overlooked. Because the view had taken hold that no general right to privacy was recognised by the common law,[90] the English courts denied, even after *Campbell*, that they had created a new 'privacy tort', fearing that to do so would be an overbold and unhistorical act of judicial law-making. Instead, they said they had merely expanded the old tort of breach of confidence.[91] South African judges did

[85] *Campbell* supra note 3 paras 21, 85, 134–5.

[86] Ibid para 137 (Lady Hale).

[87] Gavin Phillipson 'Press freedom, the public interest and privacy' in A T Kenyon (ed) *Comparative Defamation and Privacy Law* (2016) 136.

[88] *Mosley v News Group Newspapers (No 3)* [2008] EWHC 1777 para 131, drawing on *Von Hannover* supra note 3 para 76, which held that 'the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the [publication] make[s] to a debate of general interest'.

[89] *Hosking* supra note 3 para 259.

[90] *Kaye v Robertson* [1990] EWCA Civ 21; *Wainwright v Home Office* [2003] UKHL 53.

[91] See further Gavin Phillipson 'Transforming breach of confidence? Towards a common law right of privacy under the Human Rights Act' (2003) 66 *Modern LR* 726.

https://doi.org/10.47348/SALJ/v142/i3a6

not need to dissemble in this way, since, as mentioned, the wide umbrella principle of the actio iniuriarum allowed civil remedies for infringements of the plaintiff's privacy to be awarded openly since at least the 1950s. In any event, few now deny that English law has decisively expanded tortious liability for the misuse of private information, that litigation in this area is frequent, and that it has resulted in a discrete and reasonably well-developed area of law.[92] *Botha*, which makes some use of *Campbell* and other Commonwealth cases,[93] helps to bring South African law into closer alignment with it.

Is this a good thing? That is a challenging question. But let me venture a few observations. First, by favouring the use of a standalone 'public interest' defence, *Botha* may make it more difficult to sustain the generalising tendency immanent in the actio iniuriarum and in the civilian strand of South Africa's legal heritage. As we saw, our defamation defences are manifold and relatively rule-based, and *Botha* makes the clear choice *not* to seek any longer to transpose them to the law of privacy. Instead, it borrows a defence from standalone privacy torts developed by common-law jurisdictions that do not share our law's generalising tendency at all. Perhaps it is possible to reconcile this bifurcated approach to defences with a highly generalised analysis of the iniuria.[94] But a more realistic appraisal would accept that *Botha*, in so far as it confirms an approach to privacy defences that is irreconcilable with that taken in defamation, has driven a wedge between the two claims, causing them to operate more like independent 'delicts' of their own.

Alternatively, there is another possibility: namely that privacy law's now more flexible approach will feed back across the actio iniuriarum and into the law of defamation, causing a more open-ended public interest defence to be applied there too. Some would argue that defamation defences have already been evolving in that direction, particularly as a result of *Bogoshi*,[95] and should continue to do so.[96] To those who favour this view, it must

[92] See for example *Tugendhat & Christie: The Law of Privacy and the Media* 3 ed (2016) ch 5; *Clerk & Lindsell on Torts* 24 ed (2023) ch 25.3. The English courts have come to accept that they have created a new tort of 'misuse of private information' which is distinct from breach of confidence: see *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; *Bloomberg v ZXC* [2022] UKSC 5 para 45.

[93] *Botha* (CC) supra note 14 paras 139–41, 150.

[94] This is what our leading privacy-law expert has for many years sought to do: Neethling (1976) op cit note 62; Neethling et al op cit note 4 at ch 8. Neethling's promoter was Willem Joubert, whose own landmark doctoral thesis relies at pertinent moments on American sources to give content to an overarching civilian framework: see W A Joubert *Grondslae van die Persoonlikheidsreg* (1953) especially at 69–74.

[95] Supra note 48.

[96] See again Van der Walt & Midgley op cit note 35 para 133.

https://doi.org/10.47348/SALJ/v142/i3a6

be encouraging that there is now an all-purpose public interest defence available next door.

Either way, there can be no doubt that this overarching public interest standard, which *Botha* authoritatively preferred, is encompassing and elastic. Its looseness has caused dissatisfaction elsewhere. In the 1960s, American writers condemned the inconsistent decisions reached in the course of its application, saying it licensed 'naked creative choices' and 'decision-making without signposts'.[97] These perceived difficulties in fact contributed to the refusal to create a right to privacy in the United Kingdom.[98] Though the English courts have now created a privacy tort after all, the concerns about it have not dissipated. The courts themselves have accepted that each case will require an 'intense focus on the individual circumstances',[99] which 'is all very unsatisfactory from the point of view' of defendants, who are left uncertain about what disclosures they are permitted to make.[100] And though there is now much English and European case law on the topic, this has not brought clarity, but has rather 'rob[bed] that notion [of public interest] of any coherent boundaries it might once have had'.[101] These issues would surely have troubled Ackermann J, as we saw. He suggested in *Bernstein* that instituting a constitutional-style balancing test would destroy the integrity of the private-law claim, which has tighter, rule-like tests and is generally loath to trade off private rights against wider public interests. But his concerns have been swept aside by Kollapen J's opposite approach.

In the end, that is unsurprising. We live in an 'age of balancing', after all,[102] and balancing tests are making inroads even into private law, which increasingly subjects plaintiffs' rights to the open judicial consideration of countervailing public interests.[103] These trends are bound up with constitutionalisation. Even in England and Wales, where human rights have for the most part been kept out of the private common law, the

[97] Leon Brittan 'The right to privacy in England and the United States' (1963) 37 *Tulane LR* 235 at 249.

[98] Younger Committee *Report of the Committee on Privacy* (1972) Cmnd 5012, discussed in Gerald Dworkin 'The Younger Committee Report on Privacy' (1973) 36 *Modern LR* 399.

[99] *Mosley* supra note 88 para 12.

[100] *Weller v Associated Newspapers* [2015] EWCA Civ 1176 para 59.

[101] Phillipson op cit note 87 at 154.

[102] T A Aleinikoff 'Constitutional law in the age of balancing' (1987) 96 *Yale LJ* 943; Jacco Bomhoff *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (2013); Iddo Porat & Moshe Cohen-Eliya *Proportionality and Constitutional Culture* (2013).

[103] Jason N E Varuhas 'The socialisation of private law: Balancing private right and public good' (2021) 137 *LQR* 141; Franz Bauer & Ben Köhler (eds) *Proportionality in Private Law* (2023); Philip Sales 'Constitutional values in the common law of obligations' 2024 *Cambridge LJ* 132.

https://doi.org/10.47348/SALJ/v142/i3a6

tort of misuse of private information remains an ironic counterexample.[104] Not only was the tort created in order to give effect to the right to private and family life contained in art 8 of the European Convention, but that right must receive direct judicial attention in each claim that is brought: it, as well as the countervailing art 10 right to free expression, have become 'the very content of the domestic tort that the English court has to enforce'.[105] How unsurprising, then, that our Constitutional Court, with its ingenuous and ongoing enthusiasm for the constitutionalisation of private law, has adopted the same rights-balancing test.

And anyway, what is the alternative? A wide-ranging balancing enquiry seems hard to avoid in the context of civil privacy claims. As we saw, they do not have well-developed and fine-grained defences of the kind that defamation law has inherited. Nor is it easy to invent them, since privacy law's predicament is more acute. Defamation defences hew, by and large, to truth. We have come to accept that defamatory statements are permitted whenever they are true, or, by extension, whenever (although they are false) the defendant in publishing them evinced a reasonable commitment to truth-seeking. But privacy law cannot orient itself by this lodestar. It would be incoherent to make the lawfulness of the disclosure turn on its truth or falsity, since the whole purpose of the informational privacy claim, as I suggested earlier, is to say that some disclosures are unlawful even when we know they are true. Privacy rights and freedom of expression are thus in an unusually acute conflict. Moreover, our social norms about how to navigate it are shifting and contested. Arguably, courts cannot sensibly resolve the conflict without adverting to it directly in particular cases. And so the open weighing of rights, despite its obvious disadvantages, may in the privacy context simply be 'inevitable'.[106] Our courts can try to mitigate the disadvantages by expostulating that plaintiffs' constitutional privacy rights can be outweighed only by public-interest considerations of 'an extremely serious and important nature'.[107] But the truly critical

[104] See eg Gavin Phillipson 'Privacy: The development of breach of confidence — The clearest case of horizontal effect?' in David Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (2011). Paula Giliker, in a recent retrospective, describes the judicial recognition of the tort of misuse of private information under the influence of the European Convention as 'an exceptional event' (or 'outlier'), 'the result of early enthusiasm to expand tort law in a Convention-compliant way' — enthusiasm that has now waned and indeed faced a 'backlash': see P Giliker 'Protecting privacy through the tort of private nuisance' (2024) 5 *Journal of Commonwealth Law* 1 at 7–12, 26.

[105] *McKennitt v Ash* [2006] EWCA Civ 1714 para 11, critiqued in N A Moreham 'Privacy and horizontality: Relegating the common law' (2007) 123 *LQR* 373.

[106] E Barendt 'Privacy and freedom of speech' in A T Kenyon & M Richardson (eds) *New Dimensions in Privacy Law* (2009) 21.

[107] *Prinsloo* supra note 70 at 471E, cited in *Botha* (CC) supra note 14 para 151.

https://doi.org/10.47348/SALJ/v142/i3a6

question is how, in practice, the legal framework is applied — which brings us to part V.

V APPLICATION

The public interest defence creates a flexible standard, then, and we must hope that our courts will develop sensible intermediating rules and principles in the course of its application. And other key features of the legal framework are also vague and squishy. When, after all, is an expectation of privacy 'reasonable'? In trying to provide an answer, courts like to offer lists of relevant factors. Kollapen J sets out some of ours in *Botha*:

> '(a) how the information was obtained;
>
> (b) whether the information pertains to intimate details of the infringed party's personal life;
>
> (c) whether the information was provided by the infringed party, but for a purpose other than the purpose for which it was ultimately used;
>
> (d) whether the information was garnered from a search or led to a search; and
>
> (e) whether the information was communicated only to person or persons who had statutory responsibilities subject to requirements of confidentiality, or people from whom the infringed party could reasonably expect the information to be withheld.'[108]

England and Wales, in its tort of the misuse of private information, deploys the more comprehensive 'Murray factors' (so called because they were set out in *Murray v Express Newspapers plc*),[109] which received mention in *Botha*.[110]

Be that as it may, lists of factors do not take one very far. One wants to know which factors are decisive in which cases, so that the factors start to approximate defeasible generalisations. Fortunately, it is possible to identify some of these, lying behind the factors listed. Some kinds of fact are clearly 'private', in the sense that their subject will almost invariably have a reasonable expectation of privacy in respect of them. The fact that a person has a certain illness or bodily deformity,[111] or videos showing her having sex,[112] are classic examples (compare factor (b)). And even where the fact is not as inherently intimate as these, if the defendant obtained it by illegally pilfering the document in which it was written (compare factor (a)),

[108] *Botha* (CC) ibid para 102, quoting Moshikaro op cit note 19 at 18.
[109] [2008] EWCA Civ 446 para 36.
[110] *Botha* (CC) supra note 14 para 141.
[111] De Villiers op cit note 29 at 138; *Tshabalala-Msimang* supra note 67 paras 26–32.
[112] *Prinsloo* supra note 70; *Kunene* supra note 70 para 32.

https://doi.org/10.47348/SALJ/v142/i3a6

it too will almost certainly be 'private', and its dissemination prohibited, subject only to defences.[113]

These, then, are some easy cases. *Botha v Smuts* is a hard case. Factor (a) does not apply. Factor (b) is equivocal. And factors (d) and (e) are more apposite in cases involving information acquired by police or regulatory powers; they do not seem especially useful in private disputes like *Botha*. Kollapen J therefore faces a challenge, which he solves in broadly two steps. The first step is to sharpen the distinction between the family home, on the one hand, and places of commercial and civic interaction, on the other hand, and to raise the privacy protections around the former. In other words, he draws relatively clear lines around *Bernstein*'s 'inner sanctum'. Once those lines have been drawn, Mr Botha's home address falls inside it, but his farm falls without. The second step is to give much more power to plaintiffs to control the destiny of the facts they put into the public sphere. This means that, even though Mr Botha widely publicised his home address on the Internet, it was still, in legal terms, 'private'. Both are important moves. The rest of this part V discusses them in some detail.

(a) Publicly accessible commercial property

After setting out the legal framework, Kollapen J confronts a potential objection to it. How useful is it to preserve the first, subjective leg of the test, if the second, objective one will be decisive in the end anyway?[114] The English tort does not bother with the subjective leg,[115] and its use in the United States has been criticised as an 'irrelevance'.[116] But Kollapen J defends its utility, on the basis that it can simplify certain cases: if the plaintiff had no genuine wish that the information remained private, 'the enquiry ends there'.[117]

Indeed, Kollapen J goes on to decide an aspect of Mr Botha's claim in just this way.[118] He holds that Mr Botha had had no subjective expectation of privacy in respect of his ownership of the farm and of the animal trapping activities photographed upon it (see (i) above in part I). Mr Botha had given the public access to his farm for commercial purposes, and the traps were plainly visible to the cyclist when he made use of that access.

[113] Visser op cit note 35 at 1202, citing *Financial Mail* supra note 64.

[114] *Botha* (CC) supra note 14 paras 100–1.

[115] See, among many possible authorities, *Campbell* supra note 3 para 135. The difference here should not be exaggerated, however, since English law folds subjective considerations into its unitary 'reasonable expectation' test: cf N A Moreham 'Unpacking the reasonable expectation of privacy test' (2018) 134 *LQR* 651.

[116] Orin S Kerr '*Katz* has only one step: The irrelevance of subjective expectations' (2015) 82 *University of Chicago LR* 113.

[117] *Botha* (CC) supra note 14 para 101.

[118] Ibid paras 109–16.

https://doi.org/10.47348/SALJ/v142/i3a6

Nothing in the evidence showed that Mr Botha genuinely believed his ownership of the farm or his activities upon it would or should be kept confidential. He claimed only that he did 'after the event', once he had been upset by the public criticism and litigation had been brought.[119] In truth, '[t]he public nature of the access he allowed and the commercial nature of the farm locate both the farm and his ownership of it far from the inner sanctum of Mr Botha's life'.[120]

For good measure and the avoidance of doubt, Kollapen J considered whether, if he were wrong about Mr Botha's subjective expectations, they were objectively reasonable.[121] This belt-and-braces approach rather undermines his earlier claim that the value of the subjective leg is that, where it is unsatisfied, it helps to truncate the enquiry.[122] Be that as it may, Kollapen J's answer to the second, objective question was 'no', and for essentially the same reasons as the first. The farm 'is a commercial business and not a private place of abode',[123] and it was permissible and predictable that the cyclist, using the farm as such, had taken the photographs that he did. Publicising that photograph did not therefore contravene any reasonable privacy expectations.

Rogers J provided his own reasoning on this point, describing it as 'simpler' than Kollapen J's.[124] But, with respect, his approach seems much the same. Both judges sought to clarify that, by inviting the public onto his farm for commercial purposes, Mr Botha did not necessarily lose all delictual privacy protection for any activities upon it: the determination 'will always be case-specific'.[125] If the cyclist had taken a photograph of Mr Botha's young children swimming in the pool, for example, this would plausibly infringe an objectively reasonable expectation of privacy. Such activities lie close to the 'inner sanctum', to again use the celebrated language of *Bernstein*, and are 'of a private, personal, and intimate nature'.[126] It may also be a privacy infringement if the cyclist, by photographing the traps, had contravened a condition that Mr Botha had expressly or impliedly attached to access to the farm.[127] But, as a generalisation, what happens on commercial property onto which the owner has invited

[119] Ibid para 114.
[120] Ibid.
[121] Ibid paras 117–23.
[122] It also tends to confirm that, even where courts do rely on the subjective leg, it 'makes no difference to outcome': see again Kerr op cit note 116.
[123] *Botha* (CC) supra note 14 para 121(b).
[124] Ibid para 247.
[125] Ibid para 116.
[126] Ibid paras 126, 170.
[127] Ibid paras 248–9; also para 116.

https://doi.org/10.47348/SALJ/v142/i3a6

the general public will be 'public'.[128] And Mr Botha had failed to show anything special about this case.

Kollapen J went on to reject explicitly Mr Botha's argument that Mr Smuts could and should have posted the photographs and criticism of the traps without naming him as the farm's owner.[129] It would be 'artificial' and undermine 'transparency', he thought, to allow legitimate and important public criticisms to be aired but to require the participants to conceal the identities of those whom they are about.[130] It was therefore entirely permissible for Mr Smuts to publish not only the activities on the farm, but also its location and Mr Botha's identity as its owner. It is notable here that Mr Smuts had learnt of Mr Botha's ownership of the farm by making purposeful enquiries of his neighbours, once he had formed the intention to name and shame him.[131] On the facts the Constitutional Court was prepared to assume, in other words, that the public would not otherwise have come to know of Mr Botha's ownership: it was neither a matter of general public record nor something that he had made known himself.[132] It is significant, therefore, that the court thought it was obviously *not* private. This suggests that the identity of the owner of a business or non-residential property will only very exceptionally enjoy protection. To that extent, the judgment comes down on the side of free expression.

(b) The family home

That disposed of Mr Smuts's publication of Mr Botha's ownership of and activities on his farm: none of the judges saw merit in that aspect of the claim. But other aspects were more difficult. In particular, Mr Smuts had also included in his Facebook post the address of Mr Botha's insurance brokerage. For one thing, this business had no real connection with the site of the trapping: Mr Smuts disclosed it, one assumes, only so that Mr Botha could be made more vulnerable to social sanction. That alone does not appear to be significant: a purely business address of any kind will typically be 'public' information.[133] The critical point, however, is that this business

[128] True, there appears to be some residual disagreement about activities on commercial property that is *not* made accessible to the public. Kollapen J's language may imply that activities on such property are generally not private, since it, no less than Mr Botha's farm, would count as 'a commercial business and not a private place of abode'. Rogers J, by contrast, is anxious to say that it, too, should enjoy the same general or presumptive protection as domestic property (albeit that, in the case of commercial property, the presumption 'may more readily be overridden'): see paras 247–8. Arguably this is only a difference of emphasis, and is not engaged by *Botha*'s facts.

[129] *Botha* (CC) supra note 14 paras 124–9.

[130] Ibid para 126.

[131] Ibid para 7.

[132] Ibid para 123.

[133] Ibid para 250.

https://doi.org/10.47348/SALJ/v142/i3a6

address was *also* the address of Mr Botha's family home. That being so, it was to be treated quite differently, and formed part of the unmistakable 'inner sanctum' of Mr Botha's life. As Kollapen J put it:

> 'In business, one is generally involved in activity removed from the inner sanctum of one's life and in which one generally engages with the world outside. A home is a closed and private space where people live and in which they are entitled to expect the protection of their privacy. ... The one is public in nature, the other, intensely personal and private. This is an important distinction.'[134]

Kollapen J went on to re-emphasise the importance of 'the home', as sharply distinguished from mere places of business, 'and the right to privacy that must attach to [it]'.[135] For Chaskalson AJ, a fear of being harassed at one's family home 'goes to the heart of the fundamental right to privacy'.[136] Once an address relates to a person's home, then, it tips over from public into decisively private, and its disclosure will very likely contravene a reasonable expectation of privacy.[137] This is one of *Botha*'s most important findings.

To be sure, doxing has been held to be unlawful in South Africa already. In *Dutch Reformed Church v Sooknunan t/a Glory Divine World Ministries*, Satchwell J held that it is 'a gross invasion of privacy to furnish an individual's personal contact details on a public forum such as [a] Facebook wall', inter alia because it exposes that person 'to unsolicited and unwanted messages'.[138] But this remark was not substantiated further, and *Sooknunan*'s facts do not raise privacy questions cleanly, since the Facebook posts in question there were also highly defamatory. The lengthily reasoned finding by our highest court in *Botha* is considerably more authoritative. And, of course, the facts of *Botha* are in one respect much stronger than *Sooknunan*'s, since the disclosure was not of an email address, as in *Sooknunan*, but of the physical address of Mr Botha's family home. Kollapen J uses the opportunity so presented to lay down a clear protective marker: however necessary and appropriate is the rough and tumble of civic life and public debate, a person's home is off-limits. It is easy to understand the ethical and legal case for this bright-line distinction, which has recommended

[134] Ibid para 135.
[135] Ibid para 144.
[136] Ibid para 218.
[137] To be clear, it remains to be asked whether the address's disclosure can be justified in the public interest. Addresses are often justifiably disclosed as part of important bureaucratic and enforcement processes: see eg *Februarie v Eskom Finance Company* [2019] ZAWCHC 145 paras 20–2.
[138] 2012 (6) SA 201 (GSJ) para 78. See also *Munetsi* supra note 83 para 9 (sharing a person's phone number on social media is 'a breach of the common-law right to privacy').

https://doi.org/10.47348/SALJ/v142/i3a6

itself to other jurisdictions.[139] The English courts, for their part, have been more equivocal, holding that a person's home address is not protected from disclosure *unless* the plaintiff shows that the disclosure is likely to beget intrusions or harassment[140] — an approach that may resonate with Chaskalson AJ's.[141]

Despite the arguable good sense in *Botha*'s protective approach to family homes, this aspect of the case involved two complications. The first turns out to be no more than a wrinkle. The second, as we will see, is lastingly important, and invites the court to lay down a remarkable new principle.

(i) *Intention and interdicts*

The first complication is that, when Mr Smuts posted the address of Mr Botha's home, he did not know that this was what it was. He thought he was merely posting the address of his insurance business. That it was also Mr Botha's home address emerged only in the latter's court papers.

If Mr Botha had been suing Mr Smuts for damages, this would have been a devastating objection to his claim — and it would be truly extraordinary that the court in *Botha* found for the plaintiff without even attempting to rebut it. Liability under the actio iniuriarum is impossible absent intention to injure (or animus iniuriandi); this is one of the

[139] Cf *Junior Police Officers' Association of the Hong Kong Police Force v Electoral Affairs Commission CACV* [2019] HKCA 1197, decided in the unusually fractious polity of Hong Kong. See further Rebecca Ong 'Hong Kong's response to the fight against doxxing' (2025) 54 *Common Law World Review* 17.

[140] *Mills v News Group Newspapers* [2001] EWHC Ch 412 evinces the general principle that a home address is not protected ipso facto; *AM v News Group Newspapers* [2012] EWHC 308 is an exceptional case where special risks of harm justified the court in restraining publication. See further *Tugendhat & Christie* op cit note 92 at 5.60–5.62.

[141] In effect, Chaskalson AJ analyses the lawfulness of disclosures of allegedly private information by their propensity to bring about privacy infringements by intrusion, thus connecting the two types of privacy-infringement that were distinguished in note 1 above. His approach has the arguable advantage that courts can tailor their response to the defendant's publication based on the likelihood of the plaintiff's being threatened, harassed, etc; they can refrain from intervening if no such risks are present, for example. Its disadvantage is precisely that it draws the court into speculative judgements about the publication's likely consequences, on which the lawfulness of the defendant's conduct comes to depend. For these reasons, Kollapen J firmly rejects Chaskalson AJ's approach, which rejection carries a majority because Rogers J expressly agrees with it (*Botha* (CC) supra note 14 paras 162–4, 244(g)). But one wonders whether our courts will continue to uphold this neat distinction, or instead allow a disclosure's likely effects to colour their analysis of its lawfulness, as seems to have happened in England and Wales: see further David Rolph, Andrew Scott, Godwin Busuttil, Richard Parkes KC & Tom Blackburn SC *Gatley on Libel and Slander* 13 ed (2022) 23-011.

https://doi.org/10.47348/SALJ/v142/i3a6

best-known and most hotly debated facts about it.[142] And there is no doubt, on the facts, that Mr Smuts did not know or foresee that the address he posted was that of Mr Botha's home. True, some say our law should be expanded such that negligence is sufficient for liability,[143] as the plaintiffs unavailingly argued in *NM v Smith*.[144] But, even then, there is no evidence at all that Mr Smuts ought to have known that the address — listed only as 'Botha Herman Insurance Brokerage' — was that of Mr Botha's family home. In respect of that cardinal consequence, he was neither intentional nor negligent. Hence there could be no prospect of holding Mr Smuts liable for damages.

But all of this proves irrelevant, for Mr Botha was not suing him for damages. He was seeking an interdict. Since the interdict's purpose is prospective — to prevent, henceforth, the privacy infringement's continuation — there is no requirement that the defendant was at fault when he began it. 'I did not know it was his home address when I posted it', Mr Smuts might say. But the point is that he knows it now. And hence he can have no objection, going forward, to taking the address down. Or so our law has long ago decided.[145] Hence the question as to what the defendant knew or should have known at the time of the post — though it might prove very important in other privacy cases — is not, in *Botha* itself, a salient complication. In this way, Kollapen J's failure to consider this issue can be rationalised, if not quite excused.[146]

(ii) *Further dissemination of information made publicly available by the plaintiff*

Those points aside, we can focus on the most challenging issue. It arises from the fact that Mr Botha's address was widely available on several websites because he put it there in order to attract customers. He positively wanted his address to come to the public's attention, and took repeated actions to do his best to ensure this would happen. No feature of this kind was in play in *Sooknunan*, since Satchwell J accepted the plaintiffs'

[142] *Le Roux v Dey* supra note 40 paras 136–7; Brand op cit note 41 para 112. The question of animus iniuriandi has a long and celebrated history, discussed in Reinhard Zimmermann *The Law of Obligations* (1990) ch 31; Jonathan Burchell 'The protection of personality rights' in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996).

[143] See for an early example J M Burchell 'The fault element in the law of defamation' (1978) 95 *SALJ* 170 (which in turn relies on the work of P Q R Boberg).

[144] Supra note 6.

[145] *Bloemfontein Town Council v Richter* 1938 AD 195 at 229; Harms op cit note 83 para 413; Neethling et al op cit note 4 at 350.

[146] It seems likely that Kollapen J's actual reason for overlooking the question of fault is simply that, as we saw in part IV, the case was pursued throughout within a constitutional rather than a delictual framework; the latter's fault element therefore never arose in his mind at all.

https://doi.org/10.47348/SALJ/v142/i3a6

evidence that their email addresses had not been publicly available until the defendant disclosed them.[147] So *Botha* had to confront an important and novel issue. Can a plaintiff have a reasonable expectation of privacy in respect of information that is already publicly available, as a result of the plaintiff's own deliberate actions?

There are in fact two issues here. The first is that a court should not make an ass of itself.[148] More precisely, it should not award an interdict to restrain the defendant's publication of information that is already so widely available that the order will have no appreciable protective effect.[149] This is a concern about the efficacy of judicial remedies. The second issue is that, in cases where the information was made available by the plaintiff himself, this tends to suggest he did not in fact have an expectation, or not a reasonable one, that the information would remain private. It is this second issue that is pertinent in *Botha*.

Plainly, the plaintiff's own choices must play an important role in shaping what is private. Privacy law is often said to be purposed at allowing plaintiffs to determine or control what information is known about them.[150] By corollary, where the plaintiff has chosen to publicise the information in question, then a basic reason for liability seems to be missing. One way the law might achieve this outcome is through the rubric of the consent defence.[151] But, rightly or wrongly, our courts' tendency is instead to fold the question into the fluid 'reasonable expectation of privacy' test. For present purposes, the upshot is much the same, namely that the bounds of permissible disclosure are heavily parasitic upon what the plaintiff appeared to want.

It was for this reason, above all, that the SCA had dismissed Mr Botha's claim, pooh-poohing the thought that he could complain of the wider circulation of information he had himself been willing to disseminate

[147] *Sooknunan* supra note 138 paras 75–7.

[148] Nor should it emulate King Canute: *Mosley v News Group Newspapers (No 1)* [2008] EWHC 687 para 34; *PJS v News Group Newspapers Ltd* [2016] UKSC 26 para 3.

[149] Our courts are understandably reluctant to conclude that they can do nothing to prevent (further) privacy infringements. See eg *Prinsloo* supra note 70 at 468D–I; *Greeff v Protection 4U h/a Protect International* 2012 (6) SA 393 (GNP) paras 79–80.

[150] Neethling et al op cit note 4 at 46–9. For relevant theoretical discussion, see eg Charles Fried 'Privacy' (1968) 77 *Yale LJ* 475; Daniel J Solove 'Conceptualizing privacy' (2002) 90 *California LR* 1088 at 1109–21.

[151] Neethling et al op cit note 4 at 346–7; but cf Scott op cit note 56 at 396–7. In England, the fact that the relevant information was already in the public domain was sometimes styled as a 'defence' to an action for breach of confidence, though the all-or-nothing approach so implied does not cohere with modern privacy law. See for details *Tugendhat & Christie* op cit note 92 at 11.43–11.63.

https://doi.org/10.47348/SALJ/v142/i3a6

publicly, as though this trapped him in a logical contradiction.[152] But the Constitutional Court's approach is quite different. A majority of its judges — composed of Kollapen J and his three concurring colleagues, plus Chaskalson AJ in his separate judgment — found in Mr Botha's favour in respect of his home address and awarded an interdict forcing Mr Smuts to take it down. In other words, the judgment found that Mr Smuts infringed Mr Botha's privacy by publicising information that Mr Botha had sought to make public himself. How can one explain this seemingly paradoxical feature of the judgment?

Of course, it is no longer tenable to equate private information with information that is secret — that is, information that the plaintiff wanted *no one* to know.[153] It is in fact typical in privacy claims that the plaintiff had wilfully disclosed the relevant information to someone, or some part of the wider public, but that the information may nevertheless enjoy privacy protection. In *Jooste*,[154] whose facts are notorious, Harms JA restated the law on this question. The plaintiff had agreed to sell her 'kiss-and-tell' story to the defendant magazine, but in her agreement, she imposed certain conditions. The magazine published its interview with the plaintiff in breach of them. The plaintiff brought a privacy claim. Harms JA rejected as 'too simplistic' the magazine's argument that, by virtue of the plaintiff's undisputed willingness to publicise her story, the content of the interview was not, in legal terms, private. He wrote, building on much prior case law:

> '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 advisor or 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.'[155]

Similar points have been made elsewhere. 'Privacy', according to Lord Nicholls in *Douglas v Hello! Ltd*, 'can be invaded by further publication of information or photographs already disclosed to the public'.[156] Sometimes this is because of the commercial element involved, as in *Douglas* itself: a celebrity couple had agreed a lucrative deal with one tabloid magazine that it would have the sole rights to publish photographs of their wedding — thus agreeing that the photos would be made public, but strictly subject to exclusivity, which their claim against the defendant magazine sought to protect. And *Jooste*, too, may be considered somewhat unusual, since the

[152] *Smuts* (SCA) supra note 11 paras 22–3, 31.
[153] See further Solove op cit note 150 at 1105–9.
[154] Supra note 31.
[155] Ibid at 271 (citations omitted).
[156] Supra note 3 para 255. See too Phillipson op cit note 91 at 736–8.

https://doi.org/10.47348/SALJ/v142/i3a6

contract between the parties contained an express condition attached to the disclosure, which the defendant magazine had breached.

Nevertheless, courts will rightly try to advance plaintiffs' autonomy even where they have not expressly stipulated the conditions for further disclosure. They will look at the 'signals' tacitly sent by the plaintiff and seek to respect them.[157] It is surely obvious that, although a person has voluntarily made a sex tape for the viewing pleasure of his partner, he strongly wishes that it should not receive a wider circulation. And though a person might tell his doctor about his medical condition, we all understand that it is a privacy infringement for the doctor to make that information known more widely.[158] In *NM v Smith*, the plaintiffs had consented to the disclosure of their names and HIV statuses in an expert report circulated to a small group of medical professionals, but said that it nevertheless infringed their privacy to publish it in a general-readership book. The defendants argued that this was untenable: having chosen to put their information into the public domain, the plaintiffs could no longer claim that it was private. But the Constitutional Court rejected this argument and upheld the plaintiffs' claim. It drew the understandable inference that, although the plaintiffs had voluntarily shared their HIV statuses, they did so for a limited purpose and in a limited forum; they had not given 'blanket consent' to the release of information to the public at large.[159] In agreeing to their inclusion in the report, they were exercising their right to determine for themselves the bounds of disclosure — not abandoning it. It is the court's duty, then, to give effect to the plaintiff's wishes, subtly construed, and they will draw contestable but appropriate inferences about what those wishes are, based on the relevant social context.

Kollapen J's reasoning in *Botha* pursues this line of thought.[160] He takes as a starting point the importance of 'informational self-determination'.[161] In *Jooste*'s language, which Kollapen J approves,[162] individuals have the right to 'determine the destiny' of private facts. And his whole subsequent discussion, as we shall see, seeks to respect Mr Botha's 'purpose' in publishing his address, which recalls Harms JA's language once again. Nevertheless, *Botha* clearly takes things much further than the prior authorities.

[157] Moreham op cit note 115.

[158] *Jansen van Vuuren* supra note 18.

[159] *NM v Smith* supra note 6 paras 39 and 44.

[160] Remarkably, the Constitutional Court judgment in *Botha* mentions *NM v Smith* — its hitherto leading judgment on civil privacy claims — only once, and even then, in passing (per Chakalson AJ para 201). However, it was extensively relied upon in the plaintiff's written submissions and was a central basis of the High Court judgment; there is no doubt that Kollapen J was well-acquainted with it.

[161] *Botha* (CC) supra note 14 paras 109–10, 143, 175.

[162] Ibid para 146.

https://doi.org/10.47348/SALJ/v142/i3a6

After all, Mr Botha — in a clear disanalogy with *NM v Smith* — had made his address available to anyone in the world. He positively wanted it to come to maximal public attention.

To reach these facts, Kollapen J has to give new force to the concept of informational self-determination. His innovation is to construe Mr Botha's 'purpose' in publishing the information very narrowly. On this basis, he holds that Mr Smuts had behaved unlawfully when he posted Mr Botha's address, because his purpose differed from Mr Botha's own purpose when he publicised it:

> 'An important consideration is the purpose for which information is published. Purpose is relevant here because Mr Botha published his address as part of advertising his insurance brokerage. Mr Smuts, however, re-published that information which included Mr Botha's address, in relation to animal trapping.'
>
> 'In cases where the information in question was placed in the public domain for a limited purpose and it is subsequently used for other purposes, … purpose may qualify and limit the future use of that information.'
>
> 'It cannot be said that because Mr Botha published his address it was open to Mr Smuts to do so as well. … Mr Botha, in publishing his address, did so purely in the context of his brokerage advertisement and for no other reason that can be discerned. Mr Smuts used this information for a totally different and unrelated purpose.'[163]

In this way, Mr Botha's evident willingness to publicise his address himself does not show that he had no reasonable expectation of privacy in respect of it. For that willingness must be understood narrowly, defined by its particular purpose. Subjectively, 'Mr Botha retained an expectation of privacy that his address would remain a private fact for all purposes except the business of his insurance brokerage',[164] and this expectation was, in Kollapen J's view, objectively reasonable. Mr Botha's purpose lives on, continuing to fetter the use of his information by others, even once he has put that information into the public domain.

Botha thereby creates a strong principle — surely too strong. When defendants encounter information on the Internet, they rarely know how it came to be there. Even if they know it was put there by the plaintiff himself, how are they to say what the plaintiff's purpose was?[165] And how

[163] Ibid paras 138, 142 and 169.

[164] Ibid para 136.

[165] Kollapen J's attraction to the language of 'purpose', apart from its resonance with cases such as *Jooste*, is quite clearly indebted to statutory provisions regulating the collection and republication of personal data, which frequently specify that the data may be collected only for certain purposes, and not used for purposes other than those: see eg ss 13–15 of the Protection of Personal Information Act 4 of 2013 ('POPIA'). Legislative mechanisms of this kind are indeed the primary inspiration for factor (c) in his list quoted at note 108 above. But it may be doubted

https://doi.org/10.47348/SALJ/v142/i3a6

widely or narrowly should that purpose be construed? The plaintiff will rarely have uploaded his personal information with the precise purpose of having the defendant circulate it more widely, still less will he have done so with the precise purpose of having the defendant couple it with controversial further accusations to 'name and shame' him. Hence in almost any disputatious case, the plaintiff will be able to say, with plausibility, that the defendant's purpose in disseminating the information differed from his own. And then it will follow that the defendant has acted unlawfully, even if he is merely re-publishing information the plaintiff himself had made public. In short, unless *Botha*'s principle is moderated, it would vastly extend privacy protections and pose severe risks to free speech.

Kollapen J, no doubt aware of these concerns, offers some predictable pablum. The plaintiff's purpose in making the information available, though 'relevant', is 'not dispositive'.[166] All other relevant factors must be considered too. The outcome will always depend (you guessed it!) on the facts of the particular case.[167] One would love to know, then, why Mr Botha's purpose in this case was not only highly relevant but dispositive. And, to be fair, Kollapen J's judgment does give us another clue. He suggests that there was no true voluntariness in Mr Botha's disclosure of the address at which he lived. That is because publicising one's business address to attract custom is something one has to do if one is to make a living. And in the modern world that includes putting it on the Internet.[168] To be sure, not everyone's business address is also their home. And yet Mr Botha's decision to operate his business from there is, again, not unusual: many people do it, some due to 'economic necessity'.[169] The result may be that the boundary between people's public and private lives 'become[s] relatively porous'.[170] But courts have a responsibility, in these circumstances, to ensure that some protection of private life remains. And this means they must distinguish disclosures that are a result of 'conscious choice' from those compelled by circumstance.[171]

Kollapen J recognises, then, that his reasoning creates difficulties in drawing the line between the public and private spheres. But in fact I would suggest it does something more: it makes that way of thinking about privacy and publicity obsolete. It has become misleading to apply a spatial metaphor, whereby information *either* remains within the 'private sphere'

how smoothly this logic can be transposed to non-statutory contexts, where the 'purpose' in question, rather than being expressly specified or officially mandated by the legislation, exists only in the plaintiff's mind.

166 *Botha* (CC) supra note 14 paras 116 and 142.

167 Ibid paras 99 and 176.

168 Ibid para 118.

169 Ibid para 145.

170 Ibid para 118.

171 Ibid.

https://doi.org/10.47348/SALJ/v142/i3a6

and thus subject to privacy protections *or* has crossed the boundary into the 'public domain' and become fair game. That way of thinking might work in *Jansen van Vuuren* or *NM v Smith*, where prior to the defendant's actions the circle to which the information had been disclosed was clearly circumscribed and small. Scholars had understandably sought to preserve and apply this model to the Internet and social media: they assumed that the plaintiff, in order to enjoy civil privacy protections over information he has uploaded, would have to show his wish to keep the information within a limited circle, for example by password-protecting the website on which he posted it, or by changing his privacy settings so that only his followers could see it.[172] But Mr Botha took no such steps to limit his address's circulation: in fact he took active steps to make his address available to everyone in the world with an Internet connection. On any meaningful analysis, therefore, his address was already 'in the public domain', and indeed Kollapen J himself describes it as such.[173] We must therefore understand what the Constitutional Court is doing in *Botha* in a new way: rather than seeking to define and protect the boundaries of the private sphere, it has imposed new norms about how information may be disseminated even after it is undisputably in the public domain.

Kollapen J's approach is therefore pathbreaking. But it has been anticipated, to a large extent, by the English courts. They have drawn a distinction between the in-principle availability of the information in question — the fact that it is theoretically possible, in other words, for members of the public to get hold of it — and the reality of whether they are in fact aware of it or likely to become aware of it.[174] It is the latter — actual awareness — that counts. Information can remain legally private, in other words, even when it is theoretically available to the public at large, and hence a defendant can act unlawfully if he causes already publicly available information to become more widely known. Accordingly, 'information available on the Internet is not necessarily of itself to be regarded as beyond the law's protection'.[175] English courts have therefore injuncted newspapers from disseminating information that had been listed on public websites[176] or embarrassing photographs that were

[172] S Papadopoulos 'Revisiting the public disclosure of private facts in cyberworld' (2009) 30 *Obiter* 30; Anneliese Roos 'Privacy in the Facebook era: A South African legal perspective' (2012) 129 *SALJ* 375; Neethling et al op cit note 4 at 323n115.

[173] *Botha* (CC) supra note 14 para 142.

[174] Rolph et al *Gatley on Slander* op cit note 141 at 23-009.

[175] *KGM v News Group Newspapers* [2010] EWHC 3145 para 30. See also *Tugendhat & Christie* op cit note 92 at 11.48.

[176] *Venables v News Group International* [2001] EWHC 32 paras 27–33.

https://doi.org/10.47348/SALJ/v142/i3a6

already available to all Facebook users.[177] And they have emphasised the basic human reasons for doing so:

> 'It is fairly obvious that wall-to-wall excoriation in national newspapers … is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up. Moreover, with each exposure of personal information or allegations, … there is a new intrusion and occasion for distress or embarrassment.'[178]

None of this quite reaches the facts of *Botha*. But it is not far off. It shows the understandable normative pressure the courts feel to address the concrete harms caused to those who are the subject of public scandals, and the recognition that these harms occur because of the actual hostile attention that the defendant's act of publication has provoked. That the information he disseminated was already notionally available does nothing to diminish the harms caused by the scandal. If the courts want to act, the logical endpoint is that they will seek to police the onward dissemination even of information that was already in the public domain — as Kollapen J did in *Botha*.

All this is rather bold, of course. It promises a brave new world, in which courts in civil privacy cases will have to regulate a whole new area of social life. Rogers J, in dissent, was not willing to go there, or at least not on *Botha*'s facts. He thought the existing law gave Mr Botha sufficient protection. If his family were harassed, or his home intruded upon, that would itself be legally prohibited.[179] But it was too strained to say that the dissemination of Mr Botha's home address was itself unlawful, given that Mr Smuts had thought he was sharing, for legitimate reasons, a business address. Moreover, the mere fact of a person's home address (as opposed to information about what he does there) is routinely shared and indeed publicly observable by his neighbours and passersby.[180] Kollapen J's decision therefore applies to cyberworld a haughty standard that is defied by real life. In sum, while Rogers J's judgment is more subtle than the SCA's, it reaches essentially the same conclusion: Mr Botha must lose, or otherwise the cost would be too great for freedom of expression.

Kollapen J, by contrast, bequeaths a significant new pro-plaintiff principle. Does it carry the force of a majority? Technically not, although the point may be debated. Chaskalson AJ agrees with Kollapen J's ultimate conclusion, namely that by publishing Mr Botha's address Mr Smuts contravened his objectively reasonable expectation of privacy.

[177] *RocknRoll v News Group Newspapers* [2013] EWHC 24.

[178] *CTB v News Group Newspapers* [2011] EWHC 1326, quoted with approval in *PJS* supra note 148 para 29.

[179] *Botha* (CC) supra note 14 para 254.

[180] Ibid para 255.

https://doi.org/10.47348/SALJ/v142/i3a6

Chaskalson AJ was also forceful in saying that it should not matter that the address had already been put online by Mr Botha: there was no doubt that Mr Smuts's reposting of it, in a new context, caused understandable anguish to Mr Botha and increased the risk of harassment.[181] As we saw, however, Chaskalson AJ conceptualises the case quite differently from Kollapen J, and his reasoning takes a differing course, which does not see him endorsing the most novel aspect of Kollapen J's judgment, namely its emphasis on Mr Botha's purpose.

(iii) *Applying the public interest defence*

Because Kollapen J finds that Mr Botha had a subjective expectation of privacy in respect of his Gqeberha address, and because he holds that expectation to be objectively reasonable, he has to deal with the third requirement in his schema. Could Mr Smuts successfully defend himself on the basis that disclosing the address was in the public interest?

Kollapen J, like every judge who heard the case, was happy to accept that the ethics of animal trapping was a question of legitimate public interest, and that Mr Smuts was justified in drawing attention to and forcefully criticising it.[182] But that was not sufficient: Mr Smuts had to show that Mr Botha's home address, specifically, contributed to that public debate. He had to show that his inclusion of this particular piece of private information was 'proportiona[te]', and hence that his infringement of Mr Botha's privacy 'only [went] as far as reasonably necessary'.[183] But, on this cardinal point, Mr Smuts's public interest defence fell flat. For there was no public interest in his sharing Mr Botha's Gqeberha address, which was 'peripheral' to what was happening upon his farm a hundred kilometres away.[184] Its contribution to the public debate was 'minimal' at best.[185] And so Mr Smuts's only defence fell away.

Notably, then, for all of Kollapen J's rhetoric about the importance of s 36-style rights-balancing — and there is a lot of it — the adjudication of the public interest defence boils down, in application, to a more focused question: was the disclosure of the information in question reasonably necessary to advance a debate of legitimate public interest? Perhaps we should be sceptical, then, of the grander claims that Kollapen J had

[181] Ibid paras 226–7.

[182] Ibid paras 125–6. It is of some interest that the key Australian case of *ABC v Lenah Game Meats* supra note 3 likewise involved a defendant who had sought to expose the plaintiff's mistreatment of animals.

[183] *Botha* (CC) supra note 14 para 152. The latter phrase comes from *Huey Extreme Club v McDonald t/a Sport Helicopters* 2005 (1) SA 485 (C) and, ultimately, *S v I* supra note 61.

[184] *Botha* (CC) ibid para 149.

[185] Ibid para 151.

https://doi.org/10.47348/SALJ/v142/i3a6

made about how to characterise the nature of the enquiry.[186] And we would do well to remember, also, that *Botha* is in fact a case in which the defendant claimed that the disclosure was necessary to expose the plaintiff's wrongdoing, which is a familiar and important instantiation of the delictual defence.[187] One hopes that our courts will, in future, focus on crystallising the categories in which the defence applies, rather than inflating it with fashionable talk of rights-balancing.

(iv) *Summary and disposition*

In respect of Mr Botha's address in Gqeberha, then, all three requirements of Kollapen J's schema were met, and (equivalently) Mr Smuts's publication of it on Facebook was ultima facie unlawful. The address was private information because it was the address of Mr Botha's home, and because, although he had already published it widely, he had published it for a purpose different from Mr Smuts's. And the infringement of his privacy was not justified, because, although Mr Smuts's post as a whole contributed to a debate of legitimate public interest, the specific inclusion of the peripheral Gqeberha address did not. An interdict was issued requiring Mr Smuts to delete it from his own Facebook post,[188] as well as to delete third-party replies that referred to it.[189]

[186] See part IV(b) above.

[187] For example *Duggan* supra note 61; *Kunene* supra note 70 paras 25–9. The position in England and Wales is discussed in *Tugendhat & Christie* op cit note 92 at 11.80–11.84. See too the case law on South Africa's 'public benefit' requirement of the justification defence to defamation, which has regularly sought to strike a balance between the plaintiff's privacy and the importance of exposing his wrongdoing: Neethling et al op cit note 4 at 228.

[188] *Botha* (CC) supra note 14 para 179. This order carried the force of a majority, because Chaskalson AJ agreed with it despite his differing conceptualisation of the case (discussed at note 141 above). For Chaskalson AJ, the cardinal question was whether, by posting the address at which Mr Botha and his family lived, it exposed them to threats, intrusions and harassment that were sufficient to make Mr Smuts's failure to remove his post unlawful. His answer, on the evidence available to him, was that Mr Botha's fears of harassment were indeed reasonable (ibid paras 219–20).

[189] See para 2(d) of the substitute order. This tacitly confirms that our courts are willing to impose duties on controllers of social media pages to delete injurious content posted by others. Cf, in the context of defamation, *Sooknunan* supra note 138 paras 47–9.

https://doi.org/10.47348/SALJ/v142/i3a6

However, the rest of Mr Smuts's post was allowed to stay up.[190] This included Mr Botha's name and the location of his farm,[191] as well as the highly unfavourable remarks about his conduct — which were protected, seemingly uncontroversially, by the defence of fair comment.[192]

VI CONCLUSIONS

Botha v Smuts is, despite its flaws, a landmark judgment. It is our apex court's most comprehensive statement of the principles to be applied to decide civil claims for infringements of informational privacy, and for that reason alone will become practically very important.[193] In addition, it refines our law, for example by settling that infringements of informational privacy are to be justified by the application of an encompassing 'public interest' standard. Throughout its statement of the applicable principles, *Botha* has caused our civil law of privacy to become more closely

[190] For delict scholars, it may be regrettable that Mr Smuts had already removed the photo of Mr Botha and his daughter before litigation was brought: cases involving the publication of photographs, and especially photographs of the plaintiff's children, have provoked notable pro-plaintiff developments in England and Wales: *Murray* supra note 109; *Weller* supra note 100; Thomas D C Bennett 'The relevance and importance of third party interests in privacy cases' (2011) 127 *LQR* 531. See in our context Neethling et al op cit note 4 at 118–23; Avani Singh & Tina Power 'Understanding the privacy rights of the African child in the digital era' (2021) 21 *African Human Rights LJ* 99.

[191] Ibid para 177. Kollapen J even specified that 'the name of … [Mr Botha's] insurance brokerage' was allowed to stay up — which may be surprising, given the ease with which any competent user of Internet search engines can use that name to find out its address, exactly as Mr Smuts did.

[192] Mr Botha did not contest the High Court's finding in this regard: *Botha* (CC) supra note 14 para 127.

[193] It is worth noting that the judgment is likely to remain important even now that POPIA has come into force. (It had not when the dispute in *Botha* arose.) Though some courts have already taken the view that POPIA applies to cases involving one-off disclosures of allegedly private information by ordinary people like Mr Smuts (see *Munetsi* supra note 83), the Act's scope of application is intricately specified, open to interpretation, and likely to be vigorously debated (see for exhaustive treatment Neethling et al op cit note 4 ch 10). For several reasons, including the Act's express exclusion of information processing 'in the course of a purely personal or household activity' (s 6(1)*(a)*), it may come to pass that the scope of the legislation is read narrowly, leaving at least some such cases outside it. In any event, even if POPIA does cover such cases, the common law apparently continues to operate alongside it (which was again the view taken in *Munetsi*). And even where POPIA itself is being applied, many of its provisions are liable to be understood in conformity with the common law: for example, 'personal information' is a pivotal concept in the Act (non-exhaustively defined in s 1); this information must be used 'in accordance or compatible with the purpose for which it was collected' (s 15(1)), which it will be if the information 'has deliberately been made public by the data subject' (s 15(3)*(b)*); and several provisions of the Act contain 'public interest' defences. All of these provisions mirror common-law principles and are likely to be applied in light of them.

https://doi.org/10.47348/SALJ/v142/i3a6

aligned with Anglo-American law. To some extent, this is a welcome development, since other jurisdictions have useful materials on which we can draw to solve our emerging problems — a comparativist approach that this article has unabashedly encouraged. Yet, the fact that Anglo-American law has made such major inroads is partly a consequence of the Constitutional Court's brushing aside, in apparent ignorance, of the Roman-Dutch actio iniuriarum that occupies the same space. It is also partly a consequence of the court's preference for broad balancing tests, imported from constitutional and statutory law, over existing private-law mechanisms — an inclination that the court may do better to arrest. This article has sought to show, however, that the principles devised in *Botha* can be comfortably slotted into the elements of the actio iniuriarum, especially wrongfulness.

Having in substance imported our applicable principles from other jurisdictions, we can expect to encounter the same difficulties and drawbacks that they have. The most obvious of these is that when courts apply loose balancing tests, they tend to produce unpredictable outcomes. Perhaps the back-and-forth yawing of *Botha*'s outcome as the case progressed through the judicial hierarchy is suggestive. But whether this sort of indeterminacy can realistically be avoided in the context of our emerging civil privacy jurisprudence is another matter.

We should also expect that the notionally different stages of the framework will be persistently run together. *Botha* itself discusses the question whether the 'subjective' and 'objective' legs of the 'reasonable expectation of privacy' test are truly justified in having a separate existence; it gives an affirmative answer, but one arguably belied in application.[194] In addition, our courts have noted in the past that it is ambiguous whether the countervailing interests of others, which compete with the plaintiff's interest in privacy, should feature in the 'reasonable expectation' test or as part of the 'public interest' defence.[195] *Botha*, for its part, says that others' interests should feature in the justification question. But it is not hard to see that they tend to crop up in the prior question of whether the plaintiff's expectation of privacy was reasonable.[196] For does not the reasonableness of the plaintiff's expectation that the information should remain private depend on the interests that others have in its being made public? Indeed, this conflation again seems to have happened ab initio in *Botha* itself, since Kollapen J explains why the public interest in the free flow of information counts against finding that the plaintiff had a reasonable expectation of privacy.[197] But these overlaps can perhaps be forgiven. The most important

[194] See part V(a) above.
[195] For example *Financial Mail* supra note 64 at 463.
[196] Compare *Campbell* supra note 3 para 22.
[197] *Botha* (CC) supra note 14 paras 121(a), 124–9.

https://doi.org/10.47348/SALJ/v142/i3a6

thing about a legal framework is that it ensures all relevant considerations are given a space to be ventilated — which *Botha*'s framework competently does. That each space should be discrete and non-overlapping is a secondary virtue.

Botha has further importance because of the principles that Kollapen J lays down in the course of his framework's application. In my view, we should be pleased that the poorly reasoned SCA judgment has been overtaken. That judgment fails altogether to consider leading authorities such as *Jooste* and *NM v Smith*, which at least arguably support Mr Botha's claim. And, by its repeated conclusory assertions that Mr Smuts's freedom of expression must win out, the SCA abjured its responsibility to consider new techniques to protect privacy in the Internet age. By contrast, Kollapen J gladly shoulders that responsibility. I suggested that the basic human reasons why he wants to police the hostile use of personal information on the Internet are easy to understand. The more difficult question is whether that can be done using the rubric of privacy in a way that lays down sensible lines and does not overreach.

Here the Constitutional Court's judgment does two distinctive things. It confirms, with new starkness, that the family home enjoys elevated status and will be jealously guarded by civil privacy law. And it takes the remarkable step of imposing liability on a defendant for the further dissemination of information that was already undoubtedly in the public domain because the plaintiff had chosen on several occasions to put it there. To justify this approach, Kollapen J uses the plaintiff's 'purpose', contestably interpreted, to imply a limitation on what it is lawful for others to do with his information. This unleashes a powerful new principle that plaintiffs are sure to rely on in future — and which future courts will need to moderate. If they do not, *Botha* may mark a newly tough regime for defendants in the Internet era.

https://doi.org/10.47348/SALJ/v142/i3a6