

Duchess of Sussex, Privacy and POPIA

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The privacy of individuals is almost sacrosanct and where intrusions are threatened, such intruders need to make sure that they are within the prescripts of the law or risk the consequences of breach or non-compliance with privacy legislation. In the South African context, from 1 July 2021 forward, non-compliance will be met by an enforcement notice from the Information Regulator.

The grace period provided for in terms of the Protection of Personal Information Act, 2013 ("**POPIA**") is fast running out and it is therefore important to consider what we can learn from other jurisdictions that have been enforcing privacy legislation for decades.

POPIA gives effect to the constitutional right to privacy. The South African Constitution ("**the Constitution**") provides for the right to privacy which includes the right not to have the privacy of one's communications infringed and the right to freedom of expression which includes freedom of the press and other media.

However, the rights guaranteed by the Constitution are not absolute. Section 36 of the Constitution provides for the limitation or balancing of rights against each other. This means that in some instances the limitation of a right such as privacy can be lawful.

It is a well-known fact that the Duchess of Sussex Meghan Markle ("**Markle**") sent a letter to her father Thomas Markle. The Mail on Sunday and MailOnline, owned by Associated Newspapers Limited ("**Associated Newspapers**"), got a hold of Markle's letter and reproduced large parts of it for publication over five articles. Consequently, the issue of misuse of private information, privacy and breach of the relevant data protection legislation was brought before the High Court of Justice in the United Kingdom ("**the Court**") by Markle.

The Court focussed on the issue of reasonable expectation of privacy when it was required to rule on the matter between the Markle and Associated Newspapers. In the first instance, the Court considered whether Markle enjoyed a reasonable expectation of privacy in respect of the information in question. That implies that there is something of a private nature that is worthy of protection. This issue, as per the Court, is determined by an analysis of:

- the attributes of the claimant,
- the nature of the activity in which the claimant was engaged,
- the place at which it took place,
- the nature and purpose of the intrusion,
- the absence of consent,
- the effect on the claimant, and
- the circumstances in which and purposes for which the information came into the hands of the publisher.

Subsequently, the Court had to consider the question of whether in all the circumstances of the case before it, the privacy rights of Markle had to yield to the imperatives of the freedom of expression enjoyed by Associated Newspapers and their audiences.

Wholly considered, the Court was required to apply a proportionality test to determine the comparative importance of the specific rights claimed by both parties.

Applying the two stage test, the Court held that Markle did indeed enjoy a reasonable expectation of privacy. Although she held a very high public profile, that did not take away from the fact that the activity in which she was engaged (sending a letter to her father) was of

a private nature and did not form part of any aspect of her public role or functions.

Notwithstanding the above, Associated Newspapers proceeded with its intrusion into the private life of Markle by way of a five article spread in both its printed and digital newspaper platforms. It further did so in circumstances where Markle had not given her consent for such publication, which publication concerned what was deemed to be self evidently sensitive or private information. This caused Markle distress the effect of which could not be outweighed by the purpose of the publication, i.e. to satisfy the curiosity of the general public. Moreover, the information was obtained from Markle's father as opposed to Markle herself in addition to circumstances where same had not entered the public domain at the time of the publication complained of.

At the second stage of the inquiry, the Court held that the interference with Markle's reasonable expectation of privacy was not necessary and proportionate in pursuit of a legitimate aim of protecting the right to freedom of expression, nor was it necessary and proportionate in respect of protecting the public from being misled.

Consequently, Markle succeeded in her claim against Associated Newspapers.

Were we required to consider this situation from a South African perspective, using the example of *Duchess of Sussex v Associated Newspapers Ltd*, one would have to consider the concept of reasonable expectation of privacy and determine if the letter constitutes personal information in terms of POPIA. The handling/processing of personal information in the above matter would constitute the sharing of the letter with Associated Newspapers and its subsequent publication to the general public. Consequently, the question would be whether there is a lawful basis for processing in terms of POPIA and whether the conditions for lawful processing were complied with.

POPIA makes provision for what is termed "exclusion for journalistic purposes". In essence, it gives effect to freedom of expression and the press, but only to a certain extent. As such POPIA provides that its provisions do not apply to the processing of personal information solely for the purpose of journalistic expression to the extent that such an exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression. This balance sought to be struck in terms of POPIA is comparable to the two stage test elucidated in *Duchess of Sussex*.

Therefore, considering the facts in terms of POPIA one would have to consider if there is a legitimate interest that out-weights the interest of an individual. The reasons for publishing the letter, which publication was excessive in the *Duchess of Sussex* example, could possibly be argued as being inadequate and irrelevant as required by POPIA. In other words there were no legitimate grounds on which Associated Newspapers could rely. Moreover, consent to the publication of the letter was not granted, nor was the letter constituting personal informational obtained from Markle herself. So how would this matter have been dealt with in the South African context?

From 1 July 2021, a new brave world awaits us all indeed.



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