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Hey POPIA, is the publication of a person's HIV status, positive or negative?

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The right to privacy and the rights of public figures came before the court in the case of Tshabalala-Msimang versus Makhanya[1]. In this case, the *Sunday Times* had published an article referring to the then Minister of Health's abuse of alcohol, her abuse of power and the breach of hospital rules. The *Sunday Times* was in possession of Tshabalala-Msimang's private and confidential hospital records and contended that the publication of the reports was in the public interest.

In the Tshabalala-Msimang's case, which was decided before the promulgation of the Protection of Personal Information Act 4 of 2013 ("**POPIA**"), the court balanced (reconciled) the competing interests of journalistic, literary, or artistic expression (a constitutionally protected right) with that of another constitutionally protected right, namely, the right to privacy.

The court may, once again be faced with a decision that requires a reconciliation of constitutional rights – *Sunday World's* right to freedom of expression and Sello Maake ka Ncube's right to privacy. This time, however, with the benefit of some guidance contained in the provisions of POPIA.

The disclosure of medical information constitutes a core focus area when considering the right to privacy. This is because significant harm can result when health information is disclosed.[2] In the case of *NM v Smith*[3], Madala J explained why the non-consensual disclosure of confidential medical information, including the HIV status of the applicants, can be the basis of a claim for damages. Specifically, Madala J explained that –

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

It is important to note that POPIA does not apply to the processing of personal information solely for the purpose of journalistic, literary or artistic 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[4].

It is also noteworthy that the Bill of Rights makes provision for the limitation of constitutionally protected rights, provided that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality, and freedom, taking all relevant factors into account[5]. However, since there is no hierarchy of rights entrenched in the Bill of Rights, the question that remains, therefore, is how a dispute between freedom of expression and the right to privacy can be reconciled?

To this end, Burns and Burger-Smidt recognise *that it is a relatively easy legislative process to provide for the statutory regulation of two rights, but it might be difficult to effect a reconciliation between competing rights. What form would the reconciliation have to take and how do the courts weigh up the two rights? It is apparent that the court will adopt a balancing of two rights and that such issue of conflict will have to be adjudged on each occasion. The weight to be afforded to each of the two rights falls within the courts' judicial powers and functions*[6].

Due to South Africa's limited jurisprudence on such issues, the court may find it helpful to consider foreign jurisprudence when deciding this matter.

In English law, the courts have adopted a two stage approach to the reconciliation of public interest and freedom of expression. In ZXC v Bloomberg LP[7], the Court said that the first stage of the enquiry is whether a claimant has a reasonable expectation of privacy in the relevant information. If the answer is in the affirmative, stage two involves an enquiry and evaluation as to whether that expectation is outweighed by a countervailing interest. In this case, the issue was whether a person has a reasonable expectation of privacy in relation to a policed or similar inquiry. The court accepted that a person does have a reasonable expectation of privacy in a police investigation, until a charge is brought against such person. It is understandable that a person would have a reasonable expectation in those circumstances, because there usually is a stigma related to police investigations.

The European courts have also, on numerous occasions, considered the conflict between press freedom and the right to privacy.

In the case of Axel Springer v Germany (GC)[8], the court had to consider the ban which had been imposed by a domestic court on the owner who wanted to publish an article on the arrest and conviction of the star of a popular television series. In this case, the court iterated that the right to freedom of expression must be balanced against the right to the respect for private life and accordingly found that it was common ground that the injunctions constituted an infringement of the publisher's freedom of expression.

In reaching its decision, the court had considered –

- firstly, that the published article relating to the actor's arrest and conviction were public judicial facts that could be considered to present a degree of general interest.
- secondly, that the actor qualified as a public figure and that he had sought the limelight by revealing facts of his private life in other interviews. This meant that the actor's legitimate expectation that his privacy would effectively be protected, was reduced; and
- thirdly, after examining the issue of how the information was obtained and whether it was reliable, the court found that the manner in which the information had been obtained had a sufficient factual basis

Ultimately, the court found that the publishing company had not acted in bad faith and had simply reported on the arrest and outcome of the prosecution; it had not referred to the actor's private life.

Having said this, it is also important to note that a person's HIV status constitutes special personal information in terms of POPIA, the non-consensual processing of which is prohibited under section 26 of POPIA. However, section 7 also tells us that POPIA does not apply to the processing of personal information solely for the purpose of journalistic, literary or artistic 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.

So where does this leave us? After all, his wife told the newspaper...

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1. See the Sunday World article titled "How Sello Maake kaNcube exposed me to HIV – wife" available at https://sundayworld.co.za/celebrity-news/how-sello-maake-kancube-exposed-me-to-hiv-wife/, accessed on 20 December 2024.
2. See The Citizen article titled "Sello Maake Ka-Ncube takes legal action after disclosure of HIV status" available at https://www.citizen.co.za/entertainment/celebrity-news/sello-maake-ka-ncube-takes-legal-action-after-disclosure-of-hiv-status/, accessed on 20 December 2024.
3. [2008] 1 All SA 509 (W), 2008 (6) SA 102 (W).
4. See Burns Y & Burger-Smidt A (2023) Protection of Personal Information: *Law and Practice, 2nd edition:* LexisNexis.
5. NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (7) BCLR 751 (CC), 2007 (5) SA 250 (CC).
6. See section 7(1) of POPIA.
7. See section 36 of the Bill of Rights.
8. See Burns Y & Burger-Smidt A (2023) Protection of Personal Information: *Law and Practice, 2nd edition:* LexisNexis.
9. ZXC v Bloomberg LP Case No. A2/2019/1158 before the Royal Court of Justice.
10. App. No. 39954/08, 7 February 2012.



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