

REGULATORY

The paradox between the right to privacy and the right to freedom of expression

17 October 2024 7 min read

***Botha v Smuts and Another* [2024] ZACC 22**

The right to privacy, a shield against unwanted intrusions, allows individuals to control their personal information and make life decisions. In contrast, the right to freedom of expression, a cornerstone of democracy, is not just a right but a call to action. It fosters robust public debate by empowering individuals to express opinions, seek information, and share ideas without censorship, making the audience feel engaged and participative.

However, these rights, enshrined in the Constitution of the Republic of South Africa, 1996, introduce a paradox of conflicting rights. The Constitutional Court's ("CC") recent decision of *Botha v Smuts and Another* [2024] ZACC 22 ("***Botha case***") is a compelling example of how even the apex court of South Africa grapples with this paradox. The CC handed down four separate judgements, each offering a distinct perspective on balancing the right to privacy and freedom of expression. Rather than a unanimous approach, the differing opinions demonstrate the inherent tensions in determining how far one right can extend before it unjustly infringes on another. This underscores the reality that there is no one-size-fits-all solution when balancing such fundamental rights, particularly in cases involving public interest and individual dignity.

Privacy rights can limit the ability to express certain opinions or share information, particularly in cases involving public figures, whistleblowers, or matters of public interest. Conversely, unrestricted freedom of expression, if not properly regulated, can lead to significant invasions of privacy, such as media intrusion into private lives or the spread of personal information without consent.

The public interest may justify limitations on privacy when it comes to matters of public significance, such as corruption or criminal activity. The CC recognised the critical role of public interest in cases involving conflicting rights. To this end, the CC held that when balancing the right to privacy against the right to freedom of expression, one must consider whether "*the public interest mandates prioritising expression over privacy*". However, the right to privacy is crucial in protecting individuals from being subjected to public scrutiny without consent, even if they are public figures. Freedom of expression, while a powerful tool, is often limited to preventing harm to others, which can include significant harm arising from invasions of privacy. This underscores the need for caution and responsibility in exercising this right.

The rise of digital communication has amplified tensions between these rights. For instance, social media platforms can facilitate free expression but also lead to significant privacy breaches. In response to these challenges, data protection laws, such as the Protection of Personal Information Act 4 of 2013 ("**POPIA**"), have been enacted to provide legal frameworks for handling personal information, thereby protecting privacy in the digital age.

The expectation of privacy over information in the public domain is a delicate balance, as it involves reconciling personal privacy rights with the principles of transparency and freedom of expression. This delicate balance underscores the complexity of the issue.

Information in the public domain refers to data or knowledge that is freely available and not subject to copyright or ownership. This includes government publications, court records, content shared on public platforms and publicly visible information. One of the core questions the CC considered in the Botha case was whether one has a claim to privacy regarding personal information extinguished if already in the public domain and placed there by the data subject.^[1] In answering this question, the CC noted that one cannot be said to enjoy an unqualified expectation of privacy over information willingly put into the public domain. However, on this issue, the CC ultimately held that –

"[176]... public disclosure of information does not necessarily mean that a data subject loses all expectation of privacy over that information. The compatibility in the purpose for which information was originally posted and thereafter used will remain a relevant factor in determining the bounds of the expectation of privacy."

The above finding of the CC that public disclosure of information does not necessarily mean that a data subject loses all expectation of privacy is important and points to the further processing restrictions as set out in POPIA. While the CC seeks to protect individual privacy even after certain information becomes public, it seemingly underestimates the challenges of enforcing privacy in an era where information in the public domain is difficult to control. Once personal information is disclosed, particularly in today's digital landscape, it spreads quickly and pervasively, making it nearly impossible to contain or retract. This reality diminishes the value of maintaining the right to privacy over such information as the very nature of the public domain erodes any practical expectation of privacy or confidentiality. Put differently, trying to safeguard privacy for information already available to the public may prove moot.

Where personal information is already in the public domain and widely accessible, the right to privacy becomes somewhat abstract rather than meaningful, especially when it is difficult (if not impossible) to stop the further dissemination of information.

This is why there is generally a lower expectation of privacy for inherently non-personal information (for example, statistics or public records) compared to sensitive personal information (e.g., medical records, personal communications). Information shared in a public setting (like a public speech) may carry less expectation of privacy than private conversations inadvertently disclosed.

If individuals knowingly share information in a public forum, their expectation of privacy diminishes. For example, posting on social media platforms usually implies a willingness for that information to be public. In cases involving public figures or issues of public concern (for example, government accountability), there is often a more substantial justification for the public's access to certain personal information, potentially limiting the expectation of privacy.

The decision of the CC demonstrates that courts often grapple with cases where the expectation of privacy conflicts with the public's right to know. Decisions can hinge on factors like the relevance of the information to public discourse or how it was obtained. Journalistic practices often face dilemmas when reporting on private individuals who have become newsworthy. It is noteworthy that ethical guidelines, which play a crucial role in advocating for sensitivity to privacy, even when publicly available information, are of utmost importance in these situations.

The decision of the CC highlights some of the difficult areas the law is required to navigate in the era of online platforms, easy access to information and the growing phenomenon of personal information being placed in the public domain. In its conclusion, the CC notes that

"People construct different relationships with social media and online platforms. Informational self-determination requires respect for these relationships and the acceptance by the data subject of the consequences that come with using online platforms. The law must retain the necessary flexibility to acknowledge different expectations of privacy and be sensitive to context, individual choice and the demands that the public interest generates."

The expectation of privacy over information in the public domain is not absolute. It depends on various factors, including the information's nature, compatibility test noted by the CC, disclosure context, and prevailing legal and ethical standards. These legal standards provide a secure framework for understanding the boundaries of privacy in the public domain.

Related content: Please also refer to our article [here](#) where we deal with the sensitive interplay between the right of access to information vs. the right to privacy

[1] A data subject is the person to whom personal information relates, as defined in section 1 of POPIA.



Ahmore Burger-Smidt

Head of Regulatory

[View Profile](#)



Dale Adams