

SOUTH AFRICA / JUDGMENT

Botha v Smuts and Another (2832/2019) [2020] ZAECPEHC 19 (4 June 2020)

[2020] ZAECPEHC 19

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Roberson

CASE / FILE NUMBER

2832/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, PORT ELIZABETH)

CASE

NO: 2832/2019

Date

heard: 30/04/2020

Date

delivered: 04/06/2020

In

the matter between:

HERMAN
BOTH A Applicant
and
BOOL
SMUTS First
Respondent
LANDMARK LEOPARD AND
PREDATOR PROJECT- Second
Respondent
SOUTH AFRICA

JUDGMENT

ROBERSON J:

- [1] The applicant carries on business as an insurance broker in Port Elizabeth. He also owns a farm, Varsfontein, in the Alicedale, Eastern Cape, district, on which he conducts the business of cattle farming. The first respondent is the founder and executive director of the Landmark Foundation, which operates the second respondent. The first respondent is, inter alia, a wildlife conservationist and activist who has for 17 years been a leader in efforts to promote the conservation of indigenous wildlife in South Africa, particularly in the Eastern, Western, and Northern Cape provinces.
- [2] On the morning of 23 September 2019, Mr Nicholas Louw was one of a group of cyclists participating in an adventure ride organised by Quantum Adventures. Their route traversed Varsfontein. According to Louw the organiser of the ride is obliged to obtain permission from the relevant landowners over whose land the participants ride. During the ride over Varsfontein, Louw came across two cages on the farm, one containing a dead baboon and the other containing a dead porcupine. The cages were positioned where there was no shade and there was no water in the cages. Oranges lay on the ground near to the baboon. Not seeing any blood from a gunshot wound, or any obvious indication of the cause of the death of the animals, Louw gained the impression that they had suffered a drawn-out death, probably from dehydration, while trapped in the cage. Louw was outraged and viewed what he had seen as barbaric and unethical. He took photographs of the cages containing the dead animals and sent them to the first respondent.
- [3] What happened next is the subject of this litigation. On 9 October 2019 the first respondent posted the photographs on the second respondent's Facebook page, together with a photograph of the applicant and his baby daughter, which was the applicant's Whatsapp profile picture. The first respondent further posted a Google search location of the applicant's business and home address and his telephone number. A Whatsapp conversation between the applicant and the first respondent was also posted, in which the applicant was asked if he had permits to trap animals, to which he answered in the affirmative. The written content of the post was as follows:

“While we spend our efforts trying to promote ecologically acceptable practices on livestock farms to promote ecological integrity and regeneration, we are inundated by reports of contrarian practices that are unethical, barbaric and utterly ruinous to biodiversity.

These images are from a farm near Alicedale in the Eastern Cape owned by Mr Herman Botha of Port Elizabeth, who is involved in the insurance industry. The farm is Varsfontein.

This is utterly vile. It is ecologically ruinous. Mr Botha claims to have permits to do this – see the WhatsApp conversation with him attached.

The images show a trap to capture baboons (they climb through the drum to get access to the oranges – often poisoned – and then cannot get out). See the porcupine in traps too. Utterly unethical, cruel and barbaric.”

- [4] The posts sparked many comments on the Facebook page, some of which were annexed to the applicant’s founding affidavit. They were mostly critical of the applicant and the particular practice of trapping. Some of the comments entailed offensive language, such as “What an absolute asshole. He should be in that cage.” and “What a joke!! Dumb f**k!” One person said that produce from farmers like Botha should be boycotted, another person suggested a social media campaign to shame the applicant until he lost all his insurance clients, and another said “Someone drop him a visit”.
- [5] There were some comments in defence of the applicant. One person referred to the problem that baboons and porcupines cause to farmers and asked how farmers should get rid of the problem. Another warned the first respondent that a civil case awaited him, saying it was illegal to post private information about a person with the intention of damaging his reputation.
- [6] The applicant approached this court on an urgent basis and Mullins AJ granted a rule nisi in terms of which the respondents were to show cause why an order should not be granted to the effect that they were to remove the Facebook post and were prohibited from submitting any further posts which made reference to the applicant, his family, his addresses and his business. The post was removed. The photograph of the applicant and his daughter was removed before the application was launched.
- [7] The matter came before me on the extended return day. In view of the Covid-19 crisis it was agreed that oral submissions would be dispensed with.
- [8] In his founding affidavit the applicant stated that prior to the launching of the application the respondents were invited by his attorney to remove the post and that on the same day he attempted unsuccessfully to contact the first respondent to provide him with his hunting permit and in the light thereof to remove the post. The applicant annexed a copy of his hunting permit and stated that he is entitled to capture in cages, inter alia, an unrestricted number of Chacma baboons and porcupine. He denied that the oranges seen near the baboon were poisoned. The applicant stated that the respondents had no regard for the reputational damage the post might have caused, and further stated that the respondents had created a security risk by posting the photographs, the name and location of his farm, and the Google search result depicting his home and business address. He said that at the time of deposing to the founding affidavit, the post had been shared 108 times and that there had been 212 comments on the post. He pointed out that each shared post could itself be shared, and that each comment could have a number of replies.

- [9] The applicant maintained that the respondents' comments on the post were defamatory and intended to undermine his reputation, status and good name, to cause harm to his business and to endanger him and his family.
- [10] The applicant included in his founding affidavit an extract from an open letter written by the first respondent in 2005 and published in an article, seemingly in the Mail and Guardian newspaper. The extract quoted the first respondent as saying:

"Baboons have raided my house on three occasions in the last month, with one incident involving more than 10 juveniles ransacking my house – despite all doors being closed and every window having burglar bars – destroying my property and defecating and urinating on beds, the kitchen and anything in sight. They also destroyed anything edible in the house."

The author of the article wrote:

"Bool believes shooting 'one, or a few of the problematic baboons is definitely a management tool that must be considered, in conjunction with other measures'."

- [11] In his answering affidavit, the first respondent explained how he came to know the identity of the applicant and his personal particulars. Louw had sent him a map of Varsfontein and he set out to determine the identity of the owner of Varsfontein. One Professor Alkers, who resides in Alicedale, informed the first respondent that the applicant was the owner of Varsfontein and was a businessman in Port Elizabeth, and further provided the first respondent with the applicant's telephone number (presumably his cellphone number because the first respondent contacted the applicant using Whatsapp). A Google search of the applicant's name revealed the applicant's business and contact details. The first respondent maintained that the information revealed by the Google search had been placed in the public domain by the applicant himself. He assumed that the address revealed by the Google search was the applicant's insurance business address and not his home address.
- [12] On 3 September 2019 the first respondent contacted the applicant via Whatsapp. Again the first respondent said that the applicant's Whatsapp profile picture had been placed in the public domain by the applicant himself for use on social media, and was available to anyone who had the applicant's cellphone number. The first respondent sent the photographs taken by Louw via Whatsapp to the applicant and in the Whatsapp conversation asked the applicant if he wished to comment on the photographs and whether he had permits. The applicant declined to comment on the photographs and answered yes in respect of the permits. During an ensuing telephone call the applicant verbally abused the first respondent for enquiring about the matter and the first respondent explained that he advocates against such practices. The applicant terminated the call.

The first respondent requested copies of the permit via Whatsapp and SMS during the next few days but the applicant did not respond.

The Facebook post followed. The first respondent informed his attorney of the post. His attorney advised him to remove the applicant's Whatsapp profile picture because it included the image of a child and he immediately removed the profile picture. This was a few hours after the post. He apologised for posting the profile picture and said he regrets having done so.

- [13] The first respondent holds degrees in biological anthropology, medicine and environmental management. He is a wildlife researcher and a Research Fellow of the University of the Western Cape. His principal research focus is the efficacy of human-wildlife conflict mitigation efforts and the management of leopards. He considers himself to be an expert in both fields and believes that he is regarded as such.
- [14] The first respondent stated that the comments he made on the Facebook page are his genuinely-held view, based on his qualifications and experience in the field of wildlife conservation. Part of his purpose of the post was to stimulate robust debate on a thorny and controversial topic. He said that his comments were not aimed at the legality of the trapping practices in question, given that he had included in his post the applicant's affirmation that he had a permit. He referred to certain provisions of the Nature Conservation Ordinance 19 of 1974, inter alia s 29 (e), which prohibits hunting after sunset without a permit to do so. He invited the applicant in reply to clarify whether or not he limits his hunting activities to the day- time. He further referred to s 2 (1) of the Animals Protection Act 71 of 1962, which sets out various offences pertaining to ill-treatment of and cruelty to animals. He said that while he did not in his post comment on the legality of the applicant's practices, he did not accept that they were in all respects lawful and in particular that they were in compliance with the Animals Protection Act.
- [15] He went on to say that apart from the question of lawfulness, he stood by his comments that the applicant's trapping practices depicted in the photographs were unethical, cruel and barbaric, and referred to the "potential for disjuncture between law and ethics – the former not infrequently trailing behind the latter".
- [16] The first respondent annexed affidavits from five persons who he said are recognised experts in the field of wildlife conservation. He summarised the contents which I have in turn abbreviated. A baboon's response to being trapped is similar to that of a human, and similarly the response of the baboon's family is similar to that of a human family. Baboons suffer trauma when separated from the family and often injure themselves seriously when trying to escape from a trap. There is also social disruption when an individual is removed from a troop. For example the removal of a dominant male can result in increased aberrant behaviour. Further, indiscriminate trapping does not target the individual animal thought to be responsible for damage caused. It is therefore arbitrary and largely ineffective. There are non-lethal and ethical ways to deal with baboons. Baboons play an important role in biodiversity and the ecosystem. For example hoofed animals forage on vegetation dropped by baboons from trees, baboons kill ticks which cause tick borne disease in cattle, and they spread broader and more varied species of seeds than other animals.

- [17] With regard to the photographs taken by Louw, the first respondent said that the animals had apparently been left without water or shade and there was no indication that their death had been brought about painlessly, as opposed to death from shock, exhaustion, dehydration, hyperthermia or injuries sustained in attempting to escape from the trap.
- [18] The first respondent maintained that his post amounted to the exercise of his right to freedom of expression as well as fair comment on facts which were true and related to matters of public interest. Any prejudice caused to the applicant by the post, so he stated, was owing to the nature of the applicant's trapping practices which he cannot legally shield from the public eye. If the applicant's reputation or business interests were affected, again this was owing to the nature of his trapping practices for which he is to blame. The first respondent took no responsibility for the comments made by others on the post. He said that Facebook employs several thousand censors who monitor, and where necessary remove or sanitise, harmful content.
- [19] With regard to the newspaper article in which he was quoted, the first respondent said that the quotes were misleading and selective. He had written the open letter after he had encountered ongoing problems with baboons in a built-up residential area in the town of Nature's Valley. He attached the full letter. It seems to have been in response to a petition circulated by someone concerned about the protection of baboons. In the letter the first respondent said, *inter alia*, that the baboon problem had become a threat to human life, domestic animals, and property. He suggested that the problem be dealt with realistically and with a practical approach to environmental management. He listed certain management strategies to be implemented as a solution to the baboon problem in Nature's Valley. These included shooting one or several of the offending troop, baboon chasers, non-lethal cage traps to move baboons away from problem sites, and electric fencing. He pointed out further that it is not illegal to shoot baboons. He stated that he did not support the extermination of animals especially animals which are wild and part of natural ecosystems. He did not believe that the baboons in Nature's Valley were totally in their natural environment.
- [20] In his replying affidavit the applicant denied that his trapping practices, which he said were followed by most if not all cattle and game farmers, are cruel and damaging to biodiversity. He annexed an affidavit from a Mr Lance Henegan in which Henegan recounted how the animals photographed in the cages had died. He was on Varsfontein on the day the photographs were taken, intending to hunt warthog. He drove past the cages and did not see any animals in them. Later that day, on his return from hunting, he drove past the cages and saw the baboon and the porcupine in the cages. He estimated the time as between 9 and 11 am. He shot both animals and sent a radio message to the farm employees to collect the dead animals. He is an experienced hunter and said that they did not suffer a drawn out death and did not die from dehydration. They had been in the cages for a few hours. He has hunted on Varsfontein on many occasions in the applicant's absence. The applicant has always requested that he check that the cages are empty after the day's hunt. The applicant

confirmed that traps are only set when either he or hunters are on Varsfontein and he gives instructions that the cages are checked daily and it is ensured that they are empty. The applicant also said that his certificate of adequate enclosure, which he annexed,

entitled him to hunt at night but that baboons are terrestrial and diurnal, spending most of their daylight hours foraging on the ground and in trees and sleeping at night.

[21] The applicant did not take issue with the first respondent expressing his views on his trapping practices and accepted that the topic was of public interest, but he objected to the posting of his personal information on social media, including the Whatsapp profile picture, his name, his business and home address and the name of his farm, without his permission. He said that if the first respondent wished to take issue with his practices the appropriate action would have been to report him to the provincial Department of Environmental Affairs and Nature Conservation. If the first respondent intended to highlight what he considered to be unethical, cruel and barbaric behaviour which is ruinous to biodiversity, he could and should have done so without reference to the applicant's personal information. If the first respondent had wanted to open up a debate on this trapping practice, he could have done so without mentioning the applicant's personal information, and no one would have linked the practice to the applicant and his family. Members of the public would still have been able to debate the topic. If it had not been for the first respondent posting the applicant's personal information, no member of the public would have obtained such information, and the applicant would not have been subjected to social media "warfare", which included

threatening comments against him and his business.

[22] With regard to the respondents' contentions that his personal particulars were in the public domain, the applicant pointed out that the only way in which the first respondent could have obtained this information was when Louw gave him the name of the farm, and Professor Alkers, a farmer in the area, provided him with the applicant's name as owner of the farm and his telephone number. Had the applicant's personal information been in the public domain, the first respondent would not have needed to ask a private person (Alkers) for the information. While the subject matter of the post is of public interest, the applicant's personal information was not in the public interest nor was it fair comment. He said that his cellphone is for his personal and business use. The first respondent did not fall into either of these categories and did not have the authority to demand information from him about his trapping practices. Nonetheless he did advise the first respondent that he had a permit. He denied verbally abusing the first respondent during the Whatsapp call.

[23] The applicant accepted that the first respondent's post, aside from the applicant's personal information, fell within his right of freedom of expression. He further did not take issue with the publication of photographs depicting the traps taken on his farm. However he said that such right could not outweigh the applicant's and his family's right to privacy and not to suffer potential physical or economic harm. He expressed the view that the first respondent's intention was to defame him and "out" him for participating in a common and

legal practice.

DISCUSSION

[24] The treatment of animals by humans is very much a topic of public interest. Views are diverse, some extreme and some balanced and objective. Practices which are legal are often deplored. For example shooting a wild animal merely for a trophy evokes outrage in some quarters, and those who are outraged are in turn criticised for their views. Some people choose not to eat animal products for ethical reasons and are considered by some to be irrational in so choosing. Some people are horrified at the unprohibited conditions in which, for example, cattle and chickens are kept prior to slaughter for human consumption, their natural habits obliterated. Others are not bothered at all. There is also hypocrisy and ignorance. A person who might label the shooting of a baboon as cruel and unethical, without attempting to learn the proffered rationale behind the shooting, will happily eat beef purchased in the supermarket. It is an ongoing debate which in my view must be kept alive so that animal suffering is minimised as much as possible.

[25] In my view this case resorts in the tension between the right to privacy and the right to freedom of expression, both constitutionally protected. I do not intend to consider the question of damage to reputation, or the risk of personal and economic harm.

[26] Section 14 of the Constitution provides:

“Privacy

Everyone has the right to privacy, which includes the right not to have -

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.”

Section 16 of the Constitution provides:

“Freedom of expression

- (1) Everyone has the right to freedom of expression, which includes -
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to -

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

[27] In *NM and Others v Smith and Others* (2007) (5) SA 250 (CC) O'Regan J said the following at paragraph [145] (footnote omitted):

“Freedom of expression is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible, but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy. Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them. As Scanlon described in his seminal essay on freedom of expression, an autonomous person

‘... cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.’

[28] In *National Media Ltd and Another v Jooste* [1996] ZASCA 24; 1996 (3) SA 262 Harms JA said the following at 271G-272B:

“A right to privacy encompasses the competence to determine the destiny of private facts (see Neethling's comment on the judgment of the court a quo: 1994 THRHR 703 at 706). The individual concerned is entitled to dictate the ambit of disclosure e g to a circle of friends, a professional adviser or the public (cf Jansen van Vuuren and Another NNO v Kruger [1993] ZASCA 145; 1993

- (4) SA 842 (A); Neethling *Persoonlikheidsreg* (3rd ed) p 238-9). He may prescribe the purpose and method of the disclosure (cf the facts in *O'Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954
- (3) SA 244 (C)
- whether that case was truly concerned with privacy does not require consideration). Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public. A contrary view will place undue constraints upon the individual's so-called "absolute rights of personality" (*Minister of Justice v Hofmeyr* [1993] ZASCA 40[1993] ZASCA 40; ; 1993
- (3) SA 131 (A) 1451). It will also mean that rights of personality are of a lower order than real or personal rights. These can be limited

conditionally or unconditionally and irrespective of motive.”

[29] In *NM and Others* (supra) Madala J considered the right to privacy at paragraph [34] (footnotes omitted):

“Private facts have been defined as those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private.”

And at paragraph [45]:

“This protection of privacy in my view raises in every individual an expectation that he or she will not be interfered with. Indeed there must be a pressing social need for that expectation to be violated and the person’s rights to privacy interfered with. There was no such compelling public interest in this case.”

[30] In *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T), van der Westhuizen J dealt with the balancing of the right to freedom of expression and the right to dignity and privacy. At 466 I-J he said:

“The issue at the core of this dispute seems to be the complex and delicate process of balancing the right of an individual to human

dignity and to privacy against the right to freedom of expression, including freedom of the media, and related values such as openness

and public interest.”

Further at 469D-H he said:

*“The reasons for the importance of free expression are often explained as the need in a democracy of a free-flow of information and ideas, the role of free expression in the so-called search for the truth, and the ordinary human need to express oneself and to communicate with others. However, it is also recognised, inter alia by the Constitutional Court in *Khumalo and Others v Holomisa* 2002*

(5) SA 401 (CC) at 417D, 418D - 419B and 419, that dignity and privacy as constitutional rights and values, and freedom of expression as a right and value, often compete and thus have to be balanced against one another. Our constitutional jurisprudence does not recognise a hierarchy of rights, but all rights may be limited and have to be balanced when competing. Obviously, the outcome of such a process of balancing will depend not only on the nature and contents of the rights, but also on the context of the circumstances of each particular case.

The kind of freedom of expression related to issues which are politically, socially, economically and scientifically important, to mention but a few areas, in other words the kind of expression which is related to the abovementioned ideal of democracy and the quest for the truth, could perhaps often outweigh concerns such as privacy, ownership and even the dignity of an individual. Examples would include the exposure by the media of serious crime, corruption or dishonesty amongst political or other community leaders, the judiciary, senior government

officials, or police officers, in other words of conduct which can be crucially and seriously harmful to society and its members, and the publication of scientific findings.”

- [31] The debate concerning the rights of animals and the treatment of animals by humans, being in the public interest, is in my view one that should be aired in the exercise of the right to freedom of expression. Progressive legislation for the protection of animals will have been informed by the expression of peoples’ opinions and the efforts of campaigners for animal rights. Voices such as those of the first respondent and of the experts with whose views he associates himself need to be heard and engaged with. As indicated above, there are divergent views on the topic, often strongly expressed, and criticism and intolerance of others’ views are equally strongly expressed. This constitutes “freedom to impart and receive information and ideas”. The applicant has no quarrel with this concept.
- [32] It was submitted on behalf of the respondents that the information published in the post was already in the public domain and does not fall within the sphere of the applicant’s right to privacy. His ownership of Varsfontein was to be found in the Deeds Registry and he himself had placed his personal information on the internet, and his photograph on his Whatsapp profile.
- [33] The first respondent did not learn the name of the owner of Varsfontein from the Deeds Registry. He requested the information from Alkers who also gave him the applicant’s cellphone number, which the applicant stated is for personal and business use. Through this number the first respondent discovered the applicant’s Whatsapp profile picture.
- [34] Further, I am of the view that the information revealed by the Google search was not placed by the applicant on the internet for publication on as broad a public platform as Facebook, coupled with information about his farming practices. It is well known that a Facebook post will attract numerous unbridled comments, as this case illustrates. The publication of the applicant’s personal information on the internet was in my view to identify him as being in the insurance broking business and to attract clients. Similarly, and perhaps even more so, his Whatsapp profile picture revealed through his cellphone number, which was for personal and business use, was not for publication on such a broad platform. In *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998
- (4) SA 1127 (CC), Sachs J, in deciding that the imparting of certain information had not breached the applicant’s right to privacy, took into account that “[the information] did not involve data provided by applicant himself for one purpose and used for another” and that “it was not disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld” (at paragraph [51]). In my view it was reasonable for the applicant to expect that his personal information on the internet and his Whatsapp profile picture would not be published on a platform such as Facebook, together with an article bound to instigate comments.

[35] In *NM and Others* the applicants had instituted an action in the High Court for damages arising from the publication of their names and HIV status in a book. One of the defences raised was that the applicants' HIV status was already in the public domain. Prior to the publishing of the book the applicants' names had been mentioned in an application for an interdict to prevent the inclusion of their names in the book, and at various commissions of enquiry. In this regard, and relevant to the present case, Madala J said at paragraph [39]:

"In my view, when they made their application for the interdict in their names, they were not thereby saying their names should be published in a book having a wide circulation throughout South Africa, which would be the position since the second applicant is a national figure. Similarly by attending the various inquiries they were not giving blanket consent to the publication of their status."

[36] What was said by Harms JA in *National Media* (supra) is also relevant to this aspect, when he spoke of "the competence to determine the destiny of private facts".

[37] Further, Madala J's reference, in *NM and Another*, to the right not to be interfered with is relevant to this aspect. The publication of the applicant's personal information on Facebook resulted in interference by way of offensive and threatening comments, where there was no compelling public interest. The public interest lay in the topic, not in the applicant's personal information. The applicant was singled out and his photograph published on a broad platform for a practice for which he has a permit and which he says is common to many farmers (my personal views on the practice are irrelevant). This is part of the context of the publication and is a factor to be taken into account in balancing the competing rights (see *Prinsloo* supra).

[38] It was submitted that the applicant's use of animal traps on his farm is not covered by the right to privacy and that his practice is seen by hunters and cyclists on his farm. This may be so but in my view it does not justify the publishing of his personal information and photograph on Facebook for the purpose of highlighting and debating the practice of animal trapping.

[39] It was further submitted that the applicant had publicly and openly on oath set out all this information in his affidavits in this matter. I cannot agree with this submission. It is a kind of ex post facto justification. The applicant exercised his right to approach a court because of the Facebook post which published his personal information. His trapping practice was the topic in the post and he was obliged to deal with it, particularly because the first respondent suggested that the animals had died a cruel death and expressed some reservations about the legality of the applicant's practice.

[40] I am therefore of the view that the applicant's right to privacy was infringed and that the balancing exercise must result in his favour. He therefore demonstrated a clear right to an interdict.

- [41] The contents of the applicant's affidavits were also relied upon in submitting that there was no reasonable apprehension of harm, because what he sought to keep hidden had now been publicly disclosed by him in his affidavits. Again, the applicant was entitled to approach a court to seek relief and in order to do so, had to provide this information in his affidavits. It was also submitted that the applicant has no genuine apprehension that the respondents might re-post the photograph of his daughter and that there is no need for an interdict to prevent such re-posting. An interdict is aimed at preventing an ongoing or future infringement of a right. Even if the photograph is not re-posted (it seems that if it had not included the applicant's daughter the respondents would not have deleted the photograph prior to the launching of the application), the applicant's personal information which in the context of all the circumstances he reasonably expected not to be published on Facebook, would remain published and there would be an ongoing breach of his right to privacy.
- [42] I therefore intend to confirm the rule with some amendments. The photographs of the animals and the comments of the first respondent on the trapping practice should remain on the post but the applicant's personal information should be removed.
- [43] This means that the ambit of the relief claimed by the applicant is somewhat reduced. I am of the view that he is nonetheless the substantially successful party. His complaint was always the wide public exposure to which he was subjected.
- [44] There may be practical difficulties in the implementation of my order because the post has already been removed. However it is necessary for me to amend the order to allow a portion of the post to remain.
- [45] The following order will issue:
- [45.1] The rule nisi granted on 11 October 2019 is confirmed, as amended, as follows:
- [45.1.1] The respondents are to remove from the second respondent's Facebook post made on its Facebook page on 9 October 2019 the photograph of the applicant on annexure D to the founding affidavit, and the content contained in annexures E, F, and G to the founding affidavit, and any reference to the name of the applicant, his insurance business and its location, and the name of his farm, contained in annexure H to the founding affidavit.
- [45.1.2] The respondents are prohibited from submitting any further posts on the second respondent's Facebook page which make reference to the applicant, his family, his addresses and his business.
- [45.2] The respondents are to pay the applicant's costs, jointly and severally, the one paying the other to be absolved.

—

J M ROBERSON

JUDGE OF THE HIGH COURT

Applicant's heads of argument prepared by Adv D Bands, instructed by Lawrence Masiza Vorster Inc, Port Elizabeth.

Respondents' heads of argument prepared by Adv M Blumberg SC, instructed by BDLS Attorneys, Port Elizabeth.

Judgment delivered electronically by email to the parties' attorneys, by arrangement.

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