

SOUTH AFRICA / JUDGMENT

De Jager v Netcare Limited and Others (42041/16) [2025]

ZAGPPHC 141 (17 February 2025)

[2025] ZAGPPHC 141

COURT

North Gauteng High Court, Pretoria

BEFORE

M P Motha

CASE / FILE NUMBER

42041/16

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FLYNOTES:

LEGISLATION – POPIA – Surveillance – Challenge to admissibility of surveillance evidence – Pictures were taken in public setting – Rational link between taking of pictures and need for evidence in exposing truth about plaintiff's state of health – No less restrictive means to achieve defendant's goal – Evidence was lawfully obtained under Act – Admissible and relevant to case – Surveillance evidence admitted – Redaction of personal information of non-data subjects ordered – Protection of Personal Information Act 4 of 2013, s 27(1)(b).

REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
Case
Number: 42041/16
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED.

DATE

2025/02/17

SIGNATURE

In

the matter between:

NICOLAAS

J DE JAGER

PLAINTIFF

and

NETCARE

LIMITED

DEFENDANT

PROFESSOR

DONRICH THALDAR

1st AMICUS CURIAE

PROFESSOR

SIZWE SNAIL KA MTUZE

2nd AMICUS CURIAE

JUDGMENT

MOTHA, J

Introduction

[1] Following the instructions to comply with Rule 16A of the Uniform Rules of Court in the judgment handed down on 23 May 2024, three amici curae sought admission into the matter; and one, subsequently, fell by the wayside. The remaining two amici curae - Professor Donrich Thaldar, from the School of Law, University of Kwazulu-Natal and Professor SSK Mtuze, from the Department of

Mercantile Law, Nelson Mandela University - were admitted by the court and made invaluable submissions. To balance the apparent

conflict between protecting the right to privacy and the public interest to discover the truth, [1]their incisive input was just what the doctor ordered.

[2] As adumbrated in the afore-mentioned judgment, the issue of privacy implicates constitutionally protected and enshrined rights. A lot has been authored by scholars about the right to privacy. Indeed, this topic is wily as was stated in *Bernstein and Others v Bester and Others* NNO[2] where the court held: “The concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate.”[3] In an effort to unpack this topic, the second amicus referred to the writings of Tracy Cohen who interpreted this right to include freedom from unauthorized disclosures of information about one's personal life.[4]

- [3] Examining this topic, the court in the matter of National Media Ltd and Another v Jooste,[5] stated:

“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 adviser, 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. A contrary view will place undue constraints upon the individual's so-called ‘absolute right of personality’.”[6] (References omitted)

The issue in contention

- [4] The decisive and determinative question confronting this court is whether the plaintiff's objection to the evidence of Mr. Dion Pienaar falls under the legislation which codifies privacy Law, namely: The Protection of Personal Information Act 4 of 2013, (POPIA). An affirmative answer to this question, a priori, would have a debilitating and deleterious effect on the plaintiff's case because of the principle of subsidiarity. Litigants tend to pay lip service to this principle; however, courts cannot afford to do that. Properly understood, this principle fosters a bottom-to-top approach; thereby making the law accessible to ordinary folks. As is the case in this matter and often in administrative law matters, this principle is neglected by litigants, and yet it packs a devastating punch in a hierarchical court battle. It is now trite that, this Roman-Catholic rule about raising children, a litigant who seeks to assert a constitutional right should in the first place base his or her case on any legislation enacted to regulate the right, and not the Constitution.[7]

- [5] In Mazibuko and Others v City of Johannesburg and Others[8] the court held:

“[W]here legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.”[9]

- [6] Reiterating this principle, the Constitutional Court in Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others[10] held:

“The principle of subsidiarity, repeatedly recognised by this Court, has a number of applications. One application of the principle is that a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right. The litigant must either challenge the constitutionality of the legislation so enacted or rely upon the legislation to make its case.”[11]

- [7] In casu, the plaintiff relied on s 14 of the Constitution in mounting his attack against the admission of the report of Mr. Dion Pienaar. Not once did he mention or challenge the constitutionality of POPIA. Having done neither of what is referred to in Eskom case, the plaintiff cannot be permitted to vindicate his privacy right by directly invoking sections of the Constitution, instead of relying on POPIA, which allows for the lawful processing of information if certain grounds are met.
- [8] To further solidify this point, it does not hurt to refer to the matter of South African National Defence Union v Minister of Defence and Others,[12] where the court dealing with this very principle said:

“Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant’s view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. The proper approach to be followed should legislation not have been enacted as contemplated by section 23(5) need not be considered now.”[13]

- [9] Seeing that neither of the litigants to this matter was alive to this principle, nor mounted an argument around it, this court relied heavily on the submissions of the amici curiae. To be frank, this court is indebted to the amici curiae’s illuminating and eye-opening submissions. Verily, when judges try cases, they are inadvertently put on trial, and their success depends largely on the quality of the submissions.

Submissions

by amici curiae and counsel

- [10] Right from the starting blocks, both the amici curiae were ad idem in submitting that POPIA finds application in this matter. Counsel for the plaintiff also submitted that POPIA is applicable in this case. Cadit quaestio! POPIA was not pleaded by the plaintiff. Consequently, the plaintiff’s case falls to be dismissed, and the evidence obtained through surveillance should be admitted. For all intents and purposes, this should be the end of this matter, however, the question of whether POPIA finds application in this matter is much more nuanced and cannot be disposed of that easily.
- [11] Bucking the trend, the defendant’s counsel referred to the exclusions in s 6(e) of POPIA. In the same vein, in his heads of argument at paragraph 44, the first amicus invited this court to clarify the exclusion in POPIA that the legislature carved out for the processing of personal information

relating to the judiciary functions of a court. The exclusions under s 6(1) reads as follows:

“6(1) This Act does not apply to the processing of personal information-

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) relating to the judicial functions of a court referred to in section 166 of the Constitution.”

[12] Section 166 of the Constitution deals with the Judicial system. As one of the three arms of government, the executive and the legislature, the judicial function of a court is to interpret the law. The separation of powers is of paramount importance. Therefore, once the legislature (Parliament) had passed POPIA, excluding the judiciary functions from dealing with the processing of personal information, courts had to oblige. Does this mean that POPIA is not applicable in this case?

[13] The answer to this question calls for cool heads, as stated in *Cool Ideas 1186 CC v Hubbard and Another*: [14] “A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.” [15] In my view, it is not an absurdity to recognise that POPIA caters for two types of personal information, namely: personal information and special personal information. Section 6(1), in its ordinary and grammatical meaning, excludes the processing of personal information,

not special personal information.

[14] The distinction between personal information and special personal information is accentuated in the definitions appended to these words. Special personal information is defined in s 26 and differs in all material respects from personal information. Special personal information is more consequential and, therefore, gets elevated from being affected by s 6(1) exclusion. The purpose of this distinction, in my opinion, is to prevent the potential opening of the proverbial floodgates and thereby drowning the courts in endless litigations on the processing of all manner of personal information. The processing of special personal information requires another layer of protection and is circumscribed to the processing of only ten special personal information, viz:

- The religion
- philosophical beliefs
- race
- ethnic origin
- trade union membership
- political persuasion

- health
- sex life
- biometric information
- criminal behaviour.

[15] In contrast to these ten, personal information does not have numerus clausus, just under (a), over 18 items are covered. Perhaps, it is prudent to refer to its definition in s 1 of POPIA. It reads:

“Personal information means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to-

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- (d) the biometric information of the person;
- (e) the personal opinion, views of preference of the person;
- (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that will reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the person; and
- (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person...”

[16] For the sake of completeness, the word “processing” as defined in POPIA needs to be understood. Under s 1, processing is defined as:

“means any operations or activity or any set of operations, whether or not by automatic means, concerning personal information including-

- (a) the collection, receipt, recording, organization collation storage, updating or modification, retrieval, alteration, consultation or use;
- (b) dissemination by means of transmission, distribution or making available in any other form; or

- (c) merging, linking, as well as restriction, degradation, erasure or destruction of information...”

[17] Section 3(4) of POPIA defines automated means as:

“(4) ‘Automated means’, for the purposes of this section, means any equipment capable of operating automatically in response to instructions given for the purpose of processing information.”

[18] I, therefore, conclude that this court is not excluded from dealing with the processing of special personal information. Since this matter involves the health of the plaintiff, it is, in my opinion, self-explanatory that this court is dealing with the processing of special personal information. Thus, POPIA is applicable in this case. As further proof that POPIA is germane to this matter, the first amicus referred to the purpose statement of the Act which is encapsulated under s 2 of POPIA. It reads:

“Purpose of Act

2. The purpose of this Act is to —

- (a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at—
 - (i) balancing the right to privacy against other rights, particularly the right of access to information; and
 - (ii) protecting important interests, including the free flow of information within the Republic and across international borders;
- (b) Regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;
- (c) ...”

[19] From the purpose statement, it is patent that POPIA is the codification of this country’s informational privacy law. With that backdrop in mind, the first amicus submitted that the plaintiff’s invocation of section 14 of the Constitution, instead of the provisions of POPIA, imperils their case. This submission finds resonance with this court. The objection of the plaintiff to the evidence of Mr. Dion Pienaar falls to be dismissed. We, therefore, have come full circle, and in essence, this matter ends here. However, the ancillary question to the POPIA question is: would the evidence under POPIA pass muster?

Under POPIA, would the evidence pass muster?

[20] Had the plaintiff pleaded POPIA, the first amicus submitted that he would still have not succeeded. In terms of s 9 of POPIA, the processing of personal information is lawful on certain grounds, namely:

“Personal information must be processed-

- (a) lawfully; and
- (b) in a reasonable manner that does not infringe the privacy of the data subject.”

[21] Occupying the centre stage is s 26 of POPIA, for our purposes. Like the Siamese twins, s 26 shares the stage with s 27 of POPIA, as these sections must be read together. First, s 26 of POPIA reads:

“Prohibition on processing of special personal information.

26. A responsible party may, subject to section 27, not process personal information concerning-
- (a) the religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information of a data subject; or
 - (b)...”

[22] Second, s 27 of POPIA reads:

“General authorisation concerning special personal information.

27. (1) The prohibition on processing personal information, as referred to in section 26, does not apply if the-
- (a)...
 - (b) Processing is necessary for the establishment, exercise or defense of a right or obligation in law;
 - (c)...
 - (d)...
 - (e)...
 - (f)...”

[23] The first amicus submitted that the defendant was defending a right in law, following the issuance of summons. To procure evidence that is relevant to the *facta probanda* in defence of their right in law, it was necessary to conduct this surveillance. Put differently, the surveillance was entirely lawful in terms of s 27(1)(b) of POPIA. I find this submission persuasive, not least because of the amount involved.

[24] Save for the convergence on that POPIA finds application in this case, the amici are poles apart. The second amicus submitted that the evidence should not be accepted. The substratum of his submission was that consent should have been sought. Quoting

professor Neethling, whom he referred to as uthixo (god) of privacy, the second amicus submitted that “a person's right to privacy includes a person having control over his or her personal affairs and being reasonably

free from unsolicited intrusion”,[16] (Informationelle Selbstbestimmung), a German equivalent term. Proceeding with Prof Neethling, he mentioned that privacy is a personality interest and in turn, a

personality interest is a non-patrimonial interest that cannot exist separately from an individual affair.

[25] Posing a rhetorical question, he asked if the boni mores of a democratic South Africa permit surveillance, especially after the apartheid nightmare. He referred to the matter of Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Sooknunan t/a Glory Devine World Ministries[17] where the court said:

“I consider it a gross invasion of privacy to furnish an individual’s personal contact details on a public forum such as this Facebook wall. It exposes the recipient to unsolicited and unwanted messages. It interferes with the recipient’s normal communications to others. It is private information which only Van Rooyen or Engelbrecht have the right to impart or make public.”[18]

[26] Having referred to the matter of Smuts and Another v Botha,[19] he questioned the reasonableness of the surveillance conducted by the defendant and reminded the court of the minimality principle in s 10 of POPIA. This section simply states that: “Personal information may only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive.” Even when consent has been granted, the defendant’s action, in sharing the information, must be compatible with the purpose for which it was processed.

[27] He submitted that the defendant should have complied with s 18 of POPIA. This section deals with Notification to the data subject – the person to whom personal information relates- when collecting personal information. As already stated, consent is at the heart of the second amicus’s case. Whilst I share the antipathy to special personal information being gathered surreptitiously, I found this submission of the need for consent and, compliance with the eight conditions of s 18, with respect, puzzling. I would have thought that the sting in any surveillance is in the element of surprise and surreptitiousness. If the plaintiff had been warned, he would have organised his affairs accordingly. Since the information related to the plaintiff’s health, he insisted that consent should have been obtained before the surveillance occurred.

[28] When confronted by the court with the statement that s 27(1)(b) covers the defendant in that the processing was necessary for their defence against a lawsuit that involves the possible payment of R 24 887 600.64, alternatively R 25 737 600.64, the second amicus was demure and protested that he was not arguing for the defendant or the plaintiff. Does the defendant have a right to do what it has done in the context of the plaintiff’s right to privacy? He asked.

Indeed, if s 27 did not come to the defendant's rescue, I would accept his submission. However, that is not the case.

[29] In an epic epilogue, the second amicus demonstrated and unpacked how deeply colonised South African law is. Even in a completely new field of law, such as POPIA, South African lawmakers model the laws that govern South Africans on our former Colonizers. Sometimes, the laws are copied word for word under the guise of best international practices. It begs the question of what the role of South African and African academics, scholars, izinyanga, izangomas, traditional leaders and what have you is. With this mindset, there is no hope of getting the monkey of colonialism off our backs, certainly not in this lifetime. Strictly speaking, there is nothing wrong with the sharing of ideas, but the emphasis must be on the sharing. South African lawmakers copy, hook line and sinker, European laws. Little wonder some South Africans feel alienated from some of the laws. What is sad, as pointed out by the first amicus in reply, some African states look to South African law to shape their countries' laws on topics such as privacy. Consequently,

Africans get poisoned with the colonial view of the law on these topics and, thus, continue to live under a colonial legal system.

[30] Having emphatically and categorically agreed with his counterpart that POPIA finds application in casu, the second amicus submitted that POPIA is modelled on the European Union's (EU) 1995 Data Protection Directive. The General Data Protection

Regulation (GDPR) of 2018 is law in the entire EU. He submitted that the EU. Data protection law was modelled on the German Data

protection law. Thus, if one is looking for jurisprudence in this field, one needs to look no further than Germany, France and all EU member states. In reply, the first amicus submitted that South African law needs to be decolonised. I could not agree more, but this advice needs to be heeded by all, including

South African Universities, lawmakers and courts. Otherwise, the law will remain elitist and foreign to most South Africans.

Conclusion

[31] In the result, I find that, in this case, it is in the interest of justice to admit the evidence obtained using surveillance. I find the submission of the first amicus persuasive that even under POPIA, the processing of the evidence through spying would have been lawful under s 27(1) (b). I must

register this court's displeasure at the processing of personal information of children and non-data subjects. This court's

role is limited because the information that was processed, involving the child and non-data subjects, amounted to the processing of personal information which is hit by the s 6 exclusion. Notwithstanding that, s 45(4) of the Children's Act[20] makes it abundantly clear that this court is the upper guardian of all children. What is more, s 35 of POPIA prohibits the processing of personal information of children. To ameliorate the harm visited on the child and those family members of the plaintiff who are not data subjects, their photos, videos, or the information on them must be redacted with immediate effect.

Costs

[32] Both parties agreed that there should be no order as to costs in this matter, and as such, there is none.

Order

1. Mr. Dion Pienaar's evidence obtained through surveillance is relevant to the facta probanda of the case and is admitted into evidence.
2. All the information, photos and videos of those who are not the data subject, including the children, must be redacted immediately.
3. No order as to costs.

M P MOTH A

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Plaintiff: B P GEACH (SC), W BOTHA and D SEKWAKWENG instructed by VAN NIEKERK ATTORNEYS INC. For the Defendant: S. JOUBERT (SC) instructed by WHALLEY VAN DER LITH ATTORNEYS 1st Amicus curiae PROFESSION DONRICH THALDAR 2nd Amicus curiae PROFESSION SIZWE SNAIL KA MTUZE Date of hearing: 25 September 2024 Date of judgment: 17 February 2025

[1] City of Cape Town v South African National Roads Authority Limited and Others [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA); 2015 (5) BCLR 560 (SCA) at para 37. "But while there is an interest in protecting privacy there is also the public interest in discovering the truth."

[1] City of Cape Town v South African National Roads Authority Limited and Others [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA); 2015 (5) BCLR 560 (SCA) at para 37.

"But while there is an interest in protecting privacy there is also the public interest in discovering the truth."

[2] [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751.

- [3] Id at para 65.
- [4] Cohen “But for the nicety of knocking and requesting a right of entry’ Surveillance law and privacy rights in South Africa”
- (2000) The Southern African Journal of Information and Communication (SAJIC) Issue 1.
- [5] [1996] ZASCA 24; 1996 (3) SA 262 (SCA); [1996] 2 All SA 510 (A).
- [6] Id at 271G – 272B.
- [7] South African National Defence Union v Minister of Defence and Others
- [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC); [2007] 9 BLLR 785 (CC); (2007) 28 ILJ 1909 (CC).
- [8] [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).
- [9] Id at para 73.
- [10] [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC).
- [11] Id at para 149.
- [12] [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC); [2007] 9 BLLR 785 (CC); (2007) 28 ILJ 1909 (CC).
- [13] Id at para 52.
- [14] Cool Ideas 1186 CC v Hubbard and Another
- [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).
- [15] Id at para 28.
- [16] Neethling et al. Neethling's Law of Personality 2nd ed (LexisNexis Butterworths 2005).
- [17] [2012] ZAGPJHC 97; 2012 (6) SA 201 (GSJ); [2012] 3 All SA 322 (GSJ).
- [18] Id at para 78.
- [19] [2022] ZASCA 3; 2022 (2) SA 425 (SCA).
- [20] Act 38 of 2005.

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