IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Reportable

In the matter between: CASE NO: 18656/07

MANTOMBAZANA EDMIE TSHABALALA-MSIMANG First applicant

MEDI CLINIC LTD Second applicant

and

MONDLI MAKHANYA First respondent

JOCELYN MAKER Second respondent

MEGAN POWER Third respondent

JOHNNIC PUBLICATIONS Fourth respondent

JUDGMENT

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INTRODUCTION

[1] "*The time will come when our nation will honour the memory of all the sons, the daughters, the mothers, the fathers, the youth and the*

*children who, by their thoughts and deeds, gave us the right to assert with pride that we are South Africans, that we are Africans and that we are citizens of the world".*1 History has bestowed on our generation in our beloved country the gift of a rare opportunity to manage the birth of our freedom as a nation and to nurture it towards its maturity. This in turn, obliges all of us as citizens of this country to speak, and to act in very special ways. Section 1 of the Constitution2 informs us that 鍍*he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms*. This means that there are in existence dominant values as well as an ethos that binds us as communities to ensure social cohesion. In South Africa we have a value system based on the culture of ubuntu.

[2] This in effect is the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. Ubuntu speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection. Ubuntu is a culture which places some emphasis on the commonality and on the interdependence of

1 Nelson Mandela: ***Freedom to the Future, South Africans, Africans and Citizens of the World***, Houses of Parliament, Cape Town, 24 May 1994
2 The Constitution of the Republic of South Africa, Act 108 of 1996

the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community, that such a person may be part of. In South Africa ubuntu must become a notion with particular resonance in the building of our constitutional democracy. *"The value of human dignity in our constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in Section 14 of the Constitution, recognises that human beings have a right to have a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity."*[3]

[3] Since 1948 the Universal Declaration of Human Rights has been the most important, and the most effective, inspiration for personal, national and international efforts to secure and protect basic rights for

3 ***Khumalo and others v Holomisa***, 2002 (5) SA 401 (CC) 418 at para [27]

humanity. Article 19 of the Declaration guarantees the universal freedoms of opinion, speech and publication. However the declaration also acknowledges the ongoing struggle for press freedom and freedom of expression. Article 19 states that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

THE ISSUES IN THIS MATTER

[4] In this matter the applicants have instituted an application against the respondents in order to secure the delivery of copies of the first applicant's medical records regarding her stay at the second applicant's Cape Town hospital. They further seek an interdict to restrain the respondents from further publishing or commenting on these records and from gaining the hospital records or any other private or confidential information concerning the first applicant's medical condition and/or treatment. They also seek relief requiring the respondents to destroy all reference to the aforesaid records in their respective notebooks and computers.

[5] The respondents acknowledged that they were in possession of the first applicant's medical records pertaining to her stay at the second applicant's hospital in 2005. However, in the words of the deponent to

the answering affidavit on behalf of the respondents Ms Suzanne Smuts, *"I respectfully submit that so germaine are the allegations of alcohol abuse to the first applicant's fitness for office, that they are not confidential. I also respectfully submit that such access is justified by the great public interest in the information published"*.

THE FACTS

[6] The first applicant is a member of the cabinet of the Government of the Republic of South Africa. She is responsible for the portfolio of national health. The second applicant is a private hospital group. One of the private hospitals that the second applicant owns is operated in the Cape Town Medi Clinic Centre. The respondents are the editor, journalists and the owner and publisher of *"The Sunday Times"* newspaper respectively.

[7] During 2005 the first applicant was hospitalised and treated as an in-patient at the Cape Town Medi Clinic on two occasions. On Sunday, 12 August 2007, the Sunday Times published an article, apparently written by the second and third respondents, that was entitled: *"Manto's Hospital Booze Binge"*. In the article the following is *inter alia* alleged:

"*The Sunday Times is also in possession of documents*

> *related to Tshabalala-Msimang's two hospital stays in 2005. Doctors who were given the files to assess for the Sunday Times said they were shocked at the excessive use of painkillers and sleeping tablets and said the patient should not have been allowed to consume alcohol while on them.*

Records show that on February 11, the night before her first operation, at 8.20pm, the minister was handed two sleeping tablets – one from her own stock and one given to her by the clinic. The report clearly states that she also drank white wine and enjoyed her supper from Woolworths. At 11.30pm it is recorded that she had wine again. The following day she underwent surgery.

> *On the night after the surgery at 7pm, she was given her supper with wine, and was also given sleeping tablets.*

During the early hours of the morning she complained of pain and was given morphine.
On February 13 at 7pm her record shows that she was drinking wine when Dr De Beer visited her. De Beer is an internationally renowned shoulder surgeon.
…
During her second admission, her records show that on March 5, a few hours before her second operation on the infected shoulder, she ordered dry white wine at 8.45pm.
On March 7 at 7pm the records show that the minister was having a drink with Dr De Beer."

[8] The first applicant contended that the article had contained other allegations which were either defamatory or invasive of her right to privacy and dignity. She was alarmed when she became aware of the fact that the Sunday Times had access to and was in possession of the private and confidential hospital records relating to her stay and treatment at the Cape Town Medi Clinic. She further stated that she was surprised to learn this particular fact. She emphasised that she had never authorised the release of such records to anyone, including

the respondents.

[9] Then, on Monday, 13 August 2007 Dr de la Hertzog ("Hertzog"), the chairman of the second applicant, called the first applicant and spoke to her spokesperson. He was informed that the files containing the first applicant's medical records were missing from the second applicant's archives. The first applicant's spokesperson then asked Hertzog to provide a written statement to that effect. Hertzog communicated a letter addressed to the first applicant dated 13 August 2007 in which the first applicant was informed that:

> "… we hereby confirm that we have established that the hospital records relating to your two admissions to the Cape Town Medi-*Clinic during 2005 have been removed from our secure archives in an unauthorized manner.*
>
> *We shall be lodging a case of theft with the South African Police Services in Cape Town tomorrow morning."*

[10] Thereafter, communication was shared on behalf of the applicants by their legal representatives and the respondents' legal representatives. The gist of the applicants' contention was that the possession of the private and confidential medical records by the Sunday Times and by its employees contravened Section 17 of the National Health Act, Act 61 of 2003 ("National Health Act") and was therefore unlawful. It was requested on behalf of the applicants that these documents be

handed over immediately to the legal representatives of the applicants. The respondents' attorneys in their turn, stated that the respondents did not admit that they were in breach of Section 17 of the National Health Act. They further denied that the National Health Act placed an obligation on the respondents to return any of the documents which constituted medical records.

[11] In her affidavit on behalf of the respondents, Smuts sets out that the respondents had derived the information that was published in the Sunday Times on 12 August 2007 from *"reliable sources, including the first applicant's medical records"*. Smuts stated that the respondents were not in the possession of the original records. She further set out that the publication of the respondents' article of 12 August 2007 was protected by Section 16(1)(a) and (b) of the Constitution. It was strenuously contended on behalf of the respondents that *"there is a great public interest in publication of the allegations in the respondents' article of 12 August 2007 and this public interest overrides any entitlement, that the applicants may otherwise have had, to the relief sought"*.

[12] In an attempt to indicate that the publication was justified by the public interest in the information published, Smuts goes into great length in the course of her affidavit to set out certain background facts which

include:

[12.1] constitutional provisions relating to the freedom of the press and other media;

[12.2] the first applicant's responsibilities as a cabinet member responsible for the portfolio of national health;

[12.3] the oath taken by the first applicant in terms of Section 95 of the Constitution whereby she swore, *inter alia*, that she would *"obey, respect and uphold the Constitution and all other law of the Republic of South Africa; and hold her office as Minister with honour and dignity"*;

[12.4] the political responsibilities of the first applicant who is politically responsible for the administration of the Department of Health in terms of the Constitution;

[12.5] the first applicant's meeting during January 2003 with provincial members of the executive committees for health in the nine provinces in South Africa with a view to *"intensify the health campaign against alcohol and substance abuse as one major factor behind many health and social problems in the country"*;

[12.6] the many meetings convened by the first applicant as well as the seminars and conferences that she attended where health regeneration was promoted;

[12.7] the article printed in the Sunday Times on 19 August 2007 which included the fact that the first applicant *"had alcoholic liver disease caused by years of excessive drinking"* before her liver transplant in early 2007. This according to Smuts was received from the general public. Smuts further emphasised that the first applicant had not ceased drinking alcohol before the transplant, or after the transplant. According to Smuts therefore, the first applicant ought not to have been given a transplant;

[12.8] that the first applicant was convicted of theft in the Republic of Botswana;

[12.9] the conduct of the first applicant at many meetings is also set out;

[12.10] the acrimony that existed between the first applicant and her then Deputy Minister of Health;

[12.11] the proposed policies on HIV/Aids that have been termed as

"extremely controversial";

[12.12] the altercation that the first applicant had with Mr Mark Heywood of the Aids Law Project.

[13] Smuts further sets out certain facts that had occurred during 2005 when the first applicant was hospitalised on two occasions for the shoulder operation. She states that alcohol was taken to the first applicant at the time that she was hospitalised. Certain small bottles of wine were delivered to her on several occasions. And she was unruly in her conduct towards hospital staff who were given unreasonable instructions by the first applicant. The affidavit then sets out in great detail why the first applicant did not qualify according to Smuts for a liver transplant. It also deals with the *"theft"* while the first applicant was in Botswana *"during the '70's"*.

[14] A close reflection of the papers reveal that it is not disputed that the first applicant was a patient in a health establishment owned and controlled by the second applicant. That the records containing information relating to the first applicant's health, including her health status, treatment and stay at the establishment were kept at the Cape Town Medi Clinic. And that the records were in fact stolen from Cape Town Medi Clinic.

THE URGENT APPLICATION

[15] This matter was placed before Msimeki AJ on 17 August 2007 in the court dealing with urgent matters. On that occasion, an order was made by consent to the effect that:

> *"1 The rules relating to the manner and time periods with regard to service are dispensed with and this matter is dealt with as one of urgency.*
>
> *2 This matter is postponed to 10h00 on 24th August 2007 to the Urgent Court.*
>
> *3 Pending the finalisation of this matter, the Respondents are to forthwith and not later than 15h00 today deposit all health records or parts thereof (including copies and reproductions thereof) pertaining to the health status, treatment or stay of the First Applicant in the Cape Town Medi-Clinic, still in their possession, in a safety deposit box at the Sandton Branch of the Standard Bank of South Africa, to which only attorneys of the parties shall have joint and simultaneous access. The cost attendant upon the said deposit and safekeeping of the documents are to be borne by the respondents.*
>
> *4. Pending the finalisation of this matter the Respondents are interdicted and restrained*
>
> *4.1 from copying, reproducing, or disseminating any of the aforesaid records;*
>
> *4.2 from further commenting on or publishing any comments on the aforesaid records.*
>
> *5 The Respondents are to file their opposing papers, if any, not later than close of business Tuesday, 21 August 2007.*
>
> *6 The Applicants are to file their replying papers, if any, not later than close of business Thursday 23 August 2007.*
>
> *7 The costs of this application are reserved."*

[16] It is clear that the parties agreed that this matter was urgent and such

agreement was made an order by Msimeki AJ. Furthermore, it was also agreed that pending the finalisation of this particular matter, the respondents were interdicted and restrained as set out earlier hereinbefore. Save for making these comments, nothing further revolves around that particular day.

APPLICATION TO STRIKE OUT

[17] At the hearing, an application was made on behalf of the applicants for striking out several of the paragraphs that were incorporated in Smuts' affidavit. It was contended that these paragraphs contained allegations which were irrelevant, vexatious, scandalous, and inadmissible hearsay evidence. It was further contended that the respondents' papers were voluminous, however their defence was really capable of being captured in a few paragraphs. It was contended on behalf of the applicants that the respondents abused the opportunity to file the answering affidavit and in so doing, they *"put up all manner of irrelevant, vexatious and scandalous material that has no bearing on the issues to be decided by this court"*.

[18] In terms of Rule 6(15) of the Uniform Rules of Court a Court has a discretion in an application by any party to strike out from any affidavit any matter which is:

[18.1] scandalous;

[18.2] vexatious; or

[18.3] irrelevant.

A Court may entertain an application to strike out material from affidavits on grounds other than those in Rule 6(15).4

[19] "*Irrelevant"* with regard to the contents of an affidavit refers to allegations which do not apply to the matter in hand and do not contribute one way or another to a decision of such matter.5 天*exatious* in respect of an affidavit refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.6 鉄*candalous matter* is allegations or matters which may or may not be relevant but which are so worded as to be abusive or defamatory.7

[20] For an application to strike out allegations from an affidavit to succeed, two important requirements must be satisfied:

[20.1] the matter sought to be struck out must be scandalous,

4 ***Titty's Bar and Bottle Store v ABC Garage and others*** 1974 (4) SA 362 (W) at [368F-G]
5 ***Vaatz v Law Society of Namibia*** 1991 (3) SA (Nm) [566D]; ***Swissborough Diamond***
Mines v Government of RSA 1999 (2) SA 279 (T) at [336J-337B]
6 ***Vaatz v Law Society of Namibia*** above at [566C-E]
7 *Id*

vexatious or irrelevant or be of a kind envisaged for example in the ***Titty's Bar*** case;

[20.2] the Court must be satisfied that if the matter is not struck out the party seeking to have the matter struck out would be prejudiced8.

[21] It was contended on behalf of the applicants that if a party is required to deal with scandalous or irrelevant matter then the main issue could be *"side-tracked"*. However if such matter was left unanswered the other party may well be defamed. The argument continued that the retention of such matter would therefore be prejudicial to the innocent party.

[22] The paragraphs referred to dealt with the conduct of the first applicant during her stay at the Cape Town Medi Clinic, as well as the many other items that I have set out earlier herein. The respondents contended that they were not contravening the relevant provisions of the National Health Act because the information that was gleaned from the records were in the public interest and therefore published. They further stated that there is a debate in South Africa at present as to whether or not the first applicant is a fit occupant of the high office that she presently holds. This debate they contended is presently

8 *Id* at [566G-I]

being carried out in public in the columns of newspapers and on radio. They further state that it is also carried out by ordinary citizens in the course of ordinary social interaction. In the circumstances of the present matter, I do not believe that the allegations made by Smuts in her affidavit constitute irrelevant, vexatious or scandalous matter. These allegations are necessary for the respondents to set out in greater detail what their response was in respect to the case made out by the applicants. The defence of public interest raised by the respondents entails a recognition of a constitutional importance of the rights to freedom of expression and to receive and impart information and ideas, now entrenched in Section 16 of the Constitution. In her attempt to set out these allegations, Smuts informs the reader the reasons why there will be benefit flowing from a free flow of information. She emphasises that the revelations made are relevant to the first applicant's performance of her constitutional and ministerial duties and are therefore in the public interest. It is in the context of this matter that one will have to determine whether the first applicant's privacy was indeed invaded and that the defence raised by the respondents does disentitle the first applicant to her remedy. In these circumstances I am satisfied that the allegations set out by Smuts are not irrelevant, vexatious or scandalous. Therefore the application to strike out is dismissed.

[23] At the hearing, the respondents tendered two additional affidavits from the second and third respondents respectively. I did not consider any of the material in these affidavits to be prejudicial to either of the applicants and accordingly I allowed these two affidavits. There was no affidavit filed by the first respondent.

HEALTH RECORDS: THE LEGAL POSITION

[24] The National Health Act was implemented to provide a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws on the National, Provincial and Local Governments with regard to health services; and to provide for matters connected therewith. The objects of the National Health Act which are covered in Section 2 set out the following:

> "2. ***Objects of the Act.*** *– The objects of this Act are to regulate national health and to provide uniformity in respect of health services across the nation by –*
>
> *a) establishing a national health system which –*
>
> *(i) encompasses public and private providers of health services; and*
>
> *(ii) provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford;*
>
> *(b) setting out the rights and duties of*

healthcare providers, health workers, health establishments and users; and

(c) protecting, respecting, promoting and fulfilling the rights of –

(i) the people of South Africa to the progressive realization of the constitutional rights of access to healthcare services, including reproductive healthcare;

(ii) …
(iii) …

iv) …"

[25] Section 14 of the National Health Act deals with confidentiality:

"14. ***Confidentiality*** *– (1) All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential.*

(2) Subject to section 15, no person may disclose any information contemplated in sub-section (1) unless –

(a) the user consents to that disclosure in writing;

(b) a court order or any law requires that disclosure; or
(c) non-disclosure of the information represents a serious threat to public health.

15. ***Access to health records*** *–(1) A health worker or any healthcare provider that has access to the health records of a user may disclose such personal information to any other person, healthcare provider or health establishment as is necessary for any legitimate purpose within the ordinary course and scope of his or her duties where such access or disclosure is in the interests*

of the user.

(2) For the purpose of this section 'personal information' means personal information as defined in Section 1 of the Promotion of Access to Information Act, 2000 (Act no 2 of 2000).

16. …

*17. **Protection of health records** – (1) The person in charge of a health establishment in possession of a user's health records must set up control measures to prevent unauthorised access to those records and to the storage facility in which, or system by which, records are kept.*

(2) Any person who

(a) …
(b) …
(c) …
(d) …
(e) …

(f) without authority, copies any part of a record;

(g) without authority, connects the personal identification elements of a user's records with any element of that record that concerns the user's conditions, treatment or history;

(h) gains unauthorised access to a record or record keeping system, including intercepting information being transmitted from one person or one part of a record keeping system, to another;

(i) …

(j) …

commits an offence and is liable on conviction to a fine or to imprisonment for a

period not exceeding one year or to both a fine and such imprisonment."

[26] It is clear that in terms of the National Health Act the medical records of a person are private and confidential.9 Generally speaking, where a person acquires knowledge of private facts through a wrongful act of intrusion, any disclosure of such facts by such person or by any person, in principle, constitutes an infringement of the right to privacy.10

[27] The reason for treating the information concerning a user, including information relating to his/her health status, treatment or stay in a health establishment as confidential is not difficult to understand. The confidential medical information invariably contains sensitive and personal information about the user. This personal and intimate information concerning the individual's health, reflects sensitive decisions and the choices that relate to issues pertaining to bodily and psychological integrity as well as personal autonomy. Section 14(1) of the National Health Act imposes a duty of confidence in respect of information that is contained in a user's health record. This is simply because the information contained in the health records is information

9 Section 14(1) of the National Health Act

10 Neethling's ***Law of Personality*** (2nd ed) Neethling *et al* at p 226; ***Financial Mail (Pty) Ltd v Sage Holdings Ltd*** 1993 (2) SA 451 (AD) at [462-463]; ***Motor Industry Fund Administrators (Pty) Ltd v Janit and others*** 1994 (3) SA 56 at [60H-61B]

that is private. *"Individuals value the privacy of confidential medical information because of the vast number of people who could have access to the information and the potential harmful effects that may result from disclosure. The lack of respect for private medical information and its subsequent disclosure may result in fear of jeopardising an individual's right to make certain fundamental choices that he/she has a right to make. There is therefore strong privacy interest in maintaining confidentiality."*11 Section 14(1) of the National Health Act deems it imperative and mandatory to afford the information recorded on the health records protection against unauthorised disclosure. Here, the right to the user 痴 privacy is paramount. The unlawful disclosure of the information contained in the health record will cause extreme trauma as well as pain to the user. This information is confidential because it is the user who has control over the information about himself or herself. It is also the user who can decide to keep it confidential from others. In the National Health Act, the legislature considered the confidentiality of the information important enough to impose certain criminal sanctions in the event of the breach of the confidentiality. In terms of the Constitution, as well as the National Health Act, the private information contained in the health records of a user relating to the health status, treatment or stay in a health establishment of that user

11 ***NM and others v Charlene Smith and others*** (2007) 7 BCLR 751 (CC)

is worth protecting as an aspect of human autonomy and dignity. This in turn includes the right to control the dissemination of information relating to one痴 private medical health records that will definitely impact on an individual痴 private life as well as the right to the esteem and respect of other people.

[28] *"A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom.*

If human dignity is regarded as foundational in our Constitution a corollary thereto must be that it must be jealously guarded and protected. As this court held in Dawood and another v Minister of Home Affairs and others, Shalabi and another v Minister of Home Affairs and others, Thomas and another v Minister of Home Affairs and others: the value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for the black South Africans was routinely and cruelly denied. It asserts it too to inform the future to invest in our democracy respect for the intrinsic worth of

*all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."*12

[29] In ***S v Makwanyane and another*** the Constitutional Court observed that: *"respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution"*.13

12 ***NM and others v Charlene Smith and others*** at para [49] and [50]
13 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para [329C]

[30] The first applicant further enjoys a constitutional basis for her claim to right to privacy which is protected by Section 14 of the Constitution which provides:

"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."

[31] Both Section 14 of the Constitution, as well as Section 14(1) of the National Health Act envisage that the first applicant has a right to her privacy which would entitle her not to have her private medical information disclosed without her consent to the public. In ***Bernstein and others v Bester NO and others***, Ackerman J recognised that privacy is an elusive concept that has been the subject of much debate by scholars14. We assert the value of privacy because of our constitutional understanding of what it means to be a human being. An implicit part of this aspect of privacy incorporates the right to choose what personal information of ours is released into the public domain. 典*he more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That*

14 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para [65]

*decision should not be made by others.*15

[32] It is for the above reasons that The National Health Act recognises confidentiality of healthcare records and the privacy attaching to such information. It also recognises the need to protect the information that is contained therein. The National Health Act also regulates the position regarding the keeping, maintenance, access, and disclosure of a user's health records.

[33] In the present matter, the respondents have not been able to show that they have not contravened the National Health Act and that their continued access of the health records of the first applicant does not result in a continuous contravention of the provisions of the National Health Act. In fact, the contravention of the National Health Act by the respondents has on these papers been established. The Sunday Times, does not have any right to the medical records of the first applicant, either to possess or otherwise to have access to them. It also does not have a right to retain any copies of such records or any part thereof. In fact, in terms of the National Health Act these records are to be kept and maintained by the second applicant and access to these records is only permitted in very strict circumstances. It is the first applicant who has the right to authorize access or to deny such

15 O'Regan J in ***NM and others v Charlene Smith and others*** above at para [132]

access. I see no reason why I should not make an order that would specify that the records pertaining to the treatment and the stay of the first applicant in the Cape Town Medi Clinic of the second applicant which were in the possession of the respondents be returned to the second applicant. It is generally the user under the relevant provisions of the National Health Act that has a right to determine who obtains access to her health records and to information relating to her health status, treatment and stay as a patient in a health establishment. Since the records contain private and confidential information of the first applicant (including information on her health status, treatment and stay in the Cape Medi Clinic) she is entitled to claim that those who are not authorized to have access, return it to either the first applicant or the second applicant.

THE RELIEF SOUGHT BY THE FIRST APPLICANT INTERDICTING AND RESTRAINING THE RESPONDENTS FROM FURTHER COMMENTING ON, AND OF PUBLISHING ANY COMMENTS ON THE UNLAWFULLY OBTAINED RECORDS.

[34] In a case where the information sought for publication is obtained by

unlawful means, there may well be overriding considerations of public interest which would permit of its publication.16 The applicants request that the respondents should be 妬nterdicted from further commenting on or publishing any comment�dictates the present discussion and finding.

[35] The freedom of the press is celebrated as one of the great pillars of liberty. It is entrenched in our Constitution17 but it is often misunderstood. Freedom of the press does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However freedom of the press does mean that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish.

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16 "gIt seems to me that such a case would be rara avis and that the public interest in favour of publication would have to be very cogent indeed. In my opinion, this was not such a case. Here the information in question related to sensitive and confidential information concerning Sage's internal affairs and delicate business negotiations being conducted by it and no good reason was advanced by the appellants as to why the public should have been informed about all this or why indeed the appellants should have been permitted to use this information as the springboard for which is generally a fairly hostile article concerning Sage and its financial affairs." ***Financial Mail (Pty) Ltd v Sage Holdings Ltd*** at [465]

17 Section 16, "*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 sub-section (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"

[36] As a general matter, any person is likely to feel violated, harmed and invaded by the publication of unlawfully obtained information. Any reasonable person would probably feel less concerned if their discussions of an upcoming metropolitan council election, or the state of the global economy was unlawfully intercepted and subsequently published, than that person would if their discussion of intensely private matters such as family disputes or medical records were illegally intercepted and published for a larger audience. Similarly, on the public interest side of the equation, the public will certainly be interested and accordingly benefit from discussion of matters which are clearly in the public interest.

[37] Public interest it must be noted is a mysterious concept. Like a battered piece of string charged with elasticity, impossible to measure or weigh. The concept changes with the dawn of each new day, tempered by the facts of each case. Public interest will naturally depend on the nature of the information conveyed and on the situation of the parties involved. Public interest is central to policy debates, politics, and democracy. While it is generally acclaimed that promoting the common well-being or general welfare is constructive, there is little, if any, consensus on what exactly constitutes the public interest.

[38] The public has the right to be informed of current news and events

concerning the lives of public persons such as politicians and public officials. This right has been given express recognition in Section 16(1) (a) and (2) of the Constitution which protects the freedom of the press and other media and the freedom to receive and impart information and ideas. The public has the right to be informed not only on matters which have a direct effect on life, such as legislative enactments, and financial policy. This right may in appropriate circumstances extend to information about public figures.

[39] The question then is who is a public figure and to what extent may such a public figure rely on his or her right to privacy to prevent publication of matter he or she would rather keep private ? Here, professor McQuoid- Mason offers the following test:

"In short it is submitted that the test whether a person is a public figure should be: has he by his personality, status or conduct exposed himself to such a degree of publicity as to justify intrusion into, or a public discourse on, certain aspects of his private life? However, non-actionable intrusions on his privacy should be limited to those that are in the public interest or for the public benefit, so that unjustified prying into personal affairs, unrelated to the person's public life, may be prevented."18

18 McQuoid-Mason DJ *"Invasion of Potency?"* (1973) 90 SALJ 23 at [29]

[40] Where a person seeks publicity and consents to it, or in relevant circumstances, by the nature of the position occupied by the individual, this individual cannot object when his or her actions are publicised. This principle applies equally, in appropriate cases, where the information sought to be published has been unlawfully acquired. However, any such interference must be both reasonable and necessary. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.

[41] Freedom of expression includes the right to acquire information and to disseminate it. Freedom of expression enables people to contribute to debate on social and moral issues. This right is the most important driver of political discourse so essential to democracy, which in turn is a concomitant of a free society.

[42] An untrammeled system of free expression, that is designed to enrich the community and to enrich each participant who is engaged in it, has costs. These costs take the form of statements that injure people's feelings as well as those that challenge their views.

[43] The enquiry in a matter such as the present envisages recognition of

the constitutional importance of the rights to freedom of expression and to receive and impart information and ideas, entrenched in Section 16 of the Constitution.19 The SCA has recently dealt with a matter where these two competing constitutional rights come into conflict, ie. the right to freedom of expression and the right to dignity. The SCA stated that where two competing constitutional rights come into conflict 'each invoked by different parties, and seeking to intrude on the other's right 'a court must reconcile them. All constitutional rights have equal value and therefore this reconciliation is achieved by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other according to what is required by the particular circumstances and within the constraints that are imposed by Section 36 of the Constitution. In other words, one weighs the extent of the limitation against the purpose, importance and effect of the intrusion and this entails weighing the benefit that flows from allowing the intrusion against the loss that that intrusion will entail.20 The SCA thereafter held that when a ban on publication is sought there must be a demonstrable relationship between publication and the prejudice it is alleged will be caused. 'In summary a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the

19 ***National Media Ltd v Bogoshi*** 1998 (4) SA 1196 (SCA)
20 ***Midi Television (Pty) Ltd v Director of Public Prosecutions, Western Cape;*** (unreported decision of SCA dated 18 May 2007, under case number 100/06) at para [9]-[11]

*publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage.*21 The SCA held that the reason for this was that it is not merely the interests of those associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information.

[44] In the present matter what must be weighed is the extent of the limitation of the first applicant's rights against the benefit that flows from allowing the intrusion of the right to receive and impart information in Section 16(1)(b) of the Constitution. The respondents have set out in the answering affidavit, the reasons why there will be a benefit in allowing a free flow of information – which the revelations made are relevant to the first applicant's performance of her constitutional and ministerial duties and are therefore in my mind in the public interest. Therefore the respondents should not be prohibited from further commenting in this matter.

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21 ***Midi Television (Pty) Ltd*** at para [19]

[45] In her capacity as a Minister the first applicant cannot detract from the fact that she is a public figure. In such a case her life and affairs have become public knowledge and the press in its turn may inform the public of them.

[46] Much of the information that was published was already in the public domain. Here the information although unlawfully obtained, went beyond being simply interesting to the public; there was in fact a pressing need for the public to be informed about the information contained in the medical records of the first applicant. Then, the disclosure made by the Sunday Times did not mislead the public about an issue which the public has a genuine concern. And finally, the publication of the unlawfully obtained controversial information was capable of contributing to a debate in our democratic society relating to a politician in the exercise of her functions.

[47] It is important to note that the contents incorporated in the hospital record according to Smuts, can be verified by "*reliable sources*." Smuts emphasises in her affidavit that the information found in the record was independently known to a few people. These include hospital staff, as well as fellow users.

[48] The respondents' contention that they have reliable sources to verify the information in the hospital records means that the privacy right that the first applicant enjoys and seeks to assert becomes diluted. At this stage, it is understandable that these witnesses are not prepared to come forward to volunteer this information. Journalists generally rely on these sources. The veracity of this information cannot be weighed at this point in time. However, when the matter reaches these courts cloaked in a different cause of action then this evidence can clearly be tested. In the matter of ***NM and others v Smith and others*** Sachs J sets out: *"in Bogoshi*[22] *the SCA developed in a way that was sensitive to contemporary concerns and realities, a well-weighted means of balancing respect for individual personality rights with concern for freedom of the press.* According to the SCA, what mattered was the reasonableness of the publication in the circumstances.

[49] The ***Bogoshi*** approach has two principal virtues. Firstly, it seeks to harmonise as much as possible respect for human dignity and freedom of the press, rather than to rank them in terms of precedence. Secondly, by stressing the need for the media to take reasonable steps to verify the information to be published, it introduces objective standards that can be determined in advance by

22 ***National Media Ltd and others v Bogoshi*** 1998 (4) SA 1196 (SCA)

the profession and then evaluated on a case by case basis by the courts. The result is the creation of clearly identifiable and operational norms, and the fostering in the media of a value of care and responsibility.23

[50] This is a case where the need for the truth, is in fact overwhelming. Indeed in this matter the personality involved as well as her status establishes her newsworthiness. Here, we are dealing with a person who enjoys a very high position in the eyes of the public and it is the very same public that craves attention in respect of the information that is in the hands of the Sunday Times. The overwhelming public interest points in the direction of informing the public about the contents incorporated in the medical records in relation to the first applicant, albeit that the medical records may have been unlawfully obtained. In these circumstances I am unable to accede to the requests of the applicants with regard to paragraphs 3 and 7 of their notice of motion which in effect would impose a form of censorship in relation to any future publication around the medical record.

[51] I am not inclined to believe that the respondents should be ordered to delete all reference to the medical records pertaining to the first applicant from their personal computers or notebooks. The medical records in themselves must be deleted. However, the notes invariably

23 ***National Media Ltd and others v Bogoshi*** above at para [203] and [204]

taken during the course of investigative newsgathering can be obtained from many sources, including the medical records. It may be very difficult to unscramble the information, and more importantly, I am not satisfied that a proper case has been made out for this relief.

GENERAL COMMENTS ON THE CONDUCT OF JOURNALISTS

[52] I cannot complete this judgment without expressing my views about the conduct of the first, second, third and fourth respondents in the context of the present matter. It is common cause that the records were not lawfully obtained by The Sunday Times. The Sunday Times and its reporters failed to afford the first applicant an opportunity to respond to the contents of the medical record. However they verified the information from other *"reliable sources"*.

[53] Journalists should be cautious when using information that is tainted with criminal activity. It is an integral part of the professional standards of journalists to respect the right to privacy and human dignity of the individual.

[54] It is not clear if any of the respondents in the present matter took the necessary steps to investigate the illegal status of the medical record that they were armed with. There is an ethical obligation on journalists in matters such as the present to ascertain whether the document that

they are armed with, has in fact been legally obtained. Although the publication of the contents incorporated in the confidential records of the first applicant and verified by "reliable sources" were capable of contributing to a debate in our democratic society, I cannot make a specific finding that The Sunday Times *should* have published them. The harm caused to the first applicant, and her family as well as those close to her must have been vast and painful. Newspapers, no less than other players in our society must keep in mind the consequences of their activities. Those involved with the present stories should have thought long and carefully about suitable alternatives before they chose to release this information. I have deliberately set out at the commencement of this judgment the constitutional values that we collectively espouse as a nation governed by the Constitution. The alternatives are to be found there.

[55] However, Courts must use its hindsight sparingly: " exuberant judicial blue-penciling after-the –fact would blunt the quills of even the most honourable journalists" 24 This is at least implied by the pronounced deference I have afforded to the media on matters of public interest. If I was presiding in a court of manners or ethics, I might well censure the respondents. I trust that the South African Press Ombudsman will fervently consider the conduct of the respondents Ø This also resides

24 Ross v Midwest Communications Inc., 870 F2d, 275 (5th Circuit 1989).

in the realm of the public interest. The possibility of a crime having been committed in contravention of section 17 of The National Health Act is being investigated by the prosecuting authorities. The due process of law expects this investigation to be conducted.

[56] This decision has not been concluded easily. The difficulty is compounded when two competing constitutional rights come into conflict, one right must suffer. Thus, the first applicant must suffer the limitation of her right to privacy. However within all the euphoria and outcry against the conduct of the first applicant, she does enjoy support. Just because we possess rights, does not mean that we must exercise them to the hilt at every opportunity. Though we enjoy the freedom of expression, we would be ill advised to celebrate them by vilifying each other on the slightest pretext.

[57] Whatever I may think of the conduct and reporting behavior of the respondents in the present matter, it would be false to the precepts of our Constitution if I allowed the interdict against the respondents from further commenting on the issues that have already entered the public domain. The prospect of favouring the applicants with this remedy may suspend journalism in a manner too dangerous to accept.

[58] We must never lose sight of the sage pronouncement made by our learned Chief Justice, Langa CJ when he said:

"The inescapable conclusion is that a reasonable journalist or a reasonable publisher would have *foreseen the possibility that there was not consent. Because the possible harm was great, the effort necessary to avoid that harm minimal and the benefit of publishing the names negligible, a reasonable journalist or publisher would have taken steps to avoid that harm….. Whatever course they chose the defendants, to use the words of Sachs J, "should have left no stone unturned in [their] pursuit of verification." The fact that they left those stones unturned renders them negligent.*

A word should be said about the third respondent's liability. As a publisher it bears a separate responsibility to ensure that everything it publishes is lawful. It cannot abandon that responsibility to those whose work it chooses to disseminate. It is therefore negligent for the same reasons as the first respondent."[25]

[59] I see no reason why I should not grant an order of costs against the respondents jointly and severally. They were in possession of medical reports concerning the first applicant, which to their knowledge was unlawfully obtained. They acted in contravention of The National Health Act by making unauthorized copies. This sort of conduct cannot be condoned. It is proper that the respondents be ordered to

25 NM and Others v Charlene Smith and Others above at para [111]and [112}

pay the costs of this application.

[60] It was argued on behalf of the applicants that I should make a punitive cost order which should include the costs of three counsel. In the exercise of my judicial discretion, I simply cannot accede to this request. There were important issues that were raised by Smuts on behalf of the respondents and these needed to be investigated thoroughly. I have already indicated that these issues were not spurious, vexatious or irrelevant.

ORDER

[61] In all of the above circumstances I make the following order:

[61.1] The documents relating to the health records in relation to the treatment or stay of the first applicant in the Cape Town Medi Clinic placed in a safe deposit box at the Sandton Branch of the Standard Bank of South Africa must be returned to the second applicant forthwith. The respondents are further ordered to delete all copies of these medical records that may be stored on their personal computers or laptops. The personal notes made by the respondents are not affected by this order.

[61.2] The interim order made by Msimeki AJ on 17 August 2007 in terms whereof the respondents were interdicted and restrained from *"further commenting on or publishing any comments on the aforesaid records"* is discharged.

[61.3] The first, second, third and fourth respondents are ordered to pay the costs of the first and second applicants jointly and severally, the one paying the other to be absolved. These costs include the costs of the application before Msimeki AJ. Such costs are to include the costs of employing two counsel.

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JAJBHAY J
JUDGE OF THE HIGH COURT
DATE OF HEARING: 24 AUGUST 2007

DATE OF JUDGMENT: 30 AUGUST 2007

ON BEHALF OF THE APPLICANTS:

ADV MOERANE SC; ADV COPEN SC; ADV VALLY

INSTRUCTED BY:
MPONYANA LEDWABA INC

ON BEHALF OF THE RESPONDENTS:

ADV CAMPBELL SC; ADV MASHABANE
INSTRUCTED BY:
BELL DEWAR & HALL