

## NM AND OTHERS v SMITH AND OTHERS (FREEDOM OF EXPRESSION INSTITUTE AS

AMICUS CURIAE) 2007 (5) SA 250 (CC)\*

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### SUMMARY

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- The applicants in this matter were three HIV-positive women who claimed that the respondents had violated their rights to privacy and dignity by publishing their names and HIV status.
- In the High Court the applicants claimed damages in an amount of R200 000 against each respondent, based on the *actio injuriarum*, for the violation of their rights to privacy, dignity and psychological integrity arising from said publication, without their consent, in a biography of the second respondent, authored by the first respondent and published by the third respondent. The respondents raised the defences that:
  - (i) the publication was neither intentional nor negligent as the applicants' HIV status was not a private fact at the time the book was published since their names had previously been disclosed in an application to interdict the publication thereof in the book and at various commissions of inquiry; and
  - (ii) the publication was not unlawful in that the applicants had given their consent to their names being used in the interdict application and at the various commissions of inquiry; alternatively
  - (iii) there was no malice on the part of the respondents in publishing the names and HIV status of the applicants.
- The High Court dismissed the action against the first and second respondents but ordered the third respondent to pay damages of R15 000 to each of the applicants, directed the deletion of the applicants' names from the book, and directed that, until such deletion had been made, no further copies of the book could be sold.
- The applicants applied, unsuccessfully, to both the High Court and the Supreme Court of Appeal for leave to appeal against that part of the High Court's judgment dismissing their action against the first and second respondents and against the *quantum* of the damages awarded against the third respondent.

- The applicants then approached the Constitutional Court for the requisite leave to appeal. Before the Constitutional Court the applicants argued, *inter alia*, that the common-law *actio injuriarum* had to be developed in accordance with the protection afforded their rights to privacy, dignity and psychological integrity in terms of the Constitution of the Republic of South Africa, 1996. Liability ought to be imposed on those who negligently, as opposed to intentionally, published unauthorised confidential medical information, unless the public interest clearly demanded otherwise, in which case they ought to have succeeded against the first and second respondents also.
- The applicants challenged the *quantum* of the damages awarded by the High Court on the basis that it failed to give sufficient weight to the fact that the applicants' constitutional rights had been violated by the publication.
- *Held*, that the *actio injuriarum* under the common law protected both dignity and privacy under the concept of *dignitas*.
- *Held*, further, in respect of the applicants' right to privacy, that 'private facts' were those matters, the disclosure of which would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, in the same circumstances and in respect of which there was a will to keep them private.
- *Held*, further, that an individual's HIV status, particularly within the South African context, deserved protection against indiscriminate disclosure due to the nature and negative social context of the disease, as well as the potential intolerance and discrimination that resulted from such disclosure.
- *Held*, further, that the respondents' assumption that others were allowed access to private medical information once it had left the hands of physicians and other personnel involved in medical care was fundamentally flawed. It failed to take into account an individual's desire to keep information confidential. It did not follow that an individual automatically consented to or expected the release of information to others outside that health care setting.
- On the facts of the present case, there was nothing to suggest that the applicants' HIV status had become a matter of public knowledge. There was no compelling public interest which justified interference with the applicants' right to privacy.
- *Held*, further, that the High Court was incorrect in finding the first and second respondents not liable for any damage suffered at the time of publication of the book. On the evidence the first respondent did not sufficiently attempt to establish whether the necessary consents had been obtained.

- More importantly, pseudonyms instead of the real names of the applicants could have been used. The same applied to the second respondent.
- *Held*, further, that the publication by the respondents of the applicants' HIV status therefore constituted wrongful publication of a private fact: the applicants' right to privacy was breached by the respondents.
- *Held*, further, in respect of the applicants' right to dignity, that it was an affront to a person's dignity to disclose details of his or her HIV status, or any other private medical information, without his or her consent.
- *Held*, further, that because of indignity of the public stigma, degradation, and discrimination that accompanied HIV/AIDS, the respondents' disclosure of the applicants' HIV-positive status violated their dignity and psychological integrity, and it could not be shown that the disclosure was in the public interest.
- *Held*, further, in respect of the suggested development of the common law, that the present case was not an appropriate one for developing the common law as suggested.
- *Held*, that, on the evidence, the respondents were certainly aware that the applicants had not given their consent, or at least foresaw the possibility that consent had not been given for disclosure. As seasoned campaigners in the field of HIV/AIDS, the respondents well knew their conduct was wrongful, and that the disclosure of private facts was likely to invade the privacy rights of the applicants.
- *Held*, further, that the respondents had therefore not rebutted the presumption that the disclosure of private facts was done with the intention to harm the applicants.
- Therefore, the respondents had the requisite *animus injuriandi*. Their defence, accordingly, had to fail.
- *Held*, further, in respect of the *quantum* of damages, that due to the gravity of the respondents' violation of the applicants' dignity and privacy, a higher award was reasonable. A fair assessment of the damage suffered by the applicants was R35 000 for each applicant.
- *Held*, accordingly, that the application for leave to appeal be granted. Order of G the Court *a quo* set aside and replaced with an order that: (a) the respondents were to pay damages in an amount of R35 000 to each applicant; and (b) the names of the applicants were to be deleted from all unsold copies of the book.