

# Chapter 38

## Privacy

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## 38.1 Introduction: the meaning of privacy

Section 14 of the Final Constitution 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.<sup>1</sup>

Privacy has a variety of connotations,<sup>2</sup> has been described as 'an amorphous and elusive' concept,<sup>3</sup> and has been closely identified with the concept of identity.<sup>4</sup> Whatever its actual extension is, at the very least, the right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life. Such freedom from interference may require that a citizen be free from unauthorized disclosures of information about his or her personal life.<sup>5</sup> This second connotation of privacy implies that individuals have control not only over who communicates with them but also who has access to the flow of information about them.<sup>6</sup>

Privacy, like other rights, is not absolute.<sup>7</sup> The 'inner sanctum' of a person (eg, family life, sexual preference and home environment) may be shielded from invasion by conflicting rights of the community. However, as a person moves into

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communal relations and activities such as business<sup>8</sup> and social interaction, the scope of personal space shrinks accordingly.<sup>9</sup> This diminished personal space does not entail that people involved in business or social interactions no longer have a right to privacy:<sup>10</sup> As Neethling, Potgieter and Visser have argued:

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1 The Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC'). The wording in s 13 of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') is substantially the same: 'Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.'

2 See AF Westin *Privacy and Freedom* (1967) 7 ('the voluntary and temporary withdrawal of a person from the general society through physical and psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve'). Cf *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T), 348-5. See also *International Commission of Jurists Conclusions of the Nordic Conference on the Right to Privacy* (1967) (Nordic Conference defined privacy as 'the right to be let alone to live one's own life with the minimum degree of interference'); *Olmstead v United States* 277 US 438, 478, 48 S Ct 564 (1928) (Brandeis J dissenting) ('the right to be let alone—the most comprehensive of rights and the right most valued by civilized men'); J Neethling *Die Reg op Privaatheid* (1976) 287 ('n individuele lewens-toestand van afsondering van openbaarheid'). Cf *National Media Ltd & another v Jooste* 1996 (3) SA 262 (A), 271. See also J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 365 ('Burchell Personality Rights').

3 *Bernstein v Bester* NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 65 ('Bernstein').

4 *Ibid.*

5 *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 91.

6 D J McQuoid-Mason *The Law of Privacy in South Africa* (1977) 99 ('McQuoid-Mason Privacy'). Cf J Neethling J M, Potgieter & P J Visser *Neethling's Law of Personality* (4th edition 1996) 243 ('Neethling et al *Law of Personality*'): ('privacy can be infringed only by acquaintance with personal facts by outsiders contrary to the determination and will of the person whose right is infringed, and such acquaintance can take place in two ways only, namely through intrusion (or acquaintance with private facts) and disclosure (or revelation of private facts)').

7 Cf *Case v Minister of Safety and Security* (supra) at para 106.

Privacy is an individual condition of life characterized by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state.<sup>11</sup>

Thus a right to privacy encompasses the competence to determine 'the destiny of private facts'. This determination of destiny, in turn, embraces the right to decide 'when and under what conditions private facts may be made public'.

## 38.2 Common-law right to privacy

Section 14<sup>12</sup> creates a constitutional right to privacy. The supremacy of the Constitution does not mean that all previous notions of privacy will be forgotten and fall into disuse. The courts will inevitably retain those existing common-law actions which are in harmony with the values of the Constitution.<sup>13</sup> For instance, it is unlikely that in the immediate future the courts will develop an independent 'constitutional delict' of invasion of privacy, unless circumstances arise where such invasion cannot be accommodated by the common law and the courts are required to fashion some other 'appropriate remedy'.<sup>14</sup>

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- 8 In appropriate circumstances the right to privacy also extends to business relationships. See *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596, 613 (Tk). Despite the suggestion to the contrary. See *Shelton v Commissioner for South African Revenue Services* 2000 (2) SA 106 (E), 123. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 17 (Langa DP assumed that businesses could sue for invasion of privacy when he said: 'The right to privacy may be claimed by any person. The present matter is concerned with the right to privacy of . . . a natural person, and nine business entities which are juristic persons'. He then went on to observe that 'what is clear is that the right to privacy is applicable, where appropriate, to a juristic person'.) See § 38.5.
- 9 *Bernstein* (supra) at para 67.
- 10 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* (supra) at para 16 infra: ('The right, however, does not relate solely to the individual within his or her intimate space . . . Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied.')
- 11 J Neethling, JM Potgieter & PJ Visser (eds) *Law of Delict* (2001) 355 ('Neethling et al, *Law of Delict*'). Cf *Bernstein* (supra) at para 68.
- 12 Section 13 of the Interim Constitution.
- 13 Cf *Gardener v Whitaker* 1995 (2) SA 672 (E), 684, 1994 (5) BCLR 19 (E). It has been pointed out, however, that caution must be exercised when attempting to project common-law principles onto the interpretation of fundamental rights and their limitation: At common law the determination of whether an invasion of privacy has taken place constitutes a single inquiry, including an assessment of its unlawfulness, whereas in constitutional adjudication under the Constitution a two-stage approach must be used in deciding the constitutionality of a statute. See *Bernstein* (supra) at para 71 (Ackermann J). See S Woolman 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.
- 14 D McQuoid-Mason 'Invasion of Privacy: Common Law v Constitutional Delict — Does It make a Difference?' (2000) *Acta Juridica* 227, 259-261 ('McQuoid-Mason 'Common Law v Constitutional Delict'). See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) ('Fose').

South African courts have had little difficulty in recognizing a common-law action for invasion of privacy under the broad principles of the *actio injuriarum*.<sup>15</sup> A traditional definition for this delict would be 'an intentional and wrongful interference with another's right to seclusion in his [or her] private life'.<sup>16</sup> There is, however, no requirement of intention in cases involving the mass media.<sup>17</sup>

### (a) Essentials for liability

For a common-law action for invasion of privacy based on the *actio injuriarum* to succeed, the plaintiff must prove the following essential elements: (i) wrongfulness, (ii) fault in the form of intention — or in the case of the mass media, negligence, and (iii) infringement of the plaintiff's privacy.<sup>18</sup>

#### (i) Wrongfulness

The wrongfulness of a factual infringement of privacy is judged in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the court.<sup>19</sup> In *National Media Ltd & another v Jooste*, Harms JA wrote:

The boundary of a right or its infringement remains an objective question. As a general proposition, the general sense of justice does not require the protection of a fact that the interested party has no wish to keep private.<sup>20</sup>

It has been pointed out, however, that 'legal protection of private facts is extended to ordinary or reasonable sensibilities and not to hypersensitiveness'.<sup>21</sup> The courts will not protect facts 'whose disclosure will not 'cause mental distress and injury to anyone possessed of ordinary feelings and intelligence'.<sup>22</sup> Put slightly differently,

15 *O'Keeffe v Argus Printing and Publishing Co Ltd & Another* 1954 (3) SA 244 (C), 248 ('O'Keeffe'); Cf *McQuoid-Mason Privacy* (supra) at 86. See *S v A & another* 1971 (2) SA 293 (T), 297 ('S v A'): '[T]here can be no doubt that a person's right to privacy is one of . . . 'those real rights, those rights *in rem* related to personality, which every free man is entitled to enjoy'. See also *Bernstein* (supra) at para 68.

16 *McQuoid-Mason Privacy* (supra) at 100. The courts have found reference to the American courts useful when considering this the contours and the requirements of this action. *O'Keeffe* (supra) at 249; cf *Rhodesian Printing and Publishing Co Ltd v Duggan & another* 1975 (1) SA 590 (RA), 593-4 ('*Rhodesian Printing*'). See generally *McQuoid-Mason Privacy* (supra) at 35 for relevant United States developments. See also *Bernstein* (supra) at para 75.

17 See *infra* § 38.2 (a)(ii)(bb).

18 Cf *McQuoid-Mason Privacy* (supra) at 33, 100.

19 *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451 (A), 462 ('*Financial Mail*'); *Bernstein* (supra) at para 68. See also *O'Keeffe* (supra) at 249; *S v A* (supra) at 299; *Rhodesian Printing* (supra) at 595; *McQuoid-Mason Privacy* (supra) at 118-22.

20 See *National Media Ltd & another v Jooste* 1996 (3) SA 262 (A), 271 (Harms JA).

21 *Ibid.*

22 *Financial Mail* (supra) at 462; *National Media Ltd & another v Jooste* (supra) at 270.

even if a person feels subjectively that his or her rights have been impaired under the *actio injuriarum*, such impairment will not be unlawful unless a person of ordinary sensibilities would have regarded the conduct as offensive.

The test for injury in these cases is objective.<sup>23</sup> This subjective-objective distinction tracks the analysis of the Constitutional Court<sup>24</sup>. The Court has held that a person's subjective expectation of privacy will only have been wrongfully violated if the court is satisfied that such expectation was objectively reasonable.<sup>25</sup>

In determining the current modes of thought and values of any community, the courts may be influenced by its statute law.<sup>26</sup> It is also clear that the Constitution — 'and its spirit, purport and objects' — will play a major role in determining the 'new' *boni mores* of South African society.<sup>27</sup> In a sense, the Bill of Rights 'crystallizes' the *boni mores* of society by providing that an infringement of the right to privacy in the Constitution is *prima facie* unlawful.<sup>28</sup>

## (ii) Fault

The defendant must have acted intentionally or with *animus injuriandi*.<sup>29</sup> In a case involving the media, negligence may be sufficient.<sup>30</sup>

### (aa) Intention or *animus injuriandi*

*Animus injuriandi* in defamation and related wrongs requires the intention to injure and consciousness of wrongfulness.<sup>31</sup> The intention to injure refers to the direction of the wrongdoer's will towards the conduct. Consciousness of wrongfulness means

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23 Cf *De Lange v Costa* 1989 (2) SA 857 (A), 860; Burchell *Personality Rights* (supra) at 329.

24 McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 232.

25 *Bernstein* (supra) at para 75. See below § 38.3(a)(i).

26 *Rhodesian Printing* (supra) at 595.

27 *Gardener v Whitaker* 1995 (2) SA 672 (E), 684, 1994 (5) BCLR 19 (E) (Froneman J). For a discussion of the direct and indirect application of the Chapter on Fundamental Rights to the common law, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

28 Burchell *Personality Rights* (supra) at 117. Cf Neethling et al *Law of Personality* (supra) at 239, n 7.

29 *O'Keeffe* (supra) at 247; *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W), 468; *Mhlongo v Bailey & another* 1958 (1) SA 370 (W), 372; *C v Minister of Correctional Services* 1996 (4) SA 292 (T), 306. Cf McQuoid-Mason *Privacy* (supra) at 113-5.

30 Cf *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA), 1213, 1999 (1) BCLR 1 (SCA), [1998] 4 All SA 347 (A) ('*Bogoshi*'). See below § 38.2(a)(ii)(bb).

31 Cf *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), 154.

that the defendant must know that his or her conduct is wrong.<sup>32</sup> The principles governing intention in delict are similar to those in criminal law: intention may be categorized as *dolus directus*, *dolus indirectus*, and *dolus eventualis*.<sup>33</sup> Once the other elements of an invasion of privacy have been proved, *animus injuriandi* will be presumed.<sup>34</sup>

For policy reasons the courts have not required the element of consciousness of wrongfulness as an element of *animus injuriandi* in wrongs affecting the liberty of the individual: wrongful arrest and detention or detention without a warrant or a wrongful attachment of goods.<sup>35</sup> In such cases, it is not open to the defendants to argue that they were ignorant of the wrongfulness of their acts.<sup>36</sup> Strict liability is imposed.<sup>37</sup> It has been suggested that a possible effect of the Constitution on the concept of *animus injuriandi* might be to regard certain of the rights mentioned in s 14 (such as unlawful searches and seizures) as so fundamental and important that strict liability should be imposed in the same manner as the common law imposition of strict liability for unlawful arrest, detention and attachment.<sup>38</sup>

### **(bb) Negligence by the mass media**

The Supreme Court of Appeal has suggested that in defamation cases 'the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of *animus injuriandi*'.<sup>39</sup> The court went on to say that 'given the credibility which the media enjoys amongst large sections of the community,' it would be 'entirely reasonable' to hold that 'the media are liable unless they were not negligent'.<sup>40</sup> Similar considerations apply to publications

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32 Neethling et al *Law of Delict* (supra) at 125.

33 Neethling et al *Law of Delict* (supra) at 123-125. *Dolus eventualis* has been applied to electronic surveillance by private detectives. *S v A* (supra) at 299.

34 *Kidson v SA Associated Newspapers Ltd* (supra) at 468. It has been suggested that where the plaintiff can prove patrimonial loss he or she should be entitled to sue for a negligent invasion of privacy under the *lex aquilia*. See McQuoid-Mason *Privacy* (supra) at 253. See also H D Krause 'The Right to Privacy in Germany — Pointers for American Legislation?' (1965) *Duke LJ* 481, 516 (In Germany liability for negligent invasions of privacy should be 'limited to situations in which the plaintiff can show tangible damage').

35 *Minister of Justice v Hofmeyr* (supra) at 154-5; *Todt v Ipser* 1993 (3) SA 577 (A), 588; *C v Minister of Correctional Services* (supra) at 306. Cf McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 233.

36 *Todt v Ipser* (supra) at 588.

37 Neethling et al *Law of Personality* (supra) at 129.

38 McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 233-234. Cf Burchell *Personality Rights* (supra) at 117-118.

39 *Bogoshi* (supra) at 1213. See also *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) ('*Khumalo*').

resulting in invasions of privacy by the media.<sup>41</sup> The adoption of the 'reasonableness' test regarding the conduct of the media may not, it has been opined, necessarily mean that the court endorsed negligence as a requirement for liability by the media.<sup>42</sup> However, the requirement of negligent conduct by the media to determine liability seems to accord with the constitutional imperative of freedom of the press.<sup>43</sup> The controversy has arisen because the courts tend to blur the questions of wrongfulness and fault and because the criterion of 'reasonableness' can be used in two senses: (1) during the policy-based inquiry into whether the defendant's conduct was unlawful; and (2) during the defence stage to determine whether the defendant's conduct was justifiable.<sup>44</sup> The Constitutional Court has since confirmed that the latter applies and that 'reasonable publication' is another one of the crystallized defences available to the media.<sup>45</sup> It did not, however,

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comment on the fact that a High Court has suggested that the reasonable publication defence should be extended to other situations not only publications by the media.<sup>46</sup>

The suggestion that the mass media may only use those defences that negate wrongfulness,<sup>47</sup> will have to be revisited in the light of s 16<sup>48</sup>— freedom of expression — of the Constitution. The courts must now weigh up competing constitutional imperatives of the right to privacy against the freedom of the press.<sup>49</sup> In media cases, the Constitutional Court has held that the 'reasonable publication' defence strikes an equitable balance between freedom of expression and the duty of editors and journalists to act with due care and respect for the individual's dignity.<sup>50</sup>

### **(iii) Invasion of privacy**

40 Ibid. Cf *McQuoid-Mason 'Common Law v Constitutional Delict'* (supra) at 234.

41 Cf *Jansen van Rensburg v Kruger* 1993 (4) SA 842 (A), 849-850.

42 See JR Midgley 'Media Liability for Defamation' (1999) 116 *SALJ* 211, 215.

43 Section 16(1). See Burchell *Personality Rights* (supra) at 226-227.

44 Cf Burchell *Personality Rights* (supra) at 388.

45 *Khumalo* (supra) at paras 18-19. See infra § 38.2(c)(i), for the other crystallized defences of truth and for the public benefit, fair comment and qualified privilege.

46 *Marais v Groenewald* 2001 (1) SA 634 (T), 646, [2001] 2 All SA 578 (T). Cf JR Midgley 'Intention Remains the Fault Criterion under the Actio Injuriarum' (2001) 118 *SALJ* 433, 440; JR Midgley 'Media Liability for Defamation' (supra) at 223.

47 See below § 38.2(c)(i).

48 Section 15 of the Interim Constitution.

49 *Khumalo* (supra) at para 25: 'In particular, the values of human dignity, freedom and equality'.



In South Africa, the courts have regarded invasion of privacy as an impairment of *dignitas*<sup>51</sup> under the *actio injuriarum*. Privacy thus includes 'those rights relating to . . . dignity'.<sup>52</sup> Although the Constitution mentions 'dignity' and 'privacy' separately,<sup>53</sup> the Constitutional Court has stated that they are linked.<sup>54</sup> Invasions of privacy may be broadly divided into intrusions or interferences with private life, and disclosures and acquisition of information.<sup>55</sup> The latter are sometimes called substantive and informational privacy rights.<sup>56</sup>

### (aa) Intrusions and interferences with private life

The courts have held the following intrusions into a person's private life or affairs or 'inner sanctum'<sup>57</sup> to be criminally or civilly actionable: illegally entering a private residence,<sup>58</sup> persistently shadowing a person,<sup>59</sup> secretly watching a person undress<sup>60</sup> or bath,<sup>61</sup> improperly interrogating a detainee,<sup>62</sup> electronically 'bugging' a person's home,<sup>63</sup> reading a person's private documents,<sup>64</sup> or correspondence,<sup>65</sup>

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50 *Khumalo* (supra) at para 43.

51 *O'Keefe* (supra); *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T), 383-4, *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A), 455; *Nell v Nell* 1990 (3) SA 889 (T), 896; *Sage Holdings & another v Financial Mail (Pty) Ltd & others* 1991 (2) SA 117 (W), 129-31, *Sage Holdings & another v Financial Mail (Pty) Ltd & others* 1993 (2) SA 451 (A), 462-3; *McQuoid-Mason Privacy* (supra) at 124. See, however, J Neethling *Persoonlikheidsreg* (3rd Edition 1991) 223-6, where he describes privacy as an independent right.

52 *O'Keefe* (supra) at 246. Cf *McQuoid-Mason 'Common Law v Constitutional Delict'* (supra) at 229.

53 Sections 10 and 14 respectively. Cf Neethling et al *Law of Personality* (supra) at 242 n 40: 'the express constitutional recognition of the right to privacy . . . independent of the right to dignity . . . finally lays to rest the possible equation of, and thus confusion between, these two personality rights'. See, however, O'Regan J's judgment in *Khumalo* (supra) at para 26: 'No sharp lines . . . can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution'.

54 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (6) BCLR 726 (CC) at para 30.

55 In the United States invasions of privacy tend to be divided into: (a) intrusions, (b) public disclosures of private facts, (c) placing a person in a false light, and (d) appropriation. See generally W Page Keeton, DB Dobbs, RE Keeton and DG Owen *Prosser and Keeton on The Law of Torts* (5<sup>th</sup> edition 1984) 851-66; *McQuoid-Mason Privacy* (supra) at 37-43.

56 Cf L du Plessis & J de Ville 'Personal Rights' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 242.

57 *Bernstein* (supra) at para 71.

58 *De Fourd v Council of Cape Town* (1898) 15 SC 399, 402, police entering a brothel without a warrant; *S v Boshoff & others* 1981 (1) SA 393 (T), 396. Cf *S v I & another* 1976 (1) SA 781 (RA).

59 *Epstein v Epstein* 1906 TH 87. Cf *McQuoid-Mason Privacy* (supra) at 154.

taking unauthorized blood tests<sup>66</sup> and illegal telephone tapping.<sup>67</sup> The Constitution makes all of these forms of intrusions unlawful.<sup>68</sup> Most of these intrusions involve individuals becoming acquainted with private information about others without their consent. If such information is communicated to third parties without lawful justification, it would give rise to an action for invasion of privacy based on wrongful disclosure of private facts.<sup>69</sup> The list of intrusions that fall under the general rubric of invasion of privacy is not closed.<sup>70</sup>

### **(bb) Publication of private facts**

Traditionally, publication of private facts may involve placing a person in a false light<sup>71</sup> and appropriating their image or likeness for monetary purposes.<sup>72</sup> These acts are dealt with as separate forms of invasion of privacy.<sup>73</sup> Some commentators have

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60 *R v Holliday* 1927 CPD 395,401; *R v Daniels* 1938 TPD 312, 313; *R v R* 1954 (2) SA 134 (N), 135.

61 *R v Schoonberg* 1926 OPD 247.

62 *Gosschalk v Rossouw* 1966 (2) SA 476 (C), 492; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).

63 *S v A* (supra); cf *McQuoid-Mason Privacy* (supra) at 148-9.

64 *Reid-Daly v Hickman & others* 1981 (2) SA 315 (ZA), 323.

65 *S v Hammer & others* 1994 (2) SACR 496, 498 (C).

66 *Seetal v Pravitha & another NO* 1983 (3) SA 827 (D), 861-862; *M v R* 1989 (1) SA 416 (O), 426-7; *Nell v Nell* 1990 (3) SA 889 (T), 895-896; *C v Minister of Correctional Services* 1996 (4) SA 292 (T), 300. See also *D v K* 1997 (2) BCLR 209 (N) (Natal Provincial Division held that the constitutional protection of privacy precluded it from invoking its inherent jurisdiction to order the respondent in a paternity dispute to undergo a blood test against his will. The court held that the presumptions contained in ss 1 and 2 of the Children's Status Act 82 of 1987 adequately protected the interests of the minor child in a paternity dispute without invading the constitutionally protected privacy of the respondent.)

67 *Financial Mail* (supra) at 463.

68 FC Section 14 recognizes a general right to privacy.

69 See below § 38.2(a)(iii)(bb).

70 See *McQuoid-Mason 'Common Law v Constitutional Delict'* (supra) at 230.

71 See below § 38.2(a)(iii)(cc).

72 See below § 38.2(a)(iii)(dd).

73 Cf Page Keeton et al *The Law of Torts* (supra) at 863. Cf *McQuoid-Mason Privacy* (supra) Chapters 5-8.

suggested that false light and appropriation cases should be treated as infringements of the right to identity rather than the right to privacy.<sup>74</sup>

A list of actionable disclosures involving publications of private facts would incorporate: disclosures concerning the contents of stolen documents,<sup>75</sup> unauthorized publication of a photograph of a retired schoolteacher portraying him as a young man in the company of a well-known singer,<sup>76</sup> publication of a story about young children abducted from the custody of their parents,<sup>77</sup> attempted photographing of security policemen mentioned by counsel at a trial as having been responsible for the death of a detainee,<sup>78</sup> the disclosure of private facts obtained by illegal telephone tapping,<sup>79</sup> the unauthorized publication of a photograph and story about an unmarried mother who conceived a child by a well-known rugby player,<sup>80</sup> unauthorised disclosure by a doctor to colleagues that his patient was suffering from AIDS,<sup>81</sup> and disclosing the identity of a police informer.<sup>82</sup> All such cases would be captured by the right to privacy in the Constitution.<sup>83</sup>

### (cc) False light

Publishing non-defamatory but false statements about a person — eg a false newspaper story that certain married and engaged nurses 'want boyfriends', will also constitute placing a person in false light.<sup>84</sup> This definition of false light is a variation of a definition of publication of private facts. In both actions the facts published are not true. Such statements are not actionable under the law of defamation because there is no lowering of the plaintiff's reputation. Should the publication be deemed to fall under the right to privacy, however, it ought to be protected by the Constitution. That said, if such false light publication is regarded as

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74 Neethling et al *Law of Delict* (supra) at 357.

75 *Goodman v Von Moltke* 1938 CPD 153. Cf Neethling *Die Reg op Privaatheid* (1976) 390.

76 *Mhlongo v Bailey & another* 1958 (1) SA 370 (W) ('Mhlongo').

77 *Rhodesian Printing and Publishing Co Ltd v Duggan* 1975 (1) SA 590 (RA).

78 *La Grange v Schoeman & others* 1980 (1) SA 885 (E).

79 *Financial Mail* (supra) at 463.

80 *National Media Ltd & another v Jooste* 1996 (3) SA 262 (A), 271.

81 *Jansen van Vuuren & another NNO v Kruger* 1993 (4) SA 842 (A).

82 *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549 (T), 553, [1999] 3 All SA 285 (T).

83 FC s 14.

84 *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W).

an infringement of identity<sup>85</sup> it may not be covered as a constitutional wrong unless it is further regarded as part of dignity.<sup>86</sup> The preferred view is that false light cases should be regarded as invasions of privacy because such publicity has unjustifiably exposed the plaintiff to unwanted publicity.<sup>87</sup>

### **(dd) Appropriation**

Appropriation means that a person's image or likeness is used without their consent: for example, the unauthorized use of a photograph for an advertisement.<sup>88</sup>

Appropriation is also a variation of publication of private facts. As such, it has been suggested that appropriation is better dealt with under the right to identity.<sup>89</sup>

Indeed, the Constitutional Court has pointed out that 'the scope of privacy has been closely related to the concept of identity'.<sup>90</sup> Appropriation is clearly a violation of a person's right to decide for herself who should have access to her image and likeness — something that goes to the root of individual autonomy or privacy.<sup>91</sup> The control of one's image should be protected under the right to privacy. However, if an appropriation is regarded as an infringement of the right to identity, then it should be protected under the right to dignity broadly construed.<sup>92</sup>

The Namibian High Court has held that an applicant's claim to adopt his wife's surname was not protected by the right to privacy.<sup>93</sup> An appropriation must be linked to a reasonable expectation of privacy.<sup>94</sup>

### **(b) Remedies**

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85 See Neethling et al *Law of Delict* (supra) at 356-357.

86 See FC s 10. It has been suggested that dignity should be given a broad definition to include privacy. See Burchell *Personality Rights* (supra) at 334. The Constitutional Court has acknowledged that dignity includes identity. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (6) BCLR 726 (CC) at para 120 (Sachs J): ('The violation of dignity under section 10 . . . offers protection to persons in their multiple identities and capacities'.)

87 McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 231.

88 *O'Keeffe* (supra).

89 Neethling et al *Law of Delict* (supra) at 357.

90 *Bernstein* (supra) at para 65.

91 But see Neethling et al *Law of Delict* (supra) at 357 n 282, who suggest that it is a right independent of privacy. See also Burchell *Personality Rights* (supra) at 334, who would prefer to see the exercise of individual autonomy under the rubric of dignity rather than privacy.

92 Cf Burchell *Personality Rights* (supra) at 334. See, generally, McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 231.

93 *Muller v President of the Republic of Namibia* 2000 (6) BCLR 655, 668 (NmS) (held that her name was also not protected by the right to protection of family life).

The main remedies for invasion of privacy at common law are: (i) damages and (ii) interdicts. The old common law remedy of the right to retraction, apology and reply appears to have been abrogated by disuse.<sup>95</sup> It could, however, be revived as 'appropriate relief' under the Constitution.<sup>96</sup>

### (i) Damages

A plaintiff wishing to recover sentimental damages for invasion of privacy under the *actio injuriarum* sues for a *solatium* or satisfaction. She does not sue for pecuniary loss that can be accurately calculated in monetary terms.<sup>97</sup> Where

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patrimonial loss can also be proved the plaintiff may bring a 'rolled up' action for both sentimental damages and actual pecuniary loss.<sup>98</sup>

When calculating damages for invasion of privacy the courts will take into account the contents, nature and extent of the publication,<sup>99</sup> the standing of the plaintiff,<sup>100</sup> and the conduct of the defendant.<sup>101</sup> The courts have regarded the fact that the defendant deliberately rode roughshod over the plaintiff's feelings as an aggravating factor<sup>102</sup> and the tendering of an apology as a mitigating factor.<sup>103</sup> The court may take into account further factors: the nature of the imputations, the probable consequences of the defendant's conduct, and comparable awards in other cases.<sup>104</sup>

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94 For instance, the High Court has held that the use of an accused person's photograph for a photographic identification parade without his consent is not a violation of his right to privacy. See *S v Zwayi* 1998 (2) BCLR 242 (CK), [1998] 1 All SA 569 (CK), 1997 (2) SACR 772 (CK). Cf Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights Handbook* (3<sup>rd</sup> edition 2000) 276.

95 See below § 38.3(a)(i).

96 FC s 38. See below § 38.3(b)(iv).

97 McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 231.

98 *Mathews v Young* 1922 AD 492, 505.

99 *O'Keeffe* (supra) at 248; cf *SAAN v Yutar* 1969 (2) SA 442 (A), 458.

100 *Mhlongo* (supra) at 372. Cf *Buthulezi v Poorter & others* 1975 (4) SA 608 (W), 613-614; *Smith v Die Republikein (Edms) Bpk en 'n ander* 1989 (3) SA 872 (SWA), 878; *Afrika v Metzler* 1997 (4) SA 531 (NmH), 535.

101 *Afrika v Metzler* (supra) at 535.

102 *Mhlongo* (supra) at 372.

103 *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W), 468.

104 Cf *Smith v Die Republikein (Edms) Bpk* (supra) at 877-8.

The Namibian court has regarded flagrant invasions of fundamental rights and freedoms in the Namibian Constitution as an aggravating factor and have suggested that 'a liberal approach to *quantum*' should be adopted in such cases.<sup>105</sup> The South African Constitutional Court has held that additional constitutional punitive damages should not be awarded for infringements of fundamental rights and freedoms.<sup>106</sup> One of the main reasons advanced for rejecting punitive damages was that they blur the distinction civil and criminal law.<sup>107</sup> However, as I have argued elsewhere, not all egregious impairments of personality rights could result in criminal prosecutions.<sup>108</sup> The problem can be overcome by treating such cases as justifying aggravating compensatory damages.<sup>109</sup>

## (ii) Interdicts

In the past, under the common law, a plaintiff has been able to obtain an interdict to restrain a proposed or continued invasion of privacy.<sup>110</sup> In order to obtain a *final interdict* the plaintiff must prove that he or she has: (i) a clear right, (ii) suffered actual injury or has a well-grounded apprehension of irreparable injury,

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and (iii) that no other satisfactory remedy is available.<sup>111</sup> For an *interim interdict* the applicant must show (i) a prima facie right;<sup>112</sup> (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted; (iii) the balance of convenience favours the granting of the interim interdict; and (iv) the applicant has no other

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105 *Afrika v Metzler* (supra) at 539; cf McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 235.

106 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at paras 69-73 (Ackermann J).

107 *Ibid* at para 70. See below § 38.3(b)(i).

108 McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 235: (the unauthorized publication of the photograph in *Mhlongo* (supra) and the defamation in *Afrika v Metzler* (supra) could not have given rise to criminal actions).

109 Burchell *Personality Rights* (supra) at 474; cf McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 235.

110 *Epstein v Epstein* 1906 TH 87, 88; *Rhodesian Printing and Publishing Co Ltd v Duggan* 1975 (1) SA 590 (RA), 595; *Financial Mail* (supra).

111 *Setlogelo v Setlogelo* 1914 AD 221, 227. See McQuoid-Mason *Privacy* (supra) at 132.

112 See *La Grange v Schoeman & others* 1980 (1) SA 885 (E)(an application for an interdict failed where a newspaper photographer unsuccessfully tried to establish that he had a prima facie right to take photographs of a policeman accused in a trial of having killed a political detainee).

satisfactory remedy.<sup>113</sup> When granting such interdicts, fault by the defendant is irrelevant.<sup>114</sup>

The Constitution has now made the courts more circumspect in granting interdicts that impose prior restraints on freedom of expression. These prior restraints are regarded as presumptively invalid.<sup>115</sup> Otherwise, the imposition of such interdicts do not require a different approach from the previous common law position. The infringement of the freedom of expression can be dealt with during the 'balance of convenience' stage of the enquiry.<sup>116</sup>

### (iii) Retraction and apology

The Roman-Dutch law remedy of *amende honorable* was thought to have fallen into disuse under South African common law.<sup>117</sup> It has recently been held that although the remedy may have fallen into disuse, it had not been abrogated.<sup>118</sup> In *Mineworkers Investment Co (Pty) Ltd v Modibane*, the court wrote that even if the *amende honorable* had never existed 'the imperatives of our times would have required its invention . . . [as] it is entirely consonant with the 'spirit, purports and objects' of the Bill of Rights in our Constitution'.<sup>119</sup> It can therefore be used in circumstances where it would provide 'appropriate relief'.<sup>120</sup>

The fact that a defendant has retracted the statement or apologized has been used as a mitigating factor when assessing damages.<sup>121</sup> However, courts have also noted that in defamation cases it is 'virtually impossible for one to restore another's good name and reputation to its former glory by a mere, at times

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113 *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A), 398, [1996] 4 All SA 675 (A).

114 *Setlogelo v Setlogelo* (supra) at 227; cf *McQuoid-Mason Privacy* (supra) 132; *Burchell Personality Rights* (supra) at 490-491.

115 *Mandela v Falati* 1995 (1) SA 251 (W), 259-260, 1994 (4) BCLR 1 (W).

116 *Hix Networking Technologies v System Publishers (Pty) Ltd* (supra) at 400.

117 *Ward-Jackson v Cape Times Ltd* 1910 WLD 257, 263; cf *Kritinger v Perskorporasie van Suid-Afrika (Edms)Bpk* 1981 (2) SA 373 (O), 389.

118 *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at para 24.

119 *Ibid* at para 28.

120 *McQuoid-Mason 'Common Law v Constitutional Delict'* (supra) at 236. See below § 38.3(b)(iv).

121 Cf *Norton v Ginsberg* 1953 (4) SA 537 (A), 540.

invariably predestinated, retraction and/or apology'.<sup>122</sup> That said, Jonathan Burchell has suggested that a prompt and unreserved apology may also be a factor affecting the reasonableness of a publication.<sup>123</sup>

### **(c) Defences**

Defences that rebut wrongfulness or *animus injuriandi* in the law of defamation generally also apply to invasions of privacy.<sup>124</sup> The same is likely true for the defences that rebut negligence in cases of defamation by mass media.

#### **(i) Defences excluding wrongfulness**

Defences rebutting unlawfulness that apply to defamation — and that might also apply to invasions of privacy — include: (a) truth for the public benefit, (b) fair comment and (c) qualified privilege.<sup>125</sup> This list is not closed. Because the traditional defences of truth for the public benefit, fair comment and qualified privilege do not necessarily provide adequate protection for the press,<sup>126</sup> the broad criterion of 'reasonable publication' by the defendant can also be used to negate unlawfulness.<sup>127</sup> This defence could be raised at either the policy-based initial inquiry into the lawfulness of the privacy infringement or subsequently as a special defence dealing with absence of negligence.<sup>128</sup> This broad policy-based approach has been adopted where a spouse invaded her adulterous husband's privacy in order to get evidence for a divorce.<sup>129</sup>

#### **(aa) Truth for the public benefit**

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122 *Afrika v Metzler* (supra) at 539.

123 Burchell *Personality Rights* (supra) at 496.

124 *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A), 849-50.

125 *Ibid* at 850.

126 *National Media Limited v Bogoshi* 1998 (4) SA 1196 (SCA), 1207, [1998] 4 All SA 347 (A), 1999 (1) BCLR 1 (SCA) ('*Bogoshi*').

127 *Ibid* at 1211.

128 See generally, McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 239.

129 *S v I* 1976 (1) SA 781 (RAD), 784, where Beadle CJ observed: 'The sole issue in this case . . . is whether, in the circumstances, the appellants were justified in peeping through the window. Again put another way, were they justified in invading the complainant's privacy in the manner they did? If they were so justified, the fact that as a necessary consequence of this invasion of privacy the complainant's *dignitas* was injured is an irrelevant consideration'.



A defendant may offer a defence that the defamatory statement in question was true and for the public benefit.<sup>130</sup> The onus of proving truth and public benefit rests on the defendant.<sup>131</sup> There is no onus on the plaintiff to prove the falsity of

the published statement.<sup>132</sup> Similar principles apply to invasions of privacy.<sup>133</sup> Some commentators have suggested that the defence does not apply to invasions of privacy because privacy can only be violated if the communication concerns true facts.<sup>134</sup> However, that assessment does not hold for false light invasions of privacy<sup>135</sup> where the true facts have been falsified in a non-defamatory manner. In cases involving invasions of privacy the fact that a person is a public figure or has been catapulted into the public eye<sup>136</sup> may be an important consideration in determining whether the publication is for the public benefit.<sup>137</sup> The Constitution provides that

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130 *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 23 ('Khumalo').

131 *Bogoshi* (supra) at 1215.

132 *Khumalo* (supra) at para 43; cf *Selemela and others v Independent Newspaper Group Ltd and others* 2002 (2) BCLR 197, 208 (NC). The court in *Khumalo's* case (supra) at para 43 explained the reason as follows: '[T]he defence of reasonableness developed in [*Bogoshi's*] case . . . strikes a balance between the constitutional interests of the plaintiffs and defendants. It permits a publisher who can establish truth and the public benefit to do so and avoid liability. But if a publisher cannot establish the truth or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable' (O'Regan J).

133 Cf McQuoid-Mason *Privacy* (supra) at 218-224. The statement need not be true in all respects, provided it is substantially true (ie the material allegations are true). See *Johnson v Rand Daily Mails* 1928 AD 190, 204. Truth alone is not a defence, but may be used in mitigation of damages. See *Geyser v Pont* 1968 (4) SA 67 (W), 68. It has been held that 'the publication of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way at the particular time'. See *Bogoshi* (supra) at 1211. The publication of the truth must be for the public benefit. 'Public benefit' means the same thing as 'public interest' and has been described as: 'Material in which the public has an interest' — not 'what the public finds interesting'. Ibid. Cf *Financial Mail* (supra) at 464 (Corbett CJ) ('In my view there is a public interest in preserving confidentially in regard to private affairs and in discouraging the leaking of private and confidential information, unlawfully obtained, to the media'). The court will look at the time manner and place of publication to determine if it is for the public benefit as people should be allowed to live down their past. See *Lyon v Steyn* 1931 TPD 247, 251. Traditionally if it is proved that the defendant was actuated by spite or malice the defence of truth for the public benefit will fail. See *Coetzee v Nel* 1972 (1) SA 353 (A), 374. Although this view has been doubted on the basis that the 'truth is the truth no matter what the motives of the publisher are and the publication of truth for the public benefit does not cease to be for the public benefit simply because the publisher is prompted by some improper or ulterior motive', Burchell *Personality Rights* (supra) at 276.

134 Neethling et al *Law of Personality* (supra) at 276.

135 Neethling et al *Law of Personality* (supra) at 285: (they regard such cases as falling under 'identity' not privacy. It is probably for this reason that they say that the defence of truth for the public benefit cannot apply to invasions of privacy.)

136 Cf *La Grange v Schoeman* 1980 (1) SA 885 (E), 892.

137 Cf McQuoid-Mason *Privacy* (supra) at 219-24; Neethling et al *Law of Personality* (supra) at 268.

freedom of expression includes the 'freedom to receive or impart information or ideas.'<sup>138</sup> This proviso will become an important factor in deciding whether the publication is for the public benefit.<sup>139</sup>

### **(bb) Fair comment**

The defamation defence of fair comment may be relevant as a defence in privacy cases where the plaintiff has been portrayed in a false light because of a

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non-defamatory comment by the defendant.<sup>140</sup> The constitutional imperative of freedom of expression<sup>141</sup> may result in the courts taking a more liberal approach concerning the interpretation of the 'fairness' requirement.

### **(cc) Qualified privilege**

A defendant will not be liable for a defamatory statement made: (i) on a privileged occasion, where the statement is made in discharge of a duty; (ii) the statement was published during judicial or quasi-judicial proceedings; (iii) or the statement was

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138 Section 16(1)(b).

139 Cf Burchell *Personality Rights* (supra) at 415.

140 Cf McQuoid-Mason *Privacy* (supra) at 230. For the defence of fair comment to succeed the defendant must prove (a) the statement must be a comment (opinion) not a statement of fact; (b) the comment must be 'fair' (relevant, honest and free from malice); (c) the facts commented on must be true; and (d) the comment must be on a matter of public interest. See *Crawford v Albu* 1917 AD 102, 113-114; *Marais v Richard* 1981 (1) SA 1157 (A). A comment is an opinion not a statement of fact and the test is whether a reasonable person would regard the statement as a comment or a statement of fact. See *Crawford v Albu* (supra) at 127. A comment is fair if it is relevant, honest and made free from malice. See *Crawford v Albu* (supra) at 115. The fact that a comment is extravagant, exaggerated or prejudiced does not make it 'unfair'. See *Johnson v Beckett* 1992 (1) SA 762 (A), 780-783. If malice is shown the comment will no longer be fair. See *Johnson v Beckett* (supra) at 780, 783. The facts commented upon must be true: As in the case of truth for public benefit the facts commented upon need not be true in every minute detail. See *Buthelezi v Poorter* 1974 (4) SA 831 (W), 833.

141 Section 16(1)(b).

published in a report of proceedings of courts, parliament or public bodies.<sup>142</sup> The same principles apply to invasions of privacy.<sup>143</sup>

The position of the mass media has been strengthened by the freedom of expression provisions in the Constitution.<sup>144</sup> It is likely that the press will be able to rely more frequently on the defence of qualified privilege than in the past. Burchell has suggested that the media have a duty to inform the public of newsworthy events, characters and conduct and that the public have a corresponding interest to be so informed.<sup>145</sup> However, the courts have been careful to point out that there is no special defence of qualified privilege for the media.<sup>146</sup>

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In order to succeed with the defences of truth for the public benefit, qualified privilege and fair comment, the defendant is required to show on a balance of probabilities that all elements of the defence have been proved.<sup>147</sup> However, this requirement may inhibit freedom of expression. As a result, some authors have argued that the defendant should merely carry an evidential burden as in the case of *animus injuriandi*.<sup>148</sup> In *Gardener v Whitaker*,<sup>149</sup> the High Court held that the Constitution had brought about a fundamental change and that the plaintiff 'now bears the onus of showing that the defendant's speech or statement is, for example, false; not in the public interest; not protected by privilege; unfair comment, and the

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142 Discharge of a duty: The occasion will give rise to a qualified privileged where the person making the statement is discharging a moral, social or legal duty by communicating it to a person with a legitimate interest or duty to receive it. See *de Waal v Ziervogel* 1938 AD 112; *O v O* 1995 (4) SA 482 (W), 492. For example where a doctor may be legally obliged to make certain disclosures. Cf *Jansen van Vuuren NO v Kruger* 1993 (4) SA 842 (A), 851. The test is whether an ordinary, reasonable person, having regard to the relationship of the parties and surrounding circumstances would have made the disclosure. See *Borgin v de Villiers* 1980 (3) SA 556 (A), 577. Judicial & quasi-judicial proceedings: Judges and magistrates are presumed to have acted lawfully within the limits of their authority. See *May v Udwin* 1981 (1) SA 1 (A), 19. Witnesses, litigants, advocates and attorneys are accorded a qualified privilege as long as the statement is relevant to the case and is founded on some reasonable cause. See *Pogrand v Yutar* 1967 (2) SA 564 (A), 570; *Joubert v Venter* 1985 (1) SA 654 (A), 697. Reports of court proceedings, parliament and public bodies: The defence of qualified privilege applies to fair and substantially accurate reports of judicial or parliamentary proceedings. See *Benson v Robinson & Co* 1967 (1) SA 420 (A), 428. The defence of qualified privilege can be defeated by proof of malice. See *Benson v Robinson and Co* (supra) at 432.

143 *Jansen van Vuuren NO v Kruger* (supra) at 849.

144 Section 16(1)(b).

145 Burchell *Personality Rights* (supra) at 295. Cf *Bogoshi* (supra) at 1200.

146 *Neethling v du Preez, Neethling v The Weekly Mail* 1994 (1) SA 708 (A), 777; *Holomisa v Post Newspapers Ltd* 1996 (2) SA 588 (W), 610.

147 *Neethling v du Preez, Neethling v The Weekly Mail* (supra) at 770, 777; *Bogoshi* (supra) at 1216.

148 Burchell *Personality Rights* (supra) at 227.

149 *Bogoshi* (supra).

like'.<sup>150</sup> Such an approach was rejected in *Buthelezi v SABC*.<sup>151</sup> In *Buthelezi*, the court observed that there is no evidence 'that the Constitution sets greater store by freedom of speech than the essential worth of the character of the individual.' The court held that the onus should shift to the defendant to prove the defence because the latter has knowledge of the information necessary to establish the defence.<sup>152</sup> This latter view was supported by the Supreme Court of Appeal in *National Media Ltd v Bogoshi*.<sup>153</sup> As the law currently stands, the abolition of strict liability on the press has created a predisposition in favour of freedom of expression. The law now allows the press to escape liability by showing reasonableness or absence of negligence.

### **(dd) No closed list of defences**

The list of defences is not closed. Other defences which rebut unlawfulness that could apply to privacy are: consent, absolute privilege, statutory authority, necessity and private defence. Consent will be a good defence provided that the invasion of privacy takes the form to which the plaintiff consented.<sup>154</sup> Absolute privilege will be a good defence in situations of parliamentary privilege provided for by the Constitution.<sup>155</sup> Statutory authority may justify certain invasions of

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150 *Gardener v Whittaker* 1995 (2) SA 672 (E), 691, 1994 (5) BCLR 19 (E).

151 *Buthelezi v SABC* 1997 (12) BCLR 1733 (D).

152 *Ibid* at 1744.

153 *Bogoshi* (supra) at 1216. See *infra* § 38.2 (c)(i)(ee).

154 *National Media Ltd v Jooste* 1996 (3) SA 262 (A), 272. The defence failed, for instance, where the consent was given to use a photograph in a news story and it was used in an advertisement. See *O'Keeffe v Argus Printing and Publishing Co Ltd & Another* 1954 (3) SA 244 (C), 257. It also failed where a person consented to a photograph being used in a nursing journal article, but not for an appeal in a Sunday newspaper. See *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 416 (W), 464.

155 In respect of parliamentary proceedings, see FC s 58(1), provincial parliamentary proceedings, see FC s 117(1), and municipal councils with delegated powers from the province, see FC s 161. The privilege is absolute because it cannot be defeated by malice.

privacy<sup>156</sup> that would otherwise be unlawful, (such as the duty to report child abuse,<sup>157</sup> mentally ill persons who are dangerous,<sup>158</sup> or notifiable diseases<sup>159</sup>), provided the statutes concerned satisfy the limitation requirements of the Constitution.<sup>160</sup> Necessity could be raised as defence where the defendant has acted reasonably to prevent a threat of greater harm to another person arising from force of nature or conduct unconnected with the plaintiff.<sup>161</sup> Private defence applies where the defendant invades the plaintiff's privacy to prevent his or her interests being harmed by the plaintiff.<sup>162</sup>

### (ee) 'Reasonable publication' as a defence

'Reasonableness' is the criterion used for determining the lawfulness of publications by the mass media in defamation cases.<sup>163</sup> It could also be used to rebut unlawfulness in similar cases of invasion of privacy. In one sense, reasonableness can be used during the policy-based *ex post facto* enquiry into wrongfulness.<sup>164</sup> In another, it can also be used as a defence to rebut fault in the form of lack of

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156 In the past it was used to justify excessive intrusions by the apartheid authorities such as state interferences with a person's choice as to: marriage, see Prohibition of Mixed Marriages Act 55 of 1949 s 1; sexual partners, see Immorality Act 23 of 1957 s 16; education for whites, was controlled by the provinces, see Republic of South Africa Constitution Act 32 of 1961 s 84(1)(c); education for blacks, see the Bantu Education Act 47 of 1953; coloureds, see the Coloured Persons Education Act 47 of 1963; education for Indians, see the Indian Education Act of 1965; university, see Extension of University Education Act 45 of 1959 ss 17 and 31; residence, see Group Areas Act 36 of 1966 s 13; Bantu Land Act 27 of 1913; Bantu Trust and Land Act 18 of 1936; Coloured Persons Settlement Act 7 of 1946; Rural Coloured Areas Act 24 of 1963; entertainment, see Publications Act 42 of 1974 s 8(1)(d); political party, see Prohibition of Political Interference Act 51 of 1968 s 2. The police were also given wide powers of search, see Criminal Procedure Act 51 of 1977 s 22, detention without trial, see Criminal Procedure Act 51 of 1977 s 185; Internal Security Act 74 of 1982 s 50(1); and the right to intercept postal communications, see Post Office Act 44 of 1958 s 118A, and telephone conversations, see Post Office Act 44 of 1958 s 118A(2)(b). See generally *McQuoid-Mason Privacy* (supra) at 235. See also *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 100.

157 See, eg Child Care Act 74 of 1983 s 42.

158 See, eg Mental Health Act 18 of 1973 s 13.

159 See, eg Health Act 63 of 1977 s 45.

160 Section 36(1); *Burchell Personality Rights* (supra) 425-7. See below § 38.5.

161 Neethling et al *Law of Personality* (supra) at 263; *McQuoid-Mason Privacy* (supra) at 233. For instance, a shopkeeper with a closed circuit television camera to monitor shoppers. See *Burchell Personality Rights* (supra) at 424-5.

162 *McQuoid-Mason Privacy* (supra) at 234; cf *Rhodes University College v Field* 1947 (3) SA 437 (A), 463: '[A] man whose character, reputation or conduct has been assailed can say what is reasonably necessary to defend it.'. Cf *S v I* 1976 (1) SA 781 (RA); Neethling et al *Law of Personality* (supra) at 264-6.

163 See *Bogoshi* (supra) at 1211. Cf *Khumalo* (supra) at 424.

164 *Burchell Personality Rights* (supra) at 227.

negligence.<sup>165</sup> This dual application of the reasonableness criterion leads to an overlap between the unlawfulness enquiry and the fault criterion of negligence.<sup>166</sup>

## (ii) Defences excluding intention

Once the other elements of an action for invasion of privacy have been proved *animus injuriandi* will be presumed.<sup>167</sup> The evidential burden then shifts to the defendant to show absence of *animus injuriandi*.<sup>168</sup> Presumably this is because the defendant has unique if not incorrigible knowledge of his or her mental state at the time. The question remains, however, why only an evidential burden rests on defendants to rebut *animus injuriandi* while a full onus rests on the defendant to rebut unlawfulness.<sup>169</sup> Burchell has been pointed out that the requirement of 'subjectively assessed, intention-based liability' for individuals under the *actio injuriarum* 'furthers freedom of speech'.<sup>170</sup> Defences that rebut *animus injuriandi* include (a) mistake, (b) jest, (c) rixa, and any other defence that can rebut intention or consciousness of wrongfulness (eg intoxication,<sup>171</sup> insanity,<sup>172</sup> no intention to injure etc).

### (aa) Mistake

If the defendant did not intend to invade the plaintiff's privacy or was *bona fide* unaware of the wrongfulness of his or her act, then the presumption of *animus injuriandi* would be rebutted.<sup>173</sup> However, if the constitutional right to privacy is regarded as so fundamental that defendants may not argue that they were ignorant

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165 Ibid at 226.

166 Ibid.

167 *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 416 (W), 468.

168 *SAUK v O'Malley* 1977 (3) SA 394 (A), 403; *Neethling v du Preez*, *Neethling v The Weekly Mail* 1994 (1) SA 708 (A), 768.

169 Burchell *Personality Rights* (supra) at 305: 'The courts will have to explain why a defence excluding unlawfulness must be proved on a preponderance of probabilities but, in regard to a defence excluding *animus injuriandi*, only an evidential burden rests on the defendant'.

170 Burchell *Personality Rights* (supra) at 305.

171 Cf *Geyser en 'n ander v Pont* 1968 (4) SA 67 (W), 72-3; *Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589 (C), 592.

172 Cf *Wilhelm v Beamish* (1894) 11 SC 13, 15; *Muller v SA Associated Newspapers Ltd & others* (supra) at 592. But if the defendants' mental afflictions are such that they appreciate the nature and effect of their acts they will still be liable. See *Vaughan & another v Ford* 1953 (4) SA 486 (R), 488-9.

173 *Maisel v van Naeren* 1960 (4) SA 836 (C), 840, 850. It has been suggested that for a bona fide mistake the defendant must show subjectively both a mistake of fact and a mistake of law. See Neethling et al *Law of Personality* (supra) at 179.

of the unlawfulness of their acts, it will no longer be open to them to simply show that they made a *bona fide* mistake of law. They be obliged to show that the mistake was reasonable.<sup>174</sup>

### **(bb) Jest**

Neethling, Potgieter and Visser have argued that when a person publishes such

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defamatory words as a joke, his or her will is not directed to injuring the plaintiff's reputation.<sup>175</sup> A similar stance could well be taken with respect to invasions of privacy.<sup>176</sup> However, I believe that certain fundamental constitutional rights to privacy are so important that the defence of *bona fide* unconsciousness of wrongfulness should not be available to the defendant unless it is also reasonable.<sup>177</sup>

### **(cc) Rixa**

A defendant is not liable for defamation if he or she spoke the words without premeditation, in sudden anger on provocation by the plaintiff, and did not persist in uttering them.<sup>178</sup> Technically, if the defendant was 'unconscious of any intention to defame' at the time of the utterance, he or she would not possess *animus injuriandi*.<sup>179</sup> A similar approach could be adopted in respect of invasions of privacy.<sup>180</sup> However, in cases of egregious invasions of certain constitutional rights to privacy, it could again be argued that *bona fide* unconsciousness of the wrongfulness of the act should not be available as a defence unless it is reasonable.<sup>181</sup>

### **(dd) No closed list of defences**

174 On the possibility of strict liability being imposed, see *infra* § 38.3(a)(iii).

175 Neethling et al *Law of Personality* (*supra*) at 180. The courts have, however, introduced an objective element by holding that the defence applies if the words could not reasonably be understood in a defamatory sense. See *Peck v Katz* 1957 (2) SA 567 (T), 572-3. Cf J Burchell *The Law of Defamation in South Africa* (1985) 285-6. This could be explained on the basis that if the joke is misunderstood by reasonable bystanders an inference of *dolus eventualis* could be drawn. See NJ van der Merwe and PJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (4th edition 1980) 444. The better view seems to be that jest is a defence that rests upon the subjective absence of *animus injuriandi*. cf *Geyser v Pont* 1968 (4) SA 67 (W), 72 et seq.

176 Cf *McQuoid-Mason Privacy* (*supra*) at 241.

177 See below § 38.3(a)(iii).

178 *Kirkpatrick v Bezuidenhout* 1934 TPD 155, 158. Cf *Peck v Katz* 1957 (2) SA 567 (T), 573; *Jeftha v Williams* 1981 (3) SA 678 (C); *Bester v Calitz* 1982 (3) SA 864 (O).

179 Cf *McQuoid-Mason Privacy* (*supra*) at 240 n53.

180 Cf *McQuoid-Mason Privacy* (*supra*) at 240-1: For example, 'where after provocation during a quarrel somebody bursts into another's room or makes embarrassing disclosures concerning his argumentative opponent's private life'.

181 See below § 38.3(a)(iii).

The list of defences rebutting intention or *animus injuriandi* is not closed.<sup>182</sup>

### (ee) Rebuttal of negligence by mass media

As has been pointed out,<sup>183</sup> the court in *National Media Ltd v Bogoshi* blurred the distinction between wrongfulness and fault. At the same time, the SCA stated that the onus was on the defendant to prove that the publication was reasonable and not negligent and that 'proof of reasonableness would probably be proof of lack of negligence'.<sup>184</sup> The court rejected the principles underlying strict liability and

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*dolus eventualis* and accepted that the media could escape liability by proving that they were not negligent.<sup>185</sup> Although it has been suggested that the SCA did not go so far as to recognize that negligence was a specified ground of defence for the mass media,<sup>186</sup> the High Court seems to have placed such a gloss on *Bogoshi*.<sup>187</sup> Midgley has opined that *animus injuriandi* still remains a criterion for liability by the press, but that 'if the media were not negligent in publishing the material they may raise a lack of knowledge of unlawfulness as a defence'.<sup>188</sup> I can see no reason in principle why a reasonable lack of such knowledge by the media does not constitute a defence to an allegation of negligence.<sup>189</sup> After all, negligence is measured objectively and deals with conduct. Intention is measured subjectively. Therefore, a requirement of reasonable conduct by the defendant does not mean that media defendants have to rebut *animus injuriandi*. It merely means that they have to show that they were not negligent.<sup>190</sup>

## 38.3 The constitutional right to privacy

Section 14 of the Final Constitution refers to a general right to privacy as well as the right of individuals not to have their persons or their homes or property searched or their communications infringed. The right to privacy is recognized in a number of

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182 *Muller v SAAN* 1972 (2) SA 589 (C); Burchell *The Law of Defamation in South Africa* (supra) at 284-6.

183 See above § 38.2(a)(i).

184 *Ibid* at 1215.

185 *Ibid* at 1214-1215.

186 Midgley 'Intention Remains the Fault Criterion under the Actio Injuriarum' (2001) 118 *SALJ* 433.

187 *Marais v Groenewald en ander* 2001 (1) SA 634 (T), 645, [2002] 2 All SA 578.

188 Midgley 'Intention' (supra) at 433.

189 Cf Burchell *Personality Rights* (supra) at 227.

190 Cf *Bogoshi* (supra) at 1215.



international human rights instruments.<sup>191</sup> The right is also recognized in the constitutions of many foreign jurisdictions.<sup>192</sup>

Section 14 will not only have an impact on the development of the common law action for invasion of privacy.<sup>193</sup> It may also give rise to new actions for invasion of privacy which reflect not only the interests protected by the common law but also a number of important personal interests as against the state. In countries such as the United States the result of constitutionalizing these interests is that 'what once were victimless crimes are now lawful pursuits, the invasion of

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which creates a constitutional tort'.<sup>194</sup> Section 14 may well yield a similar transformation in South Africa. However, it would seem that at present the Constitutional Court is more inclined to develop the common law than to create a separate constitutional delict. Of course, this predisposition does not mean that such a delict may not be developed in the future.<sup>195</sup>

### **(a) Elements for a constitutional invasion of privacy**

A breach of s 14 of the Constitution will prima facie be regarded as an unlawful invasion of privacy. The onus will then be on the person or body breaching the right to establish that such breach was justified in terms of s 36. Fault is not a requirement<sup>196</sup> and any defences must be consistent with s 36.<sup>197</sup> The courts have a discretion to award a wide variety of remedies.<sup>198</sup>

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191 For example, the Universal Declaration of Human Rights (art12); the International Covenant on Civil and Political Rights (art 17); the European Convention of Human Rights and Fundamental Freedoms (art 8); the American Convention on Human Rights (art 11); the Convention on the Rights of the Child (art 16); and the American Declaration on the Rights and Duties of Man (arts 5, 9 and 10). Cf *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 104.

192 For example, in the Constitutions of Angola (art 24), Argentina (art 29), Mauritius (art 3(c)), Mexico (art 16), Mocambique (art 64), and Namibia (art 13). The right is also recognized in the French Civil Code (art 9) and Penal Code (arts 368-72). The German Basic Law does not mention a general right to privacy, but protects individual aspects of privacy such as protection of postal articles (art10) and inviolability of the home (art13). Likewise the right to privacy is not enshrined in the Constitution of the United States but has been held to be implicit in the First, Third, Fourth, Ninth and Fourteenth amendments which create 'zones of privacy'. See *Grisworld v Connecticut* 381 US 479 (1965); *Roe v Wade* 410 US 113 (1973). See, generally, *Bernstein* (supra) at paras 72-4, 77.

193 See supra § 38.2(a)(i).

194 Dooley *Modern Tort Law* (1997) Vol 3 § 35.05.

195 See, generally, McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 243-246.

196 See infra § 38.3(a)(iii).

197 See infra § 38.3(a)(ii).

198 See infra § 38.3(b).

The Constitutional Court has pointed out that whereas at common law the test for whether there has been an unlawful infringement of privacy is a single inquiry, under the Constitution a two-fold inquiry is required.<sup>199</sup> In the case of a constitutional invasion of privacy the following questions need to be answered: (a) has the invasive law or conduct infringed the right to privacy in the Constitution? (b) if so, is such an infringement justifiable in terms of the requirements of the limitation clause<sup>200</sup> of the Constitution?<sup>201</sup> For this reason the Constitutional Court has cautioned against simply using common law principles to interpret fundamental rights and their limitations.<sup>202</sup>

As has been previously mentioned, the first constitutional enquiry is analogous to the policy-based enquiry into the unlawfulness stage of the common law — in both instances the subjective expectation of privacy must be reasonable.<sup>203</sup> The second enquiry deals with the justification of the infringement of the right to privacy in terms of s 36 of the Constitution and must be discharged on a balance of probabilities.<sup>204</sup> One must consider each of these stages of the enquiry before considering whether in a constitutional action for invasion of privacy it is necessary to prove fault.

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### **(i) Was there an infringement of the constitutional right to privacy?**

The concept of privacy applies to both common law and constitutional infringements of the right.<sup>205</sup> In order to establish an infringement of the constitutional right to privacy the plaintiff will have to show that he or she had a subjective expectation of privacy which was objectively reasonable.<sup>206</sup> Except in the case of privacy rights going to the 'inner sanctum' of a person, an individual's expectation of privacy must

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199 *Bernstein* (supra) at para 71.

200 Section 36(1).

201 *Bernstein* (supra) at para 71.

202 *Ibid.*

203 See supra § 38.3.(a)(i).

204 It has been pointed out that once an infringement of the constitutional right has been established the question of whether the right may be limited 'involves a far more factual enquiry than the question of interpretation'. See J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* (supra) at 134. This inquiry may involve sociological or statistical evidence on the impact that the restriction of the right has on society. *Ibid* at 134-5.

205 See supra § 38.1.

206 *Bernstein* (supra) at para 75; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 16. The Constitutional Court has suggested that, like the American courts, the Canadian courts require a subjective expectation of privacy by the injured person and that the expectation is recognized as reasonable by society, and that the German courts use an approach similar to that of a 'reasonable expectation of privacy.' *Bernstein* (supra) at paras 76, 78.

be weighed against 'the conflicting rights of the community'.<sup>207</sup> Such expectations may also be tempered by countervailing fundamental rights such as freedom of expression<sup>208</sup> or the right of access to information.<sup>209</sup> However, freedom of expression — unlike the rights to life and dignity<sup>210</sup> — has been afforded no higher status than any other right in the Constitution,<sup>211</sup> including the right to privacy. Accordingly, the courts have to strike a balance between the individual's right to privacy and the public's right to information within the norms of the Constitution.<sup>212</sup>

The Constitution provides a right of access to any information held by the State or by any other person that is required for the exercise or protection of any rights.<sup>213</sup> These provisions have now been given effect by the Promotion of Access to Information Act.<sup>214</sup> The Act contains detailed provisions concerning the manner in which access to information held by public and private bodies should be made available.<sup>215</sup> It also provides special safeguards to protect the privacy of third parties, who are natural persons,<sup>216</sup> from publishing information which if released

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207 *Bernstein* (supra) at para 69: a person's 'inner sanctum' was described by Ackermann J as their 'family life, sexual preference and home environment'.

208 Section 16. However, it has been pointed out that in the case of the mass media it does not follow that 'journalists enjoy special constitutional immunity beyond that accorded to ordinary citizens'. See *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W), 610, [1996] 1 All SA 478 (W), 1996 (6) BCLR 836 (Cameron J).

209 Section 32, now given effect to by the Promotion of Access to Information Act 2 of 2000.

210 The Constitutional Court has said that the 'rights to life and dignity are the most important of all human rights, and the source of all other rights.' See *S v Makwanyane* 1995 (3) SA 391 (CC), 451, 1995 (6) BCLR 65 (CC).

211 *Buthulezi v SABC* 1997 (12) BCLR 1733, 1739 (D), [1998] 1 All SA 147 (D).

212 Cf *Holomisa v Argus Newspapers Ltd* (supra) at 606, where the court sought to balance freedom of speech against reputation. Section 16(1)(b) of the Constitution provides that freedom of expression includes 'freedom to receive or impart information or ideas'.

213 Section 32(1).

214 Act 2 of 2000. See J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62. See also I Currie and J Klaaren, *The Promotion of Access to Information Act* (2001).

215 Sections 17-32 (public bodies) and 53-61 (private bodies).

216 Sections 34 and 63.

would constitute an action for breach of confidence,<sup>217</sup> and, a variety of other forms of information held by public<sup>218</sup> and private bodies.<sup>219</sup> A public or private body that is sued for releasing information in terms of the Act will have to show that such disclosures were made in terms of the Act and were reasonable and justifiable in terms of FC s 36.

The constitutional right to privacy in s 14 can be broadly divided into (i) personal autonomy cases and (ii) informational privacy cases. Variations of these categories have been recognized in the common law for many years.<sup>220</sup> The common law can therefore provide some useful guidelines when giving the right content.

### **(aa) Privacy rights protecting personal autonomy**

Personal autonomy privacy rights protect individuals against intrusions in and interference with their private lives. They are sometimes called substantive privacy rights.<sup>221</sup> Many personal autonomy rights were flagrantly invaded under the apartheid state in South Africa.<sup>222</sup> Under the new constitutional dispensation these rights may be infringed only if the state or party seeking to uphold an infringement can satisfy the test set out in the limitation clause.<sup>223</sup> The recognition of a constitutional right to privacy may also give rise to new actions for invasions of privacy by the state.

Personal autonomy privacy rights permit individuals to make important decisions about their lives without interference by the state.<sup>224</sup> These rights are generally

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217 Sections 37 and 65.

218 Such as certain records of the South African Revenue Services (s 35); commercial information belonging a third party (s 36); information which might jeopardise the safety of individuals or property (s 38); information in certain police dockets in bail proceedings or used in law enforcement and legal proceedings (s 39); privileged records in legal proceedings (s 40); and research information belonging to third parties and public bodies (s 41).

219 Such as certain commercial information belonging to a third party (s 64); information which might jeopardise the safety of individuals or property (s 66); privileged records in legal proceedings (s 67); commercial information belonging to a private body (s 68); and research information belonging to third parties and private bodies (s 69).

220 Cf *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451 (A), 462. See above § 38.2(a)(iii).

221 L Du Plessis and J De Ville 'Personal Rights' in D Van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 242.

222 See above § 38.2(c)(iii)(dd).

223 S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

224 Page Keeton et al *The Law of Torts* (supra) at 866. However, it has been suggested that 'the mere compulsion to be physically present at a particular place at a particular time in response to a subpoena cannot in itself be regarded as an intrusion on a person's privacy'. *Bernstein* (supra) at para 58. Ackermann J went on to say: 'A distinction must be drawn between the compulsion to respond to a subpoena and the compulsion to answer particular questions . . . in consequence of responding to the subpoena.' Ibid.

understood to give the individual — or a small intimate group — control over such matters as marriage, procreation, contraception, family relationships, child-rearing, and education.<sup>225</sup> This set of privacy rights cover personal decisions about one's home life, (possession of pornography<sup>226</sup>) and one's sexual life (the practice of sodomy<sup>227</sup>). Personal autonomy privacy enables individuals to decide who should enter their home and protects individuals from unauthorized intrusions into their homes by officers of the state<sup>228</sup> and other uninvited persons. However, these rights are not unlimited. Certain pornographic material may not be protected by the right to privacy.<sup>229</sup> Nor may certain sexual behaviour.<sup>230</sup> This lack of protection is particularly apt particularly where harm is caused to others — even if it takes place in the privacy of the home.

## (1) Pornography

Section 2(1) of the repealed<sup>231</sup> Indecent or Obscene Photographic Matter Act,<sup>232</sup> subject to certain exceptions,<sup>233</sup> prohibited the possession of any 'indecent or obscene photographic matter'.<sup>234</sup> The latter was defined as including 'photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or

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225 Page Keeton et al *The Law of Torts* (supra) at 866-7.

226 *Case v Minister of Safety & Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 91.

227 Cf *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (C), 30, 1998 (12) BCLR 1517 (CC) at 30 ('*NCGLE*').

228 Cf *State v Madiba* 1998 (1) BCLR 38, 43 (D); *State v Gumede* 1998 (5) BCLR 530, 538 (D).

229 *Case v Minister of Safety and Security* (supra) at para 99 (Langa J) (for example, pornography involving children or animals).

230 *NCGLE* (supra) at para 118 (Sachs J): 'There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private . . . The privacy interest is overcome because of the perceived harm'. For a critique of Sach J's argument, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.1(6).

231 Repealed by the Films and Publications Act 65 of 1996 s 33.

232 Act 37 of 1967.

233 These were set out in s 2(2), which relates to situations where special permission has been granted, or the photographic matter has not been declared undesirable.

234 'Photographic matter' is defined in s 1 to include 'any photograph, photogravure and cinematograph film, and any pictorial representation intended for exhibition through the medium of a mechanical device'.

anything of a like nature'.<sup>235</sup> In *Case & another v Minister of Safety and Security & others*<sup>236</sup> the Constitutional Court struck down s 2(1) as an unconstitutional violation of the right to privacy. Didcott J wrote:

What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the Interim Constitution (Act 200 of 1993) guarantees that I shall enjoy.<sup>237</sup>

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However, the right to personal autonomy privacy is not absolute. Didcott J's statement was qualified by some of the other judges<sup>238</sup> who expressed concern about issues such as child pornography.<sup>239</sup>

## (2) Sexual relationships

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>240</sup> the Constitutional Court considered the constitutionality of the common law crime of sodomy and s 20A of the Sexual Offences Act.<sup>241</sup> Although the court found that the crime of sodomy violated the right of homosexuals not to be discriminated against on the basis of sexual orientation, it also made the following observations concerning privacy:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.<sup>242</sup>

The court went on to say that 'the law may continue to proscribe what is acceptable and what is unacceptable even in relation to sexual expression and even in the sanctum of the home, and may, within justifiable limits, penalize what is harmful and

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235 Section 1.

236 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC).

237 Ibid at para 91.

238 See *Case* (supra) at para 99. Langa J observes that the right to personal privacy even in this context is not necessarily exempt from limitation. Didcott J accepts this qualification. Ibid at para 95.

239 Ibid at para 107 (Madala J). Cf *Osborne v Ohio* 495 US 103, 110 S Ct 1691 (1990).

240 *NCGLE* (supra).

241 Sexual Offences Act 23 of 1957 s 20A

242 *NCGLE* (supra) at para 23.

regulate what is offensive'.<sup>243</sup> The court rejected the notion that 'the privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper'.<sup>244</sup> The court observed that 'privacy protects persons not places' and is 'not simply a negative right to occupy a private space free from government intrusion, but a right to get on with your life and to express your personality'.<sup>245</sup>

### (3) Prostitution

In *S v Jordan and others*<sup>246</sup> the Constitutional Court had to decide whether ss 2, 3(b) and (c) and s 20(1) (aA) of the Sexual Offences Act<sup>247</sup>— that made it an offence to keep a brothel and to have unlawful carnal intercourse or commit an act of indecency for reward — were unconstitutional in terms of the interim Constitution. Although most of the judgment dealt with whether the provisions were

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discriminatory, violated the rights to freedom and security and economic activity, and whether the state was entitled to outlaw commercial sex, the court also briefly dealt with the question of privacy.<sup>248</sup> The court held that none of the considerations regarding the establishment and nurturing of 'human relationships without interference from the outside community' mentioned in *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>249</sup> were present in the case of prostitution.<sup>250</sup> The court went on to say that by 'making her sexual services available for hire to strangers in the market place, the sex worker empties the sex act of much of its private and intimate character . . . [and] places her far away from the inner sanctum of protected privacy rights'.<sup>251</sup> The court, however, concluded that 's 20(1)(aA) does amount to an infringement of privacy and we cannot agree with the proposition that

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243 Ibid at para 118.

244 E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450, 464.

245 *NCGLE* (supra) at para 116 (Sachs J).

246 2002 (6) SA 642 (CC) ('*Jordan*').

247 Act 23 of 1957.

248 *Jordan* (supra) at para 82 (Ngcobo J) (that privacy 'lies at the periphery [of the case] and not at its inner core').

249 *NCGLE* (supra) at para 23.

250 *Jordan* (supra) at paras 29 (Ngcobo J) and 82 (Sachs and O'Regan JJ). Interestingly enough, more than a hundred years ago, De Villiers CJ, in a case involving a raid on a brothel by the police without a proper warrant observed as follows: 'Even these abandoned women have their rights, and without their permission or a legal warrant no policeman is justified in interfering with their privacy.' *De Fourd v Cape Town Council* (1898) 15 SC 399, 402.

251 *Jordan* (supra) at para 82. The court subsequently observed: 'although s 20(1)(aA) breaches the right to privacy, it does not reach into the core of privacy, but only touches its penumbra'. Ibid at para 86.

prostitutes surrender all their rights to privacy in relation to the use of their bodies simply because they receive money for their sexual services'.<sup>252</sup> The question, then, was whether the invasion of privacy occasioned by s 20(1)(aA) was justified in terms of s 33, the limitation clause, of the Interim Constitution. The court found that it was.<sup>253</sup>

The American experience regarding privacy rights which protect personal autonomy is instructive. The US Supreme Court has declared unconstitutional state laws which prohibited abortion except in order to save the mother's life;<sup>254</sup> city by-laws that have attempted to restrict the number of related individuals living in one house,<sup>255</sup> and by-laws that defined a 'family' narrowly as including only a few categories of related individuals.<sup>256</sup>

### **(bb) Privacy rights protecting information**

Privacy rights limit the ability of people to gain, publish, disclose or use information about others without their consent. Some of these privacy rights have been

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mentioned earlier in the discussion of common-law actions.<sup>257</sup> During the apartheid era in South Africa, the state engaged in widespread abuse of rights protecting information. Most of the offensive legislation upon which the abuse was predicated has been repealed.<sup>258</sup> Examples of invasions of informational privacy rights that are protected under the Final Constitution include: taking a prisoner's blood with consent, but not for HIV testing without consent;<sup>259</sup> taking a person's blood for testing with consent, but not for DNA testing;<sup>260</sup> and restoring erased computer information.<sup>261</sup>

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252 *Jordan* (supra) at para 83: (Sachs and O'Regan JJ) 'However, we conclude that the invasion of privacy thus caused is not extensive'.

253 *Jordan* (supra) at para 94. See infra, § 38.5.

254 *Roe v Wade* 410 US 113, 93 SCt 705 (1973). For a discussion of privacy issues in the context of abortion, see M O'Sullivan & C Bailey 'Reproductive Rights' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1st edition R55 1999) § 16.3.

255 *Belle Terre v Boraas* 416 US 1, 94 SCt 1536 (1974).

256 *Moore v City of East Cleveland* 431 US 494, 97 SCt 1932 (1977). See also L du Plessis & J de Ville 'Personal Rights' in Van Wyk et al *Rights and Constitutionalism* (supra) at 248; S Woolman and J De Waal 'Freedom of Association' in Van Wyk et al *Rights and Constitutionalism* (supra) at 338 and S Woolman 'Freedom of Association' § 44.3(c)(ii).

257 See supra § 38.2(a)(iii).

258 See supra § 38.2(c)(iii)(dd).

259 Cf *C v Minister of Correctional Services* 1996 (4) SA 292 (T).

260 *S v R* 2000 (1) SACR 33, 39 (W).



Attempts by examinees to prevent the extraction of information at meetings of creditors in company liquidation and insolvency hearings by relying on the constitutional right to privacy have also been considered by the courts. In *Bernstein v Bester NO*<sup>262</sup> the Constitutional Court held that ss 417 and 418 of the Companies Act<sup>263</sup> were not inconsistent with the privacy and search and seizure provisions of s 13 of the interim Constitution. However, the Court held that if the answer to any question would infringe or threaten the examinee's interim Constitution rights, it would constitute 'sufficient cause' for the purposes of s 418(5)(b)(iii)(aa) of the Companies Act for refusing to answer the question, because such a question would not have been 'lawfully put'.<sup>264</sup> The Constitutional Court has held that the same principle applies to questions asked in terms of ss 64 and 65 of the Insolvency Act.<sup>265</sup> A similar approach was adopted by the Constitutional Court in respect of s 205 of the Criminal Procedure Act.<sup>266</sup> This Act also requires examinees to answer certain questions or face criminal penalties.<sup>267</sup>

It seems that if information is conveyed in circumstances analogous to a privileged occasion under the common law,<sup>268</sup> such disclosure may not necessarily be a breach of constitutional privacy provided the information itself was not originally obtained as a result of such a breach. In *Mistry v Interim National Medical and Dental Council of South Africa & others*,<sup>269</sup> information was communicated by one medicines control inspector to another for the purposes of planning and implementing a search of premises in order to carry out a regulatory inspection. It was argued that this was an invasion of constitutional privacy provided for in

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Interim Constitution s 13 and contrary to the secrecy provisions of the Medicines and Related Substances Control Act<sup>270</sup> and the Medical, Dental and Supplementary Health Service Professions Act.<sup>271</sup> In finding that the applicant's right to constitutional privacy had not been breached, the Constitutional Court took into

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261 *Klein v Attorney-General*, WLD 1995 (3) SA 848 (W), 865.

262 *Bernstein* (supra).

263 Act 61 of 1973.

264 *Bernstein* (supra) at para 61.

265 Act 24 of 1936. See *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 77.

266 Act 51 of 1977.

267 *Nel v Le Roux NO & others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC) at para 18.

268 See supra § 38.2(c)(i)(cc).

269 1998 (7) BCLR 880 (CC), 1998 (4) SA 1127 (CC) ('*Mistry*').

270 Act 101 of 1965, s 34.

account the following factors: the substance of the communication was merely that a complaint had been made and that an inspection was planned; the information had not been obtained in an intrusive manner but had been volunteered by a member of the public; it was not about intimate aspects of the applicant's personal life but about how he conducted his medical practice; it did not involve data provided by the applicant himself for one purpose and used for another; it was information which led to a search, not information derived from a search; and 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, but was communicated only to a person who had statutory responsibilities for carrying out regulatory inspections for the purpose of protecting the public health, and who was himself subject to the requirements of confidentiality.<sup>272</sup>

State demands for information that is reasonably required for official statistical,<sup>273</sup> census<sup>274</sup> and income tax<sup>275</sup> purposes are likely to be regarded as reasonable and justifiable.<sup>276</sup> Likewise, statutory reporting requirements concerning information about child abuse<sup>277</sup> and mental patients who are dangerous to others<sup>278</sup> are likely to be declared constitutional.<sup>279</sup>

The United States' experience concerning access to information is useful, but should not be followed blindly. It has been held not to be unconstitutional for a statute to require doctors to disclose information to the state about prescriptions for certain drugs with a high potential for abuse,<sup>280</sup> and for certain census questions to elicit information concerning personal and family characteristics.<sup>281</sup> It has also been held that a telephone subscriber can have no 'reasonable expectation of privacy'

271 Act 56 of 1974, s 41A(9)(a).

272 *Mistry* (supra) at para 44 (Sachs J).

273 Statistics Act 66 of 1976.

274 *Ibid.*

275 Income Tax Act 58 of 1962.

276 See generally *McQuoid-Mason Privacy* (supra) at 99, 158. It could perhaps be argued that the Identification Act 72 of 1986 s 6 goes too far, particularly with regard to the need for fingerprints (s 11). However, the secrecy provisions (s 17) and the need to guard against fraud may justify the requirement.

277 Child Care Act 74 of 1983 s 42; Prevention of Family Violence Act 133 of 1993, s 4.

278 Mental Health Act 18 of 1973, s 13.

279 See Woolman 'Limitation' (supra).

280 *Whalen v Roe* 429 US 589, 97 S Ct 869 (1977) (information was stored in a central computer).

281 *United States v Little* 321 F Supp 38 D Del (1971). See generally Du Plessis and De Ville 'Personal Rights' in Van Wyk et al *Rights and Constitutionalism* (supra) at 244-5.

regarding telephone calls which are electronically monitored by a telephone company,<sup>282</sup> and that a bank client has no expectation of privacy in respect

of information contained in cheques and deposit slips handed in to the bank.<sup>283</sup> These latter decisions are wrong. They assume that the subscribers and clients have forfeited their right to privacy simply by agreeing to comply with the statutory or other requirements of the service providers.

Section 14 of the Final Constitution specifically provides protection against the following methods of unlawfully obtaining information: (a) searches of people's persons or homes;<sup>284</sup> (b) searches of people's property;<sup>285</sup> (c) seizures of possessions;<sup>286</sup> and (d) infringements of communications.<sup>287</sup> The list is not exhaustive. The first three categories can be broadly subsumed under a single category of unlawful searches and seizures.

### **(ii) Unlawful searches and seizures**

Unlawful searches and seizures include searches of individual's persons or homes, searches of individual's property and seizure of possessions. Such searches and seizures are generally regarded as invasions of privacy.<sup>288</sup> A number of laws authorizing searches and seizures have been declared unconstitutional. De Waal, Currie and Erasmus have suggested<sup>289</sup> that to be constitutionally valid such laws must (i) properly define the power to search and seize;<sup>290</sup> (ii) provide for prior authorization by an independent authority;<sup>291</sup> and, (iii) must require the independent

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282 *Smith v Maryland* 442 US 735, 99 Sct 2577 (1979).

283 *United States v Miller* 425 US 435, 96 Sct 1619 (1976).

284 *S v Madiba* 1998 (1) BCLR 38, 43 (D)(search and seizure in terms of Arms and Ammunition Act 75 of 1969 – evidence allowed).

285 Cf *Mistry* (supra)(search of doctor's surgery).

286 *Mistry* (supra)(seizure of pharmaceutical goods).

287 *S v Naidoo* 1998 (1) SACR 479 (N), 1998 (1) BCLR 46 (D)(intercepting a telephone call); *Protea Technology v Wainer and others* 1997 (9) BCLR 1225 (W)(recording a telephone conversation). Where such information is used only by the person obtaining it and is not disclosed to others the unlawful conduct may amount to an intrusion.

288 See *Fedics Group (Pty) Ltd & another v Matus & another* 1997 (9) BCLR 1199 (C), 1998 (2) SA 617 (C) at para 97.

289 See De Waal et al *Bill of Rights* (supra) at 278.

290 *Mistry* (supra) at para 29.

291 *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) BCLR 198, 218-9 (C), 1995 (2) SA 148.

authority to be provided with evidence on oath that there are reasonable grounds for conducting the search.<sup>292</sup>

Section 13 of the Interim Constitution was aimed at protecting personal privacy and not private property.<sup>293</sup> The same proposition applies to s 14 of the Final Constitution.<sup>294</sup> A person may be searched in terms of the Criminal Procedure

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Act<sup>295</sup> if he or she has been arrested,<sup>296</sup> or the person conducting the search has a search warrant.<sup>297</sup> A search without a warrant will usually result in a constitutional violation.<sup>298</sup> Quite a number of extant statutory provisions regarding searches and seizures should be regarded as unconstitutional invasions of privacy.<sup>299</sup>

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292 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000 (10) BCLR 1079 (CC), 2001 (1) SA 545 (CC) at para 28. See also *South African Association of Personal Injury Lawyers v Heath* 2001(1) SA 883 (CC), 2000 (10) BCLR 1131, 1165 (CC). Cf De Waal et al *Bill of Rights* (supra) at 278.

293 *Mistry* (supra) at para 28.

294 *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 116.

295 Act 51 of 1977.

296 Section 23.

297 Section 21(2).

298 *S v Motloutsi* 1996 (1) SA 584 (C), 592-3, 1996 (2) BCLR 220 (C)(the fact that the accused's lessee had allowed the police to search the premises without a warrant did not make the police conduct lawful).

299 See eg ss 19-36 in Chapter 2 of the Criminal Procedure Act, which confer extensive powers of search and seizure and provide for entry of premises and the forfeiture and disposal of property; s 11(1)(g) of the Drugs and Drug Trafficking Act, which allows a police official to 'seize anything which, in his opinion, is connected with, or may provide proof of a contravention of a provision' of the Act; s 41(1)(a) of the Arms and Ammunition Act, which allows a police official 'who has reason to believe that an offence has been committed, by means of or in respect of any article which he has reason to believe to be in or on any place, including any premises, building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle, or any part thereof or to be in possession of any person' to 'without warrant, enter and search such a place or search such a person and seize any article, arm or ammunition'; s 4 of the Customs and Excise Act, which gives customs officers wide powers of entry search and seizure and to question people; s 8(6) of the Prevention of Public Violence and Intimidation Act, which allows the Chairman, or any member of staff, of a Commission of Inquiry Regarding the Prevention of Public Violence, for the purposes of an inquiry, at all reasonable times to enter upon and inspect any premises and demand and seize any document on or kept on such premises; s 37(2)(b) of the Criminal Procedure Act, which allows a registered medical practitioner attached to any hospital to take a blood sample from a person if such medical officer has reasonable grounds to believe that the contents of the person's blood may be relevant at any later criminal proceedings. The taking of fingerprints of an arrested person in terms of s 37 of the Criminal Procedure Act was found not to be contrary to ss 10 and 11(2) of the Interim Constitution, but the question of privacy was not raised. See *S v Huma & another* 1996 (1) SA 232 (W), 233, 237.

The Constitutional Court declared that s 28(1) of the Medicines and Related Substances Control Act<sup>300</sup>— which empowered inspectors to enter and search premises without a warrant and to seize and remove medicines from those premises — is inconsistent with the privacy right contained in IC s 13.<sup>301</sup> It held that to the extent that a statute authorizes warrantless entry into private homes and rifling through intimate possessions, such a statute would breach the right to personal privacy.<sup>302</sup> The court held that the invasion authorized by s 28(1) was substantially disproportionate to its public purpose, was clearly overbroad in its reach, and failed to pass the proportionality test.<sup>303</sup> Furthermore, the provisions were so wide that they could not be 'read down' to bring them within the limits of the Constitution.<sup>304</sup>

A lower court has held that s 6 of the Investigation of Serious Economic Offences Act,<sup>305</sup> which empowers the Director of the Office for Serious Economic Offences in pursuit of an enquiry under s 5 to enter and search premises

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and to seize and remove property therefrom without authority, violates the constitutional right to privacy in terms of the Interim Constitution.<sup>306</sup> However, s 7 of the Act, which prohibits disclosure without the permission of the Director of any information obtained as a result of an enquiry, search and seizure conducted in terms of the Act, was held by the same court not to be unconstitutional because the Director is required to act *intra vires* s 7.<sup>307</sup>

It has also been held that the provisions of s 7(3) of the Harmful Business Practices Act,<sup>308</sup>— which gave investigating officers arbitrary powers of entry, inspection, search and seizure without a warrant — are an infringement of s 14 of the Constitution.<sup>309</sup> Section 7(3) was not saved by the limitation clause of the

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300 Act 101 of 1965.

301 *Mistry* (supra).

302 *Ibid* at para 16.

303 *Ibid* at para 23.

304 *Ibid* at para 27.

305 Act 117 of 1991.

306 *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).

307 *Ibid*.

308 Act 71 of 1988.

309 *Janse van Rensburg NO v Minister van Handel en Nywerheid en 'n ander* 1999 (2) BCLR 204, 220 (T). ('*Janse van Rensburg*')

Constitution<sup>310</sup> because there was no reason why such powers could not be subject to the same sort of prerequisites and controls that are laid down by the search and seizure provisions of s 21 of the Criminal Procedure Act.<sup>311</sup> The argument that the exercise of the powers in s 7(3) of the Harmful Business Practices Act would not be unconstitutional if the provisions were used with due regard to the Constitution was held not to be feasible in practice.<sup>312</sup>

In the United States the word 'search' has been held to mean 'a governmental invasion of a person's privacy'.<sup>313</sup> Persons claiming that their privacy has been invaded have to establish that they had a subjective expectation of privacy, and that society has recognized that expectation as objectively reasonable.<sup>314</sup> The American courts have decided that whether or not an individual has lost his or her legitimate expectation of privacy is determined by considering such factors as whether the item was abandoned<sup>315</sup> or obtained by consent.<sup>316</sup> The courts have also interpreted 'seizure' of a person's property as occurring when the government 'meaningfully interferes with an individual's interests in possession'.<sup>317</sup> As

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the South African Constitution operates horizontally as well as vertically, the terms 'searches' and 'seizures' may have a wider meaning than in the United States and may apply to private security firms and any one else who engages in unlawful searches and seizures. However, it has been held that Bills<sup>318</sup> designed to prohibit traditional leaders from accepting any remuneration or allowances other than that provided for by law or custom of the Province of KwaZulu-Natal do not violate the

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310 Section 36(1).

311 Act 51 of 1977. See *Janse van Rensburg* (supra) at 220. (The court said that by way of comparison notice could also be taken of s 10(2) of the Consumer Affairs (Unfair Business Practices) Act 7 of 1996 of Gauteng.)

312 *Janse van Rensburg* (supra) at 220.

313 *Rakas v Illinois* 439 US 128 at 143, 99 SCt 421 (1978).

314 *Ibid.* Cf *Bernstein* (supra) at para 75: (Ackermann J) '[I]t seems a sensible approach to say that the scope of a person's privacy extends a fortiori only to those aspects in regard to which a legitimate expectation of privacy can be harboured.'

315 *Katz v United States* 389 US 347, 361, 88 SCt 507 (1967); *Abel v United States* 362 US 217, 241, 80 SCt 683 (1960). No expectation of privacy where items were left in a hotel waste basket after a guest had checked out of the hotel.

316 See *United States v Matlock* 415 US 164, 177, 94 SCt 988 (1974) (Consent given by a fellow occupant of a bedroom). But see *S v Motloutsi* 1996 (1) SA 584 (C), 592-3, 1996 (7) BCLR 220 (C) (the court held that the fact the accused's lessee had given consent for the police to search the premises without a warrant did not make their conduct lawful).

317 *United States v Jacobsen* 466 US 109, 120, 104 SCt 1652 (1984).

318 See *KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill, 1995 and Payment of Salaries, Allowances and other Privileges to the Ingonyama Amendment Bill, 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC).

right not to have private possessions seized in terms of s 13 of the Interim Constitution.<sup>319</sup>

The Constitutional Court has no jurisdiction to investigate the legality of searches and seizures which occurred prior to the Interim Constitution coming into operation.<sup>320</sup>

### (iii) Infringements of private communications

Infringements of private communications have long been recognized as invasions of privacy in South African law.<sup>321</sup> For instance, the courts have held that eavesdropping and electronic surveillance by private detectives during matrimonial disputes may result in a criminal invasion of privacy if the methods used are unreasonable.<sup>322</sup> The stealing of tape recordings of confidential business meetings and offering them to a third party has been held to be an unlawful invasion of privacy.<sup>323</sup> During the Apartheid era, however, widespread violation of private communications was sanctioned by statute. For example, a person designated by the Minister of Posts and Telegraphs, or a Minister who was a member of the State Security Council, could authorize the interception of mail 'in the interests of state security'<sup>324</sup> and listen in to telephone conversations.<sup>325</sup> Such practices would today certainly be an infringement of s 14.<sup>326</sup>

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The Interception and Monitoring Prohibition Act<sup>327</sup> now prohibits the intentional interception of telecommunications or monitoring of conversations by monitoring

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319 *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Amendment Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC).

320 *Key v Attorney-General, Cape Provincial Division, & another* 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC), 1996 (2) SACR 113 (CC); *Rudolph & another v Commissioner for Inland Revenue & others* 1996 (4) SA 552 (CC), 1996 (7) BCLR 889 (CC).

321 *McQuoid-Mason Privacy* (supra) at 141-142. See above § 38.2.

322 *S v A* 1971 (2) SA 293 (T), 297 (where private detectives were convicted on a charge of *crimen injuria* for installing a 'transmitter wireless microphone' under the dressing table of the complainant during an investigation into the latter's private life at the request of an estranged spouse).

323 *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A).

324 Post Office Act 44 of 1958 s 118A. Cf *McQuoid-Mason Privacy* (supra) at 141-142.

325 Act 44 of 1958 s 118(2)(b). Cf *McQuoid-Mason Privacy* (supra) at 145-146.

326 Section 13 of the Interim Constitution. See, for example, *Fedics Group (Pty) Ltd & another v Matus & another* 1997 (9) BCLR 1199 (C), 1998 (2) SA 617 (C); *Protea Technology Ltd & another v Wainer & others* 1997 (9) BCLR 1225 (W).

327 Act 127 of 1992.

devices<sup>328</sup> unless such interception is authorized by a judge.<sup>329</sup> The same applies to postal articles.<sup>330</sup> The courts have held that the primary purpose of the Act is to protect confidential information from illicit eavesdropping.<sup>331</sup> Such authorization, however, may only be given by a judge, on written application, if he or she is satisfied that: (i) the offence that has been or is being or will probably be committed is a serious offence that cannot be properly investigated in any other manner and of which the investigation in terms of the Act is necessary; or (ii) the security of the Republic is threatened or (iii) that the gathering of information concerning a threat to the security of the Republic is necessary.<sup>332</sup> The above provisions may well be open to scrutiny by the Constitutional Court to determine whether they violate FC s 14. Even if these provisions are found constitutionally sound, where the provisions of the Act have not been followed, the injured party may have an action for an invasion of his or her constitutional right to privacy<sup>333</sup> and secure an order declaring that the evidence obtained is inadmissible.<sup>334</sup>

Some courts have held that in the case of intercepting a telephone call from a kidnapper demanding a ransom, or the interception of persistent indecent telephone calls made by a perverted caller, such interceptions may escape the prohibition in s 2(1)(b) of the Interception and Monitoring Prohibition Act. They escape on the grounds of the consent of one of the parties to the telephone call or on the basis of an argument that such a call would not constitute 'a conversation'.<sup>335</sup> However, in cases where police informers or traps are used, the mere consent of one of the parties to the surreptitious electronic recording of a

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328 Section 2(1).

329 Section 2(2).

330 Section 2(2)(b).

331 *Lenco v Holdings Ltd & others v Eckstein & others* 1996 (2) SA 693, 700 (N); *S v Kidson* 1999 (1) SACR 338, 344 (W) ('Kidson').

332 Section 3(1)(b).

333 See, for example, *S v Naidoo & another* 1998 (1) BCLR 46, 72 (N), 1998 (1) SACR 479 (N) (McCall J) ('If the monitoring of a conversation is not authorized by a direction properly and lawfully issued by a Judge in terms of section 3, then not only would such monitoring constitute a criminal offence in terms of the Monitoring Act, it would also, in my judgment, constitute an infringement of the right to privacy, which includes the right not to be subject to the violation of private communications'.)

334 *S v Naidoo* (supra) at 72: a judge granted a direction in terms of the Monitoring Act, based on false and misleading information, to tap a telephone. See also *S v Nkabinde* 1998 (8) BCLR 996 (N): the police monitored conversations between the accused and his legal representatives in terms of an order wrongly granted under the Monitoring Act, and continued to do so for a period beyond the date provided for by the tainted authority.

335 *S v Naidoo* (supra). See *Kidson* (supra) at 343 (Cameron J agreed with McCall J that consent by one of the parties to a two-party conversation may render that monitoring exempt, but went on to qualify his agreement).



conversation is not sufficient, and proper prior authorization must be obtained.<sup>336</sup> A reasonable expectation of privacy is violated when a telephone conversation is intercepted by a third party without the knowledge or consent of the participants.<sup>337</sup> However, the mere fact that the parties on a telephone are aware that they must be careful when talking on the telephone cannot be construed as consent to the violation, or a waiver of the person's expectation of a right to privacy.<sup>338</sup>

The case of 'participant monitoring' has been dealt with differently by the High Court.<sup>339</sup> Where a suspect who was assisting the police in their investigations into a murder had offered to visit an accused at her home carrying a concealed voice-activated tape recorder and had later handed over the recording to the police, the information imparted was held not to be 'confidential information' for the purposes of the Interception and Monitoring Prohibition Act.<sup>340</sup> The court held that the legislature could not have intended to impose an unqualified prohibition on participant monitoring. Its primary aim is to protect confidential information from such illicit eavesdropping as third-party surveillance.<sup>341</sup> While the Act prohibits intentional monitoring to gather confidential information, information voluntarily imparted in a two-party conversation covering the criminal conduct of the communicator is not for the purposes of the Act 'confidential information' in relation to the other party to the conversation.<sup>342</sup> Therefore, 'no constitutionally cognisable breach of privacy occurred' when the police procured the monitoring by the suspect of his conversation with the accused.<sup>343</sup> Even assuming that the Act had been breached, the court found that these facts did not support a claim of entrapment. Although the police might have played a trick on the accused, the police violation was 'minimal' and there had not been 'any police impropriety or invasion of privacy' or 'serious failure' by them.<sup>344</sup> More recently the 'participant

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336 Compare the Canadian approach in *R v Duarte* [1990] 1 SCR 30; *R v Wiggins* [1990] 1 SCR 62; *R v Wong* [1990] 3 SCR 36. See also P W Hogg *Constitutional Law of Canada vol II* (3 ed 1992) 45-7.

337 *R v Thompson* [1990] 2 SCR 1111. Cf Hogg *Constitutional Law of Canada* (supra) at 45-7.

338 *S v Naidoo*(supra) at 89.

339 *Kidson* (supra).

340 *Kidson* (supra) at 348. Cameron J took the view that the formulation by Heher J, in *Protea Technology Limited & another v Wainer & others* 1997 3 B All SA 594 (W), 603 ('*Protea Technology*'), that the question of whether or not the information enjoys the protection of the Act depends largely upon the intention of the communicator was 'over-broad'. *Kidson* (supra) at 347. He suggested that the following additional requirement should be added: 'the information the communicator intended to restrict as confidential must be information upon which the law attributes the confidentiality'. *Ibid*.

341 *Ibid* at 344.

342 *Ibid* at 348.

343 *Ibid* at 350.

monitoring' exemption from constitutional invalidity has been extended to entrapment in both civil<sup>345</sup> and criminal<sup>346</sup> cases.<sup>347</sup>

In *Protea Technology v Wainer*, the court held that employees have a legitimate expectation of privacy concerning telephone calls made and received by them in matters unconnected with their employer's business.<sup>348</sup> Where conversations involve their employer's affairs the latter is entitled to demand and obtain as full an account as the employee is capable of furnishing.<sup>349</sup> Such conversations are not protected by the Constitution because as soon as employees abandon their private sphere for the affairs of their employers they lose the benefit of the right to privacy. The employers then have the right to know both the substance and the manner in which employees conduct themselves and it matters not how the information is obtained.<sup>350</sup> However, such an approach goes too far and could make working conditions untenable. Unreasonable monitoring of employees' communications when dealing with the employer's business should be regarded as *prima facie* evidence of a breach of their constitutional right to privacy. Employers who wish to monitor continually the substance and manner in which their employees communicate with others about the affairs of the business should be required to justify their conduct within the provisions of s 36 of the Constitution.<sup>351</sup>

In the United States, electronic eavesdropping on private conversations has been held to be an invasion of privacy<sup>352</sup> except where such calls are electronically monitored by a telephone company.<sup>353</sup> In Germany, the privacy of correspondence, post and telecommunications is protected by the Basic Law.<sup>354</sup>

#### **(iv) Fault not required**

344 Ibid at 352. Cameron J therefore used his discretion to admit the tape recording and transcript. Ibid at 353. The court had previously cautioned that: 'The police and other agencies should not be encouraged to circumvent statutory prohibitions with flimsy re-arrangements of personnel and operators' *Kidson* (supra) at 346.

345 See *Tap Wine Trading CC v Cape Classic Wines (Western Cape) CC* 1999 (4) SA 194 (C), 197, [1998] 4 All SA 86 (C).

346 See *S v Dube* 2000 (1) SACR 53, 75-6 (N), 2000 (6) BCLR 685 (N), 2000 (2) SA 583 (N).

347 See De Waal et al *Bill of Rights* (supra) at 287: 'In our view these cases were correctly decided since a person can hardly be said to have a subjective expectation of privacy *vis-a-vis* a party to a conversation. The Monitoring Act and Constitution is [sic] aimed at preventing third party monitoring in the sense of eavesdropping'. That said, if the conversation was meant to be confidential (and was not unlawful) and a disclosure is subsequently made to third parties, the protection of the general right to privacy in s 14 of the Final Constitution would apply.

348 *Protea Technology* (supra).

349 Ibid at 1240.

350 Ibid at 1241.

351 Woolman 'Limitations' (supra).

352 See *Katz v United States* 389 US 347, 88 S Ct 507 (1967).

Fault is not a requirement for an infringement of a constitutional right to privacy. Thus strict liability may be imposed upon a defendant who breaches the constitutional right to privacy. Actions brought under the general common law right to privacy, as developed under the Final Constitution, require the usual fault

elements to be proved.<sup>355</sup> However, the position regarding actions based on the listed categories in s 14 may be different. The imposition of strict liability for unlawful searches and seizures and interferences with communications specifically listed in the Constitution is similar to that adopted by the common law in respect of unlawful arrest or imprisonment.<sup>356</sup> Such wrongs are technically regarded as *injuriae* under the *actio injuriarum*. But the courts tend to impose strict liability on the arresting or imprisoning authorities.<sup>357</sup> The plaintiff must prove the fact of the arrest or imprisonment and that it was unlawful. It is not necessary to allege or prove *dolus* or *culpa*.<sup>358</sup> Thereafter, it is for the defendant to show that the arrest or imprisonment was justified.<sup>359</sup> The policy behind the approach is that the courts regard unlawful arrest as a serious encroachment upon the freedom of an individual.<sup>360</sup> The infringement of a constitutional right to privacy can be regarded as equally egregious, particularly the specific categories mentioned in s 14. The US courts adopt this approach with respect to constitutional torts involving invasions of privacy.<sup>361</sup>

The defendant can justify such infringements at the rights analysis stage by showing that the plaintiff had no reasonable expectation of privacy<sup>362</sup> or

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353 See *Smith v Maryland* 442 US 735, 99 SCt 2577 (1979). See also Du Plessis and De Ville 'Personal Rights' in Van Wyk et al *Rights and Constitutionalism* (supra) at 244-5.

354 Article 10. See Du Plessis and De Ville 'Personal Rights' in Van Wyk et al *Rights and Constitutionalism* (supra) at 248-9.

355 See supra § 38.2(a)(ii).

356 *Whittaker v Roos and Bateman* 1912 AD 92, 129; *Ramsay v Minister van Polisie* 1981 (4) SA 802 (A), 806-7; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), 156.

357 *Ibid.* See also Neethling et al *Law of Personality* (supra) at 130.

358 *Donono v Minister of Prisons* 1973 (4) SA 259 (C), 262; *Shoba v Minister van Justisie* 1982 (2) SA 554 (C), 559.

359 *May v Union Government* 1954 (3) SA 120 (N), 124; *Ingram v Minister of Justice* 1962 (3) SA 225 (W), 227; *Bhika v Minister of Justice* 1965 (4) SA 399 (W), 400; *Divisional Commissioner of SA Police Witwatersrand v SA Associated Newspapers Ltd* 1966 (2) SA 503 (A), 511-2; cf *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A), 883-4; *Prinsloo v Newman* 1975 (1) SA 481 (A), 500; *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A), 589.

360 *Areff v Minister van Polisie* 1977 (2) SA 900 (A), 914.

361 Cf *Monroe v Pape* 365 US 167 (1961), wrongful search, seizure and arrest. See also *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388 (1971).

subsequently, in terms of s 36, showing that the legally sanctioned limitation was reasonable and justifiable.<sup>363</sup>

## **(b) Remedies**

There is a wide range of remedies available for breaches of fundamental rights in the Constitution.<sup>364</sup> Apart from the specific remedy of declaring any law or conduct inconsistent with the Constitution invalid to the extent of the inconsistency,<sup>365</sup> the court may grant 'appropriate relief' including a declaration of rights, to any person who alleges and proves that a right in the bill of rights has been infringed or threatened.<sup>366</sup>

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In respect of infringements of privacy four broad categories of constitutional remedies will be considered: (a) constitutional damages; (b) interdicts; (c) declarations of invalidity; and (e) exclusion of evidence.<sup>367</sup> The first two are always relevant for a delictual action for invasion of privacy, while the latter may sometimes be relevant. However, these categories are not closed. The courts have the power to adopt a flexible approach by granting any other 'appropriate relief'.<sup>368</sup>

## **(i) Constitutional damages**

In *Fose v Minister of Safety and Security*,<sup>369</sup> the Constitutional Court expressed the view that in most cases the ordinary common law remedies for delictual damages for infringements of personality rights will be an adequate remedy for a breach of a fundamental right. However, it has been pointed out that there is no reason 'to imagine that any remedy is excluded' provided it 'serves to vindicate the Constitution and deter its further infringement'.<sup>370</sup> In *Fose*, the Court expressed strong reservations about the concept of punitive damages for constitutional wrongs and refused to grant them on the facts of the case. It appears, however, that the court rejected the concept of constitutional punitive damages *in addition to* the damages that were claimed by the plaintiff as a *solatium* for the torture and assault

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362 See supra § 38.3(a)(ii).

363 See infra § 38.3(c).

364 See, generally, De Waal et al *Bill of Rights* (supra) ch. 8.

365 Section 172 (1).

366 Section 38.

367 De Waal et al *Bill of Rights* (supra) at 159.

368 Section 38. See De Waal et al *Bill of Rights* (supra) at 172-173.

369 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 at paras 58, 98 ('Fose'). See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

370 *Ibid* at para 100 (Kriegler J).

allegedly suffered by him at the hands of the police. The fact that his constitutional rights had been egregiously violated would be provided for in the calculation of the common law damages that would be awarded to vindicate his rights.<sup>371</sup>

Justice Ackermann, writing for the majority, stated that as the claim for punitive constitutional damages was in addition to the claim for patrimonial loss, pain and suffering, loss of amenities, *contumelia* and other general damages, it would perpetuate 'an historical anomaly' which 'fails to observe the distinctive functions of the civil and criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution'.<sup>372</sup> A more cautious approach was taken by Didcott J and Kriegler J. Didcott J thought that punitive damages should not be awarded against the state and that the matter was better dealt with by the legislature.<sup>373</sup> Kriegler J argued that although punitive damages should not be awarded in the case before the court, he believed that the court should not go as far as 'rejecting for all time the possibility that a case may arise where punitive or exemplary damages are 'appropriate' redress for infringement of constitutionally protected rights'.<sup>374</sup>

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However, after *Carmichele* the position regarding damages for delicts resulting from breaches of constitutional fundamental rights has changed.<sup>375</sup> Now all courts will be required to develop the common law so that it complies with constitutional imperatives. That said, courts are still unlikely to award additional constitutional damages unless these can be regarded as 'an appropriate remedy'.<sup>376</sup> In such cases it would have to be shown that such damages would vindicate the Constitution and serve to deter further violations of fundamental rights.<sup>377</sup>

The same common law principles concerning the presumption that the plaintiff has suffered sentimental damages will apply.<sup>378</sup> The quantum of damages for a *solatium* cannot be accurately calculated and the court will take into account the same factors as under the common law. It is submitted however that when calculating the quantum of damages the fact that the defendant has breached a

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371 Ibid at para 67.

372 Ibid at para 70.

373 Ibid at para 87.

374 Ibid at para 91. Kriegler J pointed out that Ackermann J had been 'uncharacteristically ambivalent' in that he appeared to reject the concept in paras 69–73 of his judgment, but at para 70 'seeks to found the current rejection on the particular facts of this case.' Ibid.

375 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

376 Ackermann J observed, in *Fose* (supra) at para 69, that 'an appropriate remedy must mean an effective remedy'.

377 *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 at para 38.

378 See, generally, Neethling et al *Law of Personality* (supra) at 277.

constitutional right should be regarded as an aggravating factor, in the sense that it is *prima facie* evidence of egregious conduct by the defendant.<sup>379</sup>

## (ii) Interdicts

The Constitutional Court has used the remedy of interdict<sup>380</sup> and *mandamus*<sup>381</sup> to protect fundamental rights. The elements required for the granting of an interdict to prevent a constitutional infringement are the same as those that apply at common law.<sup>382</sup> Where there is an application for a prior restraint against the publication of an alleged defamatory statement, the courts have been cautious about infringing the right to freedom of expression.<sup>383</sup> In such cases, the courts seem to take the view that such restraints bear a heavy presumption against constitutional validity.<sup>384</sup> Similar principles would apply to publications involving informational privacy. De Waal, Currie and Erasmus point out that the Constitutional Court has on occasion used 'the so-called 'structural interdict' which directs violators to rectify the breach of fundamental rights under court supervision'.<sup>385</sup>

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## (iii) Declarations of invalidity

If the court finds that a law or a provision of a law is inconsistent with the Constitution it may declare the law or the provision invalid to the extent of the inconsistency.<sup>386</sup> This applies equally to the conduct of a person or an institution.<sup>387</sup> There have been several instances where certain provisions of laws<sup>388</sup> or conduct of

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379 Cf *Afrika v Metzler* 1997 (4) SA 531 (NmH), 539 (court said that the fact that the defendant had breached a fundamental right in the Namibian Constitution should be regarded as an aggravating factor).

380 See, eg, *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 96 (an interdict was an appropriate remedy to prevent the selective institution of legal proceedings by the city council for the recovery of rates which amounted to unfair discrimination in breach of the Constitution).

381 See, eg, *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 46: a mandamus was considered an appropriate remedy to compel the Electoral Commission to comply with Constitution.

382 See above § 38.2(b)(ii).

383 *Mandela v Falati* 1995 (1) SA 251 (W).

384 *Mandela v Falati* (supra) at 259-60.

385 De Waal et al *Bill of Rights* (supra) at 193, citing *August v Electoral Commission* 1999 (3) SA 191 (CC), 1999 (4) BCLR 363 (CC) (The Electoral Commission was directed to make the necessary arrangements to enable prisoners to vote).

386 Section 172(1)(a).

387 Section 2 read with s 172(1); cf De Waal et al *Bill of Rights* (supra) at 176.

certain persons<sup>389</sup> have been declared inconsistent with the constitutional right to privacy. In such cases, the declaration of invalidity could also lay the basis of an award for delictual damages. The plaintiff's claim could include a prayer for a declaration of invalidity together with a prayer for an award of damages if the first prayer is upheld. The remedy of a declaration of the invalidity of a statute does not exist at common law.

#### (iv) Exclusion of improperly obtained evidence

In searches and seizures or infringements of private communications which result in a person's privacy being unlawfully infringed and evidence improperly obtained, the evidence must be excluded if it would render the trial unfair or be detrimental to the administration of justice.<sup>390</sup> This topic is discussed elsewhere in this volume.<sup>391</sup>

#### (v) Any other 'appropriate relief'

The Constitution empowers the courts to provide 'appropriate relief' where the applicant's statutory or common law remedies are insufficient.<sup>392</sup> In delictual actions, any other 'appropriate relief' could be any remedy that vindicates the Constitution, deters future violations of fundamental rights and is relevant to the plaintiff's claim for relief. In some instances it could be a prerequisite for, or in addition to, a claim for damages. Such remedies may include exclusion of

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evidence,<sup>393</sup> administrative law remedies,<sup>394</sup> a declaration of rights<sup>395</sup> or some other appropriate remedy.

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388 Cf *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) 148, 218-21 (C), 1995 (2) BCLR 198 (C)(declaring invalid s 6 of the Investigation of Serious Economic Offences Act 117 of 1991); *Mistry* (supra) at para 27(declaring invalid s 28(1) of the Medicines and Related Substances Control Act 101 of 1965); *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 220 (T)(declaring invalid s 7(3) of the Harmful Business Practices Act 71 of 1988).

389 *S v Naidoo* 1998 (1) BCLR 46, 72 (N), 1998 (1) SACR 479 (N)(where the police monitored telephone communications in violation of the Interception and Monitoring Act 127 of 1992 and the Constitution).

390 Section 35 (5) of the Constitution; *S v Naidoo* (supra). The principle seems to apply to both criminal and civil cases. See *Fedics Group (Pty) Ltd & another v Matus & another* 1997 (9) BCLR 1199 (C), 1998 (2) SA 617 (C) at para 92.

391 See M Chaskalson and W Trengove 'Evidence' (supra) at § 26.4(c); PJ Schwikkard 'Evidence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 52.

392 FC s 38. For instance, where a provincial department of welfare had failed to process an applicant's claim for a social grant within a reasonable period of time, the court ordered the authorities to pay her grant from the date when it should have accrued to her if her application had been dealt with reasonably and not from the later date when it accrued in terms of the regulations. See *Mahambehala v Member of the Executive Council for Welfare, Eastern Cape and another* 2001 (9) BCLR 899, 911 (SE), 2002 (1) SA 342 (SE), 356; *Mbanga v MEC for Welfare, Eastern Cape and another* 2002 (1) SA 359 (SE), 370.

393 *Ibid.*



De Waal, Currie and Erasmus have suggested that before finding a constitutional remedy for the private violation of a right in the bill of rights, the court must 'first look at legislation, then turn to existing common law and finally, if all else fails, develop a new common law remedy'.<sup>396</sup> This principle could be applied, for example, to a false light invasion of privacy where the plaintiff wishes to demand a retraction, an apology or a right of reply. There is no statute that provides for this. The common law remedy of *amende honorable* was thought to have fallen into disuse.<sup>397</sup> However, in holding that the remedy is still part of South African law, a High Court has recently stated that if the remedy had not existed the constitutional 'imperatives of our times would have had required its invention' as 'appropriate relief'.<sup>398</sup> Thus, before creating a new remedy — the court did, in fact, rely on the existing common law and resuscitate an existing remedy.<sup>399</sup>

### (c) Defences

The traditional defences rebutting wrongfulness in respect of a common law invasion of privacy<sup>400</sup> may also be applied to an invasion of the constitutional right to privacy provided they satisfy the requirements of the limitation clause.<sup>401</sup> Strictly speaking, as fault is not required for an invasion of the constitutional right to privacy,<sup>402</sup> it is not open to a defendant to use the common law defences that rebut fault in respect of the invasion of a constitutional right to privacy. However, it is probably unlikely

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394 Where, for example, there is a violation of just administrative action in terms of the Final Constitution. Cf *Claude Neon v City Council of Germiston* 1995 (3) SA 710 (W), 1995 (5) BCLR 556 (W); De Waal et al *Bill of Rights* (supra) at 177.

395 See FC s 38. Cf *In re: The National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC) at para 40; *JT Publishing v Minister of Safety and Security* 1997 (3) SA 514 (CC), 1996 (12) BCLR 1599 (CC).

396 See De Waal et al *Bill of Rights* (supra) at 195. The authors contend a person who is prevented from voting must first lay a charge under the Electoral Act 73 of 1998 (ss 87-94 read with ss 97-99) and then bring an action under the *actio injuriarum* at common law. If these mechanisms do not provide the person with a remedy the court should assist him or her by developing the common law. If this cannot be done and the citizen is still unable to vote, he or she can then approach the court which 'must revisit the statutes, the common law and if necessary develop a new remedy that is appropriate to give effect to the constitutional right.' *Ibid*.

397 Cf *Kritzinger v Poskorporasie van Suid-Afrika (Edms) Bpk* 1981 (2) SA 373 (O), 389.

398 *Mineworkers Investment Co (Pty) Ltd v Modilane* 2002 (6) SA 512 (W) at para 28. See above § 38.2(b)(iv).

399 *Carmichele* makes it clear that the courts must develop the common law actions and remedies to ensure that the spirit, purport and objects of the Constitution are vindicated.

400 See supra § 38.2(c)(i).

401 *National Media Limited v Bogoshi* 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA). See below § 38.5.

402 See supra § 38.3(a)(iii).



that the courts are presently ready to develop the common law to impose strict liability for all forms of invasions of the constitutional right to

privacy (other than those express categories in s 14).<sup>403</sup> To impose strict liability for all forms of invasions of the constitutional right to privacy would involve negating the traditional requirement of fault (more particularly, *animus injuriandi*)<sup>404</sup> for claims under the *actio injuriarum*.<sup>405</sup>

If strict liability is imposed for an invasion of the constitutional right to privacy the only defence open to the defendant would be to show that the statutory provision could be justified by reference to the limitation clause in the Constitution.<sup>406</sup> The analysis would proceed as follows. At the first stage — the rights stage — the defendant merely has to give an explanation of why the plaintiff does not have a reasonable expectation of privacy (eg, where a 'participant' monitors a conversation with a colleague suspected of committing a crime).<sup>407</sup> If the defendant succeeds that is the end of the matter. If the defendant fails, then the question arises as to whether his or her conduct is protected by the limitation clause. The justification in terms of the limitation clause could be regarded as a special defence to a claim for a breach of a constitutional fundamental right which must be proved on a balance of probabilities.<sup>408</sup>

## 38.4 Privacy and juristic persons

At common law it was previously thought that as privacy is primarily a human trait, an action for invasion of privacy would not be open to artificial or juristic persons.<sup>409</sup> Artificial or juristic persons could not sue for invasion of privacy because they did not have a body or *dignitas* or feelings or self-respect. They could, on the other hand,

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403 In terms of s14 people have the right not to have their (a) person or home searched; (b) property searched; (c) possessions seized; or (d) the privacy of their communications infringed.

404 See above § 38.2(a)(ii)(aa).

405 See D McQuoid-Mason 'Invasion of Privacy: Common Law v Constitutional Delict — Does It make a Difference?' (2000) *Acta Juridica* 227, 260.

406 Conduct alone, without a statutory basis, could not be justified because it would not constitute a law of general application. See Woolman 'Limitations' (supra).

407 Cf *S v Dube* 2000 (1) SACR 53, 75-6 (N), 2000 (6) BCLR 685 (N), 2000 (2) SA 583 (N). See above §38.3(a)(i)(bb).

408 The defences for invasion of privacy are similar to the defences for defamation. See *Janse van Vuuren v Kruger* 1993 (4) SA 842 (A), 849-50. In defamation if a defendant cannot prove on a balance of probabilities that defence of truth for the public benefit he or she can fall back on the defence of reasonable publication. See *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 43. Either defence may indicate that the defendant's conduct was reasonable and justifiable in terms of the limitation clause in s 36.

409 Cf *Universiteit van Pretoria v Tommie Meyer Films* 1977 (4) SA 376 (T) and *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A), 453-4; McQuoid-Mason *Privacy* (supra) at 191.

sue for defamation. <sup>410</sup> The Appellate Division did, however, hold that an artificial person may have a right to privacy. <sup>411</sup>

Because privacy rights are generally justified by reference to personal autonomy, <sup>412</sup> their protection should generally be limited to natural persons. <sup>413</sup> That said, it seems consistent with the nature of the right that juristic persons should be able to claim certain informational privacy rights, <sup>414</sup> unless no reasonable expectation of privacy exists. <sup>415</sup> This view accords with the informational rights protected under the common law in *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another*. <sup>416</sup> It also conforms to the position on the privacy rights of juristic persons set out in *AK Entertainment CC v Minister of Safety and Security*. <sup>417</sup> The Constitutional Court has also held that juristic persons enjoy the right to privacy in terms of the Constitution. However, because they are not bearers of human dignity, their privacy is less deserving of protection. <sup>418</sup> Nonetheless 'what is clear is that the right to privacy is applicable, where appropriate, to a juristic person'. <sup>419</sup>

## 38.5 Privacy and limitations analysis

### (a) Limitations of personal autonomy privacy

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410 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A), 453-4.

411 *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451 (A) (a corporation had the right to sue for invasion of privacy where a newspaper had obtained information from a private memorandum and unlawful tape recordings).

412 See supra §§ 38.2.(a)(iii)(aa) and 38.3(a)(i)(aa).

413 Cf *Bernstein* (supra) at para 79.

414 In the US juristic persons have been able to claim for certain informational privacy rights, particularly in respect of the so-called 'appropriation' cases. 'Constitutional Law' *American Jurisprudence* (2nd Edition 1972) 606 at para 16(A). Cf *McQuoid-Mason Privacy* (supra) at 192; *Neethling Die Reg op Privaatheid* (supra) at 295.

415 *Bernstein* (supra) at para 90. Section 8(4) of the Constitution provides that: 'Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.'

416 1993 (2) SA 451 (A), (the corporation was suing to prevent the publication of unlawfully obtained information).

417 1995 (1) SA 783 (E), 1994 (4) BCLR 31 (E).

418 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000 (10) BCLR 1079 (CC), 2001 (1) SA 545 (CC) at para 16.

419 *Ibid* at para 17.

The right to privacy is not absolute.<sup>420</sup> In personal autonomy privacy cases involving the possession of pornography or conducting of sexual relationships — even though they may involve the 'inner sanctum' of the privacy continuum — certain conduct may be justifiably limited. For instance, it may be reasonable and justifiable to outlaw the possession of child pornography<sup>421</sup> or sexual relationships involving children or animals.<sup>422</sup>

In *S v Jordan and others*<sup>423</sup> the Constitutional Court had to decide whether ss 2, 3(b) and (c) and 20(1)(aA) of the Sexual Offences Act<sup>424</sup> were unconstitutional and invalid. In the course of the judgments the court considered whether in the context of the right to privacy the provisions could be justified in terms of the limitations clause of the Interim Constitution. Ngcobo J wrote:

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Having regard to the legitimate State interest in proscribing prostitution and brothel-keeping, viewed against the scope of the limitation on the right of the prostitute and brothel-keeper to earn a living, I conclude that if there be a limitation of the right to privacy, the limitation is justified.<sup>425</sup>

Likewise, Sachs J and O'Regan J agreed with the submission of Counsel for the State:

Parliament could choose between prohibiting prostitution, regulating it or abstaining from addressing it at all. The Act opted for prohibition and, while this might carry with it certain problems, it is a constitutionally permissible legislative choice.<sup>426</sup>

The court found that it was a justifiable limitation of the right to privacy to criminalize prostitution in terms of s 20(1)(aA).<sup>427</sup>

## **(b) Limitations of informational privacy**

The Constitutional Court has held that the provisions of ss 417(3) and 418(2) of the Companies Act<sup>428</sup>— which compel production of private possessions or private

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420 See, generally, Woolman 'Limitations' (supra).

421 *Case v Minister of Safety and Security* 1996 (3) SA 165 (CC), at para 107 (Madala J). See above § 38.3(a)(i)(aa).

422 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 118 (Sachs J). See supra § 38.3(a)(i)(aa).

423 2002 (6) SA 642 (CC) ('*Jordan*').

424 Act 23 of 1957.

425 *Jordan* (supra) at para 29.

426 *Ibid* at para 92.

427 *Ibid* at para 94.

428 Act 61 of 1973.

communications during the winding-up of a company — are justifiable.<sup>429</sup> The Court in *Bernstein* wrote:

The public's interest in ascertaining the truth surrounding the collapse of the company, the liquidator's interest in a speedy and effective liquidation of the company and the creditors' and contributor's financial interests in the recovery of company assets must be weighed against this peripheral infringement of the right not to be subjected to seizure of private possessions.<sup>430</sup>

The court also found that the information sought at such hearings pertained to 'participation in a public sphere' and could not rightly be held to be 'inhering in the person'. There was no reasonable expectation of privacy.<sup>431</sup>

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OS 12-03, ch38-p43

The lower courts have also held that although the interrogation requirements under ss 65 and 152 of the Insolvency Act<sup>432</sup> infringed a debtor's right to privacy, such infringements are justified. The courts concluded that the rights of a creditor should enjoy preference over the insolvent's right to privacy in pre-sequestration matters.<sup>433</sup> Likewise, it has been held that the power of the Director of the Office for Serious Economic Offences, in terms of s 7 of the Investigation of Serious Economic Offences Act,<sup>434</sup> to decide whether or not to permit disclosures concerning information obtained as a result of an enquiry, search and seizure conducted in terms of the Act, is reasonable and justifiable. It was deemed so because the Act required the Director to act *intra vires* section 7.<sup>435</sup>

It has been held that the arbitrary powers of search and seizure given to inspectors under s 7(3) of the Business Practices Act<sup>436</sup> are not reasonable and justifiable.<sup>437</sup> They failed the limitations test because there was no reason why they

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429 *Bernstein* (supra) at para 90 (Ackermann J).

430 *Ibid.* The court also reaffirmed its decision in *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 127. There it held that s 417(2)(b) of the Companies Act, which requires persons examined under that section to answer questions which might incriminate them, and provides that any answers given may be used in evidence against them, was not a justifiable limitation in terms of s 33 under the Interim Constitution. The Court found that there was not an acceptable degree of proportionality between the legitimate objective sought to be achieved in s 417(2)(b) and the means chosen.

431 *Bernstein* (supra) at para 85.

432 Act 24 of 1936.

433 *Podlas v Cohen and Bryden NO & others* 1994 (4) SA 662 (T), 1994 (3) BCLR 137 (T).

434 Act 117 of 1991.

435 *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).

436 Act 71 of 1988.

437 *Janse van Rensburg NO v Minister van Handel en Nywerheid en 'n ander* 1999 (2) BCLR 204 (T).

could not be subject to the same well-articulated controls laid down in s 21 of the Criminal Procedure Act.<sup>438</sup>

There have been conflicting High Court decisions concerning the validity of the provisions governing the seizure of property in terms of the Proceeds of Crime Act<sup>439</sup> and the National Prosecuting Authority Act.<sup>440</sup> In *Bathgate*, the powers of seizure justified in terms of s 36. In *Hyundai* the powers of seizure were failed the limitations test.<sup>441</sup>

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438 Act 51 of 1977.

439 Act 76 of 1996, s 36; *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (1) SACR 105, 135 (C), 2000 (2) SA 535 (C), 2000 (2) BCLR 151 (C) (powers of seizure justified in terms of s 36.)

440 Act 32 of 1998; *Hyundai Motor Distributors (Pty) Ltd v Smith NO* 2000 (1) SACR 503 (T), 2000 (2) SA 934 (T), [2000] 1 All SA 259 (T)(powers of seizure not justified in terms of s 36).

441 *Gardener v Whitaker* 1995 (2) SA 672 (E), 686, 1994 (5) BCLR 19 (E); *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 65 (CC) at para 102; *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 162, 1995 (2) BCLR 198 (C); *Director of Public Prosecutions: Cape of Good Hope v Bathgate* (supra) at 126-127.