

# BOTHA V SMUTS - FARMS, PHOTOS, PHYSICAL ADDRESSES AND PRIVACY: CONSTITUTIONAL COURT RULING ON ONLINE USE OF PERSONAL INFORMATION

Category: Privacy Law, Infosec, and POPIA  
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*"...this matter implicates more than the rights of the parties. It implicates our collective relationship with the internet and its power over our online personae."*

*Constitutional Court of South Africa, 9 October 2024*

## **Introduction**

Mr Botha took Mr Smuts and others all the way to the [Constitutional Court](#) regarding a matter, where he believed certain online posts about his animal trapping activities infringed his privacy.

This matter illustrates how contentious and complex the law around privacy and freedom of expression can be. It shows how, even in the Constitutional Court, the eight judges adjudicating the matter delivered four differing judgments. It is significant because:

(a) *there is no authoritative pronouncement on the issue, with available, cogent, academic or*

*expert views on it being divergent;*

(b) *it raises new and difficult questions of law; and*

(c) *the answer to the question in issue is not readily discernible.*[\[1\]](#)

This article assesses just one of the four different judgments handed down in the matter. It explains how the judgment gives guidance on a number of privacy and freedom of expression issues. They include the following:

- As much as the issues rose before the Protection of Personal Information Act (POPIA) came into force, the judgment also provides guidance on an aspect of POPIA that many deal with daily: what rights they have over personal information that is derived from a public record or that they have deliberately made public e.g. on the internet or on social media.
- The judgment also opines on the issue of whether granting relief long after information has been disseminated on social media should still be considered, even if the issue is moot. In simpler terms, it discusses whether relief can still be granted long after the horse has bolted.

## **Background**

The issues arose in 2019. Mr Smuts obtained photographs related to animal trapping activities on Mr Botha's farm. He regarded these activities as unethical and cruel. He had some short-lived interaction with Mr Botha about this. Mr Smuts found Mr Botha's farm address and brokerage business address (which also happened to be his home address) online and published it and the photographs on a Facebook page. This elicited many negative comments about Mr Botha.

Mr Botha obtained a High Court order interdicting Mr Smuts and ordering that the Facebook post be deleted. Mr Smuts appealed to the Supreme Court of Appeal, which reversed the High Court's order. Mr Botha then appealed to the Constitutional Court. The Constitutional Court handed down judgment on 9 October 2024.

## **Was Mr Botha's privacy right infringed by the publication of his name and farm's location?**

In assessing the entire Facebook post, the Court took the view that the post should be broken down into its components and that each individual fact should then be focused on.[\[2\]](#)

With regard to whether data subjects have self-determination over information they voluntarily disclosed to the public, the Court opined that a:

*...voluntary decision to disclose information to the public in itself changes the boundaries of self-determination and shapes the data subject's subjective expectation of privacy. While the subjective expectation of privacy may not always be totally eroded when this happens, it is arguably diminished.*[\[3\]](#)

The Court assessed whether Mr Smuts disclosing Mr Botha's farm's address and location, infringed his privacy. In applying the well-known *Bernstein* legal test, the Court considered that because trapping practices were in the public interest and the farm is a commercial operation and trapping formed part of its operations, the legitimate interests of visitors to the farm would justify them sharing this with others. It found that *"these facts do not, objectively speaking, constitute private facts"* and therefore do not result in a breach of Mr Botha's privacy rights.

## **Was Mr Botha's privacy right infringed by the publication of his name and insurance business' details?**

The Court discussed this aspect and recognised that by publishing his brokerage business information on at least ten websites, Mr Botha sacrificed part of his subjective expectation of privacy. Importantly, the Court highlighted that *"it cannot be said that by doing so he renounced all expectations of privacy in respect of his address."* It emphasised that his expectation would not have been that it was open for his address to be revealed to the world in connection with matters unrelated to the brokerage.

The Court highlighted that even though his brokerage shared the same address as his home, it would be wrong to suggest that his home address was also fair game insofar as it could be publicised and linked to the farm where the trapping had occurred. The Court discussed how Mr Botha had clearly publicised the address as being that of his brokerage and not his home. It took the view that because he did not conflate the two addresses, he *"expected that the privacy of his home and its location would continue to enjoy protection."*

The Court also considered the original purpose for which information was disclosed, especially where the disclosure was for a limited specific purpose and where it was then used for other purposes. In discussing individual autonomy and self-determination in the context of personal information we make public, the Court says:

*In using online platforms, we are not required to surrender our autonomy nor the intimate aspects of our lives. We will invariably face challenges in how we take advantage of online publication and protect our private lives, but that is the task of living in the modern world where competing priorities and rights come into sharp conflict. It is how they are managed that ultimately matters*

The Court discussed the fact that it would leave many people who work and live at the same address in a difficult position, because people's right to privacy regarding their home details would be eroded. The Court then confirmed that by locating his home and business at the same address, Mr Botha did not extinguish his right to privacy regarding his home.

It then weighed up Mr Botha's right to privacy against Mr Smuts' right to freedom of expression. It asked whether *"whether it is in the public interest to link Mr Botha's home address with legal trapping on a commercial farm."* The Court took the view that Mr Botha's home address was not critical to Mr Smuts' cause, and that it was *"merely peripheral"*. Including Mr Botha's address did little to advance Mr Smuts' cause, but had serious potential to disclose personal and intimate details of Mr Botha and his family, namely his home address.

The Court found that this constituted an invasion of Mr Botha's privacy that could not be justified by arguing that Mr Smuts' right to freedom of expression was more important.

This judgement is important because it clarifies what we can and cannot do with information that others post online. It defines more clearly how we can lawfully use others' personal information for purposes of freedom of expression and when using such information would constitute an invasion of someone's privacy.

Without so much of our lives spent online and with many of us expressing ourselves in cyberspace, this judgment will definitely assist in determining how we regulate our online behaviour, and respect others' privacy.

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[\[1\]](#) See paragraph 38 of the judgment

[\[2\]](#) See paragraph 105 of the judgment.

[\[3\]](#) See paragraph 110 of the judgment