

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT: 69/05

NM and Others v Smith and Others

Date of Judgment: 4 April 2007

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The applicants in this matter are three women who are HIV positive. The respondents are Ms Charlene Smith, Ms Patricia de Lille and New Africa Books (Pty) Ltd. The applicants claim that the respondents violated their rights to privacy and dignity by publishing their names and HIV status in a biography of Ms de Lille.

The applicants had participated in clinical trials and raised concerns about the illnesses and fatalities among the participants. They averred that the consent forms for the trials had not been properly explained to them. Ms de Lille was contacted in order to help investigate the complaints. Professor SA Strauss was appointed to conduct an inquiry into the allegations of misconduct and subsequently issued a report on the trials (the Strauss Report). This report contained the applicants' names and HIV status. The report and the materials relevant to the investigation were sent to a limited number of people involved in the investigation, including Ms de Lille.

Ms Charlene Smith was commissioned by New Africa Books to write a biography of Ms de Lille. The book revealed the names and HIV status of the applicants. The applicants first sought an interdict against the continued publication of the book, but ultimately withdrew the application. They requested the removal of their names from the book and the respondents declined to do so. The applicants sued the respondents for damages in the Johannesburg High Court. The High Court held that the disclosure of the applicants' names in the book was not unlawful as Ms Smith and Ms de Lille were not negligent in assuming that consent had been given to the University of Pretoria, and did not act with the requisite intent to reveal private medical facts. The High Court held, however, that failure to stop the distribution of copies of the book after it had become apparent that consent had not been given, violated the applicants' right to privacy and ordered New Africa Books to pay them R15 000 each in damages. The applicants unsuccessfully appealed to the Supreme Court of Appeal.

In the appeal to this Court the Freedom of Expression Institute was admitted as amicus curiae. It argued that including negligence as a ground for fault, as contended for by the applicants, would unjustifiably limit the right to freedom of expression.

Madala J, with whom Moseneke DCJ, Mokgoro J, Skweyiya J, Van der Westhuizen J and Yacoob J concurred, set aside the High Court decision. He held that the respondents were aware that the applicants had not given their express consent but had gone ahead and published their names, violating their privacy and dignity rights. The use of pseudonyms instead of the applicants' real names would not have rendered the book any less authentic and nowhere could it be shown that the public interest demanded otherwise. Madala J held that Ms Smith and Ms de Lille were liable for damages together with the publishers due to their infringement of the applicants' rights to privacy and dignity from the moment of the publication of the book. He awarded R35 000 in damages to be paid by the three respondents to each of the applicants.

In a separate concurring judgment Sachs J added that there was no reason to doubt the genuineness of Ms Smith's belief (in fact erroneous) that the applicants had indeed placed their medical status in the public domain. Nevertheless, given the extreme sensitivity of the information involved, she should have left no stone unturned in her pursuit of verification. Of even greater importance, if the slightest doubt existed, there was no need to publish the actual names of the applicants. The current appeal did not deal with famous people who simultaneously craved and decried extreme public attention, but with people whose lives were dominated by anxiety and who were only slowly beginning to break through intense barriers of community prejudice. The moral of the story was that unless overwhelming public interest pointed the other way, publishers should refrain from circulating information identifying the HIV status of named individuals unless they had the clearest possible proof of consent to publication.

Langa CJ wrote a judgment agreeing in part and dissenting in part with the judgment of Madala J. He found that the respondents did not act intentionally. He agreed with O'Regan J that the common law must be developed with regard to media defendants, and would develop it to replace the current requirement of intention with that of negligence. Langa CJ held that the first and third respondents would qualify as media defendants and as the Strauss Report cannot be regarded as a public document, they had acted negligently. Agreeing with Madala J's assessment of damages, he held that the applicants were attempting to vindicate constitutional rights and should get all their costs.

In a dissenting judgment, O'Regan J held that the right to privacy protects citizens from the publication of private medical information without consent and that this right had to be balanced with the right to freedom of expression. On the facts of the case, the publication of the applicants' names and HIV status was neither intentional nor negligent. Ms Smith assumed that consent was generally given because the applicants' names and HIV status were published in the Strauss Report, a reputable publication, with no disclaimer regarding their consent to the contrary. The respondents did not entertain the possibility that either the University or Professor Strauss would have sent a report to Ms de Lille, a Member of Parliament, in circumstances where the applicants' consent was limited and was not noted as such. The media has an obligation to act in an objectively appropriate fashion when publishing material that may infringe on a person's right to privacy. However, to hold that the respondents were under a further duty to contact either the University or the applicants to ensure that they had in fact consented to the original publication of their names would impose a significant burden on freedom of expression.

O'Regan J, however, found that the failure by New Africa Books to take steps to withdraw copies of the book once the lack of consent became clear, was unlawful, and that an appeal lodged by New Africa Books must fail. O'Regan J would have dismissed the appeal of the applicants.