

SACHS J ABRIDGED JUDGMENT (CONCURRING)

NM and Others v Smith and Others

201. In many industrialised states privacy law has been advancing by leaps and bounds. The rich and famous seek legally to restrain the voracious mass media that swallow up and regurgitate trivial and hurtful information about their private lives.¹ In our country privacy law has been invoked in quite a different context. It is to provide balm for the traumatised dignity of people living in the harshest of social conditions and afflicted with the most serious of ailments. It is in this human rights context that the competing interests at stake in the present matter must be dealt with.
202. In a fittingly accessible manner, Madala J has indicated how in the particular circumstances of this case competing needs with respect to human dignity, on the one hand, and freedom of expression, on the other, should be reconciled. I support his reasons and conclusions, and wish to add the following observations.
203. In *Bogoshi* the SCA developed in a way that was sensitive to contemporary concerns and realities, a well-weighted means of balancing respect for individual personality rights with concern for freedom of the press. Though the case related to the law of defamation, the principles developed in it are eminently transportable to the law of privacy. The SCA ensured the continued protection of individual rights of reputation by re-affirming the traditional common law principle that once the injurious statement was proved, intent to injure would be presumed, and a defendant would escape liability only by establishing truth and public benefit. But to pre-empt

the undue chilling effect of huge potential claims for damages following on honest error, it added that even if aspects of a publication turned out to be untrue, a showing that the media concerned had taken reasonable steps to ensure the veracity of the relevant information would establish a good defence to the unlawfulness of the publication. What mattered was the reasonableness of the publication in the circumstances.

204. The *Bogoshi* approach has two principal virtues. Firstly, it seeks to harmonise as much as possible respect for human dignity and freedom of the press, rather than to rank them in terms of precedence. The emphasis is placed on context, balance and proportionality, and not on formal and arid classifications accompanied by mantras that favour either human dignity or press freedom. The more private the matter, the greater the call for caution on the part of the media, while conversely, the more profound the public interest, the more heavily will it weigh in the scales. Secondly, by stressing the need for the media to take reasonable steps to verify the information to be published, it introduces objective standards that can be determined in advance by the profession and then evaluated on a case-by-case basis by the courts. The result is the creation of clearly identifiable and operational norms, and the fostering in the media of a culture of care and responsibility.

205. I feel that both of these elements are relevant as to how the tension between privacy rights and press freedom should be handled in the present matter. There is nothing to suggest that Ms Smith, an experienced journalist, was unaware of the norms of her profession, and there is no reason to doubt the genuineness of her 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.

206. There might be some cases where the need for verisimilitude, a sense of actuality, may be overwhelming. Indeed, in the case of film stars, models and titled personalities, it is precisely their celebrity that establishes their newsworthiness. This

case is not one of those. We are not dealing with famous people who simultaneously crave and decry extreme public attention. We are concerned with people whose lives are dominated by anxiety and who are only slowly beginning to break through intense barriers of community prejudice. Hardly a day goes by without one reading in one publication or another the name of someone living with HIV, where an asterisk is attached to indicate that the name is not real.

207. In the present matter the publishing of the actual names of the applicants could have added only minimally to the vibrancy and texture of the story, if at all. At the same time it was devastating to the applicants. When the expressive interests are balanced against the privacy interests, the scales come down with a clang on the side of privacy. In the result, the steps taken by Ms Smith, Ms de Lille and the publishers to avoid unwitting damage through unauthorised disclosure of private medical facts, did not meet the standard of reasonableness.

208. Ms Smith and Ms de Lille both have an honourable history of raising public awareness of the need to deal sympathetically and efficaciously with the pandemic. The fact that persons with their record are being called to account for failure to ensure that highly sensitive private medical facts about identified individuals were not inappropriately revealed, serves to underline the need to hold firmly to stringent standards of respect for privacy in this area. These are standards that the profession has set for itself, and that the law demands of all.

209. From a legal point of view, then, the moral of the story is that unless overwhelming public interest points the other way, publishers should refrain from circulating information identifying the HIV status of named individuals, unless they have the clearest possible proof of consent to publication having been given, or that the information is in the broad public domain.

210. At its heart this case was never about money. It was about defining appropriate journalistic and publishing standards in a murky and undeveloped area of our law. In this context it is a matter of regret that parties that shared a deep concern about the need to develop a humane and sympathetic approach to people living with HIV, found themselves increasingly at loggerheads. The trial was acrimonious and argument in our Court at times became strident. Yet the law has been clarified in ways that hopefully will be helpful to all concerned. Forensic closure has finally been achieved. It is to be hoped that in an appropriate spirit of healing, the offer of a private apology made at an earlier stage by Ms Smith, Ms de Lille and the publishers, will now be generously renewed by them, and generously accepted by the applicants.