REPORTABLE 7

IBBO MANDAZA
versus
THE DAILY NEWS
and
GEOFF NYAROTA

HIGH COURT OF ZIMBABWE
ADAM J
HARARE 20 February, 19 March, 27 & 30 May and 28 August 2002

Mr *Zhou,* for the applicant
Mr *Wernberg,* for the respondents

ADAM J: The applicant was granted interim relief on his urgent chamber application on 19 July 2001 whereby the respondents are interdicted from publishing any dossier of applicant's properties or committing any further unlawful acts of intrusion into the applicant's private life. The respondents filed its opposing affidavit on 24 July 2001 and the applicant filed his answering affidavit on 3 August 2001. The applicant's heads of argument were filed on 10 October 2001 with the respondents' heads of argument being filed on 24 October 2001. At the hearing of the matter on 20 February 2002 the matter was postponed *sine die* with costs reserved together with the interim relief altered by consent whereby the respondents were interdicted from publishing unlawful acts of intrusion into the applicant's private life. On 14 March 2002 the applicant filed a supplementary affidavit now seeking a final order in accordance with the amended draft order that the respondents be interdicted from intruding into the applicant's private life by taking and/or publishing aerial photographs of the applicant's properties. On 19 March 2002 the matter was further postponed with costs being reserved. On 27 May 2002 the applicant's supplementary heads of argument were filed on which date the matter was postponed to 30 May 2002.

In his founding affidavit the applicant averred that the first respondent on 6 July 2001 published an article which suggested that he could only have acquired the three properties named in the published article through unlawful means; that he believed that besides the extreme defamatory nature of the publication it is also an extreme form of invasion into his constitutional right to privacy; that on 16 July 2001 the respondents published yet another article in which they stated they were

finalising a dossier of his properties; that he believed that there is no legal or moral justification why his private life must be opened up and laid out for public consumption; that the Constitution of this country specifically protects him and guarantees his right to privacy and if the respondents are not interdicted from publishing the so called dossier of his properties he obviously would not have enjoyed the right to such protection against intrusions into his private life. He also averred that the respondents have, to an extent, caused damage to his person by their previous publications on him and they should not be allowed to aggravate such damage without just cause.

In the opposing affidavit the second respondent averred that both respondents admit publication of the article but denied that the article suggested that the applicant had acquired the three properties through unlawful means; that the first respondent's reporter specifically invited the applicant to comment but contented himself with an abusive response. The respondents denied that the publication of the article is defamatory and most importantly the applicant has not sought to particularise the manner in which the article is allegedly defamatory nor indeed has the applicant contended that the facts published are not true. They pointed out that the applicant is a public figure and the article is of a public interest. They averred that they do not accept the contents of the paragraph about the applicant's constitutional right to privacy insofar as they relate to a constitutional right to privacy or to an infringement thereof. They averred that the respondents published the article in the public interest and in the exercise of their right to freedom of expression and that in any event the ownership of properties are a matter of public record and can be established by a search in the Deeds Registry. They averred with respect there can be no right to privacy where ownership is a matter of public record. Alternatively and, in any event; publication was truthful and in the public interest. They denied the contents of the paragraph in which the applicant believed that there is no legal or moral justification why his private life must be opened up and laid out there for public consumption. They denied that publications of ownership of certain properties, which publication was truthful can be an infringement of privacy. Indeed, the applicant admits he owns or controls other properties. They failed to see how or why the respondents should be interdicted from publishing matters of public record. Moreover, the interdict constitutes an

infringement of freedom of the press and the respondents' right to freedom of expression to an extent that is not reasonably required in a democratic society.

In his answering affidavit the applicant averred that it surely does not take any splitting of hairs to see the import of the publication. Anybody who reads the report will undoubtedly end up with the conclusion that he unlawfully acquired the three properties. He also reiterated that he had no obligation at all to discuss his private acquisitions with the respondents' reporter. He reminded the respondents that this application is not meant to prove the defamatory nature of the publication, it is meant to interdict the respondent from violating his constitutional right to privacy. He denied that the publication is in the public interest and that he is a public figure in the sense of him being a suitable candidate to be stripped of the right to privacy. His properties belong to him, his wife and children who enjoy the protection of the Zimbabwe Constitution. Hiring private planes to photograph his family home hardly is of public interest and surely is a serious intrusion into my family's privacy. Whether the facts are true or false is not relevant, he simply should not be displayed into the public gaze especially if no justification exists. He averred that the respondents' right of expression does not supercede his right to privacy at all. He also averred that there is no way that the article can be said to have been of public interest. Further the fact that ownership of property is a matter of public record does not mean that such ownership can be published without just cause. He did not share the view that ownership of immovable property is matter of public record and therefore becomes a non-issue for the sake of the right to privacy. He reiterated that the publication was nowhere near being in the public interest. He asserted that permitting the respondents to publicise the dossier on his properties is tantamount to legalising the violation of his constitutional right to privacy. A democratic society respects and protects quite jealously, the individual's rights including the right to privacy.

The respondents' heads of argument indicates that the applicant's case is based on section 11(c) of the Zimbabwe Constitution which was repealed by Act 14 of 1996. The respondent's legal practitioner submits that there can be no question in this matter of the applicant's privacy being invaded as the ownership of immovable properties is a matter of public record. In effect the final order sought seeks to interfere with the respondents' right to address matters of public concern. The

applicant in his supplementary heads of argument states that the respondents admit that photographs were taken using telephoto lens well outside the applicant's airspace and that the photographs of his Mount Pleasant house was taken from outside the property. The applicant's legal practitioner submits that what is not disputed that this was done without the applicant's authority.

It is undoubtedly true that the Fourteenth Amendment in 1996 repealed and replaced section 11 of the Constitution by a Preamble. It provides that persons are entitled, subject to the provisions of the Constitution, to the fundamental rights and freedoms of the individual in Chapter Three of the Constitution but with the limitation that the enjoyment of those rights and freedoms do not prejudice the public interest or the rights and freedom of other persons. Prior to the Fourteenth Amendment in the case of *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) GUBBAY CJ held that section 11 was a substantive provision (although commencing with the word "Whereas") that conferred a Preamble to the rights provided for in the Declaration of Rights section. The purpose of this section was to strike a necessary accommodation between the enjoyment of the freedoms and the potential prejudice resulting from their exercise both to others and the public. The Learned Chief Justice observed at 55:

> "In *Dow v Attorney-General* [1992] LRC (Const) 623, a decision of the Appeal Court of Botswana, AMISSAH JP, at 636e –637b, considered the identically worded s 3 of the Constitution of Botswana. He viewed it, most aptly, as 'the key or umbrella provision' in the Declaration of Rights under which all rights and freedoms must be subsumed; and went on to point out that encapsulates the sum total of the individual's rights and freedoms in general terms, which may be expanded upon in the expository, elaborating and limiting section ensuing in the Declaration of Rights."

It is true that the eminent Justice Holmes in *Jacobson v Massachusetts* 197 US 11 (1905) in considering a State law relating to vaccinations with reference to the Preamble of the American Constitution said at 22:

> "Although [the Constitution's] preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless apart from the preamble, it be

> found in some express delegation of power, or in some power be to properly implied therefrom."

Even Justice Holmes accepted that what is contained in the Preamble can be a source of substantive powers if it could be properly implied from the text of the body of the Constitution.

In this context the principles of Constitutional interpretation are pertinent. In *Hunter v Southam Inc* (1985) 11 DLR (4th) 641 (SCC) at 649 it was stated:

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet the social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting the provision, bear these considerations in mind."

In light of the foregoing the effect of the Fourteenth Amendment cannot be said to have in any way curtailed or dwindled the right to each of the following, namely life, liberty, security of person and the protection of the law, freedom of conscience, of expression, and of assembly and association and protection for privacy of a person's home and other property which are encapsulated in section 11 Preamble that refers to persons being entitled to fundamental rights and freedoms of the individual. In my view section 18 read with section 11 still provides a constitutional right to privacy even though not well-expressed in the explicit terms of section 14 of the South African Constitution. That section 14 provides that 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. Even section 14 is not an exhaustive list since the expression "includes" is used. This would suggest to me that paragraphs (a) to (d) are merely some of the examples of the constitutional right to privacy.

In *Chinamora v Angwa Furnishers (Pvt) Ltd* 1996 (2) ZLR 664 (S) GUBBAY CJ in dealing with section 18(1) said at 689 –

> "The phrase 'subject to' is a simple expedient which subjects the provisions of the subject section to the provisions of the master section where there is a clash, the concept shows which of the two takes effect."

He referred to the judgment of MULLER JA in *S v Murwane* 1982 (3) SA 717 (A) who said at 747H:

> "The purpose of phrase 'subject to' … is to establish what is dominant and what is subordinate or subservient; that to which a provision is 'subject', is dominant – in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation."

In *Rhodesia Printing & Publishing Co. Ltd v X and Anor* 1974 (2) RLR 207 (A) it was held that under Roman-Dutch Law there was a qualified right to privacy. BEADLE CJ said at 214:

> "The starting point in the law of this subject is that *prima facie: "*Every person has an inborn right to tranquil enjoyment of his peace of mind'. (See Melius de Villiers on *Injuria,* 24, *O'Keeffe v Argus Printing & Publishing Co. Ltd* 1954 (3) SA 244 (C) p. 247; *R v Umfaan* 1908 TS 62 at 66; *S v A* 1971 (2) SA 293 (T) p. 297) *Prima facie, therefore every incursion of that right is an injuria.* This general rule is, however, subject to a great many limitations … For the purpose of this case, however, I find the following passage from de Villiers helpful. See *O'Keeffe*'s case (*supra*), at page 248:
>
> > 'Whether an act is to be placed amongst those that involve an insult, indignity, humiliation or vexation depends to a great extent upon the modes of thought prevalent amongst any particular community or at any period of time, as upon those different classes or grades of society, and the question must to a great extent therefore be left to the discretion of the court where an action on account of the alleged injury is brought …'
>
> This passage is clear authority for the proposition that in dealing with what the 'modes of thought prevailing in a particular community' distinction may be drawn between 'different classes or grades of society'."

In *O'Keeffe* case the unauthorised publication of the plaintiff's photograph in a newspaper advertisement was held to be violation of her *dignitas.* In *S v A, supra,* the planting of a listening device in the plaintiff's apartment was held to be an invasion of his dignity. In *Reid-Daly v Hickman* (2) 1980 ZLR 540 (A) the secret installation of an electronic listening device in the appellant's office at Inkomo Camp was held to be an invasion of his dignity. But in *S v I & Anor* 1976 (1) SA 781 (RAD) the wife suspected the husband of committing adultery so she hired a private investigator. The wife and the private peeped through a bedroom window where the husband was with a woman in a double bed. BEADLE ACJ said at 787E:

> "In a case where one spouse suspects the other of committing adultery, which the guilty spouse denies, invasion of privacy of the guilty spouse and of his paramour by the injured spouse may be justified where the injured spouse invades that privacy *solely* with the *bona fide* motive of obtaining evidence of the adultery, and the invasion is more than is reasonably necessary for the purpose of obtaining that evidence. I, stress here the word solely because, if the injured spouse knows that she already has, or that she clearly has the means of getting, other adequate evidence of adultery ... The evidential onus of proving her motive must rest on the injured spouse.
> ...
> I now turn to the merits of the instant case. When the appellants peeped through the complainant's window, they did so *solely* with the *bona fide* motive of obtaining evidence of his adultery. I do not think that in the circumstances what they did can be considered as doing more than was reasonably necessary for the purpose of obtaining evidence of that fact. I am, therefore, of the opinion that they were justified in peeping through the window and that their conviction of criminal *injuria* for so doing was not warranted."

In *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) CORBETT CJ observed at 462E – H and 464C – D:

> "I need not essay a definition of the right to privacy. Suffice it to identify two forms which an invasion thereof may take, *viz* (i) an unlawful intrusion upon the personal privacy of another and (ii) the unlawful publication of private facts about a person ... Of course, not all such intrusion or publications are unlawful. And in demarcating the boundary between lawfulness and unlawfulness in this field, the Court might have regard to the particular facts of the case and judge them in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court ... Often ... a decision on the issue of unlawfulness will involve weighing of competing interests.
> ...
> (i) There is a wide difference between what is interesting to the public and what it is in the public interest to make known ...
>
> (2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the number of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest."

However, the intrinsic significance of freedom of expression has been universally accepted. In *re Munhumeso & Ors, supra,* GUBBAY CJ observed at 57:

> "Freedom of expression, one of the most precious of all the guaranteed freedoms, has four special purposes to serve: (i) it helps the individual to obtain self fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making and (iv) it

provides a mechanism by which it is possible to establish a reasonable balance between stability and social change."

In *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S) GUBBAY CJ in considering the importance of freedom of expression said at 210-211:

"It was stated by this court in *In re Munhumeso,* ... at 56F-H .. that;

> 'The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man'; per European Court of Human Rights in *Handyside v United Kingdom* 1 EHRR 737 at para 49.'
>
> In *Wood & Ors v Min. of Justice & Ors* 1994 (2) ZLR 195 (S) at 198 the comment was added that the freedom of expression is 'one always to be jealously guarded by the courts'.
>
> This approach, which underscore the pre-emminence of freedom of expression as an indispensable condition for a free and democratic society, conforms with what is reflected in international human rights instruments, some of which Zimbabwe has ratified or acceded to."

In *National Media Ltd & Ors v Bogoshi* 1998 (1) SA 1196 (SCA) HEFER JA observed at 1207-8, 1210-11 and 1216:

"It is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other...

It would be wrong to regard either of the rival interests with which we are concerned as more important than the other. The importance of the protection of reputation is self-evident ... In a judgment of the Supreme Court of Canada (*Hill v Church of Scientology of Toronto* (1995) 126DLR (4th) 129 (SCC) at 162) CORY J cited an article by David Lepofsky in which the author said that reputation is the 'fundamental foundation on which people are able to interact with each other in social environments? and proceed to say (at 163) that –

> 'the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.'

The freedom of expression is equally important. Professor Van der Westuizen (in *Van Wyk et al Rights and Constitutionalism: The New South African Legal Order* at 264) describes it as essential in any attempt to build a democratic social and political order. Elsewhere it has been referred to as 'the matrix, the indispensable condition of nearly every other form of freedom'

(*Palko v State of Connecticut* 302 US 319 (1937) at 327), and in the majority judgment in the European Court of Human Rights in *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754 it was said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. That this is not an overstatement appears from McIntyre J's reminder in *Retail, Wholesale and Department Store Union, Local 580 et al v Dolphin Delivery Ltd* (1987) 33 DLR (4th) 174 (SCC) at 183 that –

> '(f)reedom of expression … is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society'.
> …

In the same vein Joffe J said in *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Anor* 1995 (2) SA 221 (T) at 227H-228A:

> 'The role of the press in a democratic society cannot be understated. … It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal - and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern.'

If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*.

…

In my judgment the decision in *Pakendorf* must be overruled. I am with respect, convinced it was clearly wrong.

…

This provision [section 39(2)], as Kentridge AJ explained in *Du Plessis & Ors v De Klerk & Anor* 1996 (3) SA 850 (CC) at 885G-H (1996 (S) BCLR 658). 'ensures that the values embodied in chap 2 will permeate the common law in all its aspects'. … The resultant position appears to be the same as that in Canada, which is described as follows in the *Church of Scientology* case *supra* at 156:

> 'It is clear from Dolphin Delivery (supra) that the common law must be interpreted in a manner which is consistent with Charter principles. The obligation is simply a manifestation of the inherent jurisdiction of the Courts to modify or extend the common law in order to comply with prevailing social conditions and values … Historically, the common law evolved as a result of the Courts making those incremental changes which were necessary in order to make them comply with current societal values. The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the Courts to make

> such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.'
>
> (See also *De Plessis* at 881-2 (para [55]) 884B-F.)
> ..."

In *National Media* case it was pointed out that *Pakendorf en Andre v De Flamingh* 1982 (3) SA 146 (A) held that owners of newspapers, publishers, editors and printers were liable without fault and in particular, were not entitled to rely on their lack of knowledge of defamatory material in their publication, or upon erroneous belief in the lawfulness of the publication of defamatory material. The Supreme Court of Appeal overruled *Pakendorf* and restated the correct position under Roman-Dutch common law.

What HEFER JA said about striking a balance between the right to reputation and the right to freedom expression, in my view also in similar terms a balance has to be struck between the right to privacy and the right to freedom of expression. The applicant's legal counsel submitted that what the public interest or benefit would be in the publication of that information if the information is already known to the public. He referred to *Mahomed v Kassim* 1972 (2) RLR 577 (AD) where the appellant was found to have defamed the respondent by indicating that the respondent had stolen money belonging to the society. The appellant did not plead any secondary meaning of the words, but based his case on their primary meaning. The appellant applied to amend his plea by inserting a defence that the words used were true and the publication was for the public benefit. BEADLE CJ allowed the amendment and then held that the publication was not for the public benefit and so the defence of justification failed. The learned Chief Justice said at 529:

> "... the public benefit flows from making the misbehaviour of the plaintiff 'known' to the public. It seems to follow from this that that which has been said must be something of which the public are ignorant. It does not seem correct to speak of 'informing' people of something of which they are already aware. The public interest lies in telling the public something of which they are ignorant, but something which it is in their interest to know. If they already knew it, it hardly seems that the mere repetition can be of some value."

However, what was said by BEADLE CJ must now be understood along with what was enunciated by the Supreme Court in *In re Munhumeso, supra,* and *Retrofit (Pvt) Ltd v PTC & Anor*.

It cannot be seriously asserted on behalf of the applicant that information which is in the Registrar of Deed's office pertaining to ownership of immovable property is already known to the public. There is a wide difference between what information the public has access to and information that is known to the public. The two are not always synonymous.

In *Naomi Campbell v Mirror Group of Newspapers* [2002] EWHC 499 (QB) the plaintiff, the internationally renowned fashion model and celebrity, was shown on 1 February 2001 in the newspaper on the front page between two colour photographs, the one in baseball cap ordinarily dressed with the headline below – "Therapy: Naomi outside Meeting; and the other more glamorously dressed with the heading – "Naomi: I am a drug addict". The articles in it were by Polly Graham and marked "exclusive" and read – "Supermodel Naomi Campbell is attending Narcotic Anonymous meetings in a courageous bid to beat her addiction and drugs". The Editor of the "Mirror" gave the explanation that being conscious of the terms of the PCC Code of Conduct he considered carefully whether there was a public interest in publishing that Naomi Campbell had a drug problem and had sought to deal with it. The Editor thought two reasons justified it which, firstly, were that it appeared Naomi Campbell had been committing a serious drug criminal offence over a period of years and secondly, that as a role model to young people she had held herself out in the media as someone who had managed to remain immune from use of drugs in an industry where drug abuse was common. She had seriously misled the public.

Naomi Campbell's lawyers wrote a letter to the Editor enclosing a copy of proceedings which were issued on 1 February 2001 complaining about any further unlawful invasions of her privacy. The "Mirror" on 5 February 2001 published a second article headlined – "Pathetic" – under which was a photograph of Naomi Campbell and below it the heading: "Help, Naomi Campbell leaves Narcotics Anonymous meeting last week after receiving therapy in her battle against illegal drugs". The article was headed – "After years of self-publicity and illegal drug use, Naomi Campbell whinges about privacy". In the editorial of that issue the closing words were – "If Naomi Campbell wants to live like a nun let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes with it".

MORLAND J found that her regular attendance at Narcotics Anonymous meetings is easily identifiable as private and disclosure of that information would be highly offensive to a reasonable person of ordinary sensibilities (using the words of GLEESON CJ in *Australian Broadcasting Corporation v Lenah* [2001] HCA63) or that there existed a private interest worthy of protection (the guide line test given by LORD WOOLF CJ in *A v B* (CA 11 March 2002).) Reference was also made to *Douglas v Hello! Ltd* [2001] QB 967 at 1011-2 where KEENE LJ said:

> "164. ... The claim is put in terms of breach of confidence in the particulars of claim, but it was said in argument by Mr Tugendhat that the case has more to do with privacy than with confidentiality.
>
> 165. It us clear that there is no watertight division between the two concepts. *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 was a classic case where the concept of confidentiality was applied so as, in effect, to protect the privacy of communications between a husband and wife. Moreover, breach of confidence is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice.
>
> ...
>
> 168. But any consideration of article 8 rights must reflect the Convention jurisprudence which acknowledges different degrees of privacy. The European Court of Human Rights ruled in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 that the more intimate the aspects of private life which is being interfered with, the more serious must be the reasons for the interference before the latter can be legitimate: see p. 165, para 52. Personal sexuality, as in that case, is an extremely intimate aspect of a person's private life. A purely private wedding will have a lesser but still significant degree of privacy warranting protection, though subject to the considerations set out in article 8(2). But if persons choose to lessen the degree of privacy attaching to an otherwise private occasion, then the balance to be struck between their right and other considerations is likely to be effected."

(The reference to Convention is to the European Convention for Protection of Human Rights)

In *A v B, supra* LORD WOOLF CJ said:

> "4. ... under section 6 of the 1998 Act [Human Rights Act], the court, as a public authority is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect.
>
> ...
>
> 6. The manner in which the two articles operate is entirely different. Article 8 operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy. It requires a generous approach to the situations in which the privacy is to be protected. Article 10 operates in the opposite direction. This is because it protects freedom of

expression and to achieve this it is necessary to restrict the area in which remedies are available for breaches of confidence. There is a tension between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both articles are designed to protect. Each article is qualified expressly in a way which allows the interests in the other article to be taken into account.

...

11(iv) ... Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified.

...

11(x) If there is an intrusion in a situation where a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to liability in action for breach of confidence unless the intrusion can be justified.

...

11(xii) Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his or her actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published., It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line the case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to the other parts of the media. On the difficult issue of finding the right balance, useful guidance of a general nature is provided by the Council of Europe Resolution 1165 of 1998.

...

11(xiii) In drawing up a balance sheet between the respective interests of the parties courts should not act as censors or arbiters of taste. This is the task of others."

MORLAND J said at 11-22:

> "54. Inevitably a top fashion model of international renown will be the subject of media interest and publication. That interest and publication will be greatly increased if she has a colourful temperament and private life. This will be especially so if as in the case of Miss Naomi Campbell she exploits commercially her celebrity status…
>
> 55. Miss Campbell has frequently discussed with journalists and given interviews to the press or on television about aspects of her private life and behaviour when she should have known that her revelations would be published world-wide.
>
> …
>
> 57. She has publicly acknowledged that she has had problems of behavioural unpredictability and anger control which has required therapy. She admitted in evidence that she is notorious for tantrums.
>
> 58. She did not reveal that she was a drug addict and has been for some years a drug addict requiring and receiving therapy.
>
> 59. Indeed she lied about her drug addiction putting forward in interviews with the media a positively false case that unlike many models she had managed to avoid drugs.
>
> …
>
> 65. On very many occasions over the years her public and her personal private life have been subject of publication in the media.
>
> 66. Although many aspects of the private lives of celebrities and public figures will inevitably enter the public domain, in my judgment it does not follow that even with self-publicists every aspect and detail of their private lives are legitimate quarry for the journalists. They are entitled to some space of privacy.
>
> 67. In my judgment the media to conform with Article 8 should respect information about aspects or details of the private lives of celebrities and public figures which they legitimately choose to keep private, certainly 'sensitive personal data', unless there is an overriding public interest duty to publish consistent with article 10(2).
>
> …
>
> 69. Clearly the *Mirror* was fully entitled to put the record straight and publish that her denials of drug addiction were deliberately misleading …
>
> 70. … Article 10 is not an unqualified right as article 10(2) requires respect for the right of privacy has to be shown including by the media. Striking the balance having full regard to section 12(4) of the 1998 Act, clearly in my judgment Miss Naomi Campbell is entitled to the remedy of damages and/or for compensation.
>
> …
>
> 85. In my judgment the contention, that the published photographs of the claimant are sensitive personal data because they consist of information as to her racial or ethnic origin, has no materiality or relevance to the circumstances of this case. The claimant is proud to be a leading black fashion model and it is part of her life style and profession to be photographed as a black woman. She has suffered no damage or distress because the photographs disclose she is black.
>
> …

87. In my judgment the information as to the nature of and details of the therapy that the claimant was receiving at Narcotics Anonymous including the photographs with captions was clearly information as to her physical or mental health or condition, that is her drug addiction and therefore 'sensitive personal data'.

...

103 ... Thus the claimant was unaware that she was being photographed. She had no opportunity of evading being photographed or refusing her consent to being photographed.

104. In *R v Broadcasting Standards Commission exparte BBC* [2001] QB 885 ...

...

'Hale LJ said:

43. I accept that it is open to BSC to hold that secret filming of an individual for potential use in broadcasting is in itself an infringement of that individual's privacy (although it may well be warranted). Notions of what an individual might or might want to be kept 'private', 'secret', or 'secluded' are subjective to that individual.

44. I also attach particular weight to the context, which is not only the secret filming without consent but also the potential use in the mass media without consent. Furthermore, we are not talking of legal rights but broadcasting standards. If there is a good reason for infringement then it will not be unwarranted. All this seems to me to justify a wider view of the ambit of privacy than might be appropriate in some other contexts. There may well be contexts in which the concepts should be limited to human beings, whose very humanity is defined by their own particular consciousness of identity and individuality, their own wishes and their feelings . But that debate is for another day.

...

112. ... While the publication of the claimant's drug addiction and the fact that she was having therapy was necessary for the purposes of legitimate interests of the defendant, as a newspaper publisher, and was not an unwarranted intrusion into the claimant's right of privacy, it was not necessary to publish the therapy details complained of. All that needed to be published in pursuit of the defendant's legitimate interests were the facts of the drug addiction and therapy – full stop. The therapy details complained of were an unwarranted intrusion into the claimant's right of privacy."

In the United States the First Amendment freedom of expression and freedom of the press has not favoured prior restraint. In *NewYork Times Co v United States* 403 US 713 (1971) (The Pentagon Papers Case) the US Supreme Court said that – "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity". (*Near v Minnesota* 283 US 697 (1931) and *Bantam Books Inc v Sullivan* 372 US 58 (1963)). The Government "thus carries a heavy burden of showing justification for the enforcement of such a restraint" – *Organization For A Better Austin v O'Keefe* 402 US 415 (1971). In the

Pentagon Papers Case the United States Government sought to enjoin the New York Times from publishing the contents of a classified study (generally known as the "Pentagon Papers"). The US Supreme Court held that the Government had not met the burden and the injuction was denied to it. BRENNAN J said:

> "The entire thrust of the Government's claim through these cases has been that publication of the material sought to be enjoined 'could', or 'might', or 'may' prejudice the national interests in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."

The respondents' contention is that the interim relief in the form of a temporary interdict and the final order sought be the applicant would wrongly interfere with the respondents' right to address matters of public concern. The applicant asserts that the taking by the respondents photographs of the applicant's immovable properties in Harare, Juliasdale and the Mazowe area without the authority or consent of the applicant violated his right to privacy. The invasion was an unlawful intrusion upon his personal privacy and an unlawful publication of private facts about him.

There is little doubt that applicant is a public figure. The Mirror Reporter of *The Zimbabwe Mirror* described him, apart from his academic, professional and business profiles, as a renowned academician, author and publisher of many books; that he has undertaken celebrated consultancies for the UNDP; that he is currently the Chairman of the Rainbow Tourism Group and on the NUST Council. The Chief Report of *The Daily News* said he is a man of substance.

The applicant's legal counsel accepts where the information for publication purpose was obtained by means of unlawful intrusion then, generally, any publication would not be lawful – *Financial Mail (Pty) Ltd, supra,* at 463E-G. But the learned Chief Justice also pointed out that "in demarcating the boundary between lawfulness and unlawfulness on this filed, the Court must have regard to the particular facts of the case and judge them in light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court." CORBETT CJ said that this often involves the consideration and weighing of competing interests. These are the right to privacy and the right to freedom of expression and the right to freedom of the press.

The applicant has not established that the photographs of the three immovable properties were obtained by means of unlawful intrusion in the sense that the photographer entered either over his airspace or on to his immovable property. But the issue as I understand it is that the applicant's contention is that taking any photographs of his immovable property is a violation of his privacy.

In *La Grange v Schoeman & Ors* 1980 (1) SA 885 (E) the two respondents had been "catapulted into the public eye" and had become "instant celebrities". The applicant, a free-lance press photographer, was taking photographs of witnesses and others engaged in a highly publicised civil trial. On one occasion the two respondents prevented the applicant from taking photographs of them. The names of the respondents as members of the Security Police were mentioned at the trial. The applicant sought an interdict ordering the respondents not to impede him in any way taking photographs of witnesses and other persons involved in the trial. KANNEMEYER J held that the interdict claimed was too widely cast. He also held that what happened during the trial concerning the respondents was privileged and such privilege would attach to a fair and accurate report of this in the press. However, there was no justification in law which required the respondents to suffer the added indignity and inconvenience of having their photographs published in the press to satisfy the curiosity and to make it possible for the public at large to identify them. He further held that publication of photographs would go further than the report of proceedings and beyond the privilege protecting the publication of such a report. He was unpersuaded that the applicant has a right to require unwilling subjects to submit to being photographed. KANNEMEYER J then said at 895F-H and 896A:

> "It may be that to publish a photograph of a person which is taken against that person's will would not, were that person not one concerning whom injurious allegations have been made in Court, ground an action for *injuria* if that person had been 'catapulted into the public eye' against his will. This, however, does not mean that the photographer can compel such an one to submit to being photographed or require him not to take steps to prevent such photograph being taken … there was nothing to prevent the first or second respondent from avoiding being photographed by, for instance, shielding his face with a newspaper. If this is so, as I am satisfied it is, the applicant has not shown that he has a clear right in respect of which he is entitled to claim protection from the Court.
>
> This means that the respondents adopt to avoid being photographed cannot create a clear right where one does not exist. If the photographer is assaulted

> in order to prevent him from taking the photographs he has a remedy in an action for damages but the fact that he is physically prevented from taking the photographs rather than prevent by the use of stratagems gives him no right to photograph an unwilling subject."

I do not understand KANNEMEYER J as holding that there is no justification in law for a press photographer taking photographs of persons connected with a sensational or unusual trial. His observations were certainly directed at a press photographer who sought an interdict to compel a witness or others engaged in a trial to submit themselves to be photographed.

The requisites for the right to claim a final interdict that the applicant has to establish are, a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy – *Charuma Blasting & Earthmoving Services P/L v Njainjai & Ors* 2000 (1) ZLR 85 (S) at 89E.

The applicant has not established a clear right. In my view it is not sufficient for the applicant to merely assert that the respondents have taken photographs of his immovable property without his authority or consent. It cannot be maintained that the applicant has suffered any *injuria* merely by the publication of photographs of his immovable property. In my view this does not fall under 'sensitive personal data' and such intrusion cannot be categorised as unwarranted in the case of a public figure. If these photographs are meant to be read together with the articles in *The Daily News* with the allegation in his founding affidavit of their extreme defamatory nature, then the applicant has his ordinary remedy in a defamatory action for damages. The applicant has not cited any authority which supports his contention that just taking photographs of a person's movable or immovable property is a serious intrusion into his wife's, his children's and his privacy. The applicant may have had some basis if photographs, from outside his immovable property by use of telephoto lens, were taken of himself or is family on his immovable property which were offensive (falling under 'sensitive personal data').

The applicant has established no clear right which he can seek to be protected by a final interdict. Accordingly, the interim relief granted is not confirmed and the application for a final order in terms of the amended draft is dismissed with costs along with the costs of the other two hearings.

Muzangaza & Partners, applicant' legal practitioners.
Stumbles & Rowe, respondents' legal practitioners.