

**IN THE SABWIL HUMAN RIGHTS COURT
(ZOOM South Africa)**

Case No: 1112/2021

In the matter between:

HAIBO, TATA

Applicant

and

HAIBO, MAMA

Respondent

and

ACCESS TO JUSTICE

Amicus Curiae

**FILING NOTICE: THE AMICUS CURIAE HEAD OF
ARGUMENTS**

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DATED AT JOHANNESBURG THIS 4th DAY OF DECEMBER 2021

COUNSEL FOR AMICUS CURIAE:

SHALIN ARENDS

**TO: THE CHIEF REGISTRAR OF THE SABWIL HUMAN RIGHTS
COURT**

AND TO: COUNSEL FOR THE APPLICANTS

AND TO: COUNSEL FOR THE RESPONDENTS

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A. BACKGROUND

1. The applicant has instituted divorce proceedings against the respondent on the grounds of irretrievable breakdown of the marriage and due to the respondent's abusive behaviour towards her and their children. The respondent claimed the applicant was emotionally and verbally abusive towards him and their children.
2. The applicant and her children fled the matrimonial home in a Toyota Fortuner purchased by the applicant and stated that the respondent not contact her, nor will she disclose her location.
3. The Fortuner contains a GPS tracking device and dashcam, fitted with a built-in microphone. The respondent uses these to find the location of the applicant and their children, as well as recordings which contain audio of the applicant verbally abusing her children.
4. The applicant seeks an order to remove the GPS tracker and dashcam as it infringes on her right to privacy and safety.
5. The respondent rejects this stating that the manufacturers placed the tracker and dashcam features for safety purposes, and that its placement was unintentional
6. The respondent states that he will not personally track the movement of the vehicle but rather his attorney will have access to the information for the benefit of either party.
7. The applicant rejects this offer and states that the installation of the GPS tracker and dashcam for surveillance of the vehicle still infringes upon her right to privacy, regardless of whether or not it was intentionally placed there.

B. INTRODUCTION

Access to Justice South Africa has been admitted as an *amicus curiae*. As an organisation that focuses on restorative justice and has a special interest in preventing domestic violence. We submit that an infringement on the right to privacy enshrined in section 14 of the Constitution has occurred; however, certain matters of the case need to be addressed in order to act in the best interest of the victims and perpetrators of domestic violence.

C. ARGUMENT

Section 14 of the Constitution states 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”

The Court in *Bernstein v Bester* defined privacy as, “an individual condition of life characterised by seclusion from the public and publicity [which] implies an absence of acquaintance with the individual or his personal affairs in this state”. Furthermore, the Court in *Khumalo v Holomisa* also noted that the right to privacy is closely linked to human dignity - therefore, it is of utmost importance.

Section 14(d) coincides with personal information with regard to electronic communications. The Protection of Personal Information Act states personal information is not limited to, “any identifying number, symbol, email address, physical address, telephone number, location information, online identifier or other particular assignment to that person”. Section 5 of the Protection of Personal Information Act states, “a data subject has the right to have his, her or its personal information processed in accordance with the conditions for the lawful processing of personal information...”. Section 5(d) states that a person has the right to object, on reasonable grounds relating to his or her particular situation, to the processing of their personal information in terms of the grounds listed in section 11(3)(a). This includes:

- (d) processing protects a legitimate interest of the data subject;

- (e) Processing is necessary for the proper performance of a public law duty by a public body; or
- (f) Processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied

Despite the dashcam and microphone being installed by the company that manufactured the car, by using the location - especially after the applicant had explicitly stated that she does not want the respondent to know her location for her and her children's safety - without the consent of the applicant, it constitutes as an infringement to the applicant's right to privacy as per section 14(d).

Section 36(1) of the Constitution provides for the general requirements for the limitation of any right. It provides:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including -

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose”

The court in *Minister of Police and others v Kunjani* listed these factors when considering the limitation of rights. With reference to the above factors, the collection, access and usage does not constitute a justifiable limitation in accordance to section 36(1).

In the case of *Harvey v Niland and others*, the court stated, “all relevant evidence which was not rendered inadmissible by an exclusionary rule was admissible in a civil court irrespective of how it was obtained”. This is subject to a discretion to exclude unlawfully obtained evidence. Furthermore, the court also examined section 14(d) of the Constitution and the factors to consider when deciding if information was obtained illegally. Such factors include:

- The nature and context of the evidence
- The extent and manner of one's right to privacy
- Whether the party seeking to rely on the unlawfully obtained evidence attempted to obtain it by lawful means

- The idea that “while the pursuit of truth and the exposure of all that tends to veil it is cardinal in working true justice, the courts cannot countenance and the Constitution does not permit unrestrained reliance on the philosophy that end justifies the means.”

The court stated in *National Media Ltd v Jooste* that a child’s personal information was also a guardian’s personal information. Therefore, the respondent - as their legal guardian - can not be said to have infringed upon their rights to privacy.

Domestic violence is rife in South Africa - being that it has one of the highest incidences of domestic violence in the world. Furthermore, its low rate of prosecution of domestic violence cases, secondary victimisation committed by the police towards victims and repeated incidents of abuse towards women and children contribute to the rate of domestic violence. The Domestic Violence Act defines the various conducts of abusive, that being:

- Physical abuse
- Sexual abuse
- Emotional, verbal and psychological abuse
- Economic abuse
- Intimidation
- Harassment
- Stalking
- Damage to property
- Entry into the complainant’s residence without consent
- Any other controlling or abusive behaviour towards a complainant.

The Act is also applicable to children as domestic violence is a broad term that encompasses child abuse and parent-child relationships. The Children’s Act defines abuse - in relation to children - as, “any form of harm or ill-treatment deliberately inflicted on a child” and this includes assaulting a child or any other behaviour that may harm the child psychologically or emotionally. Section 9 of the Children’s Act states that in all matters concerning the care, protection and wellbeing of a child the standard that the child’s best interests is of paramount importance. Through the audio recordings obtained from the respondent, it is evident that the applicant has abused her children through verbal and physical means, such behaviour goes against their right to human dignity and freedom

and security enshrined in section 10 and 12 of the Constitution, respectively. Furthermore, it goes against section 28(d) of the Constitution which states: “Every child has the right to be protected from maltreatment, neglect, abuse or degradation”. Despite the collection of the information by the respondent resulting in an infringement of the right to privacy - for both the applicant and the children - the children’s safety is at risk therefore the information must be used in a court of law to ensure their safety and their best interests.

D. AUTHORITY

- The Constitution of the Republic of South Africa, 1996.
- The Domestic Violence Act 116 of 1998.
- The Children's Act 38 of 2005.
- The Protection of Personal Information Act 4 of 2013.
- *Minister of Police and Others v Kunjana* 2016 (2) SACR 473 (CC) (27 July 2016)
- *Harvey v Niland and Others* 2016 (2) SA 436 (ECG)
- *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449
- *Khumalo and Others v Holomisa* 2002 (5) SA 401