IN THE SABWiL HUMAN RIGHTS COURT

Case No : 1112/2021

In the matter between:

HAIBO, MAMA — Applicant

and

HAIBO, TATA — Respondent

and

ACCESS TO JUSTICE — *Amicus Curiae*

FILING NOTICE: THE APPLICANT'S HEADS OF ARGUMENT

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DATED AT JOHANNESBURG 4TH DECEMBER 2021

COUNSEL FOR APPLICANT:

NOMFUNDO MAHLANGU SC

MAMONA KONDE JC

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

AND TO: **COUNSEL FOR THE RESPONDENT**

AND TO: **COUNSEL FOR THE AMICUS CURIAE**

I The collection of information by the tracking device and dashcam infringes the Applicant's right to privacy

Section 14 states that the right to privacy includes a right to protection against the unlawful collection, retention, dissemination, and use of personal information.[1] The collection of the information by these devices installed in the vehicle violates the Applicant's right to privacy.

The right to privacy is a fundamental right in the Bill of Rights thus, it is connected with the right to human dignity.[2] In the Electronic Communications and Transactions Act 25 of 2002 (ECT Act), section 1 extends the definition of personal information to include an individual's address.[3] The Applicant has every right to protect their personal information e.g. location. As supported by the *Amicus curia*, that disclosing personal information can be used maliciously when gathered such as tracking victims of domestic violence. The devices notified the Respondent on the Applicant's location exposing the Applicant to be at risk of being tracked.

The Applicant's right to privacy should not be interfered with, the state must ensure the protection of the Applicant's right.[4] The right to privacy

[1] Constitution of the Republic of South Africa, 1996 section 14.
[2] Harvey v Niland and Others 2016 (2) SA 436 (ECG) para 40.
[3] Electronic Communications and Transactions Act 25 of 2002 section 1.
[4] Minister of Police and Others v Kunjana 2016 (9) BCLR 1237 (CC) para 18.

embraces the right to be free from intrusions and interference in one's personal life.[5] It is unconstitutional for the devices to gather the personal information of the Applicant, as they infringe on the Applicant's above-mentioned rights thus causing interference.

The Protection of Personal Information Act No. 4, 2013 (POPIA) section 5(*a*)(i) states that when collecting a person's information, the person should be aware.[6] The Respondent had a duty to inform the Applicant about these devices and their functions. To gain the Applicant's consent for personal information to be gathered because the Applicant used the Respondent's vehicle daily. Thus, the collection of information from these devices is unlawful as the requirements for gathering personal information were not complied with.[7] As a result, infringing on the Applicant's right to privacy.

II Respondent access and usage of the information gathered unlawfully from the devices infringes the Applicant's and minors right to privacy

The information obtained from the devices constitutes an infringement on the right to privacy as argued above. Based on POPIA section 13(2), no steps were taken to alert the Applicant on the personal information

[5] Ibid.
[6] Protection of Personal Information Act No. 4, 2013 section 5(a)(i).
[7] Ibid section 21(1)(a).

collected.[8] Section 22 of the ECT Act, was not complied with because there was no agreement for personal information to be gathered.[9] The Respondent's access and usage of the information is unconstitutional because the information has been obtained unlawfully. The Applicant did not agree to have their personal information being collected.

The Respondent's conduct also violates section 2 of the Recognition of Interception of Communications and Provision of Communication-Related Act 70 of 2002 (RICPCRI Act), because it prohibits an individual from intentionally interfering with others' right of privacy.[10] The Respondent intentionally collected the Applicant's information by not alerting the Applicant about the devices installed in the vehicle and their purpose. The Respondent accessed the Applicant's personal information without their consent. The Applicant is a victim of domestic violence and has a right to take reasonable measures to protect herself and the minors. Thus, the Applicant had a right to leave the Respondent and not disclose the interim location to protect herself and the minors. The children are still minors and the Applicant as their mother must protect them from any harm, thus leaving the minors would be unreasonable. It is unlawful for the

[8] Ibid section 13(2).

[9] ECT supra note 3 at section 22.

[10] Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, section 2.

Respondent to obtain and use the information as it is inconsistent with the right to privacy and dignity of the Applicant and minors.[11]

III The collection and use of the information constitutes an unjustifiable limitation of the Applicant's and Minor's right to privacy.

The law of general application assesses the limitation of rights to the extent that the limitation is reasonable and justifiable in an open and democratic society.[12] In *Prince*, the court applied factual factors of the case to the limitation clause in section 36 of the Constitution.[13] The factors of section 36 are applied in this case as follows:

a) Nature of the right

The right to privacy underpins human dignity as it protects a person and other rights such as freedom of security.[14] By exercising the right to privacy, the Applicant protects themselves and Minors from unwarranted inference. It protects the Applicant and the Minors from being subjected to domestic violence. In *S v Chapman*, the SCA upholds the duty of protection and considers victims of domestic violence vulnerable when the right to privacy is limited, therefore the

[11] Minster of Police supra note 4 para 29.
[12] Constitution supra note 1 section 36.
[13] Prince v President of the Law Society of the Cape of Good Hope 2002 (3) BCLR 231 para 45
[14] Ibid para 50.

right to privacy has become fundamental.[15] The right cannot be limited, as it put the Applicant and Minors in danger of the Respondent.

b) Importance of the purpose of limitation

The purpose for the Applicant's right to privacy being infringed was for the devices installed in the vehicle to gather information that could be used in case of emergency or commission of a crime.

c) Nature and extent of the limitation

The limitation is considered lawful to an extent that the requirement of gathering an individual's personal information is met. The ECT Act section, 51 prohibits the collection and use of personal information of an individual unless they have consented.[16] The RICPCRI Act section 5 allows an individual to give a third-party permission to collect and access their personal information for a certain purpose.[17]

The Respondent had to inform the Applicant about the devices installed in the vehicle to gain permission to be able to locate the Applicant. The Respondent violated the above-mentioned legislations by not complying with the requirements that permit the limitation of the right to privacy.

[15] S v Chapman 1997 (3) SA 341 (SCA) para 4.
[16] ECT supra note 3 section 51.
[17] RICPCRI supra note 10 section 5.

d) Relation between the limitation and its purpose

There is no rational purpose for the limitation of the Applicant's right to privacy.[18]The Respondent collected the information unlawfully. The information was not collected for an emergency or commission of a crime, instead, the Respondent accessed the information for their motives. Serval legislations were violated by the Respondent's conduct and the Respondent infringed on the Applicant's right to privacy unreasonable.

e) Less restrictive means to achieve the purpose

There are lawful measures that the Respondent could have taken to access their location, instead of obtaining information unlawfully.[19]

In *Minster of police v Kunjana* the court held that infringing on the right to privacy is not justifiable in terms of section 36 of the constitution.[20] Limiting this right to locate the Applicant is unjustifiable because after finding their location the Respondent withdrew the application of kidnapping. This shows that the Respondent wanted the interim location for their motives. The limitation of the Applicant's rights to privacy is unreasonable and unjustifiable.[21]

[18] Minister of Police supra note 4 para 24.
[19] Minister of Police supra note 4 para 8.
[20] Ibid para 6.
[21] Ibid para 32.

The removal of the devices and unlawfulness of Respondent's usage of the information

The POIPA section 5(*d*) states, the Applicant has grounds to object for the devices to be installed as it processes their personal information without consent.[22]The devices have to be removed from the vehicle. The Respondent has no intention of retrieving the vehicle and grants the Applicant access to continue using the vehicle. The Applicant has the right to have the devices removed as it infringes on the Applicant's constitutional rights. Failure to remove the devices entails that the Respondent will track the Applicant and listen in conversations. This is motive enough for the devices to be removed as the respondent is abusive and has threatened the Applicant's life. For the respondent to have access to information from the devices, suffice the violation of the above-mentioned rights.

IV Third-party having access to the information in an emergency and commission of a crime should they be not removed

The exceptions allowed should the devices be kept; the RICPCRI Act section 5 allows individuals to give a third party permission to collect and access their personal information for a certain purpose.[23] The Applicant

[22] POPIA supra note section 5(d).
[23] RICPCRI supra note 10 section 5.

has to consent for a third party to gather the information.[24] This will not infringe the Applicant's right to privacy as the information will be processed lawfully as governed in the POIPA section 9 – information to be processed lawfully without violating the right to privacy.[25] The Applicant shall choose a third party who can collect the information and access the information for usage of an emergency or a commission of a crime.

V Information gathered by the Respondent is inadmissible evidence against the Applicant in any court proceedings

As argued above that the information has been obtained unlawfully and section 35(5) of the Constitution prohibits the evidence to be admissible at court proceedings.[26] The manner that the evidence was obtained infringed on the Applicant, right to privacy and dignity thus the evidence must be inadmissible in any court proceedings.[27]

The Respondent obtained the recordings of the Applicant unlawfully, the Applicant was not aware of the dashcam recording installed in the vehicle. The Respondent did not inform the Applicant regarding the installed devices after the Respondent was aware of them.

[24] ECT supra note 3 section 51.
[25] POPIA supra note 6 section 9.
[26] Constitution supra note 1 section 35(5).
[27] Minister of Police supra note 4 para 8.

In *Gumede v State* the SCA held that evidence obtained by violating an individual's constitutional rights (right to privacy and right against self-incrimination) is inadmissible.[28] In any court proceedings, the proceedings have to be fair to achieve justice.[29] The manner the Respondent obtained the evidence is unlawful as argued above. It is unfair of the Applicant for information obtained unlawfully to be used in any court proceedings as evidence.[30]

The admission of the dashcam footage is detrimental to the administration of justice as the correct procedures were not complied with when the respondent obtained the information as it was stated in the case of *S v Hena*.[31]

The POPIA section 13(2) sets out that when gathering a person information, they have to be aware that the data is gathered and the purpose it is gathered for.[32] The Applicant did not know the devices gathering the data and the Applicant had not consented for the data to be gathered.

Thus, the court must exclude this evidence for any court proceedings should it be submitted as evidence Therefore, the Respondent cannot

[28] Gumede v S 2017 (1) SACR 253 (SCA) para 14.
[29] Ibid.
[30] Harvey supra note 2 para 40.
[31] S v Hena 2006 ZAECHC 11
[32] POPIA supra note 6 section 13(2).

submit the recordings as evidence in any court proceedings against the Applicant.

VI The Applicant’s omission to put cogent evidence against the Respondent does not change the facts of the case

In the plea filed by the Respondent in response to the Applicant’s claim, the Respondent confirmed acting out of rage and had threatened the Applicant's right to life. This is evidential to demonstrate the Respondent's behaviour towards the Applicant and Minors.

The Respondent confirmed to track the Applicant's location without the Applicant’s knowledge. The conduct of the Respondent violates section 5(1) of the RICPCRI Act, the Respondent has no authority to intercept information of the Applicant without the Applicant's consent.[33] The Applicant had alerted the Respondent that the interim location where the Applicant and Minors were located will not be disclosed to the Respondent. The Respondent violated the Act, by not requesting a law enforcement officer to assist in obtaining the information lawfully. The Respondent relied on a layperson's advice with no legal knowledge, even though the Respondent had no intention to gather the information. The Respondent shows clear intention for gathering data because after receiving the advice, installed the App and tracked the Applicant.

[33] RICPCRI supra note 6 section 5(1).

Furthermore, gathered the data and intends to use it as evidence in divorce proceedings.

VII Remedies

1. The removal of the devices installed in the vehicle constitutes unjustifiable infringement on the right to privacy and dignity of the Applicant.[34]
2. Refusal of removal of devices, the Applicant seeks to have the power of authority to choose a third party, the Applicant shall consent to; to have access to the data.[35]

   The data shall be gathered for an emergency and crime.[36]
3. A prohibitory interdict for the information gathered to not be admissible as evidence in any court proceedings.[37]
4. Mandatory interdict order granting the Applicant to make decisions regarding the vehicle for as long as it is in the Applicant's possession.
5. The Respondent to pay the legal cost of the application including the costs of two counsel.[38]

[34] Harvey supra note 2 para 40.
[35] ECT section 51.
[36] Ibid section 51(3) & section 51(4).
[37] Harvey supra note 2 para 15
[38] Ibid para 58.