

IN THE SABWIL HUMAN RIGHTS COURT
(ZOOM South Africa)

Case number: 1112/2021

In the matter between:

HAIBO, MAMA

Applicant

and

HAIBO, TATA

Respondent

and

ACCESS TO JUSTICE

Amicus Curiae

FILING SHEET: RESPONDENT'S HEADS OF ARGUMENT

1. Attached hereto is the Respondent's Heads of Argument

DATED AT **JOHANNESBURG** ON THIS 4TH DAY OF **DECEMBER**
2021

Counsel for the Respondent

NONHLANHLA PINKOANE SC

TSHIDISHO KALE

TO:

THE REGISTRAR OF THE ABOVEMENTIONED HONOURABLE
COURT, SABWIL HUMAN RIGHTS COURT, SANDTON

AND TO:

THE PRESIDING OFFICERS OF THE ABOVEMENTIONED
HONOURABLE COURT, JOHANNESBURG

AND TO:

COUNSEL FOR THE APPLICANT

AND TO:

COUNSEL FOR *AMICUS CURIAE*

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A. LIST OF ABBREVIATIONS

ICCPR	International Covenant on Civil and Political Rights
UNDHR	United Nations Declaration of Human Rights
IMPA	Interception and Monitoring Prohibition Act
RICA	Regulation of Interception of Communications and Prohibition Act
ECT	Electronic Communications Act

B. BACKGROUND

1. The Applicant and Respondent who were married out of community of property and share two minor children instituted divorce proceedings and held the relationship had irretrievably broken down.
2. Both the Applicant and Respondent had submitted abuse allegations against one another.
3. After serving summons against the Respondent, the Applicant left the matrimonial home without informing the Respondent and took their two children using the vehicle purchased by the Respondent.
4. The Applicant informed the Respondent that she had left with the children and would not disclose her location, which led to the

Respondent bringing urgent proceedings in the Children's Court but were later dropped after being made aware that the vehicle had a tracking device and dashcam application which could be accessed on his phone.

5. The Applicant not aware the vehicle was fitted with the tracking device and dashcam, both verbally and physically abused the children.
6. The Applicant now seeks an order for the removal or disconnection of GPS tracker and the dashcam and an order declaring the dashcam recordings and transcriptions inadmissible as evidence in the divorce proceedings, or in any litigation against her as she argues that it constitutes an infringement to her right to privacy and under section 2 of the Regulation of Interception of Communications and Provision of Communication related Information Act 70 of 2002.
7. The Respondents oppose these proceedings and hold that the tracking devices and dashcam were features installed by the manufacturer and thus serve as an advantage to both the Applicant and the children.

8. The Respondent make an offer that, he would uninstall the App his phone and will not personally track the movement or recordings of the vehicle but rather, his attorney or an impartial individual will do so.
9. The Applicant refuses and holds that the mere surveillance of the vehicle constitutes an infringement on her privacy rights.

C. INTRODUCTION

10. This matter concerns the application brought by the Applicant to have a GPS tracking device and a dashcam device, removed from the vehicle that the Applicant is in possession of.
11. The Applicant is of the view that the devices and the usage of the devices constitute an infringement to her right to privacy as is stated section 14 of the Constitution. The devices further impede her ability to properly make use of the vehicle.
12. The Respondent opposes the proceedings brought forth by the Applicant.
13. The Respondent is of the view that the devices, as installed by the manufacturer, constitute an important safety enhancement features for the vehicle.
14. The Respondent further argues that the devices and subsequent usage thereof, irrespective of whether or not they constitute an infringement, contain evidence that the Applicant is violent towards the children.

D. ARGUMENTS

- i. **Does using a tracking device or dashcam to collect information infringe on the right to privacy enshrined in section 14 of the Constitution?**

15. Privacy is a fundamental human right recognised in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties. It is said that privacy underpins not only human dignity but other key values such as freedom of association and freedom of speech. This is further agreed upon by *Neethling*, who says "privacy is regarded a valuable and advanced aspect of personality"¹

16. The right to privacy is entrenched under Chapter two of the Constitution called the the Bill of Rights. The Bill of Rights is regarded a cornerstone of democracy in South Africa as it enshrines the rights of all people in our country and further affirms the democratic values of human dignity, equality and freedom². It is under the ambit of the Constitution and common law that, the right to privacy³ is recognised and protected.

¹ *Neethling's Law of Personality* at 29.

² Section 7(1) of the Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as the Constitution)

³ The Constitution, section 14.

17. It is however important to note that though the right to privacy is regarded a fundamental right, the right is not an absolute human right. As a common law right of personality, the right is limited by the “legitimate interests of others and the public interest”⁴ and as a fundamental right, it is limited in accordance to the limitation clause of the Bill of Rights⁵. Section 36 provides that in order for a right to be lawfully limited “the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. There must therefore be a legitimate expectation that the right to privacy may not be infringed upon in order to deem the infringement lawful.

18. The elements of liability for an action based on an infringement of a person’s privacy are in principle the same as any other injury to the personality, namely an unlawful interference with a legally protected personality interest where an outsider acquires private knowledge or discloses private details contrary to the party’s wishes and lastly intention must be present, where the outsider directs his will to violate the privacy of the party knowingly. The only time the applicant can claim for an infringement of her privacy is when there is unlawfulness and intention.

⁴ *Neethling’s Law of Personality* at 240 ff.
⁵ The Constitution, section 36.

19. Section 2(1) of the Interception and Monitoring Prohibition⁶ stated that no person shall:

- a. Intentionally and without the knowledge or permission of the dispatcher intercept a communication which has been/is being/is intended to be transmitted by telephone or any other manner over a telecommunications line; or
- b. Intentionally monitor any conversation or communication by means of monitoring device so as to gather confidential information concerning any person, body organisation.

20. The enactment of the Regulation of Interception of Communications and Provision of Communication-Related Information Act⁷ has since repealed section 2(1) of IMPA, in such a manner that such recordings mentioned in section 2(1) of IMPA are no longer rendered unlawful.

21. Section 4(1) of RICA provides that:

- a. Any person, other than a law enforcement officer, may intercept any communication if he or she is a “party” to the communication,

⁶ Section 2(1) of the Interception and Monitoring Prohibition Act 127 of 1992 (Hereinafter known as IMPA).

⁷ Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (Hereinafter known as RICA).

unless such a communication is intercepted by such a person for the purposes of committing an offence.

22. Section 1 of RICA⁸, defines as, any person in “direct communication”. This is a party that is participating in the communication or whom such direct communication is directed and in whose immediate presence such direct communication occurs and is audible and lastly any person in an “indirect communication”. This is a sender or recipient or intended recipient of such a communication. Section 4 of the Act⁹, further defines a party to the communication as person who might be listening but not actively participating in the conversation.

23. It is imperative to note that the inception of such communication should exclude the intention to commit a crime for it to be sanctioned by the RICA provisions.

⁸ RICA, section 1.
⁹ RICA, section 4.

24. The infringement of the right should also exclude unlawfulness and intention and it must most importantly, there must be a reason which justifies the infringement¹⁰.

ii. Can the access to and use of that acquired information by the devices, be used by the respondent or does it constitute an infringement to the disadvantaged party?

25. Section 4 of the RICA Act permits that any person, who is not a law enforcement officer may intercept any communication if he or she is a “party” to the communication. this excludes using the intercepted information to commit a criminal offence.

26. This means that, any information obtained be it, lawfully or unlawfully can and may be used against an individual.

27. Section 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence renders the trial unfair or will otherwise be detrimental to the interests of justice¹¹.

¹⁰ Lotus River, Ottery, Grassy Park Residents Association ao v South Peninsula Municipality 1999 (2) SA 817(C)

¹¹ The Constitution, section 35(5).

28. Though the above section disqualifies evidence that infringes on any of the fundamental rights, evidence that assists in the proper administration of the interests of justice is admissible, if it will be serve the interests of justice.

29. In *Protea Technology*¹² the court held that in respect of teephonic conversations pertaining to the employer's affairs and at the employer's business, there was no legitimate expectation of privacy and the employer was entitled to utilise recordings of the conversations.

30. In *Harvey*, the court held that privacy rights are not absolute and further stated that evidence was ruled admissible and the court confirmed the common law principle that all relevant evidence that is not rendered inadmissible by an exclusionary rule is admissible in a civil court, irrespective of how it was obtained.

iii. Is the collection and use of the information acquired by the devices justifiable in terms of section 36? And should these devices be removed and the use of the information acquired through them is dismissed will this

¹² *Protea Technology v Wainer*

**act ensure lawfulness prevails if the personality rights
are violated?**

31. Constitutional rights and freedoms are not absolute in the South African Constitution¹³. A limitation of the right to privacy ought to be justified in terms of section 36(1) of the Constitution taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation and its purpose and less restrictive means to achieve the purpose – all these make up the proportionality enquiry.¹⁴

32. The purpose of the right to privacy is to repudiate the unfair practices in the past. However the limitation is as important because even after a divorce the biological father of the child still has parental rights to his child or children¹⁵, like in this matter. Hence it can be said that the limitation was justifiable.

33. In *Bernstein* the court held that no right is considered absolute, this means that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy, only the inner sanctum of a person such as his or

¹³ I. Currie/J. de Waal, The Bill of Rights Handbook, p.163.

¹⁴ The Constitution, section 36(1).

¹⁵ Children's Act 38 of 2005 South Africa.

her family life, sexual preference and home environment is shielded from conflicting rights.

34. Furthermore section 86(1) of the Electronic Communications and Transactions Act¹⁶ states that subject to the Interception and Monitoring Prohibition Act, a person who intentionally accesses or intercepts any data without authority or permission is guilty of an offence. However this changes when it will be for the best interests of the community, which were of utmost importance in this case.

35. Therefore the collection of the information acquired by these devices was justifiable and can be accepted in the court of law.

36. Section 28 of the Constitution¹⁷ states that a child's best interests are of paramount importance in every matter concerning the child. Section 28(c) further states, a child has to be protected from maltreatment, neglect, abuse or degradation.

37. In this matter, if the devices are removed then lawfulness will not prevail because the children's personality rights would have been infringed while the applicant's right would have been held higher

¹⁶ Electronic Communications and Transactions Act 25 of 2002.

¹⁷ The Constitution, section 28.

than the children. If the recordings lack authenticity, the devices are used with a malice intention and cannot be justified only then can the removal of the devices be regarded as lawful.

iv. Can another neutral/impartial party gain access to the information recorded by the devices for use in an emergency?

38. The right to privacy is not absolute as stated in *Bernstein* the Court held:

“The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen”.¹⁸

In the event that privacy is infringed such infringement would need to be legitimate and proportionate.

39. In this instance, there is going to be need to balance the public interest right of the defendant to be aware of the whereabouts of his children, against the right to privacy of the Applicant.

40. Limitation of the right to privacy is permissible in the event that the limitation is for the protection of a public interest. Section 36 of the Constitution of the Republic of South Africa, states the following:

¹⁸ *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996)

Limitation of rights 36.

(1) 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 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.¹⁹

41. Our core focus, is on the issue that the limitation is of such utmost importance because it assist the Respondent is ensuring the safety of his children. This is supported by sec 36(1)(b) of the Constitution of the Republic of South Africa.

42. The nature of the limitation applies only in so far as it used in the process of ascertaining the whereabouts of the children.

43. there could not have been any less restrictive means of ascertaining the information as the Applicant had unconditionally stated that she did not have any intention of informing the Respondent about the whereabouts of the children.

44. We therefore state that the devices should be left intact on the vehicle, and that the third party can be appointed to monitor the devices as the Applicant will never willingly provide this information

v. Admissibility of acquired information in court as

45. We shall deal first with the admission of the evidence in a civil case. We shall seek to deal with the admission of such evidence through caselaw.

¹⁹ Constitution of South Africa 1996 section 36

46. The most influential case in regard to the admittance of improperly obtained in a civil case is *Harvey v Niland*.

47. The facts in that matter are simply that, Harvey and Niland parted business ways on bad terms and Mr Niland subsequently began to ignore the restraint of trade provision which came into effect at the termination of the business relation.²⁰

48. After being aware of the transgression of the restraint of trade by Niland, Harvey issued an instruction to his employee to look into the social media account of Niland, in an effort to find proof of the said transgression. This instruction was issued without the permission of Niland. And the transgressions were acquired.²¹

49. The decision taken in that case with regard to admission of the evidence was to the effect that all relevant evidence which was not rendered inadmissible by an exclusionary rule was admissible in a civil court irrespective of how the evidence was obtained.²²

50. In the *Protea Technology Case*, Heher J rejected the idea that evidence obtained through the unlawful tapping of a person's phone ought to be excluded.²³

51. The learned judge in that matter concluded we do not currently have statute that expressly or by necessary inference render the production of recordings made in contravention of its terms, inadmissible in evidence before a court trying a civil dispute.²⁴

52. In the *Fedics Group v Matus*, it was concluded that for a civil case, the litigant who wishes to introduce unlawfully obtained evidence

²⁰ *Harvey v Niland and Others* (5021/2015) [2015] ZACGHC 149; 2016 (2) SA 436 (ECG); (2016) 37 ILJ 1112 (ECG) (3 DECEMBER 2015)

²¹ *Harvey V Niland and Others*

²² *Harvey v Niland and Others*

²³ *Protea Technology Limited and Another v Wainer and Others* [1997] 3 ALLSA 594 (W)

²⁴ At 604d-f

needs to explain why he could not achieve justice by following ordinary procedure including but not limited to, the Anton Piller procedure.²⁵

53. In this matter, the Respondent could not have known about the existence of such evidence, unless the Respondent had utilised the means of unlawfully obtaining the evidence.

54. Therefore in a civil matter, the evidence should be admitted irrespective of how it was obtained.

55. In assessing the admissibility of the evidence in respect of a criminal trial, we shall first assess section 35(5) of the Constitution, which states that :

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”²⁶

56. In the Ndlovu case that was heard in the Eastern Cape Division, it was stated that :

“What is evident from the structure of section 35(5) is that it envisages a two-step process. First, the evidence sought to be excluded must have been obtained in a manner that infringed upon a right guaranteed by the Bill of Rights. If it is found that the impugned evidence was so obtained, the second step is to determine whether the admission of the evidence will render the trial unfair, or bring the administration of justice into disrepute. The section does not provide for the automatic exclusion of evidence that was obtained in violation of a protected right.⁴ For all intents and purposes the evidence is prima facie admissible. It must be excluded if the court determines, in the

²⁵ Fedics Group (Pty) Ltd and Another v Matus and Others; Fedics Group (Pty) Ltd and Another v Murphy and Others 1998 (2) SA 617 (C)

²⁶ The Constitution

exercise of its discretion, that its admission will have one of the consequences identified in the section”.²⁷

vi. Does the lack of evidence from a party change anything?

57. It is common cause that the evidence was obtained in an improper manner. However the evidence will not render the trial unfair, this is so because the Constitution seeks that the accused be given a fair trial. This is the position, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.²⁸

58. the mere fact that the evidence incriminates the accused in the commission of the crime he is charged with, does not mean that there is unfairness in the actual trial. Further, the general approach is that real evidence which exists irrespective of the violation of a protected right, possesses an objective reliability and its probative value is unaffected by the manner in which it was obtained.²⁹

59. where the infringement results in the discovery of evidence which existed independently, and would have been discovered independently of the rights violation, the fairness of the trial will rarely be affected.³⁰

²⁷ *Ndlovu And Others v S* (541/2019) [2020] ZAECGHC 131 ; [2021] 1 ALL SA 538 (ECG); 2021 (1) SACR 299

²⁸ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995)

²⁹ *Ndlovu and Others V S* para 35

³⁰ *Ndlovu and Others v S* para 37

60. We respectfully urge this court to consider that the exclusion of this evidence would impact negatively thereon on the administration of justice.

61. The fact that the Applicant does not bring forth any cogent evidence of abuse as committed by the Respondent, does not change the circumstances of the admission of the evidence in both the civil and criminal cases.

E. Prayers.

62. The Respondent hereby prays for the following declaration order:

That the devices as installed on the vehicle does not constitute an infringement of privacy.

That the collection of information on the tracking devices by the Respondent or any other appointed and agreed upon party does not constitute an infringement of privacy.

Any evidence as collected on the tracking devices is admissible in a civil and/or criminal trial.

LIST OF AUTHORITIES

STATUTE

The Constitution of the Republic of South Africa, 1996

The Interception and Monitoring Prohibition Act 127 of 1992

Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002

Children's Act 38 of 2005 South Africa

Electronic Communications and Transactions Act 25 of 2002.

CASE LAW

Lotus River, Ottery, Grassy Park Residents Association *ao v* South Peninsula Municipality 1999 (2) SA 817(C)

Bernstein and Others *v* Bester NO and Others (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996)

Harvey *v* Niland and Others (5021/2015) [2015] ZAECGHC 149; 2016 (2) SA 436 (ECG); (2016) 37 ILJ 1112 (ECG) (3 DECEMBER 2015)

Protea Technology Limited and Another *v* Wainer and Others [1997] 3 ALLSA 594 (W)

Fedics Group (Pty) Ltd and Another *v* Matus and Others; Fedics Group (Pty) Ltd and Another *v* Murphy and Others 1998 (2) SA 617 (C)

Ndlovu And Others *v* S (541/2019) [2020] ZAECGHC 131 ; [2021] 1 ALL SA 538 (ECG); 2021 (1) SACR 299

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995)

SECONDARY SOURCE

Neethling's Law of Personality

I. Currie/J. de Waal, The Bill of Rights Handbook