

Privacy and freedom of expression:

'Too private to publish? Privacy and the individual'*

By Carole Lewis, judge of the Supreme Court of Appeal

- [1] I have chosen as the focus of my discussion the recent furore over a painting, entitled *The Spear*, exhibited at a private gallery (the Goodman Gallery) in Johannesburg. The painting depicted the South African President, Jacob Zuma, in a particular style, and, more pertinently, with an exposed, oversized penis. When the general public became aware of the image – one of many in an exhibition by the artist Brett Murray entitled 'Hail to the Thief 11' – and the image was published in a local newspaper, *City Press* (and then subsequently in many other papers and of course websites), outrage at the depiction of the President's genitals broke out. I shall describe the facts and the reaction to the painting shortly. I shall not dwell on them, for the debate around freedom of expression and the right to privacy has not been principled or legal, but primarily emotional.
- [2] I intend rather to question the legal principles that may be relevant should a similar matter come to court (the litigation that commenced for the removal of the painting was settled before it could be tried), and to raise generally the question whether politicians who have a public profile are entitled to less protection than the ordinary individual. Put differently, where is the line to be drawn between the right to privacy, which in South African law is entrenched in the Bill of Rights, and the right to freedom of expression, also an entrenched right, when one is dealing with a public figure? When, if ever, can a public figure be taken to have waived the right to protection of his or her dignity or reputation, such that artists, cartoonists, writers and publishers may say or draw or depict what they like? And what are the consequences if they breach that line?
- [3] These questions are of particular significance now, and not only in South Africa. In England, the Leveson commission of enquiry is being faced with factual investigations as to the conduct of the press and the invasion of privacy (not to mention the abuse of political power) in relation to hacking, especially in respect of mobile (cell) phones. And in *Trimingham v Associated Newspapers Ltd*,¹ the High Court has recently decided that a claimant had forfeited her right to privacy because of her position and her conduct. I shall say little of these matters for they are not in my domain, but I shall refer to the judgment in *Trimingham* later.
- [4] In South Africa these questions have been brought to the fore by the exhibition, and later the publication of images of *The Spear*. Much debate has occurred in the public arena but little in legal fora. Let me say at once that I do not propose to answer any questions about whether the painting should have been displayed or its image published. I shall

raise legal questions and suggest factors to be taken into account when deciding them, but no more.

The background

- [5] But first a broad outline of the facts. I relay these at second-hand, for I was abroad at the time of the controversy and did not get to see the painting (it was in any event defaced by the time I returned by two men acting independently of each other and for entirely different reasons). But I did see current news reports. While in Istanbul in late May, I saw CNN coverage of what was regarded as the news of the week ex Africa – the exhibition of *The Spear*, and the furore that ensued following the publication of the image in the press. Much was made of the threats to the gallery that displayed the exhibition and to the editor of the *City Press*, who initially refused to remove the image from the paper's website. Indeed there was a call by the ANC for a boycott of the newspaper.
- [6] On my return to Johannesburg every broadcast that I heard and every paper that I read had news of the latest developments. One cleric called for the artist to be stoned – to death? There was and is a huge divergence in opinion as to whether the artist should have painted the picture, the gallery displayed it or the press published the image of it. The ANC and the President himself brought an application in the Johannesburg High Court for the removal of the painting from the gallery and for the removal of the image of it from the *City Press*'s website. The application was opposed. Three judges were tasked with hearing the application – an unusual step (as a rule, one judge sits in applications in the first instance). The court adjourned on the first day of the hearing when counsel for one of the applicants could not continue arguing in the face of questions from the Bench. He was overcome by emotion and wept in court. By the following week the reasons for the application had fallen away.
- [7] The *City Press* editor eventually agreed to remove the image from the website and the gallery removed the defaced painting from display. All parties agreed that they had to work towards a better understanding of one another's cultures and feelings, and there was a show of unity and forgiveness. There was nonetheless a subsequent march on the gallery – which led to road closures for the better part of a day – and the debate continues. Indeed the censorship board has declared that the image may not be seen by children under 16.
- [8] What considerations should the court have taken into account had the application been pursued? Before considering these I should describe the painting more fully. I

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did not see it and current images on websites that I have found have been self-censored so I am borrowing descriptions from websites² and friends. Images are, I understand, still available, uncensored, on the internet.

The Spear and the aftermath

- [9] I deliberately relate the facts and debate in very broad terms, for I do not want to engage with the work and the incident but with the general principles underpinning the law. *The Spear* was shown as one of numerous paintings by Brett Murray, a local artist. His work is often satirical and makes stark political statements. The image of the President bears little likeness to the man himself. It is modelled on a poster of Vladimir Lenin and shows Zuma in what has been called 'Leninist style' – hands on hips, with a belligerent stance. Only the face, against a background of red paint, can be said to be a likeness of Zuma. The rest of the image seems to be borrowed from the original poster depicting Lenin. As J Brooks Spector says:³

'[H]is head is framed mostly in red, his arm is posed downward, leading in the classic pose of a Baroque period cavalier or swordsman, and most importantly, of course – there is a healthy, hefty set of male genital organs depicted in some detail, located well outside his trousers.'

But there are still other allusions and referrals within this picture ... *The Spear* is a complex collection of referents, some obviously drawn from historic images and some, too, referencing Zuma's well-known sexual history – the multiple wives and girlfriends, and his nearly two dozen children. Even the work's title can be read as a knowing reach-back to the ANC's armed wing during the apartheid era, *Umkonto weSizwe*, 'The Spear of the Nation.'

- [10] The wrath of the country was directed not at these borrowings and references, or the reputedly shabbily executed painting, but at the tumescent penis, which hangs out of the clothes worn by the body. The overwhelming view of those who have expressed outrage is that a white artist has painted the private parts of a black president, thus not only invading his privacy and besmirching his dignity but doing so with racist intent. Murray implies, they argue, that black men are sexual 'animals' who are prone to overwhelming lust.
- [11] The defenders of free speech and artistic expression, on the other hand, have argued that the painting is not actually of the President, and especially not of *his* penis. The painting is satirical and makes a political point. It is not racist, they argue, since paintings of politicians with their genitals exposed are part of general satirical comment, and are not unusual. Various recent examples have been alluded to. There has not generally been any objection to the exhibition of nudes, or of naked politicians in particular. And the picture is but one of many in the exhibition that protest about greed, corruption, nepotism and other current woes. President Zuma is seen as the face of the ANC which has not lived up to the promises of the new political dispensation.
- [12] But that is in another context and a different culture, the counter-argument runs. So what is the context? That is for the viewer to determine: is that not inherent in art? However,

as noted, many see it as stereotyping the black man as promiscuous. Some see it as depicting the black man as a primitive being whose singular purpose is to mate. It has been argued, also, that those who see the painting as a political statement, to be viewed in the context of Zuma's governance style and his lifestyle, do not understand the history of the oppression of black people. It may be the educated art critics' view that the painting is just a political statement, say those who object to the image: but it is the ordinary person whose view must be determinative.

- [13] As far as governance style is concerned, Zuma has a reputation as a cadre-deployer (and for appointing his potential protectors to positions of high office), as not understanding the limits to his power and of not caring sufficiently for the welfare of the people of the country. Problems of poverty, homelessness and unemployment are more important issues, say some. And many instances of bad appointment-making to public positions have been retold since the painting has become a new focus of attention. Litigation around this issue, and that of the dropping of corruption charges against him before his appointment as President, is current. And of course it is hard for him to shake off the shadows of a proposed corruption trial and of an actual trial for rape.
- [14] So those who view the painting from a political perspective have interpreted it as portraying a president who 'pisses' on his people. Others say that it depicts a man who thinks only with his genitals. Yet others (as suggested in the passage above) see it as a mockery of his lifestyle: the several wives, and the children born out of extra-marital relationships. That he was charged with rape, but acquitted, has also featured in much discussion. He did not deny having sex with the complainant, but claimed it was consensual and was given the benefit of the doubt. What is not disputed was that the complainant was the daughter of family friends – thus much younger than him and where he was in effect in a position of trust – and that the sex was unprotected. Although he knew she was HIV positive he took no precautions, but in giving evidence in his defence said that he had showered when the act was completed. Hence the cartoons of him by Zapiro (Jonathan Shapiro), a cartoonist against whom defamatory action by Zuma is pending, depicting a showerhead protruding from the President's head.
- [15] The painting is seen in this context as portraying the President's lust and his lack of sexual control. Zuma himself is alleged to have said that the painting portrays him as a womaniser and a philanderer. It is this, primarily, that appears to have caused most offence. And, secondly, and also importantly, the painting is regarded as hurtful and deeply offensive because it is seen as stereotyping the black man: it is regarded by many as injurious to black people in general.

The rights to dignity, privacy, and freedom of expression

- [16] These rights have long been recognised in our legal system: in the case of dignity, the action for insult and for defamation, the *actio injuriarum*, dates back to the XII Tables of 453 BC. Underlying the action, of course, there is a right, although

the legal system devised by the Romans at that time, and even later, was action rather than rights-based. And freedom of expression has been protected to a considerable extent, even prior to the entrenchment in the Constitution⁴ of these rights. We have thus never had the same problems in dealing with pure privacy rights as the English system encounters. The right to dignity created by the Romans is protected by the *actio injuriarum*: a person whose dignity is offended may bring the action for damages, though a mere breach of the right in itself has seldom led to litigation. The publication of an injurious statement, provided that it is unlawful, and the injury intentional, generally constitutes defamation. And actions for defamation are brought far more frequently than actions for breach of privacy or dignity. I shall touch on this later.

[17] The Bill of Rights in the Constitution expressly enshrines the right to privacy⁵ and the first provision in the Constitution states that the State is founded on a number of values including 'human dignity'. The right to freedom of expression is entrenched in s 16, and includes freedom of the press and other media, and, expressly also, freedom of artistic creativity. The section reads:

'Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.'

Subsection (2) states that the right does not extend to propaganda for war, incitement of violence and advocacy of hatred based on race, ethnicity, gender or religion (hate speech).

[18] In several cases South African courts have held that there is no hierarchy of rights. Each is as important as the next, and which one takes primacy is a question that must be determined on the particular facts of a case.⁶ It is also important to note the principle that certain rights entrenched in the Bill can be invoked as between individuals, and not only against the State – what we call horizontal application. The Constitution provides that the Bill applies to all organs of state, including the legislature and the judiciary, and that it binds 'a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.⁷ Courts are required to apply or develop the common law to the extent that legislation does not give effect to any right.

[19] Our courts have attempted to balance the interests of individuals asserting different rights both through the common law and by balancing rights with reference to the Constitution. So, which right takes primacy in the instance of *The Spear*? Freedom of artistic expression or dignity and privacy? In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*,⁸ the Supreme Court of Appeal held that the determination of primacy lay in the limitation clause of the Bill of Rights.

[20] Section 36, pivotal to many decisions on whether a right has been breached or limited, reads:

'(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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[21] The court in *Midi TV* said:⁹

'The extent to which the full enjoyment of a constitutionally protected right might be limited is circumscribed by the Constitution itself. Any such limitation is constitutionally permitted only if the limitation has its source in law of general application and only 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, amongst others, the factors enumerated in s 36.'

The court found that the right of the public to receive information about a trial was more important, in that case, than the right of the DPP to mount an effective prosecution, on the assumption that a trial would be prejudiced in some way by a television broadcast.

Justification for infringement of privacy

[22] How then does one determine the justification for limiting the right to privacy? I shall deal only with politicians in this paper. That is because we have no important decisions dealing with the infringement of the rights to dignity and privacy of South African celebrities (at least, of which I am aware). In this regard we differ greatly from the UK and the USA. I suggest that in answering the question – as with almost all others – context is all-important. I have described briefly the political and cultural context in which the painting has been viewed. In the context of the public domain, do politicians waive their rights to all privacy when they embark on a career in politics? In *Mthembi-Mahanyele*¹⁰ I suggested that defamatory statements about politicians should be treated differently when made about a politician's public life: that they might be justifiable in context.¹¹ If not, the requirement of the action that the statement be made wrongfully or unlawfully would not be met and the action would fail.

[23] This entailed creating a new defence to the action for defamation on the basis of the importance of freedom of expression in a democratic state. In certain circumstances the reputations of those in public life, and accountable to the public for their conduct, must yield to the public interest in being informed. A refusal on the part of a member of government to be accountable justifies a statement that she has behaved improperly in the execution of her duties, provided only that there is a reasonable belief in the truth of what is said.

[24] This approach followed Australian and New Zealand cases

(in particular *Lange v Atkinson and Australian Consolidated Press NZ Ltd*).¹² It has been approved *obiter* by that court and the Constitutional Court subsequently.¹³ But that is in the political context – it may be justifiable to say defamatory or injurious things about the politician's public work. But what of saying injurious and defamatory things about the politician's private life?

[25] In England the most recent case on a political figure is *Trimingham v Associated Newspapers Ltd*:¹⁴ the court held that Ms Trimingham could not take action for breach of her privacy despite article 8 of the European Convention on Human Rights (ECHR). Ms Trimingham's claim for breach of her privacy advanced under article 8 ECHR failed.¹⁵ I do not wish to recite the facts for they are known to the audience. Ms Trimingham was a press officer for David Huhne, who had stood for Parliament, and been re-elected, as a Liberal Democrat. He was also the spokesman for home affairs for the party and became Secretary of State for Energy in the coalition government. As part of his election campaign he had emphasised his belief in the importance of family. Trimingham and Huhne were having an affair at the time when Huhne campaigned. Yet he was married and she was in a same-sex civil relationship with a woman. Both left their partners for each other.

[26] When the press got wind of this they had a field day. Much was made of the fact that Trimingham was a lesbian or bisexual. Photographs of her, in what would usually be private circumstances, were published and so were unflattering descriptions of her appearance. The *Daily Mail* was singled out as an offender and Trimingham brought action against the owner of the paper for damages and an injunction.

[27] She was non-suited. Tugendhat J held that in the campaign for Huhne's re-election Trimingham had, as press officer, required the public to trust her. Yet she had conducted a sexual relationship with Huhne which she had been told would result in his leaving his wife. She did this secretly, but knew that it would lead to political scandal. 'The public,' said the judge, 'has an interest in knowing how the personal life of a leading politician, especially a Cabinet Minister, is

likely to affect, or has affected, the business of government. So Ms Trimingham in her private capacity chose to take the risk of being mixed up in a political scandal, which her own conduct precipitated.'¹⁶ Tugendhat J said:¹⁷

'I understand why Ms Trimingham states that she is offended and insulted. But even if the words she complains of are offensive and insulting, that of itself would not suffice for her to succeed. It would be a serious interference with freedom of expression if those wishing to express their own views could be silenced by, or threatened with, claims for harassment based on subjective claims by individuals that they feel offended or insulted.'

[28] But more importantly Tugendhat said that the law must not 'penalise the expression of views that may offend, shock or disturb sectors of the population, including of course particular individuals.'¹⁸ This is, of course, as he said, subject to article 8 of the Convention. He continued: 'Where pluralism and toleration apply, the right to freedom of expression must be taken seriously.'

[29] In South Africa we espouse the plurality of our nation, and indeed we are very diverse (though probably not, on the whole, tolerant). Do we recognise the freedom of cartoonists to draw, and artists to paint, insulting cartoons of politicians? And if so, do we also recognise that politicians' private lives are fair game for satirists? Or even that we may disseminate information about their very private lives?

[30] Only one South African decision, as far as I am aware, has turned on when and whether a public figure's private behaviour becomes of public interest (not of interest to the public). In *Tshabalala-Msimang v Makhanya*¹⁹ the first applicant (TM) was the Minister of Health – she who said that people who were HIV positive should eat beetroot and African potatoes rather than take antiretroviral drugs. The second applicant was a private clinic. The respondents were, respectively, the editor, journalists and owner of the *Sunday Times* newspaper. TM was hospitalised in the clinic. The *Sunday Times* published an article some two years after the hospitalisation entitled 'Manto's hospital booze binge.' TM was reputedly a heavy drinker and needed a liver transplant,



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which she in fact subsequently underwent. The article claimed that while in hospital TM, who was on sleeping and other medication, demanded that she be bought wine by hospital staff. They complied with her wishes. The records stated that she had asked for wine and drunk it.

- [31] The hospital records for TM had been filched and made their way into the hands of *Sunday Times* journalists. TM sought an interdict ordering the respondents to return her medical records, and asked for an order that the paper be restrained from publishing comments on them. She succeeded on the first leg. But the Johannesburg High Court refused the order prohibiting publication. Great stress was laid on the importance of freedom of the press. It considered that TM was a public figure (this was, in my view, beyond doubt) and that by the nature of her position she could not object when her actions were publicised. 'In such a case' the court said, 'her life and affairs have become public knowledge and the press in its turn may inform the public of them.'²⁰ This was despite the fact that the clinic records had been obtained unlawfully.
- [32] The court did not explain why private matters were to be treated in the same way as matters that related to her portfolio as health minister. It reasoned that because the information was largely in the public domain already, there was a 'pressing need' for the public to be informed and for a debate as to the role of a politician in the 'exercise of her functions.'²¹ The need for the truth was overwhelming, said the court.²²
- [33] As I have said, there is no analysis in the judgment on the difference between private and public matters. Surely even a public figure – a celebrity or a politician, especially a member of government – has the right to keep some matters private and to protect her dignity? The test, I suggest, must be whether the dissemination of the information is in the public interest, and does not amount to mere gossip or unwarranted publication of confidential facts. Professor Tamar Gidron explains the tension between public interest in matters, on the one hand, and the public interest, on the other:²³

'It is the struggle between the desire and need to publish, on the one hand, and the fear of causing injury to a person's emotional state, reputation, and dignity, on the other, that confronts a modern society in its attempt to provide legal protection for the right to privacy and the right to reputation. This is made particularly difficult by the fact that modern society is hungry for knowledge, news, the exposure of "confidential", even gossipy, details and the unceasing flow of information – whereas the actual importance of such information is usually disproportionate to the interest that it arouses.'

Context

- [34] In considering public interest we must of course consider the context in which information is published. In a matter concerning the publication of a schoolboy 'joke', the Constitutional Court recently emphasised the need to take into account the context in which publication of matter occurs. In *Le Roux v Dey*²⁴ the court was divided as to whether a deputy principal of a school had been defamed by the

publication of a computer-manipulated image of his head superimposed on the body of a gay bodybuilder: he was depicted sitting next to the school principal, whose head was also superimposed on that of an image of a bodybuilder. The picture suggested that the men were masturbating, for their hands were apparently on their genitals, but these were concealed by a picture of the school crest. The image, crafted by a schoolboy one boring Sunday afternoon, was circulated by his friends amongst other pupils at the school on cell phones and in cyberspace generally. A printout was also posted on a school notice board but was taken down shortly after being put up. The boys were disciplined by the school and deprived of various privileges and awards. When criminally charged with *crimen injuria* they were punished with community service.

- [35] I shall not dwell on the facts nor the judgments of the Constitutional Court: the case is not directly in point, for it deals not with public figures but with a very private schoolmaster. But it is useful to illustrate the importance of the context in which injurious matter is stated or painted or published, and to indicate the recognition by the minority of an injury to dignity which, although published, did not constitute defamation.
- [36] Suffice it to say that the boys were made to apologise and the principal accepted their apology. The deputy principal, Dr Dey, did not accept the apology and sued for damages. The High Court upheld his claim for defamation as did the Supreme Court of Appeal. There was one dissenting judgment in that court which considered that the image was injurious, and warranted an award of damages, but that it had not been defamatory since the reasonable viewer would have understood the context in which it had been made and circulated, and would not have interpreted it as suggesting that the plaintiff was a person of immoral character. Two judges of the Constitutional Court adopted the same approach: the image had hurt the plaintiff but had not defamed him.²⁵ Two judges of that court considered that the creation and circulation of the image was not actionable:²⁶ the defendants were schoolchildren who had created and circulated a clumsy image intended as a joke. That they were children was found to be central to their view that the reasonable viewer would not have taken the image seriously. The majority²⁷ found that the image had been defamatory but reduced the quantum of the award of damages.
- [37] Much has been written about these judgments in academic journals. I do not want to add to the debate, save to say that all the judges of the Constitutional Court were at pains to make clear that it is the reasonable person whose interpretation of a statement or image must be taken into account in assessing whether the reputation of the plaintiff had been adversely affected, such that it was defamatory. For a pure breach of one's dignity that need of course not be so: it is the feelings of the plaintiff that must be taken into account. But that too must be viewed from an objective point of view. For the purpose of this paper, however, what is more important is that the judges were also clear that the context – in that case, the school environment – was significant.
- [38] In his minority judgment Yacoob J said:²⁸

'[S]ome attacks on human dignity are more serious than others: the violation of dignity in the context of the violation of other constitutional rights would ordinarily be regarded as more serious than otherwise. Two examples will suffice. The violation of human dignity in the context of unfair discrimination on any of the grounds listed in the Constitution would be unarguably egregious. So would the violation of these rights in the context of an unlawful intrusion into one's home in the process of a criminal investigation *Another factor which, in my view, has relevance to the intrusive character of the violation of the right to dignity would be the power relations between the person who committed the allegedly wrongful conduct in question and the person who was the target of the injury.* I would regard the violation of the dignity of a relatively powerless and vulnerable person by a powerful, strong person in authority as more serious than the allegedly wrongful conduct involved here.' (My emphasis.)

- [39] None of the other judgments suggested a different view on this issue. But note that 13 of the judges who considered this matter regarded the boys' conduct as a matter to be viewed seriously. The defence that it was a joke – a poor and tasteless one – was rejected. And that there was no assertion of fact (a prerequisite for liability for defamation) has, it is argued, been overlooked.²⁹
- [40] In what context, then, and in which society, is the conflict between the right of artistic and political expression to be measured against the right of the President to dignity and privacy? Given the diversity of people in South Africa, the history of the country, and the still prevalent sense of oppression and racial discrimination, how do we answer the following questions? Did Brett Murray and all who displayed his picture infringe the rights of privacy and dignity? Does the President still have those rights despite his highly


publicized sexual life and the poor governance decisions for which he is constantly criticised? Was any assertion actually made against the President? Was the painting and its publication justified in the circumstances? The questions are obviously sensitive and I venture no answers. But I do suggest that one has to put a number of items into the respective scales when balancing these two rights.

• Scale 1 – Freedom of information and of artistic expression

The importance of political satire, and the right to comment on the work of politicians in a democracy; the public acts of the President and his lifestyle; his conduct when called to account for having sex with the daughter of family friends; the role of satire in a democracy; as the head of the State, the President's apparent lack of care for the poor and unemployed (despite recent claims that he does not sleep at night because of his concern for the plight of his countrymen); that the painting was one of many depicting a government that is accused of being corrupt and of having mismanaged the affairs of the country; and the fact that the nude (and the naked) are, at least in most of the Western world and in Africa too, commonly depicted in paintings and sculptures.

• Scale 2 – Privacy and dignity

I would place in this scale: cultural sensitivity; the history of racism and oppression of the country over centuries; the patriarchal nature of the society in which the President has been raised; the need to avoid stereotyping African people with reference to their bodies and their genitals; and perhaps the general ignorance of artistic endeavour spawned by centuries of colonialism and apartheid.

There are of course other factors that may be significant. But these, I hope, will start the debate. 

13 July 2012

Endnotes

- ¹ [2012] EWHC 1296 (QB), [2012] NLJR 781, [2012] All ER (D) 248 (May).
- ² In particular J Brooks Spector in the *Daily Maverick* at <http://dailymaverick.co.za/article/2012-05-22-goodman-what-a-difference-a-spear-makes>.
- ³ *Ibid.*
- ⁴ Act 108 of 1996.
- ⁵ Section 14 provides that everyone has the right to privacy, and precludes specified conduct. The common law entitles everyone to have his or her privacy protected, and to that end the *actio injuriarum* has been developed over centuries.
- ⁶ See *S v Mamabolo (E TV & others intervening)* 2001 (3) SA 409 (CC) para 41 and *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) para 42, following *Khumalo v Holomisa* 2002 (5) SA 401 (CC) paras 24-28.
- ⁷ Section 8 of the Constitution provides:
'(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'
- ⁸ 2007 (5) SA 540 (SCA).
- ⁹ Para 7.
- ¹⁰ Cited above.

- ¹¹ Howie P concurred. Two judges dissented on the basis that it was sufficient to determine whether the publication was made reasonably in the circumstances. A third agreed that the *Mail & Guardian* was not liable for implying that the cabinet minister for housing was corrupt, but on the basis that the suggestion had been made so often in the press previously that it had ceased to be defamatory.
- ¹² [2000] 3 NZLR 385 (CA). See contra *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) and *Jameel v Wall Street Journal* 2006 UKHL 44.
- ¹³ *Le Roux v Dey* 2010 (4) SA 210 (SCA) para 11 and *Le Roux v Dey* 2011 (3) SA 274 (CC) para 123.
- ¹⁴ [2012] EWHC 1296 (QB).
- ¹⁵ For a comprehensive review of the law in Europe and the UK see *Mosley v The United Kingdom (Strasbourg)* 10 May 2011, application 48009/08.
- ¹⁶ Para 249.
- ¹⁷ Para 267.
- ¹⁸ Para 266.
- ¹⁹ 2008 (6) SA 102 (W).
- ²⁰ Para 44.
- ²¹ Para 45.
- ²² Para 49.
- ²³ 'Publication of private information: an examination of the right to privacy from a comparative perspective' 2010 *TSAR* 37.
- ²⁴ 2011 (3) SA 274 (CC).
- ²⁵ Cameron and Froneman JJ in a joint judgment.
- ²⁶ Yacoob J, with whom Skweyia J concurred.
- ²⁷ Per Brand AJ.
- ²⁸ Para 46.
- ²⁹ See Anton Fagan 'The Constitutional Court loses its (and our) sense of humour: *Le Roux v Dey* (2011) 128 *SALJ* 395 at 399.