REPORTABLE CASE NO. 335/94

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

NATIONAL MEDIA LIMITED First Appellant

NEIL HAMMAN Second Appellant

and

ANNA JOOSTE Respondent

CORAM: CORBETT CJ, BOTHA, NESTADT, HARMS JJA et PLEWMAN AJA

HEARD: 27 FEBRUARY 1996

DELIVERED: 26 MAART 1996

J U D G M E N T

HARMS JA/

HARMS JA:

> "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attending upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.
>
> Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus

> dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under the blighting influence."

These words (by Warren and Brandeis, The Right to Privacy, (1890) 4 Harvard Law Review 193)[1,] said a century ago, were well said.

The issue in this appeal is whether the appellants (the publisher of two weekly magazines, the Huisgenoot and You, and the news editor of the former) have wrongly breached the respondent's right to privacy by publishing details of private affairs for "public delectation" (Melius de villiers, The Roman and Roman-Dutcn Law of Injuries,

[1] The quotation was taken from Prosser et al, Cases and Materials on Torts, 7th ed, p 1083.

(1899) p 138 n 32). These magazines have the identical content, the one in Afrikaans and the other in English. The trial magistrate found against the respondent but on appeal to the Cape Provincial Division her claim was upheld by Olivier J, Van Niekerk J concurring: Jooste v National Media Ltd en 'n Ander 1994 (2) SA 634 (c).

The respondent, at the time an unmarried postgraduate student, was thrust into the public eye during September 1988. The daily press had discovered that she had, some six months earlier, given birth to a child. A well-known rugby player, Mr Naas Botha, was alleged to be the father. Apart from a desire to cater for the prurient reader, her life was not otherwise of interest to the media. She was initially not at all prepared to talk to the press, but the press was nevertheless able to establish some inconsequential personal details, the name of the child and the fact that an application against Botha for maintenance for the child had been settled. These facts and an unflattering photograph of

her was published.

Within a few days she succumbed somewhat to persistent press pressure. She allowed her photograph to be taken and gave personal details and intimate information concerning her emotions during pregnancy and relating to the maintenance litigation. Nevertheless, she remained steadfast in her refusal to discuss her relationship with Botha and said that, as far as the paternity issue was concerned, she would deal with it should it arise. For an article on unwed mothers in the Huisgrenoot of 9 March 1989 she had some change of heart. For the first time she told a member of the media that Botha was indeed the father of the child. In addition, she spoke of her problems as a single parent.

Two articles on the child's second birthday appeared on 25 March 1990 in the Rapport, a national Sunday paper. Photographs of mother and child were published. The articles were, according to their tenor, based on interviews with the respondent. Botha's paternity was alleged. He was

referred to as her former lover. Detail concerning the settlement agreement on maintenance was given, as also her allegation that it had been breached. Some play was made of Botha's refusal to recognise the child as his own and the fact that he had ignored the child's birthday. I should add in fairness to the respondent that she alleged at the trial that she had been tricked into the interview.

These then were the facts concerning the respondent's private life that had become, properly or improperly, public before the events that led to the present litigation. These events have been set out in some detail in the reported judgment of the court a guo (at 640C-645B). That exposition is, save for an important exception (at 641H) to which I shall return, essentially correct and does not require repetition. I shall confine myself to the salient facts.

It became common knowledge during the first half of 1991 that Botha was about to be married to a Miss Karen

Kruger. The respondent was also aware of this fact. Not satisfied with the existing agreement with Botha, she decided to institute proceedings in the Maintenance Court against him. At the same time she contacted a journalist of the Huisgenoot, Miss Gomes, and offered to tell and sell the "story" of her relationship with Botha for publication in the Hizisgenoot and You. Her motive for doing so, she said, was to counter possible negative publicity that might have followed from the intended maintenance proceedings. As she informed Gomes, she was "sorry it's all coming in the open so soon before Naas's second marriage but the agreement we've had up to now isn't working out".

Her offer to Gomes resulted on 8 June 1991 in the conclusion of an agreement that was in part oral and in part written. It is accepted by counsel for the appellants that the material terms of the agreement were these: The respondent would receive payment of R5 000 upon publication of an exclusive interview. However, publication was only to

be effected once the respondent had approved the contents of the article and the photographs to be used, and had agreed to the date of publication.

The interview took place and photographs were taken of the respondent and her child. Gomes prepared the article and submitted it to the respondent. The respondent edited the article and in her answering telefacsimile declared it beautiful ("bale mooi") but somewhat emotional ("bietjies te emosioneel"). She proposed nine specific amendments to the text and concluded the telefacsimile with a request to see the final and also the translated version for You and suggested tentatively the first week in July as the publication date.

Gomes effected amendments to the article. The court a guo (at 641H) found that the changes requested had by far not been made. Counsel for the appellants argued otherwise, submitting that there had been due compliance with the respondent's requests. It seems to me that the truth

lies somewhere in between. For reasons that will become apparent, I find it unnecessary to compare the second draft with the first and I shall assume that Gomes complied substantially with the respondent's request.

A second draft was also transmitted to the respondent, first in Afrikaans (the court a guo erred in this regard at 641H) and then in English. She was again not satisfied and proposed further amendments (summarized by the court below at 644D-G). Some of her complaints relating to the text appear to be frivolous, a few received proper attention, one or two seem to be of substance and were ignored as was her fairly vague complaint that the general tone of the article was negative — she required something more positive.

The article was published in the 27 June 1991 editions of the Huisgenoot and You. A summary is to be found in the judgment of Olivier J (at 638E-639D). The publication was, however, preceded by events that are crucial

to the outcome of this appeal.

> Even before the respondent had settled the second draft, the news editor requested her to withdraw her maintenance application until the article had been published. His concern was that the article could infringe the sub judice rule. In addition, Botha's attorney had telephoned her and, as she understood it, threatened her with litigation. His letter recording the conversation was interpreted by her to be a summons. Not prepared to postpone her application and fearing litigation by Botha, she informed the appellants on 19 June that she withdrew her consent to publication. She remained adamant and edited the second draft under protest, having been told that publication was imminent and inevitable. The appellant's apparent motive in publishing the article on 27 June was to juxtapose it alongside an article on Botha's impending wedding. Whatever the motives of the parties concerned, the fact of the matter is that the article was published on that day without the

respondent's consent and in breach of the agreement — the final text had not been approved and she had not agreed to 27 June as the date for publication.

The respondent's claim for damages was based on the allegation that the publication of the article invaded her privacy. The defence was twofold: A denial of an invasion of her privacy and, in the alternative, a plea of consent based upon the agreement referred to earlier.

It is convenient to consider at the outset whether the article disclosed any private facts, i e facts worthy of protection that had not become public before their publication by the appellants on 27 June. The court a quo (at 646E-F) held that important and highly intimate detail had been so disclosed. It was but faintly argued that Olivier J had erred in this regard. It is true that some facts concern the child only, but as mother and guardian of the child, the respondent is entitled to prescribe, within limits, the child's exposure to the public eye. And the

child's private facts are, in a sense, also her private facts (cf the approach in Mr and Mrs "X" v Rhodesia Printing and Publisning Co Ltd 1974 (4) SA 508 (R) and on appeal sub nom Rhodesian Printing and Publishing Co Ltd v Duggan and Anotner 1975 (1) SA 590 (RAD)). Some other facts contained in the article have no "privaatheidswaarde" because legal protection of private facts is extended to ordinary or reasonable sensibilities and not to hypersensitiveness (62A American Jurisprudence 2d Privacy par 40). The general sense of justice of the community as perceived by the court (Financial Mail (Pty) Ltd v Sage Holdings Ltd and Others 1993 (2) SA 451 (A) 462G) does not, in a case such as this, require the protection of facts whose disclosure will not "cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant" (American Jurisprudence loc cit). However, if the article is taken as a whole, it consists of a word for word narrative between

quotation marks by the respondent of her personal relationship with Botha. That, at the very least, was private and is worthy of protection.

The starting point of Mr Burger's argument for the appellants related to the so-called "privaathoudingswil", i e the individual's personal wish to withhold personal facts from others. Neethling, in his doctoral thesis, Die Reg op Privaatheid (UNISA 1976) p 287 defined "privacy" as follows:

> "Privaatheid is 'n individuele lewenstoestand van afsondering van openbaarheid. Hierdie lewenstoestand omsluit al daardie persoonlike feite wat die belanghebbende self bestem om van kennismaking deur buitestaanders uitgesluit te wees en ten opslgte waarvan hy 'n privaathoudingswil het."

This definition can be interpreted to mean that the boundary of the individual's right to privacy is determined solely by that individual's wishes or will. I do not, however, accept that this was what Neethling intended. A footnote in Neethling, Potgieter & Visser, Deliktereg, (3rd ed) p 344

n 239 puts the "privaathoudingswil" in its true perspective: Absent a will to keep a fact private, absent an interest (or a right) that can be protected. The boundary of a right or its infringement remains an objective question. As a general proposition, the general sense of justice does not require the protection of a fact that the interested party has no wish to keep private.

The argument went like this: The respondent had decided to make the private facts concerning her relationship with Botha public. This decision contracted her right to privacy because she no longer had the wish to keep these facts secret. The publication of the article could therefore not impinge on her right to privacy.

This submission is unsound because it attaches no value to the agreement between the parties. As indicated, her willingness to reduce the compass of her privacy was subject to specific conditions or terms and they have not been complied with. That, according to Mr Burger, is beside

the point because the cause of action is not one based upon a breach of contract. The response, I fear, is too simplistic. A right to privacy encompasses the competence to determine the destiny of private facts (see Neethling's comment on the judgment of the court a quo: 1994 THRHR 703 at 706). The individual concerned is entitled to dictate the ambit of disclosure e g to a circle of friends, a professional adviser or the public (cf Jansen van Vuuren and Another NNO v Kruger 1993 (4) SA 842 (A); Neethling Persoonlikheidsreg (3rd ed) p 238-9). He may prescribe the purpose and method the disclosure (cf the facts in O'Keeffe v Argus Printing and Publishing Co Ltd and Another 1954 (3) SA 244 (C) - whether that case was truly concerned with privacy does not require consideration). Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public. A contrary view will place undue constraints upon the individual's so-called "absolute rights of

personality" (Minister of Justice v Hofmeyr 1993 (3) SA 131 (A) 1451). It will also mean that rights of personality are of a lower order than real or personal rights. These can be limited conditionally or unconditionally and irrespective of motive.

This does not mean that the delictual nature of the claim is thereby compromised. The breach of the agreement is relevant to the claim in the sense that it may be a determinant of the scope of the complainant's "privaathoudingswil". Also, the general sense of justice of the community requires in my judgment due compliance with the terms of such an agreement. If, as here, it is breached intentionally, the breach may be a relevant fact to consider in assessing the wrongfulness (in a delictual context) of the publisher's action. On the other hand, had publication taken place according to the terms of the agreement, the publication of the erstwhile private facts could not have been wrongful for several reasons, such as lack of

"privaathoudingswil", consent and volenti non fit iniuria. (Where the one defence begins or the other ends is, from a practical point of view, difficult to discern and probably often of no consequence.)

The alternative defence of consent is also devoid of any merit. According to the plea, the consent consisted of the agreement. It is axiomatic that the defence of consent can only succeed if the prima facie wrongful act falls within the limits of the consent (Neethling, Potgieter and Visser, op cit, p 101). The publication did not comply with the terms of the consent and it smacks of cynicism to argue in these circumstances that the publication took place pursuant to the consent. Some point was made in this context of the fact that the respondent had, after the publication of the article, accepted payment of the agreed R5 000. That, according to Mr Burger, was evidence of an election to keep the agreement alive. I agree. The respondent has never cancelled the agreement. The appellants' breach did not

release them from the other terms of the agreement and the respondent's election entitled her to insist upon compliance of the remaining terms of the contract by the appellants. But this election by her does not detract from the fact that the publication occurred in violation of the terms of the consent.

In the result the appeal is dismissed with costs, including the costs of two counsel.

L T C HARMS JUDGE
OF APPEAL

CORBETT CJ )
BOTHA JA ) concur NESTADT
JA ) PLEWMAN AJA )