18

Privacy

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18.1 INTRODUCTION: THE MEANING OF PRIVACY

Section 14 of the Constitution provides:

- Everyone has the right to privacy, which includes the right not to have —
  - their person or home searched;
  - their property searched;
  - their possessions seized; or
  - the privacy of their communications infringed.¹

Privacy has been variously defined.² It has been described as ‘an amorphous and elusive’ concept.³ The scope of privacy has been said to be closely related to the concept of identity.⁴ At the very least, the right to privacy includes the right to be free from intrusions and interference by the state and others in one’s personal life. It may also include freedom from unauthorized disclosures of information about one’s personal life.⁵ This second connotation of privacy implies that individuals have control not only over who communicates with them but also who has access to the flow of information about them.⁶

Privacy, like other rights, is not absolute.⁷ While the ‘inner sanctum’ of a person (e.g. family life, sexual preference and home environment) may be shielded from erosion by conflicting rights of the community as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.⁸

‘Privacy is an individual condition of life characterized by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state.’⁹ Thus a right to privacy encompasses the competence to determine ‘the destiny of private facts’, which includes the right to decide ‘when and under what conditions private facts may be made public’.¹⁰

¹ The wording in s 13 of the interim Constitution is substantially the same: ‘Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.’
² See A F Westin Privacy and Freedom (1967) 7 (‘the voluntary and temporary withdrawal of a person from the general society through physical and psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve’). Cf Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 576 (T) at 384–5. See also International Commission of Jurists Conclusions of the Nordic Conference on the Right to Privacy (1967) (Nordic Conference defined privacy as ‘the right to be let alone to live one’s own life with the minimum degree of interference’); Olmstead v United States 277 US 438 at 478, 48 SCt 564 (1928) (Brandeis J dissenting: ‘the right to be let alone ---- the most comprehensive of rights and the right most valued by civilized men’); J Neethling Die Reg op Privaatheid (1976) 287 (‘n individuele lewens-toestand van afsondering van openbaarheid’). Cf National Media Ltd & another v Jooste 1996 (3) SA 262 (A) at 271.
³ Bernstein v Bester NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 65.
⁴ Ibid.
⁵ Case v Minister of Safety and Security 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 91.
⁷ Cf Case v Minister of Safety and Security (supra) at para 106.
⁸ Bernstein v Bester NO (supra) at para 67.
⁹ Neethling, Potgieter & Visser Law of Delict 333; cf Bernstein v Bester NO (supra) at para 68.
¹⁰ National Media Ltd & another v Jooste 1996 (3) SA 262 (A) at 271.
18.2 COMMON-LAW RIGHT TO PRIVACY

Section 14 creates a constitutional right to privacy. The supremacy of the Constitution does not, however, mean that all previous notions of privacy will be forgotten and fall into disuse. The courts will inevitably retain those existing common-law actions which are in harmony with the values of the Constitution. South African courts have had little difficulty in recognizing a common-law action for invasion of privacy under the broad principles of the actio injuriarum. One suggested definition for this delict is ‘an intentional and wrongful interference with another’s right to seclusion in his [or her] private life’.

(a) Essentials for liability

For a common-law action for invasion of privacy based on the actio injuriarum to succeed, the plaintiff must prove the following essential elements: (i) wrongfulness, (ii) intention and (iii) impairment of the plaintiff’s personality rights (in this instance, privacy).

(i) Wrongfulness

The wrongfulness of a factual infringement of privacy is judged in the light of contemporary boni mores and the general sense of justice of the community as perceived by the court.

‘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.’

It has been pointed out, however, that ‘legal protection of private facts is extended to ordinary or reasonable sensibilities and not to hypersensitiveness’. Therefore the courts will not protect

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1 Section 13 of the interim Constitution.
2 Cf Gardener v Whitaker 1995 (2) SA 672 (E) at 684. It has been pointed out, however, that caution must be exercised when attempting to project common-law principles onto the interpretation of fundamental rights and their limitation: At common law the determination of whether an invasion of privacy has taken place constitutes a single inquiry, including an assessment of its unlawfulness, whereas in constitutional adjudication under the Constitution a two-stage approach must be used in deciding the constitutionality of a statute (per Ackermann J in Bernstein v Bester NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 71). See above, Woolman ‘Limitations’ ch 12.
3 O’Keeffe v Argus Printing and Publishing Co Ltd & another 1954 (3) SA 244 (C) at 248; Cf McQuoid-Mason Privacy 86. In S v A & another 1971 (2) SA 293 (T) at 297 it was said: ‘[T]here can be no doubt that a person’s right to privacy is one of . . . “those real rights, those rights in rem related to personality, which every free man is entitled to enjoy”.’ See also Bernstein v Bester NO (supra) at para 68.
4 McQuoid-Mason Privacy 100. The courts have found reference to the American courts useful when considering the concept. O’Keeffe v Argus Printing and Publishing Co Ltd & another 1954 (3) SA 264 (C) at 249; cf Rhodesian Printing and Publishing Co Ltd v Duggan & another 1975 (1) SA 590 (RA) at 593–4. See generally McQuoid-Mason Privacy 35 for relevant United States developments.
5 McQuoid-Mason Privacy 33, 100.
6 Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another 1993 (2) SA 451 (A) at 462; Bernstein v Bester NO (supra) at para 68. See also O’Keeffe v Argus Printing and Publishing Co Ltd & another 1954 (3) SA 244 (C) at 249; S v A & another 1971 (2) SA 293 (T) at 299; Rhodesian Printing and Publishing Co Ltd v Duggan & another 1975 (1) SA 590 (RA) at 595; McQuoid-Mason Privacy 118–22.
7 Per Harms JA in National Media Ltd & another v Jooste 1996 (2) SA 262 (A) at 271.
8 National Media Ltd & another v Jooste 1996 (2) SA 262 (A) at 271.
facts ‘whose disclosure will not “cause mental distress and injury to anyone possessed of ordinary feelings and intelligence”’.1

In determining the current modes of thought and values of any community the courts may be influenced by its statute law.2 It is also clear that the Constitution — ‘and its spirit, purport and objects’ — will play a major role in determining the ‘new’ boni mores of South African society.3

(ii) Intention

The defendant must have acted intentionally or with animus injuriandi,4 except, perhaps, in the case of the mass media.5 The position of the latter, however, may well change in the light of the new Constitution.6 It is generally accepted that animus injuriandi includes the intention to injure and consciousness of wrongfulness,7 although it has been suggested that for infringements of certain personality rights, such as the right to privacy, it is not necessary to prove consciousness of wrongfulness.8 The intention to injure refers to the direction of the wrongdoer’s will towards the conduct. Consciousness of wrongfulness means that the defendant must know that his or her conduct is wrong.9 The principles governing intention in delict are similar to those in criminal law: intention may be categorized as dolus directus, dolus indirectus, and dolus eventualis.10 Once the other elements of an invasion of privacy have been proved animus injuriandi will be presumed.11

The question of strict liability for the mass media, which restricts the media to using only those defences that negative wrongfulness,12 will have to be revisited in the light of s 1613 — freedom of expression — of the Constitution. It will now be necessary for the courts to weigh up the right to privacy against the freedom of the press. As a result, the law may revert

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1 Financial Mail (Pty) Ltd & others v Sage Holdings & another 1993 (2) SA 451 (A) at 462; National Media Ltd & another v Jooste 1996 (2) SA 262 (A) at 270.
2 Rhodesian Printing and Publishing Co Ltd v Daggan & another 1975 (1) SA 590 (RA) at 595.
3 Froneman J in Gardener v Whitaker 1995 (2) SA 672 (E) at 684. For a discussion of the indirect application of the Chapter on Fundamental Rights to the common law, see above, Woolman ‘Application’ § 10.3(a)(v).
4 O’Keeffe v Argus Printing and Publishing Co Ltd & another 1954 (3) SA 244 (C) at 247; Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461 (W) at 468; Mhlongo v Bailey & another 1958 (1) SA 370 (W) at 372; C v Minister of Correctional Services 1996 (4) SA 292 (T) at 306. Cf McQuoid-Mason Privacy 113–15.
5 Cf SAUK v O’Malley 1977 (3) SA 394 (A) at 404–5, 407; Pakendorf en andere v De Flamingh 1982 (3) SA 146 (A) at 156–8, both referring to defamation. See also McQuoid-Mason Privacy 107–9.
6 See below, § 18.2(c)(ii).
7 Cf Minister of Justice v Hofmeyr 1993 (3) SA 131 (A) at 154.
8 C v Minister of Correctional Services 1996 (4) SA 292 (T) at 306, citing Minister of Justice v Hofmeyr 1993 (3) SA 131 (A) at 154–5.
10 Ibid. The latter dolus has been applied to electronic surveillance by private detectives. S v A & another 1971 (2) SA 293 (T) at 299.
11 Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461 (W) at 468. It has been suggested that where the plaintiff can prove patrimonial loss he or she should be entitled to sue for a negligent invasion of privacy under the lex aquilia. See McQuoid-Mason Privacy 253. See also H D Krause ‘The Right to Privacy in Germany — Pointers for American Legislation?’ 1965 Duke LJ 481, 516 (in Germany liability for negligent invasions of privacy should be ‘limited to situations in which the plaintiff can show tangible damage’).
12 See below, § 18.2(c)(ii).
13 Section 15 of the interim Constitution.
to the previous position where *animus injuriandi* was presumed. That is, once a wrongful act is proved, *animus injuriandi* will be presumed.

(iii) Invasion of privacy

In South Africa the courts have regarded invasion of privacy as an impairment of *dignitas* under the *actio injuriarum*. Invasions of privacy may be broadly divided into intrusions or interferences with private life, and disclosures and acquisition of information. The latter are sometimes called substantive and informational privacy rights.

The courts have held the following intrusions or interferences to be criminally or civilly actionable: illegally entering a private residence, persistently shadowing a person, secretly watching a person undress or bath, improperly interrogating a detainee, electronically ‘bugging’ a person’s home, reading a person’s private documents, or correspondence, taking unauthorized blood tests, and illegal telephone tapping.

Actionable disclosures have also included the following: disclosures concerning the contents of stolen documents, unauthorized use of a photograph for an advertisement, unauthorized use of a photograph for an advertisement.

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2 Cf Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461 (W) at 468.
3 *Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C); *Universiteit van Pretoria v Tommie Meyer Films (Edms)* Bpk 1977 (4) SA 376 (T) at 383–4; 1979 (1) SA 441 (A) at 455; *Nell v Nell* 1990 (3) SA 889 (T) at 896; *Sage Holdings & another v Financial Mail (Pty) Ltd & others* 1991 (2) SA 117 (W) at 129–31; 1993 (2) SA 451 (A) at 462–3; McQuoid-Mason Privacy 124. See, however, J Neethling *Persoonlikheidsreg* 3 ed (1991) 223–6, where he describes privacy as an independent right.
4 In the United States invasions of privacy tend to be divided into: (a) intrusions, (b) public disclosures of private facts, (c) placing a person in a false light, and (d) appropriation. See generally W Page Keeton (ed) *Prosser and Keeton on The Law of Torts* 5 ed (1984) 851–66; McQuoid-Mason Privacy 37–43.
6 *De Foured v Council of Cape Town* (1898) 15 SC 399 at 402 (police entering a brothel without a warrant); *S v Boshoff & others* 1981 (1) SA 393 (T) at 396; cf *S v I & another* 1976 (1) SA 781 (RA).
7 *Epstein v Epstein* 1906 TH 87; cf McQuoid-Mason Privacy 154.
8 *R v Holliday* 1927 CPD 395 at 401; *R v Daniels* 1938 TPD 312 at 313; *R v R* 1954 (2) SA 134 (N) at 135.
9 *R v Schoonberg* 1926 OPD 247.
10 *Gosschalk v Roussouw* 1966 (2) SA 476 (C) at 492; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).
11 *S v A* 1971 (2) SA 293 (T); cf McQuoid-Mason Privacy 148–9.
12 *Reid-Daly v Hickman & others* 1981 (2) SA 315 (ZA) at 323.
13 *S v Hammer & others* 1994 (2) SACR 496 (C) at 498.
14 *Sretal v Pravitha & another* NO 1983 (3) SA 827 (D) at 861–2; *M v R* 1989 (1) SA 416 (O) at 426–7; *Nell v Nell* 1990 (3) SA 889 (T) at 895, 896; *C v Minister of Correctional Services* 1996 (4) SA 292 (T) at 300. See also *D v K* 1997 (2) BCLR 209 (N), in which the Natal Provincial Division held that the constitutional protection of privacy precluded it from invoking its inherent jurisdiction to order the respondent in a paternity dispute to undergo a blood test against his will. The court held that the presumptions contained in ss 1 and 2 of the *Children’s Status Act* 82 of 1987 adequately protected the interests of the minor child in a paternity dispute without invading the constitutionally protected privacy of the respondent.
15 *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 463.
16 *Goodman v Von Molke* 1938 CPD 153; cf Neethling *Die Reg op Privaathheid* 390.
17 *O’Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C), involving the ‘appropriation’ of the plaintiff’s picture for an advertisement. Neethling prefers to regard such cases as constituting an independent ‘right to identity’ (Neethling *Persoonlikheidsreg* 263).
unauthorized use of a photograph for a false newspaper story that certain nurses ‘want boyfriends’, unauthorized publication of a photograph of a retired schoolteacher portraying him as a young man in the company of a well-known singer, publication of a story about young children abducted from the custody of their parents, attempted photographing of security policemen mentioned by counsel at a trial as having been responsible for the death of a detainee, the disclosure of private facts obtained by illegal telephone tapping, and the unauthorized publication of a photograph and story about an unmarried mother who conceived a child by a well-known rugby player. A breach of the doctor/patient relationship when a doctor disclosed — without permission — that his patient was suffering from AIDS gave rise to an action for defamation. It could also have been described as an invasion of privacy.

(b) Damages

A plaintiff wishing to recover sentimental damages for invasion of privacy under the actio injuriarum will have to prove all the elements of the action. Where patrimonial loss can also be proved the plaintiff may bring a ‘rolled up’ action for both sentimental damages and actual loss.

When calculating damages for invasion of privacy the courts will take into account the contents, nature and extent of the publication, the standing of the plaintiff, and the conduct of the defendant. Thus the courts have regarded the fact that the defendant deliberately rode roughshod over the plaintiff’s feelings as an aggravating factor, and the tendering of an apology as mitigating. Further factors may include the nature of the imputations, the probable consequences of the defendant’s conduct, and comparable awards in other cases.

Apart from, or in addition to, damages a plaintiff may obtain an interdict restraining a proposed or continued invasion of privacy. In order to obtain an interdict the plaintiff must

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1. Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461 (W).
4. La Grange v Schoeman & others 1980 (1) SA 885 (E).
5. Financial Mail (Pty) Ltd v Sage Holdings Ltd 1993 (3) SA 451 (A) at 463.
9. Mathews v Young 1922 AD 412.
10. O’Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C).
12. Ibid.
14. Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461 (W) at 468.
16. Epstein v Epstein 1906 TH 87 at 88; Rhodesian Printing and Publishing Co Ltd v Duggan 1975 (1) SA 590 (RA) at 595; Financial Mail (Pty) Ltd v Sage Holdings Ltd 1993 (2) SA 451 (A). Cf La Grange v Schoeman & others 1980 (1) SA 885 (E), where a newspaper photographer unsuccessfully tried to obtain an interdict to prevent policemen, mentioned in a trial as having killed a detainee, from ‘assaulting, molesting, hindering or in any way interfering with’ his taking photographs of them.
prove that he or she has: (i) a clear right, (ii) suffered actual injury or has a well-grounded apprehension of irreparable injury, and (iii) that no other satisfactory remedy is available.\(^1\)

In the granting of an interdict fault by the defendant is irrelevant.\(^2\)

(c) Defences

Defences to a common-law action for invasion of privacy are similar to those for other actions under the *actio injuriarum* (e.g. defamation). They can be divided into those excluding wrongfulness and those excluding fault.\(^3\)

(i) Defences excluding wrongfulness

The following defences exclude the wrongfulness of the defendant’s conduct in cases of invasion of privacy: justification, privilege, fair comment, consent, necessity, private defence, and statutory authority. Justification (truth and public benefit) may be raised as a defence where a person is a public figure or disclosures concerning him or her are in the public interest.\(^4\) The defence can be defeated if the plaintiff can prove improper motive or malice on the part of the defendant.\(^5\) Apart from parliamentary privilege, which is absolute,\(^6\) a qualified privilege will exist where a statement is made: (a) in discharge of a moral, legal or social duty to a person with a reciprocal interest,\(^7\) or (b) in furtherance of a legitimate interest,\(^8\) or (c) in the course of judicial proceedings,\(^9\) or (d) reports of parliamentary or judicial proceedings.\(^10\) The defence may, however, be defeated by proof of improper motive or malice.\(^11\) Fair comment may be raised as a defence where: (a) the statement is one of comment not of fact; (b) the comment is fair; (c) the facts commented on are true; and (d) the comment is on a matter of public interest.\(^12\) The defence may be defeated by proof of improper motive or malice.\(^13\) Consent is a good defence if the invasion of privacy takes

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\(^1\) *Setlogelo v Setlogelo* 1914 AD 221 at 227. See McQuoid-Mason *Privacy* 132.

\(^2\) Ibid.

\(^3\) Cf McQuoid-Mason *Privacy* 217.

\(^4\) See generally McQuoid-Mason *Privacy* 218–24; cf *La Grange v Schoeman & others* 1980 (1) SA 885 (E) at 893; *Jooste v National Media Ltd* 1994 (2) SA 634 (C) at 645. In *S v I & another* 1976 (1) SA 781 (RA) at 788–9 the court used justification in the broad sense to deny liability for invasion of privacy where an estranged wife and a private detective caught her husband in bed with another woman.


\(^7\) Cf *Lappan v The Mayor, Councillors and Citizens of Grahamstown* 1906 EDL 40; McQuoid-Mason *Privacy* 226.

\(^8\) Cf *Human & others v East London Daily Despatch* 1975 (2) SA 251 (E); McQuoid-Mason *Privacy* 227.

\(^9\) Cf *May v Udwin* 1981 (1) SA 1 (A); *Joubert & others v Venter* 1985 (1) SA 654 (A) 697; McQuoid-Mason *Privacy* 228.

\(^10\) Cf *Benson v Robinson & Co (Pty) Ltd & another* 1967 (1) SA 320 (A).

\(^11\) Cf *Siffman v Weakley* 1909 TS 1095 at 1099–1100; McQuoid-Mason *Privacy* 229.

\(^12\) Cf *May v Udwin* 1981 (1) SA 1 (A).

\(^13\) Cf *Crawford v Albu* 1917 AD 102 at 114; *Marais v Richard en ‘n ander* 1981 (1) SA 1157 (A) at 1167; McQuoid-Mason *Privacy* 230. In the United States fair comment was favoured as a defence by Warren and Brandeis in their seminal article (S D Warren & L D Brandeis ‘The Right to Privacy’ (1890) 4 *Harvard LR* 193–4), but W L Prosser *Torts* 4 ed (1971) §52 submits that it has been subsumed under the defence of ‘constitutional privilege’.

\(^14\) Cf *Marais v Richard en ‘n ander* 1981 (1) SA 1157 (A) at 1170.
the form to which the plaintiff consented.\(^1\) Necessity can be raised as a defence where the defendant has acted reasonably to prevent a threat of greater harm to another person arising from force of nature or conduct unconnected with the plaintiff.\(^2\) Private defence will apply where the defendant invades the plaintiff’s privacy to prevent his or her interests being harmed by the plaintiff.\(^3\) Statutory authority may legalize certain invasions of privacy which would otherwise be unlawful.\(^4\) In the past it was used to justify excessive intrusions by the apartheid authorities.\(^5\) Today statutory authority will succeed as a defence only if the statutes concerned satisfy the requirements of the Constitution. Section 14\(^6\) will now prevent invasions of privacy by the state unless they can be justified in terms of the limitation provisions.

(ii) **Defences excluding intention**

The general principles of the *actio injuriarum* apply to defences excluding intention. The categories of the defences which may be used to exclude intention are not closed.\(^7\) They include mistake, *rixia*, jest, and any other defence which shows subjectively that the defendant did not have the intention to injure, such as insanity,\(^8\) or intoxication.\(^9\) Mistake will be a good defence to an action for invasion of privacy where as a result of mistake the defendant was unaware that he or she was invading the plaintiff’s privacy (i.e., had no intention to injure), but not where he or she *bona fide* believed that the invasion was made with a lawful purpose.

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1. McQuoid-Mason *Privacy* 231. Thus the defence of consent failed where the consent was given to use a photograph in a news story, not an advertisement (O’Keeffe v Argus Printing and Publishing Co Ltd & another 1954 (3) SA 244 (C) at 257); and for a nursing journal article, not an appeal for funds in a Sunday newspaper (*Kidson & others v SA Associated Newspapers Ltd* 1957 (3) 461 (W) at 464). It also failed where it had not been complied with in *National Media Ltd & another v Jooste* 1996 (3) SA 262 (A) at 272.
2. Neethling *Persoonlikheidsreg* 248; McQuoid-Mason *Privacy* 233.
3. McQuoid-Mason *Privacy* 234; cf *Rhodes University College v Field* 1947 (3) SA 437 (A) at 463: '[A] man whose character, reputation or conduct has been assailed can say what is reasonably necessary to defend it.'
4. For example, the duty to report cases of child abuse (Child Care Act 74 of 1983 s 42; Prevention of Family Violence Act 133 of 1993 s 4) and mentally ill persons who are dangerous (Mental Health Act 18 of 1973 s 13).
5. Thus during the apartheid era the state interfered with a person’s choice as to: marriage (Prohibition of Mixed Marriages Act 55 of 1949 s 1); sexual partners (Immorality Act 23 of 1957 s 16); school (education for whites was controlled by the provinces in terms of the Republic of South Africa Constitution Act 32 of 1961 s 84(1)(c); blacks by the Bantu Education Act 47 of 1953; coloureds by the Coloured Persons Education Act 47 of 1965; and Indians by the Indian Education Act of 1965); university (Extension of University Education Act 45 of 1959 ss 17 and 31); residence (Group Areas Act 36 of 1966 s 13; Bantu Land Act 27 of 1913; Bantu Trust and Land Act 18 of 1936; Coloured Persons Settlement Act 7 of 1946; Rural Coloured Areas Act 24 of 1963); entertainment (Publications Act 42 of 1974 s 8(1)(d)); and political party (Prohibition of Political Interference Act 51 of 1968 s 2). The police were also given wide powers of search (Criminal Procedure Act 51 of 1977 s 22), detention without trial (Criminal Procedure Act 51 of 1977 s 185; Internal Security Act 74 of 1982 s 50(1)) and the right to intercept postal communications (Post Office Act 44 of 1958 s 118A) and telephone conversations (Post Office Act 44 of 1958 s 118A(2)(b)). See generally McQuoid-Mason *Privacy* 235. See also *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) at para 100.
6. Section 13 of the interim Constitution.
7. Cf *Gesser en ’n ander v Pont* 1968 (4) SA 67 (W) at 72–3.
8. Cf *Wilhelm v Beamish* (1894) 11 SC 13 at 15; *Muller v SA Associated Newspapers Ltd & others* 1972 (2) SA 589 (C) at 592. But if the defendants’ mental afflictions are such that they appreciate the nature and effect of their acts they will still be liable (*Vaughan & another v Ford* 1953 (4) SA 486 (R) at 488–9).
9. Cf *Gesser en ’n ander v Pont* 1968 (4) SA 67 (W) at 72–3; *Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589 (C) at 592.
(i.e. was not conscious of the wrongfulness of the act). Rixa will indicate lack of intention where the defendant acts: (a) without premeditation, (b) in sudden anger on provocation by the plaintiff, and (c) does not subsequently persist in the conduct. Words spoken in jest or fun should not give rise to an action for invasion of privacy if they were intended and understood as such.

18.3 CONSTITUTIONAL RIGHT TO PRIVACY

Section 14 will not only have an impact on the development of the common law action for invasion of privacy. It will create new constitutional rights to privacy. For convenience these new constitutional rights to privacy can be divided into two groups: (a) privacy rights protecting personal autonomy (preventing intrusions and interferences with private life), sometimes called substantive privacy rights, and (b) privacy rights protecting information (preventing disclosures and access to information, sometimes called informational privacy rights). Recognition of these new rights may also give rise to new actions for invasion of privacy which will include not only the interests protected by the common law but also a number of important personal interests as against the state. These interests generally involve family arrangements and sexual orientation. In countries such as the United States the result of constitutionalizing these interests is that ‘what once were victimless crimes are now lawful pursuits, the invasion of which creates a constitutional tort’. Section 14 may well yield a similar transformation here.

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1 C v Minister of Correctional Services 1996 (4) SA 292 (T) at 306.
2 Cf Kirkpatrick v Bezuidenhout 1934 TPD 155 at 158; Peck v Katz 1957 (2) SA 567 (T) at 573; Jeftha v Williams 1981 (3) SA 678 (C); Bester v Calitz 1982 (3) SA 864 (O); McQuoid-Mason Privacy 240.
3 McQuoid-Mason Privacy 241; cf Masch v Leask 1916 TPD 114 at 116; Peck v Katz 1957 (2) SA 567 (T) at 572–3; Geyer en ’n ander v Pont 1968 (4) SA 67 (W) at 72–3.
4 Section 13 of the interim Constitution.
5 See above, § 18.2.
6 These rights to privacy are not unique to the South African Constitution. The right to privacy has been guaranteed in such international documents as the Universal Declaration of Human Rights (art 12), the International Covenant on Civil and Political Rights (art 17), the European Convention for Human Rights and Fundamental Freedoms (art 8), the American Convention on Human Rights (art 11), the Convention on the Rights of the Child, and the American Declaration on the Rights and Duties of Man (arts 5, 9 and 10) (cf Case & another v Minister of Safety and Security & others 1996 (3) SA 617 (CC) at para 104). It has also been included in the Constitutions of such countries as Angola (art 24), Argentina (art 29), Mauritius (art 3(c)), Mexico (art 16), Moçambique (art 64) and Namibia (art 13). The French Civil and Penal Codes also recognize a right to privacy (arts 9 and 368–72 respectively). Although the United States has no right to privacy enshrined in its Constitution, the right has been held to be implicit in the First, Third, Fourth, Ninth and Fourteenth Amendments, which ‘create zones of privacy’ (Griswold v Connecticut (1965) US 44479 at 484, 85 SCt 564). Likewise the German Basic Law does not mention a general right to privacy, but protects isolated aspects of privacy in art 4 (freedom of belief), art 10 (protection of postal communications) and art 13 (inviolability of the home), and indirectly in art 1.1 (protection of dignity) and art 2.1 (right to self-determination). The protection of a general right to privacy has been developed by the Federal Constitutional Court on a case by case basis. See generally Bernstein v Bester NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at paras 72–4, 77.
8 Ibid.
9 Dooley Modern Tort Law 8.
10 Section 13 of the interim Constitution.
Privacy rights protecting personal autonomy

Privacy rights permit individuals to make important decisions about their lives without interference by the state. These rights are generally understood to give the individual — or a small intimate group — control over such matters as marriage, procreation, contraception, family relationships, child-rearing, and education. The right to privacy also includes the right to decide who should enter one’s home and protects individuals from unauthorized intrusions into their homes by officers of the state and other uninvited persons.

Many of these rights were flagrantly invaded under the apartheid state in South Africa. Under the new constitutional dispensation these rights may be limited only if the state or party seeking to uphold a limitation can satisfy the test set out in the limitation clause.

Section 2(1) of the repealed Indecent or Obscene Photographic Matter Act, subject to certain exceptions, prohibited the possession of any ‘indecent or obscene photographic matter’. The latter was defined as including ‘photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature’. In Case & another v Minister of Safety and Security & others the Constitutional Court struck down s 2(1) as an unconstitutional limitation of the right to privacy. Didcott J stated the following:

“What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody’s business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the Interim Constitution guarantees that I shall enjoy.”

It has been doubted, however, whether this principle can be said to be analogous to situations involving sexual offences where ‘two persons submit what would normally be regarded as an act of intimacy to the gaze of others with the intention to debauch’. However,
it was conceded that, in deciding whether or not the restriction of such conduct would amount to an invasion of constitutional privacy, 'perhaps a distinction needs to be drawn between a private house and any other place to which restricted entry may be gained'.

The American experience regarding privacy rights which protect personal autonomy is instructive. The US Supreme Court has declared unconstitutional state laws which:

(a) imposed criminal sanctions for dissemination of birth control information and contraceptives,
(b) prohibited marriage between people of different races,
(c) prohibited possession of pornography,
and, (d) prohibited abortion, except in order to save the mother’s life.

The right to privacy has also been invoked where city by-laws have attempted to restrict the number of related individuals living in one house, and to define a ‘family’ narrowly as including only a few categories of related individuals.

Although most of the apartheid era legislation which violated personal autonomy and privacy has been repealed, it could be argued that certain legislation still on the statute books is unconstitutional. For example, s 20A(1) of the Sexual Offences Act provides that a male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification shall be guilty of an offence. This provision drastically interferes with the activities of persons at private parties and is a flagrant invasion of privacy. However, in National Coalition for Gay and Lesbian Equality the validity of s 20A was the decided on the basis of the equality provisions in terms of s 8, rather than the privacy provisions of s 13, of the interim Constitution (IC). Section 20A was declared to be inconsistent with IC s 8 and invalid because it discriminated against men in general and homosexual men in particular.

The court found it unnecessary to decide whether ‘conduct which is regarded by the Legislature (or prevailing mores) as deeply immoral, offensive or pernicious, can escape the hand of the law by reason of individual circumspection (privacy)’.

1 National Coalition for Gay and Lesbian Equality & others v Minister of Justice & others (supra) at 754.
3 Loving v Virginia 388 US 1, 87 SCt 1817 (1967).
4 Stanley v Georgia 394 US 557, 89 SCt 1243 (1969). However, Osborne v Ohio 495 US 103, 110 SCt 1691 (1990) held that the privacy of the home does not extend to watching child pornography. (Cf Case & another v Minister of Safety and Security & others 1996 (3) SA 617 (CC) at para 107.)
8 Act 23 of 1957.
9 A ‘party’ is defined as ‘any occurrence where more than two persons are present’ (s 20A(1)).
10 See also S v Kampher 1997 (4) SA 460 (C), 1997 (9) BCLR 1283 (CC) at para 25, where Farlam J appeared to assume, without deciding, that the criminalization of sodomy violated the constitutional right to privacy.
11 1998 (6) BCLR 726 (W), 1998 (2) SACR 102 (W).
12 National Coalition for Gay and Lesbian Equality (supra) at 753 and 754. The court also declared inconsistent with the interim Constitution the common-law crimes of sodomy and the commission of unnatural sexual acts to the extent that the latter criminalizes acts committed by a man or between men which, if committed by a woman or between women or between a man and a woman, would not constitute and offence (at 754).
13 National Coalition for Gay and Lesbian Equality (supra) at 754.
Section 27(1) of the Films and Publications Act\(^{1}\) provides that any person who is knowingly in possession of a publication\(^2\) or a film\(^3\) which depicts ‘a person who is, or is depicted as being, under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity’ commits an offence. Although the Constitutional Court has held that the proscription of the use of pornography in the home is unconstitutional,\(^4\) it may well uphold these limitations in respect of child pornography.\(^5\)

Section 2(1)(c) of the Choice of Termination of Pregnancy Act\(^6\) provides that a pregnancy may be terminated ‘after the 20th week of the gestation period [only] if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy — (i) would endanger the woman’s life; (ii) would result in a severe malfunction of the foetus; or (iii) would pose a risk of injury to the foetus’. It is submitted that this limitation may now fall within the provisions of the limitations clause.\(^7\)

It has been held that Bills\(^8\) to prohibit traditional leaders from accepting any remuneration or allowances other than that provided for by law or custom of the Province of KwaZulu-Natal does not violate the right not to have private possessions seized in terms of s 13.\(^9\)

\(b\) Privacy rights protecting information

Privacy rights protecting information generally limit the ability of people to gain, publish, disclose or use information about others without their consent. During the apartheid era in South Africa there was widespread abuse of rights protecting information. Most of the offensive legislation has been repealed.\(^10\)

Section 14 makes broad mention of a right to privacy,\(^11\) and specifically mentions (a) searches of people’s persons or homes, (b) searches of people’s property, (c) seizures of possessions, and (d) infringements of private communications.\(^12\) The list, however, is not exhaustive. It extends to any other method of obtaining information or making unauthorized disclosures (e.g. the unlawful restoration of computer information which has been erased by its owner and handing it over to the state for use in a criminal prosecution).\(^13\) Some of these have been

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1. Act 65 of 1996.
2. Section 27(1)(a).
3. Section 27(1)(b).
5. See the comments of Madala J in Case & another v Minister of Safety and Security & others 1996 (3) SA 617 (CC) at para 107; cf Osborne v Ohio 495 US 103, 110 SCt 1691 (1990).
7. See above, O'Sullivan & Bailey ‘Reproductive Rights’ § 16.3
10. See above, § 18.2(a)(i).
11. In Mistry v Interim National Medical and Dental Council of South Africa & others 1998 (7) BCLR 880 (CC) the court assumed that even though breach of informational privacy was not expressly mentioned in IC s 13, it would be covered by the broad protection of privacy guaranteed by s 13 (at para 41).
12. Section 13 of the interim Constitution included similar wording except that it referred to ‘private possessions’ and ‘violations of private communications’.
13. Klein v Attorney-General, WLD & another 1995 (3) SA 848 (W) at 865, 1995 (2) SACR 210 (W) (held to be a violation of the applicant’s ‘right to privacy comprehended by s 13 of the [interim] Constitution’).
mentioned earlier in the discussion of common-law actions. The question of unlawful searches and seizures and the violation of private communications will be dealt with below. State demands for information which is reasonably required for official statistical, census and income tax purposes are likely to be regarded as reasonable and justifiable. Likewise, statutory reporting requirements concerning information about child abuse and mental patients who are dangerous to others are likely to be declared constitutional.

Attempts by examinees to prevent the extraction of information at meetings of creditors in company liquidation and insolvency hearings by relying on the constitutional right to privacy have also been considered by the courts. In Bernstein v Bester NO the Constitutional Court held that ss 417 and 418 of the Companies Act were not inconsistent with the privacy and search and seizure provisions of IC s 13. If the answer to any question would infringe or threaten the examinee’s IC Chapter 3 rights, it would constitute ‘sufficient cause’ for the purposes of s 418(5)(b)(iii)(aa) of the Companies Act for refusing to answer the question, because such a question would not have been ‘lawfully put’. The Constitutional Court has held that the same principle applies to questions asked in terms of ss 64 and 65 of the Insolvency Act. A similar approach was adopted by the Constitutional Court in respect of s 205 of the Criminal Procedure Act, which also requires examinees to answer certain questions or face criminal penalties.

It seems that if information is conveyed in circumstances analogous to a privileged occasion under the common law, such disclosure may not necessarily be a breach of constitutional privacy provided the information itself was not originally obtained as a result of such a breach. In Mistry v Interim National Medical and Dental Council of South Africa & others information was communicated by one medicines control inspector to another for the purposes of planning and implementing a search of premises in order to carry out a regulatory inspection. It was argued that this was an invasion of constitutional privacy provided for in IC s 13, and contrary to the secrecy provisions of the Medicines and Related Substances Control Act and the Medical, Dental and Supplementary Health Service Professions Act. In finding that the applicant’s right to constitutional privacy had not been

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1 See above, § 18.2(a)(iii).  
2 See below, § 18.3(b)(i).  
4 Ibid.  
6 See generally McQuoid-Mason Privacy 158f. It could perhaps be argued that the Identification Act 72 of 1986 s 6 goes too far in this respect, particularly regarding the need for fingerprints (s 11), although the secrecy provisions (s 17) and the need to guard against fraud may justify the requirement.  
7 Child Care Act 74 of 1983 s 42; Prevention of Family Violence Act 133 of 1993 s 4.  
8 Mental Health Act 18 of 1973 s 13.  
9 The issue will be one of limitation. See above, Woolman ‘Limitation’ ch 12.  
10 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).  
12 Bernstein v Bester NO (supra) at para 61.  
13 Act 24 of 1936. See Harksen v Lane NO & others 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 77.  
14 Act 51 of 1977.  
15 Nel v Le Roux NO & others 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC) at para 18.  
16 See above, § 18.2(c)(i).  
17 1998 (7) BCLR 880 (CC).  
18 Act 101 of 1965, s 34.  
19 Act 56 of 1974, s 41A(9)(a).
breached the Constitutional Court took into account the following factors: the substance of
the communication was merely that a complaint had been made and that an inspection was
planned; the information had not been obtained in an intrusive manner but had been
volunteered by a member of the public; it was not about intimate aspects of the applicant’s
personal life but about how he conducted his medical practice; it did not involve data provided
by the applicant himself for one purpose and used for another; it was information which led
to a search, not information derived from a search; and it was not disseminated to the press
or the general public or persons from whom the applicant could reasonably expect such
private information would be withheld, but was communicated only to a person who had
statutory responsibilities for carrying out regulatory inspections for the purpose of protecting
the public health, and who was himself subject to the requirements of confidentiality.¹
The United States experience concerning access to information is useful, but should not
be followed blindly. It has been held not to be unconstitutional for a statute to require doctors
to disclose information to the state about prescriptions for certain drugs with a high potential
for abuse,² and for certain census questions to elicit information concerning personal and
family characteristics.³ It has also been held that a telephone subscriber can have no
‘reasonable expectation of privacy’ regarding telephone calls which are electronically
monitored by a telephone company,⁴ and that a bank client has no expectation of privacy in
respect of information contained in cheques and deposit slips handed in to the bank.⁵ These
latter decisions seem wrong in principle because they assume that the subscribers and clients
have forfeited their right to privacy simply by agreeing to comply with the statutory or other
requirements of the service providers.

(i) Unlawful searches and seizures
As a general rule, searches and seizures involve a violation of a person’s right to
privacy.⁶ However, in terms of the Criminal Procedure Act⁷ a person may be searched if
he or she has been arrested⁸ or the person conducting the search has been issued with a search
warrant.⁹ Generally a search without such authority would be a constitutional violation. Thus
where an accused’s private possessions were seized by the police without a warrant, when a
warrant could have been issued timeously had it been applied for, such search and seizure

¹ Per Sachs J in Mistry v Interim National Medical and Dental Council of South Africa & others (supra) at para 44.
² Whalen v Roe 429 US 589, 97 SCt 869 (1977) (where the information was stored in a central computer).
⁴ Smith v Maryland 442 US 735, 99 SCt 2577 (1979).
⁶ See, for example, Fedics v Matus 1997 (9) BCLR 1199 (C) at para 97.
⁷ Act 51 of 1977.
⁸ Section 23 (but such search ‘shall be conducted with strict regard to decency and order, and a woman shall be
searched by a woman only’).
⁹ Section 21(2).
were declared an unconstitutional invasion of privacy under the interim Constitution.\footnote{S v Motloutsi 1996 (1) SA 584 (C) at 592--3, 1996 (2) BCLR 220 (C), 1996 (1) SACR 78 (C). The fact that the accused’s lessee had permitted the search without a warrant did not render the search and seizure lawful (ibid). See also S v Madiba & another 1998 (1) BCLR 38 (D) and S v Gumede 1998 (5) BCLR 530 (D), where the evidence was allowed in despite the constitutional right to privacy being breached. See below, Chaskalson ‘Evidence’ § 26.4(c).} Quite a number of extant statutory provisions may be regarded as unconstitutional invasions of privacy.\footnote{See e.g s 19--36 in Chapter 2 of the Criminal Procedure Act, which confer extensive powers of search and seizure and provide for entry of premises and the forfeiture and disposal of property; s 11(1)(g) of the Drugs and Drug Trafficking Act, which allows a police official to ‘seize anything which, in his opinion, is connected with, or may provide proof of a contravention of a provision’ of the Act; s 41(1)(a) of the Arms and Ammunition Act, which allows a police official ‘who has reason to believe that an offence has been committed, by means of or in respect of any article which he has reason to believe to be in or on any place, including any premises, building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle, or any part thereof or to be in possession of any person’ to ‘without warrant, enter and search such a place or search such a person and seize any article, arm or ammunition’; s 4 of the Customs and Excise Act, which gives customs officers wide powers of entry search and seizure and to question people; s 8(6) of the Prevention of Public Violence and Intimidation Act, which allows the Chairman, or any member of staff, of a Commission of Inquiry Regarding the Prevention of Public Violence, for the purposes of an inquiry, at all reasonable times to enter upon and inspect any premises and demand and seize any document on or kept on such premises; s 37(2)(b) of the Criminal Procedure Act, which allows a registered medical practitioner attached to any hospital to take a blood sample from a person if such medical officer has reasonable grounds to believe that the contents of the person’s blood may be relevant at any later criminal proceedings. (The taking of fingerprints of an arrested person in terms of s 37 of the Criminal Procedure Act was found not to be contrary to ss 10 and 11(2) of the interim Constitution, but the question of privacy was not raised (S v Human & another 1996 (1) SA 232 (W) at 233, 237).}

The Constitutional Court has declared that s 28(1) of the Medicines and Related Substances Control Act,\footnote{Act 101 of 1965.} which empowers inspectors to enter and search premises without a warrant and to seize and remove medicines from those premises, was inconsistent with the privacy right contained in IC s 13.\footnote{Mistry v Interim National Medical and Dental Council of South Africa & others 1998 (7) BCLR 880 (CC).} It has held that to the extent that a statute authorizes warrantless entry into private homes and rifling through intimate possessions, which intrude on the ‘inner sanctum’ of the persons in question, such a statute would breach the right to personal privacy.\footnote{Per Sachs J at para 16.} The state was unable to establish that the breach was reasonable and justifiable in terms of IC s 33. The court held that the invasion authorized by s 28(1) was substantially disproportionate to its public purpose, was clearly overbroad in its reach, and failed to pass the proportionality test.\footnote{At para 23.} Furthermore, the provisions were so wide that they could not be ‘read down’ to bring them within the limits of the Constitution.\footnote{At para 27.}

A lower court has held that s 6 of the Investigation of Serious Economic Offences Act,\footnote{Act 117 of 1991.} which empowers the Director of the Office for Serious Economic Offences in pursuit of an enquiry under s 5 to enter and search premises and to seize and remove property therefrom without authority, violates the constitutional right to privacy in terms of the interim Constitution.\footnote{Park-Ross v Director, Office for Serious Economic Offences 1995 (2) SA 148 (C).} However, s 7, which prohibits disclosure without the permission of the Director of any information obtained as a result of an enquiry, search and seizure conducted in terms of the Act, was not held to be unconstitutional because the Director is required to act \textit{intra vires} s 7.\footnote{Ibid.}
PRIVACY

It has also been held that the provisions of s 7(3) of the Harmful Business Practices Act,\(^1\) which give investigating officers arbitrary powers of entry, inspection, search and seizure without a warrant, are an infringement of the right to privacy under s 14 of the Constitution.\(^2\) Section 7(3) was not saved by the limitation clause of the Constitution\(^3\) because there was no reason why such powers could not be subject to the same sort of prerequisites and controls that are laid down by the search and seizure provisions of s 21 of the Criminal Procedure Act.\(^4\) The argument that the exercise of the powers in s 7(3) of the Harmful Business Practices Act would not be unconstitutional if the provisions were used with due regard to the Constitution was held not to be feasible in practice.\(^5\)

\(^1\) Act 71 of 1988.
\(^2\) Janse van Rensburg NO v Minister van Handel en Nywerheid en ‘n ander 1999 (2) BCLR 204 (T) at 220.
\(^3\) Section 36(1).
\(^4\) Act 51 of 1977. The court said that by way of comparison notice could also be taken of s 10(2) of the Consumer Affairs (Unfair Business Practices) Act 7 of 1996 of Gauteng (at 220).
\(^5\) At 220.
In the United States the word ‘search’ has been held to mean ‘a governmental invasion of a person’s privacy’,¹ and persons claiming that their privacy has been invaded have to establish that they had a subjective expectation of privacy, and that society has recognized that expectation as objectively reasonable.² The American courts have decided that whether or not an individual has lost his or her legitimate expectation of privacy is determined by considering such factors as whether the item was abandoned³ or obtained by consent.⁴ The courts have also interpreted ‘seizure’ of a person’s property as occurring when the government ‘meaningfully interferes with an individual’s interests in possession’.⁵

The Constitutional Court has suggested that, like the American courts, the Canadian courts require a subjective expectation of privacy by the injured person and that the expectation is recognized as reasonable by society, and the German courts use an approach similar to that of a ‘reasonable expectation of privacy’ ⁶

The Constitutional Court, however, has no jurisdiction to investigate the legality of searches and seizures which occurred prior to the interim Constitution coming into operation.⁷

(ii) **Infringements of private communications**

Infringements of private communications have long been recognized as invasions of privacy in South African law.⁸ For instance, the courts have held that eavesdropping and electronic surveillance by private detectives during matrimonial disputes may result in a criminal invasion of privacy if the methods used are unreasonable.⁹ Also the stealing of tape recordings of confidential business meetings and offering them to a third party has been held to be an unlawful invasion of privacy.¹⁰ During the apartheid era, however, widespread violation of private communications was sanctioned by statute. For example, a person designated by the Minister of Posts and Telegraphs, or a Minister who was a member of the State Security Council, could authorize the interception of mail ‘in the interests of state

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² Ibid. Cf Bernstein v Bester NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 75: ‘[I]t seems a sensible approach to say that the scope of a person’s privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.’ (Per Ackermann J.)
³ Katz v United States 389 US 347 at 361, 88 SCt 507 (1967); Abel v United States 362 US 217 at 241, 80 SCt 683 (1960) (no expectation of privacy where items were left in a hotel waste basket after a guest had checked out of the hotel).
⁴ United States v Matlock 415 US 164 at 177, 94 SCt 988 (1974) (consent given by a fellow occupant of a bedroom).
⁶ Bernstein v Bester NO (supra) at paras 76, 78.
⁷ Key v Attorney-General, Cape Provincial Division, & another 1996 (4) SA 173 (CC); Rudolph & another v Commissioner for Inland Revenue & others 1996 (4) SA 552 (CC), 1996 (7) BCLR 889 (CC).
⁸ McQuoid-Mason *Privacy* 141f.
⁹ *S v A* 1971 (2) SA 293 (T) at 297, where private detectives were convicted on a charge of *crimen injuria* for installing a ‘transmitter wireless microphone’ under the dressing table of the complainant during an investigation into the latter’s private life at the request of an estranged spouse.
security\(^1\) and listen in to telephone conversations.\(^2\) Such practices would today certainly be an infringement of s 14.\(^3\)

The Interception and Monitoring Prohibition Act\(^4\) now prohibits the intentional interception of telecommunications or monitoring of conversations by monitoring devices\(^5\) unless authorized by a judge.\(^6\) The same applies to postal articles.\(^7\) The courts have held that the primary purpose of the Act is to protect confidential information from illicit eavesdropping.\(^8\) Such authorization, however, may only be given by a judge, on written application, if he or she is satisfied that: (i) the offence that has been or is being or will probably be committed is a serious offence that cannot be properly investigated in any other manner and of which the investigation in terms of the Act is necessary; or (ii) the security of the Republic is threatened or (iii) that the gathering of information concerning a threat to the security of the Republic is necessary.\(^9\) The above provisions may well be open to scrutiny by the Constitutional Court to determine whether or not they are reasonable and justifiable. Even if they satisfy the limitation clause, where the provisions of the Act have not been followed the injured party may have an action for an invasion of his or her constitutional right to privacy.\(^10\)

It has been suggested that in the case of intercepting a telephone call from a kidnapper demanding a ransom, or the interception of persistent indecent telephone calls made by a perverted caller, such interceptions may escape the prohibition in s 2(1)(b) of the Interception and Monitoring Prohibition Act on the grounds of the consent of one of the parties to the telephone call or on the basis of an argument that such a call would not constitute ‘a conversation’.\(^11\) However, it is submitted that in cases where police informers or traps are used, the mere consent of one of the parties to the surreptitious electronic recording of a conversation is not sufficient, and proper prior authorization should be obtained.\(^12\) A reasonable expectation of privacy is violated when a telephone conversation is intercepted by a third party without the knowledge or consent of the participants.\(^13\) However, the mere fact that the parties on a telephone are aware that they must be careful when talking on the telephone cannot be construed as consent to the violation, or a waiver of the person’s expectation of a right to privacy.\(^14\)

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\(^1\) Post Office Act 44 of 1958 s 118A. Cf McQuoid-Mason Privacy 141f.


\(^3\) Section 13 of the interim Constitution. See for example Fedics Group (Pty) Ltd & another v Matus & another 1997 (9) BCLR 1199 (C); Protea Technology Ltd & another v Wainer & others 1997 (9) BCLR 1225 (W).


\(^5\) Section 2(1).

\(^6\) Section 2(2).

\(^7\) Section 2(2)(b).

\(^8\) Lenco v Holdings Ltd & others v Eckstein & others 1996 (2) SA 693 (N) at 700; S v Kidson 1999(1) SACR 338 (W) at 344.

\(^9\) See, for example, S v Naidoo & another 1998 (1) BCLR 46 (N) at 72, 1998 (1) SACR 479 (N); ‘If the monitoring of a conversation is not authorized by a direction properly and lawfully issued by a Judge in terms of section 3, then not only would such monitoring constitute a criminal offence in terms of the Monitoring Act, it would also, in my judgment, constitute an infringement of the right to privacy, which includes the right not to be subject to the violation of private communications’ (per McCall J).

\(^10\) Per McCall J in S v Naidoo & another 1998 (1) BCLR 46 (N) at 70, 1998 (1) SACR 479 (N). In S v Kidson 1999 (1) SACR 338 (W) Cameron J agreed with McCall J that consent by one of the parties to a two-party conversation may render that monitoring exempt, but went on to qualify his agreement (at 343).


\(^13\) S v Naidoo & another (supra) at 89.
The case of ‘participant monitoring’ has been dealt with differently by the court.\(^1\) Where a suspect who was assisting the police in their investigations into a murder had offered to visit an accused at her home carrying a concealed voice-activated tape recorder and had later handed over the recording to the police, the information imparted was held not to be ‘confidential information’ for the purposes of the Interception and Monitoring Prohibition Act.\(^2\) The court held that the legislature could not have intended to impose an unqualified prohibition on participant monitoring, as its primary aim seems to have been to protect confidential information from illicit eavesdropping such as third-party surveillance.\(^3\) The Act prohibited intentional monitoring to gather confidential information, but information voluntarily imparted in a two-party conversation covering the criminal conduct of the communicator was not for the purposes of the Act ‘confidential information’ in relation to the other party to the conversation.\(^4\) Therefore ‘no constitutionally cognisable breach of privacy occurred’ when the police procure the monitoring by the suspect of his conversation with the accused.\(^5\) Even assuming that the Act had been breached, this was not a case of entrapment. Although the police might have played a trick on the accused, the police violation was ‘minimal’ and there had not been ‘any police impropriety or invasion of privacy’ or ‘serious failure’ by them.\(^6\)

\(^1\) \textit{S v Kidson} 1999 (1) SACR 338 (W).
\(^2\) At 348. Cameron J was of the view that the formulation by Heher J in \textit{Protea Technology Limited & another v Wainer & others} 1997 (3) SA 594 (W) at 603 that the question of whether or not the information enjoys the protection of the Act depends largely upon the intention of the communicator was ‘over-broad’ (at 347). He suggested that the following additional requirement should be added: ‘the information the communicator intended to restrict as confidential must be information upon which the law attributes the confidentiality’ (ibid).
\(^3\) At 344.
\(^4\) At 348.
\(^5\) At 350.
\(^6\) At 352. Cameron J therefore used his discretion to admit the tape recording and transcript (at 353). See below, Chaskalson ‘Evidence’ § 26.4(c). The court had previously cautioned that: ‘The police and other agencies should not be encouraged to circumvent statutory prohibitions with flimsy re-arrangements of personnel and operators’ (at 346).
It has been held that employees have a legitimate expectation of privacy concerning telephone calls made and received by them in matters unconnected with their employer’s business. However, where conversations involve their employer’s affairs the latter is entitled to demand and obtain as full an account as the employee is capable of furnishing. Such conversations are not protected by the Constitution because as soon as employees abandon their private sphere for the affairs of their employers they lose the benefit of the right to privacy. The employers then have the right to know both the substance and the manner in which employees conduct themselves and it matters not how the information is obtained.

It is submitted, however, that such an approach goes too far and could make working conditions untenable. Unreasonable monitoring of employees’ communications when dealing with the employer’s business should be regarded as prima facie evidence of a breach of their constitutional right to privacy. Employers who wish continually to monitor the substance and manner in which their employees communicate with others about the affairs of the business should be required to justify their conduct within the provisions of s 36 of the Constitution.

In the United States electronic eavesdropping on private conversations has been held to be an invasion of privacy except where such calls are electronically monitored by a telephone company. In Germany the privacy of correspondence, post and telecommunications is protected by the Basic Law.

(iii) Consequences of improperly obtained evidence

This topic is discussed elsewhere in this volume.

18.4 PRIVACY AND JURISTIC PERSONS

At common law it was previously thought that as privacy is primarily a human trait, an action for invasion of privacy would not be open to artificial persons. As a result, artificial persons
could not sue for invasion of privacy because they do not have a body or dignitas or feelings or self-respect. They could, on the other hand, sue for defamation. Recently, however, the Appellate Division has held that an artificial person may have a right to privacy.

Because of the human nature of privacy rights protecting personal autonomy, their protection should generally be limited to natural persons. That said, it seems consistent with the nature of the right that juristic persons should be able to claim certain informational privacy rights, unless no reasonable expectation of privacy exists. This view accords with the informational rights protected under the common law in Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another and the rights juristic persons were assumed to possess in AK Entertainment CC v Minister of Safety and Security.

Section 8(4) of the Constitution provides that: ‘Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.’

18.5 LIMITATION

Any limitation of the constitutional right to privacy in terms of s 14 would have to be brought within the provisions of s 36(1) of the Constitution.

The Constitutional Court has held that the provisions of ss 417(3) and 418(2) of the Companies Act which compel production of private possessions or private communications during the winding-up of a company are clearly justifiable in terms of s 33 of the interim Constitution even though they constitute a seizure of private possessions: The public’s interest in ascertaining the truth surrounding the collapse of the company, the liquidator’s interest in a speedy and effective liquidation of the company and the creditors’ and

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1 Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1979 (1) SA 441 (A) at 453–4.
2 Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another 1993 (2) SA 451 (A), where it was held that a corporation had the right to sue for invasion of privacy where a newspaper had obtained information from a private memorandum and unlawful tape recordings.
3 See above, § 18.1.
4 Cf Bernstein v Bester NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 79.
5 In the US juristic persons have been able to claim for certain informational privacy rights, particularly in respect of the so-called ‘appropriation’ cases. American Jurisprudence 2d Constitutional Law (1972) 606 para 16(A); cf McQuoid-Mason Privacy 192. Neethling Die Reg op Privaatheid 295.
6 Bernstein v Bester NO (supra) at para 90.
7 1993 (2) SA 451 (A), where the corporation was suing to prevent the publication of unlawfully obtained information.
8 1995 (1) SA 783 (E).
9 Section 13 of the interim Constitution.
10 Section 33(1) of the interim Constitution.
11 See above, Woolman ‘Limitations’ ch 12. See also Case v Minister of Safety and Security 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 99, where Langa J emphasized that personal privacy rights are not necessarily exempt from limitation.
13 Bernstein v Bester NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 90 (per Ackermann J).
contributor’s financial interests in the recovery of company assets must be weighed against this peripheral infringement of the right not to be subjected to seizure of private possessions.\footnote{Bernstein v Bester NO (supra) at para 90. The court also reaffirmed its decision in Ferreira v Levin NO & others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 127. There it held that s 417(2)(b) of the Companies Act, which requires persons examined under that section to answer questions which might incriminate them, and provides that any answers given may be used in evidence against them, was not a justifiable limitation in terms of s 33 under the interim Constitution. This was because there was not an acceptable proportionality between the legitimate objective sought to be achieved in s 417(2)(b) and the means chosen (ibid).}

The court also found that the information sought at such hearings pertained to ‘participation in a public sphere’ and could not rightly be held to be ‘inhering in the person’. Therefore there was no reasonable expectation of privacy.\footnote{Bernstein v Bester NO (supra) at para 85.}

The lower courts have also held that although the interrogation requirements under ss 65 and 152 of the Insolvency Act\footnote{Act 24 of 1936.} infringed a debtor’s right to privacy, such infringements were justified under the interim Constitution because they were reasonable and justifiable in an open and democratic society, as the rights of a creditor should enjoy preference over the insolvent’s right to privacy in pre-sequestration matters.\footnote{Podlas v Cohen and Bryden NO & others 1994 (4) SA 662 (T).} Likewise, it has been held that the power of the Director of the Office for Serious Economic Offences, in terms of s 7 of the Investigation of Serious Economic Offences Act,\footnote{Act 117 of 1991.} to decide whether or not to permit disclosures concerning information obtained as a result of an enquiry, search and seizure conducted in terms of the Act, was reasonable and justifiable under the interim Constitution because it required the Director to act \textit{intra vires} the section.\footnote{Park-Ross v Director, Office for Serious Economic Offences 1995 (2) SA 148 (C).}

It has been held that the arbitrary powers of search and seizure given to inspectors under s 7(3) of the Business Practices Act\footnote{Act 71 of 1988.} were not reasonable and justifiable\footnote{Janse van Rensburg NO v Minister van Handel en Nywerheid en ’n ander 1999 (2) BCLR 204 (T).} in terms of the limitations clause because there was no reason why they could not be subject to the same controls as those laid down in s 21 of the Criminal Procedure Act.\footnote{Act 51 of 1977.}