

MEDIA FREEDOM AND THE LAW OF  
PRIVACY: *NM AND OTHERS V SMITH AND  
OTHERS (FREEDOM OF EXPRESSION  
INSTITUTE AS AMICUS CURIAE)*  
2007 (5) SA 250 (CC)

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## 1 Introduction

*Patricia de Lille*, a biography of the well-known Member of Parliament, was published in March 2002.<sup>1</sup> The book included a chapter on Ms De Lille's work in campaigning for the rights of persons living with HIV/AIDS. In a chapter recounting Ms De Lille's involvement in a dispute relating to a controversial HIV drugs trial at Kalafong Hospital,<sup>2</sup> the names of three trial participants, and their HIV-positive status, were published without their consent. After the reference to their names was drawn to their attention, the three women instituted action against the author (Charlene Smith), Ms De Lille and the publisher for breach of their rights to privacy, dignity and psychological integrity. The plaintiffs alleged that the defendants *intentionally* published their HIV status without the plaintiffs' consent or, alternatively, that they acted *negligently* in doing so. While the former did not require an extension of the *actio injuriarum* (the delictual action for infringement of personality rights), the latter did.

The defendants argued that the women's HIV status was not private at the time of the book's publication, in that their status had been placed in the public domain. They also denied that the publication was either intentional or negligent.

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<sup>1</sup> C Smith *Patricia de Lille* (2002).

<sup>2</sup> The clinical trial was conducted by the head of the Immunology Clinic of the Medical Faculty of the University of Pretoria, and was aimed at determining the efficacy of a combination of drugs on patients' HIV levels.

After a trial that lasted eight days in the High Court, Schwartzman J held that the defendants lacked both intention and negligence in respect of the publication of the plaintiffs' HIV status.<sup>3</sup> With regard to the latter, Schwartzman J found that the defendants reasonably believed, at the time of publication, that the plaintiffs had consented to the disclosure of their HIV status.<sup>4</sup> The High Court, however, held the publisher liable for continuing to distribute copies of the book after it became aware that the women had not in fact consented to the general disclosure of their HIV status.<sup>5</sup> As a result, the publisher was ordered to pay R15 000 in damages to each plaintiff. The plaintiffs appealed against the High Court's exoneration of the defendants in respect of the initial publication of the book.

After the Supreme Court of Appeal denied leave to appeal, the matter came before the Constitutional Court, which (by nine judges to one) held the defendants liable for the initial publication of the plaintiffs' HIV status.<sup>6</sup> The judges were further divided as to how they came to this finding. The majority, in a judgment penned by Madala J,<sup>7</sup> did not deviate from the conventional approach to the *actio injuriarum*, holding that, contrary to the factual finding of the High Court, the defendants intentionally violated the plaintiffs' privacy. Madala J was satisfied that the defendants 'were certainly aware that the [plaintiffs] had not given their consent or at least foresaw the possibility that the consent had not been given to the disclosure'.<sup>8</sup> This rendered it unnecessary for the majority to consider whether the *actio injuriarum* should be extended to cover harm brought about by negligence (as opposed to the traditional mental element of intention).<sup>9</sup>

The remaining three judges, in separate judgments, took the legal road less travelled, effectively holding that liability for breach of privacy should be extended to include liability for media defendants based on negligence. On the facts, Langa CJ and Sachs J found that the 'media defendants' (ie the author and the publisher) fell short of

<sup>3</sup> *NM and Others v Smith and Others* [2005] 3 All SA 457 (W) (NM High Court) paras 40-41.

<sup>4</sup> The principal reasons for this were that the women had been identified by name as being HIV-positive in a report on various allegations relating to the manner in which the clinical trials were conducted, prepared by an outside expert, Prof SA Strauss, for the University of Pretoria ('*The Strauss Report*') (para 40 of the High Court judgment). The Strauss Report did not suggest that the contents of the Report were confidential (para 40.2).

<sup>5</sup> Para 44.2 of the High Court judgment.

<sup>6</sup> *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC) (NM or NM v Smith).

<sup>7</sup> In which six judges, Moseneke DCJ, Mokgoro, Nkabinde, Skweyiya, Van der Westhuizen and Yacoob JJ, concurred.

<sup>8</sup> *NM* (n 6 above) para 64.

<sup>9</sup> *NM* (n 6 above) para 57.

the standard of negligence (or reasonableness),<sup>10</sup> while O'Regan J held that they did not.<sup>11</sup>

Against the background of this variety of factual findings by the Court, and to some extent because of them, the judgment in *NM v Smith* raises various issues of significant interest, some of which are discussed in this note.<sup>12</sup> The first issue that interests us is the majority's cursory treatment of the 'constitutional matter' requirement (the threshold requirement for the Constitutional Court's jurisdiction) in a judgment that proceeds to decide the factual question of the existence of intention for purposes of the *actio injuriarum*. This is a 'garden-variety judicial task'<sup>13</sup> that one would expect ordinary appellate courts to undertake, but which is not generally the domain of a specialist court whose jurisdiction is confined to 'constitutional matters'. The second, related issue that we briefly deal with is the questionable merits of the majority's factual finding that the defendants acted intentionally. This is followed by a discussion of the most significant legal development that arises from this case: the approach of the minority judgments to the role of negligence and unreasonableness in an action for breach of privacy. The issues that arise in this context include the distinction between media and non-media defendants, the transferability of the negligence standard that applies in defamation law to privacy law, and the application of the negligence test endorsed by the minority judges to the facts of the case.

## 2 The 'constitutional matter' requirement

The Constitutional Court is a specialist court that does not have unlimited jurisdiction. While section 167(3)(a) of the Constitution proclaims that the Constitutional Court is the highest court on all 'constitutional matters', the next paragraph stipulates that the Court 'may decide only constitutional matters, and issues connected with

<sup>10</sup> *NM* (n 6 above) paras 111 & 207. Although Sachs J relies on a case dealing with media liability (the decision of the Supreme Court of Appeal in *National Media Limited and Others v Bogoshi* 1998 4 SA 1196 (SCA) (*Bogoshi*)) for this approach, it is unclear whether he limits liability based on reasonableness to the media defendants. For example, he states that he supports the 'reasons and conclusions' in Madala J's judgment and finds that Ms De Lille (who, on the approach of Langa CJ and O'Regan J, is not a media defendant) did not meet the standard of reasonableness (paras 202 & 207).

<sup>11</sup> *NM* (n 6 above) para 189.

<sup>12</sup> Other issues that the case addresses but which are outside of the scope of this note include the Court's approach to the privacy of a person's HIV/AIDS status, the relevance of dignity and reputation claims in this context (especially given the stigma attached to HIV/AIDS in society) and the proper approach to the issue of costs.

<sup>13</sup> This phrase is taken from FI Michelman 'The rule of law, legality and the supremacy of the Constitution' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) (Michelman 'The rule of law') 11-10.

decisions on constitutional matters'.<sup>14</sup> The threshold of a 'constitutional matter' (and connected issues) thus determines the line beyond which the Constitutional Court's authority does not extend. While the Constitutional Court is the highest court on constitutional matters, the Supreme Court of Appeal has the last word on non-constitutional matters.<sup>15</sup>

A 'constitutional matter' is defined in section 167(7) as including 'any issue involving the interpretation, protection or enforcement of the Constitution'. The Constitutional Court has clarified this definition by identifying certain categories of constitutional matters.<sup>16</sup> The category that most commonly applies when one is dealing with the common law (like the *actio injuriarum*) is the obligation, under section 39(2) of the Constitution, to develop the common law in light of the spirit, purport and objects of the Bill of Rights.<sup>17</sup> Nevertheless, much uncertainty remains as to the meaning of a 'constitutional matter'.<sup>18</sup>

Given the fact that classification of an issue as a 'constitutional matter' determines whether the Constitutional Court is lawfully empowered to deal with it, and given the lack of clarity as to the meaning of this requirement, it is both surprising and disappointing

<sup>14</sup> Sec 167(3)(b).

<sup>15</sup> Sec 168(3).

<sup>16</sup> *Frazer v ABSA Bank Limited (National Director of Public Prosecutions as amicus curiae)* 2007 3 484 (CC) (*Frazer v ABSA*) para 38; *Boesak v S* 2001 1 SA 912 (CC) (*Boesak*) para 14. See also Michelman 'The rule of law' (n 13 above) 11-7 - 11-8.

<sup>17</sup> See, for example, *Khumalo and others v Holomisa* 2002 5 SA 401 (CC) (*Khumalo v Holomisa*); *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 4 SA 938 (CC); and *K v Minister of Safety and Security* 2005 6 SA 419 (CC) (*K v Minister of Safety and Security*).

<sup>18</sup> Part of the reason for this uncertainty is the breadth of our Constitution. As Van der Westhuizen J remarked in *Frazer v ABSA* (n 16 above) para 36: '[p]hilosophically and conceptually it is difficult to conceive of any legal issue that it not a constitutional matter within a system of constitutional supremacy'. See also Ngcobo J in *Van der Walt v Metcash Trading Limited* 2002 4 SA 317 (CC) (*Metcash*) para 32; and C Lewis 'Reaching the pinnacle: principle, policies and people for a single apex Court in South Africa' (2005) 21 *South African Journal on Human Rights* 509 519. Michelman 'The rule of law' (n 13 above) 11.2(b) suggests that the Constitutional Court's acceptance of the legality principle (ie the exercise of all public power must be in accordance with law) logically means that all appeals are constitutional matters. This is because, as Michelman points out, a court's decision amounts to the exercise of public power and must therefore be correct as a matter of law. Michelman notes that this is apparently in conflict with the Court's endorsement of its 'less-than-plenary subject-matter competence' (11-12). Although engagement with Michelman's thought-provoking analysis falls beyond the scope of this case note, we note that it may be based on an overly broad conception of the principle of legality (an argument that is apparently acknowledged by Michelman at 11-14). In any event, this is not the approach taken by the Constitutional Court, which has remarked that '[a] contention that a lower Court reached an incorrect decision is not, without more, a constitutional matter' (*Frazer v ABSA* (n 16 above) para 40). See also the cases cited below at ns 24, 26 & 27.

that the majority's judgment in *NM v Smith* contains only three short paragraphs under the heading 'Is this a constitutional issue?':

The applicants approached this Court with a view to vindicate their constitutional rights to privacy, dignity and psychological integrity which, they allege, have been violated by the respondents. Their claim is, however, based on the *actio iniuriarum* and, therefore, falls to be determined in terms of the *actio iniuriarum*.

It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirement that access to this Court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.

The dispute before us is clearly worthy of constitutional adjudication and it is in the interests of justice that the matter be heard by this Court since it involves a nuanced and sensitive approach to balancing the interest of the media, in advocating freedom of expression, privacy and dignity of the applicants irrespective of whether it is based on the constitutional law or the common law. The Court is in any event mandated to develop and interpret the common law if necessary.<sup>19</sup>

It is apparent that only the first paragraph quoted above deals with the mandatory requirement of a constitutional matter. The remaining paragraphs deal with whether granting leave to appeal is 'in the interests of justice'.<sup>20</sup> All that one gleans from this first paragraph is that the aim of the plaintiffs was to vindicate their constitutional rights through the *actio injuriarum*. Nevertheless, as Woolman points out, the desire of litigants cannot be decisive of whether a constitutional matter arises.<sup>21</sup> The third paragraph perhaps provides an indication of the majority's thinking on this issue, stating that the case 'involves a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants'. While this may be true of other portions of the judgment,<sup>22</sup> it is difficult to envisage how this balancing comes into play in the most significant aspect of the

<sup>19</sup> *NM* (n 6 above) paras 29-31.

<sup>20</sup> While the existence of a constitutional matter is a necessary requirement for the Constitutional Court to entertain a matter, it is not in itself sufficient. The Court has a discretion as to whether or not to hear a particular constitutional matter. This discretion is exercised on the basis of the 'interests of justice', taking into account a range of factors. See, for example, *Boesak* (n 16 above) para 12. In relation to direct appeals to the Constitutional Court, the 'interests of justice' test is expressly included in sec 167(6) of the Constitution.

<sup>21</sup> S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762 782. See also *Frazer v ABSA* (n 16 above) para 40.

<sup>22</sup> For example, the majority's reasoning on the quantum of damages (which balances various constitutional rights and values) or, more clearly, the minority's extension of the *actio injuriarum* to negligence in relation to media defendants. The latter is a clear constitutional matter, in that the judges sought to develop the common law in light of the values of the Constitution (as contemplated in sec 39(2) of the Constitution).

majority's judgment, namely, the assessment of intention. This is a subjective assessment of the question whether the defendants knew that they were disclosing private information without the plaintiffs' consent or actually foresaw that this may be the case and proceeded recklessly to disclose the information. It seems to us that this is purely a factual enquiry which leaves no room for balancing of interests.

The paucity of the majority's explanation as to why the issues in its judgment amount to 'constitutional matters' is even more surprising given the fact that, irrespective of whether it was right or wrong to exercise jurisdiction on this matter, it is difficult to reconcile the Court's consideration of this matter with its previous jurisprudence on the meaning of 'constitutional matters'.

Earlier decisions of the Constitutional Court emphasise that, while the jurisdiction of the Constitutional Court is extensive and the term 'constitutional matter' should be given a wide meaning,<sup>23</sup> it is not all-embracing and some proper meaning must be given to it.<sup>24</sup> Most strikingly for our purposes, some of the Court's decisions prior to *NM v Smith* indicate that purely factual disputes do not amount to constitutional matters.<sup>25</sup> We briefly discuss two of them.

The first is *Boesak*, in which the applicant alleged that his constitutional rights to be presumed innocent and to freedom and security had been infringed by a decision of the Supreme Court of Appeal upholding fraud and theft convictions against him. According to the applicant, the Court erred in finding him guilty beyond reasonable doubt. During the course of his judgment, on behalf of a unanimous Constitutional Court, Langa DP identified certain broad principles that apply to the classification of criminal cases, including that a challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter; and '[u]nless there is some separate constitutional issue ... no constitutional right is engaged when an applicant merely disputes the findings of fact made

<sup>23</sup> *S v Basson* 2005 1 SA 171 (CC) (*Basson*) para 90-1; and *Boesak* (n 16 above) para 14. See also the later decision of the Constitutional Court in *Frazer v ABSA* (n 16 above) para 37 & 39.

<sup>24</sup> See *Basson* (n 23 above) para 91; *Metcash* (n 18 above) para 32; and *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 123. Van der Westhuizen J, on behalf of a unanimous Court in the more recent decision in *Frazer v ABSA* (n 16 above) para 39 stated as follows: 'While the conception of a constitutional matter is broad, the term is of course not completely open. The fact that sec 167(3)(b) of the Constitution limits this Court's jurisdiction to constitutional matters presupposes that a meaningful line must be drawn between constitutional and non-constitutional matters and it is the responsibility of this Court to do so'. See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another, Trustees of the Hoogekraal Highlands and another v Minister of Agriculture and Land Affairs* [2008] ZACC 12 para 39.

<sup>25</sup> I Currie & J De Waal *The Bill of Rights handbook* (5th ed, 2005) 104 state that: '[m]atters that turn purely on questions of fact are not constitutional matters'.

by the SCA'.<sup>26</sup> The second decision is *Phoebus Apollo Aviation CC v Minister of Safety and Security*,<sup>27</sup> in which the Court held that it did not have jurisdiction in relation to a dispute about whether the State should, on the facts of the particular case, be held vicariously liable for the dishonest acts of three off-duty police officers. Krieglger J stated as follows:

It is not suggested that in determining the question of vicarious liability the SCA applied any principle which is inconsistent with the Constitution. Nor is there any suggestion that any such principle needs to be adapted or evolved to bring it into harmony with the spirit, purport or objects of the Bill of Rights. On the contrary, counsel for the appellant expressly conceded that the common-law test for vicarious liability, as it stands, is consistent with the Constitution. It has long been accepted that the application of this test to the facts of a particular case is not a question of law but one of fact, pure and simple. The thrust of the argument presented on behalf of the appellant was essentially that though the SCA has set the correct test, it had applied that test incorrectly – which is of course not ordinarily a constitutional issue.<sup>28</sup>

It may be that these cases are not, on a proper reading, authority for a general principle that a dispute of fact can never be a constitutional matter, particularly if one has regard to the fact that in both cases the Court found that no constitutional matter arose only after stating that no fundamental right was implicated by the factual dispute. In *Boesak*, for example, Langa DP remarked that upholding a conviction when the SCA ought to have had reasonable doubt as to the applicant's guilt 'is no violation of the applicant's right to be presumed innocent' before he stated that the appeal did not involve a constitutional matter.<sup>29</sup> Similarly, in *Phoebus Apollo* the Court found that the right to property clearly did not apply, before stating that no constitutional matter arose.<sup>30</sup>

These cases may therefore leave room for an argument that a dispute of fact can amount to a constitutional matter where a plausible argument can be made that the matter is relevant to the

<sup>26</sup> *Boesak* (n 16 above) para 15(a).

<sup>27</sup> 2003 1 BCLR 14 (CC) (*Phoebus Apollo*).

<sup>28</sup> *Phoebus Apollo* (n 27 above) para 9.

<sup>29</sup> n 16 above, para 16. See also para 35. This approach is consistent with the decisions of the Constitutional Court to the effect that an incorrect decision by a court does not infringe a constitutional right. While one has the right to a *fair* trial (s 35(3) of the Constitution) or a *fair* public hearing (s 34), one does not have a right to the *correct* outcome in judicial proceedings. See *Lane and Fey NNO v Dabelstein and others* 2001 2 SA 1187 (CC) para 4; *Metcash* (n 18 above) paras 14 & 19; and *Basson* (n 23 above) paras 91, 94 & 99.

<sup>30</sup> n 27 above, paras 4-6 & 9. See also *Metcash* (n 18 above) para 14.

vindication of a constitutional right (whether directly or indirectly).<sup>31</sup> This reading of *Boesak* and *Phoebus Apollo* finds some support in the following dictum of Chaskalson CJ in *Basson*:

*Where no constitutional right is engaged, a challenge to a decision of the SCA or any other court, on the basis only that it is wrong on the facts, is not a constitutional matter. And a dispute that does not impact upon or give effect to an entrenched right or other constitutional provision, will not ordinarily be a constitutional matter.*<sup>32</sup>

There may thus have been scope for distinguishing *Boesak* and *Phoebus Apollo*, and arguing that because the claim in *NM Smith* was a plausible one that was clearly aimed at indirectly vindicating constitutional rights, any factual dispute that is relevant to vindicating those rights (including one as to intention on the part of the defendants) amounts to a constitutional matter. However, the difficulty which such an argument would face is the unanimous decision of the Constitutional Court in *K v Minister of Safety and Security*. This case involved a claim based on vicarious liability for rape committed by uniformed, on-duty police officers. The claim sought to vindicate a number of the victim's constitutional rights, including her rights to freedom and security of the person and dignity. The Court, in assessing whether a constitutional matter arose, considered the meaning of the 'development' of the common law for purposes of section 39(2) of the Constitution. O'Regan J, writing for a unanimous Court, noted that the common law is most clearly developed when a common law rule is changed or a new rule is introduced.<sup>33</sup> She pointed out, however, that courts more commonly decide cases within the framework of an existing rule. O'Regan J identified two types of cases where this occurs. The first is where a court merely applies the rule to 'a set of facts which it is clear fall within the terms of the rule or existing authority', in which case the rule is not developed.<sup>34</sup> The second instance is where a court determines 'whether a new set of facts falls within or beyond the

<sup>31</sup> Michelman 'The rule of law' (n 13 above) 11-10 puts it as follows: 'what the [Constitutional Court] is really telling us in *Phoebus Apollo Aviation* is that it sometimes will decline to hear argument on a claim of unconstitutionality because of the extreme *prima facie* implausibility of the claim ...'. An example of the indirect vindication of a constitutional right would be an action, such as that in *NM*, for breach of privacy (a constitutional right entrenched in sec14 of the Constitution) through the *actio iniuriarum*.

<sup>32</sup> n 23 above, para 91, emphasis added. See also *Rail Commuters Action Group and others v Transnet Limited t/a Metrorail and others* 2005 2 SA 359 (CC) (*Rail Commuters*) para 52, where O'Regan J, after quoting from *Boesak*, stated as follows: 'This reasoning does not imply that disputes of fact may not be resolved by this Court. It states merely that where the only issue in a criminal appeal is dissatisfaction with the factual findings made by the SCA, and no other constitutional issue is raised, no constitutional right is engaged by such a challenge'.

<sup>33</sup> n 17 above, para 16.

<sup>34</sup> As above.

scope of an existing rule' so that the 'precise ambit of each rule is ... clarified in relation to each new set of facts'.<sup>35</sup> This falls within the concept of the development of the common law contemplated in section 39(2), which is aimed at ensuring 'that our common law is infused with the values of the Constitution'.<sup>36</sup>

Turning to *NM v Smith*, it seems to us that a finding as to whether the defendants, as a matter of fact, knew that the information was private or that the plaintiffs had not consented to its disclosure or that the defendants actually foresaw that possibility, does not amount to the development of the common law in the manner contemplated in *K v Minister of Safety and Security*. It is difficult to see in what way the values of the Constitution are relevant to this enquiry.<sup>37</sup> Moreover, if this does amount to the development of the common law, it is difficult to reconcile this with the approach of the Constitutional Court in *Minister of Safety and Security v Luiters*,<sup>38</sup> which was argued after, and decided before, *NM v Smith*. In this case, dealing with vicarious liability in respect of the actions of an off-duty police officer who allegedly placed himself on duty, the Court unanimously held (with reliance on *K v Minister of Safety and Security*) that the question as to whether the officer subjectively intended to act within the course and scope of his employment was not a constitutional matter. Langa CJ remarked as follows:

The Minister queried the finding of the Supreme Court of Appeal that Constable Siljeur subjectively intended to act as a policeman at the time of the shooting. A number of reasons were given in support of the Minister's criticism of this finding by the Supreme Court of Appeal. The thrust of the Minister's submission, however, was to urge this Court to reconsider the facts as found by the High Court and the Supreme Court of Appeal. This submission does not raise a constitutional issue for, as it was made clear in *K*, the question whether a police officer has subjectively acted as a police officer is purely factual.

<sup>35</sup> As above.

<sup>36</sup> *K v Minister of Safety and Security* (n 17 above) para 17. O'Regan J referred to this as 'the incremental development of the rule' in light of the normative framework of the Constitution.

<sup>37</sup> As Woolman (n 21 above) 783 comments: 'the majority in *NM* acts as a trier of fact in a run-of-the-mill *actio iniuriarum* matter'. It may be suggested that the approach of the majority in *NM* falls within the second instance in *K v Minister of Safety and Security*, ie determining whether a particular set of facts falls within or beyond the ambit of an existing rule, in that the majority determined that the facts fell within the ambit of *dolus eventualis* in circumstances which would, in the absence of the Constitution, amount only to negligence. For a variation on this argument, see FI Michelman 'On the uses of interpretive 'charity': Some notes on application, avoidance, equality, and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* (Michelman 'Interpretive charity') 30 - 32. For the reasons set out in this article, we do not find this argument persuasive.

<sup>38</sup> 2007 2 SA 106 (CC) (*Luiters*).

The Constitutional Court's own case law therefore suggests that a good argument can be made that the factual question as to the defendants' state of mind in *NM v Smith* was not a constitutional matter, notwithstanding the fact that the plaintiffs were seeking to vindicate their constitutional rights.

Elsewhere in this volume, Michelman, adopting what he describes as a 'charitable' reading of the majority judgment in *NM v Smith*, suggests that the majority may have developed the common law 'in response to constitutional pressure' and that all of the issues in this case

stood to be decided in the shadow of the Bill of Rights and of the looming possibility that the common law might, depending on how they were to be decided, have to be developed under the mandate of section 39(2).<sup>39</sup>

Michelman goes on to assert that the majority, in finding that the conduct of the defendants amounted to intention, may be said to have been considering whether the common law rule applies to the new factual situation as envisaged in *K v Minister of Safety and Security*.<sup>40</sup> While Michelman's thoughtful argument merits a more detailed response than this case note permits, it seems to us that there are at least three possible responses. The first is that one cannot get away from the fact that a finding of intention (*dolus*) involves a finding of subjective state of mind (ie actual knowledge or foresight) on the part of the defendant. This is a purely factual finding which, it seems to us, leaves no space for a consideration of constitutional rights or values. Second, if the majority intended, in light of the Bill of Rights, to extend the scope of *dolus eventualis* to conduct which would otherwise not have constituted this form of intention, one would expect them to have said so expressly. On the contrary, the approach of the majority was simply to apply the *dolus eventualis* test to the facts of the case before them.<sup>41</sup> Third, even if one is able to bring the majority's approach within the wording of O'Regan J's judgment in *K v Minister of Safety and Security*, it seems to us more difficult to do so in relation to *Luiters*.

Irrespective of whether or not the majority was correct in holding that the defendants' intention (or lack thereof) properly fell within the Court's jurisdiction, our primary difficulty with the judgment of

<sup>39</sup> Michelman 'Interpretive charity' (n 37 above) 20; see also 21 and 28.

<sup>40</sup> Michelman 'Interpretive charity' (n 37 above) 28.

<sup>41</sup> As Michelman 'Interpretive charity' (n 37 above) points out at 19, Madala J expressly states that, in light of the fact that his judgment 'is not extending the common-law definition of intention to include negligence in relation to the publication of private medical facts, there will be no "chilling effect" on freedom of expression in South Africa ...' (para 69).

the majority in *NM v Smith* is that none of these issues were canvassed in the judgment and no attempt was made to reconcile the majority's approach with the previous case law. The Court thus dealt with a matter that could conceivably fall beyond its jurisdiction – an outcome that would have serious implications for the rule of law – without providing a meaningful explanation of its reasons for doing so.

Moreover, if the majority's reason for regarding the defendants' intention as a constitutional matter is that it was an issue that needed to be decided in order to determine whether the plaintiffs' constitutional rights should be vindicated, the effect of this is that a wide range of ordinary factual disputes may well occupy the Court's resources in the future.<sup>42</sup> These matters could, for example, include an extensive factual dispute as to whether an allegation in a defamation action is true (which implicates the right to dignity) or a dispute as to whether a person who caused physical harm to another did so with intention or negligence (which implicates the right to security of the person and bodily integrity).

Finally on this issue, we reiterate that the Constitution provides that the Constitutional Court's jurisdiction extends to 'issues connected with decisions on constitutional matters'. The Court has held that this phrase should be given a wide interpretation so as to extend the Court's jurisdiction to matters that 'stand in a logical relationship' to constitutional matters.<sup>43</sup> It includes 'any anterior matter [that], logically or otherwise, is capable of throwing light on or affecting the decision by this Court on the primary constitutional matter'.<sup>44</sup> It is unfortunate that the Court did not consider whether the question as to the defendants' intention fell within the scope of this concept.<sup>45</sup>

<sup>42</sup> Subject to the 'interests of justice' filter discussed above.

<sup>43</sup> *Alexcor Limited and another v Richtersveld Community and others* 2003 12 BCLR 1301 (CC) para 30.

<sup>44</sup> As above. The Court went on to state it more formally: 'when any *factum probandum* of a disputed issue is a constitutional matter, then any *factum probans*, bearing logically on the existence or otherwise of such *factum probandum*, is itself an issue "connected with a decision on a constitutional matter".' See also *Rail Commuters* (n 32 above) para 52; and *Basson* (n 23 above) para 22.

<sup>45</sup> The judgment in *Luiters* (n 38 above) suggests that this may well be the case: '[i]t was argued on behalf of the Minister that once the Court assumes jurisdiction on one basis, it has the power to alter the findings of both the High Court and the Supreme Court of Appeal on factual issues even if we do not find it necessary to change the test. It may well be that the factual issues are issues that are connected to a decision on a constitutional matter in such circumstances' (para 29).

### 3 The majority's finding of intention

The most extraordinary aspect of the judgment in *NM v Smith* is the extent to which the Court was divided on the factual question as to the defendants' state of mind.<sup>46</sup> The majority held that the defendants had intended wrongfully to infringe the plaintiffs' privacy, finding that they 'knew well of the wrongfulness of their conduct and that the disclosure of private facts was likely to invade the privacy rights of the applicants'.<sup>47</sup> The majority's criticism of the defendants is, at times, strident, stating at one point that Ms Smith

did a half-hearted check [for the consents] but soon became tired of the exercise and so decided to go ahead and produce the book without having obtained the consents of the applicants.<sup>48</sup>

These are very serious findings for the majority of the Constitutional Court to make in relation to persons (the defendants) who had testified that they honestly assumed that suitable consents had been given and did not consider the possibility that this was not the case,<sup>49</sup> and in circumstances where the Court states, '[t]hat they are good activists in the field of HIV/AIDS admits of no doubt'.<sup>50</sup>

Not only are the findings of the majority severe, they are also at odds with the decision of Schwartzman J in the trial court who, having heard several days of evidence at the trial, held that the defendants had lacked both intention and negligence. In relation to the former, he stated that Ms Smith and Ms De Lille had

by their long standing involvement with people infected with HIV, demonstrated that they are two of the most unlikely people to intentionally invade the privacy of a person infected with HIV.<sup>51</sup>

The findings of the majority are also dramatically at odds with O'Regan J's dissenting judgment. It is remarkable that the majority finds that the defendants knew that the plaintiffs had not consented

<sup>46</sup> See also Woolman (n 21 above) 781; and J Steinberg 'Generous judgment instills stigma' in *Notes from a fractured country* (2007) 221.

<sup>47</sup> *NM* (n 6 above) para 64.

<sup>48</sup> *NM* (n 6 above) para 88.

<sup>49</sup> *NM* (n 6 above) paras 159-168.

<sup>50</sup> *NM* (n 6 above) para 59.

<sup>51</sup> *NM* High Court (n 3 above) para 40. Michelman 'Interpretive charity' (n 37 above) states that the majority's refusal to defer to the High Court's finding on the facts is explicable if it viewed the High Court's application of the common law rule of intention as not being compliant with the Bill of Rights (at current page 37: Editors to insert new page number). The difficulty we have with this approach is that it assumes that the majority's discussion of whether intentional conduct was present on the facts, constitutes a constitutional matter with which the Court ought to have concerned itself. We have argued above that the Court itself does not identify this as a constitutional matter raised by the case.

to the disclosure of their HIV status (or had actually foreseen this possibility and recklessly disregarded it) where O'Regan J finds, on considering the same record, that the reasonable journalist would not have been obliged to make further enquiries in this regard.<sup>52</sup>

Given this context, one would expect that the majority would have been careful to set out their reasons for differing so dramatically from the factual findings of the trial court and O'Regan J. We agree with Langa CJ that, in light of the defendants' heartfelt denials of intention, the Court 'would need a great deal of evidence to find that these activists would intentionally infringe the rights of the very people whom they are committed to protect'.<sup>53</sup>

The reasons that the majority advances in this regard are, with respect, not convincing. While we do not intend to engage in a detailed factual analysis for purposes of this note, we mention two aspects of concern. The first is that the majority did not engage in any detail with the reasons offered by O'Regan J as to why she found that the defendants did not act with intention or negligence. The second is that a number of the majority's statements in the portion of its judgment dealing with intention indicate that the defendants did not have intention and were, at best for the plaintiffs, negligent. For example, Madala J states that: '[b]oth respondents *assumed*, without any enquiry, that the information contained in the Strauss Report was not confidential' and '[Ms Smith] *assumed* that the applicants had consented to the public disclosure of their names and HIV status because the source of the publication came from a reputable institution'.<sup>54</sup> The Court also notes that '[Ms De Lille] failed to take sufficient steps to ascertain whether the [plaintiffs] had in fact given unlimited consent'.<sup>55</sup> It is difficult to reconcile these statements, which suggest that the defendants actually made certain (incorrect) assumptions, and ought to have made further investigations, with a finding of intention, even in the form of *dolus eventualis*.<sup>56</sup>

<sup>52</sup> NM (n 6 above) paras 185-187.

<sup>53</sup> NM (n 6 above) para 93.

<sup>54</sup> NM (n 6 above) paras 60-61, emphasis added.

<sup>55</sup> NM (n 6 above) para 60.

<sup>56</sup> Michelman 'Interpretative charity' (n 37 above) suggests that the fact that the inclusion of the names of the three plaintiffs in the book could add no value to the publication (and in particular, despite protestations by Ms Smith to the contrary, certainly was not required to give authenticity to the publication) 'may have been instrumental in leading Madala J's majority to its conclusion that Smith's choice was "intentional" in the pertinent, legal sense' (at current page 43: editors to insert new page no). We submit, however, that the utility of including the plaintiffs' names in the book can at most be a factor to consider in determining whether the state of mind of Ms Smith was such that she acted with intention (either in the sense that she knew that she was acting unlawfully or foresaw that she may be doing so and acted in reckless disregard of that foresight). This factor cannot elevate otherwise negligent but non-intentional conduct to the status of *dolus*.

## 4 The Court's approach to the development of the common law of privacy

The law of defamation underwent radical reform with regard to media defendants in the *Bogoshi* case.<sup>57</sup> Although the decision has been rightly criticised for blurring the doctrinal boundaries between fault and unlawfulness in the law of delict,<sup>58</sup> it now appears to be generally accepted by our courts that the effect of *Bogoshi* is that media defendants sued for liability in defamation will be entitled to rebut the presumption of unlawfulness by proving that their conduct was in all the circumstances objectively reasonable (a position that is favourable to the media relative to non-media defendants). In addition, if the defence of absence of knowledge of unlawfulness, and hence lack of fault, is pursued by a media defendant, the media defendant must establish that it was not negligent in this regard (in this respect, the media is in a less favourable position relative to non-media defendants).<sup>59</sup>

Despite these developments in the law of defamation, until the *NM v Smith* decision, the common law principles that governed the

<sup>57</sup> n 10 above. The reform in fact started at the High Court level with the decision of Cameron J (as he then was) in *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) (*Holomisa v Argus Newspapers*).

<sup>58</sup> The Court's discussion of lawfulness in the form of reasonable publication overlaps significantly with its discussion of lack of fault in the form of a reasonable belief that the publication was lawful. For instance, Hefer JA at 1214 stated that 'the indicated approach is intended to cater for ignorance and mistake at the level of lawfulness; and in a given case negligence on the defendant's part may well be determinative of the legality of the publication'. For discussion of the blurring between the elements of fault and unlawfulness by the Court, see J Burchell *Personality rights and freedom of expression: The modern actio injuriarum* (1998) 226; JR Midgley 'Media liability for defamation' (1999) 116 *South African Law Journal* 211; D Milo 'The cabinet minister, the *Mail & Guardian*, and the report card: The Supreme Court of Appeal's decision in the *Mthembi-Mahanyele* case' (2005) 122 *South African Law Journal* 28 38-39; J Neethling 'The protection of false defamatory publications by the mass media: Recent developments in South Africa against the background of Australian, New Zealand and English law' (2007) 40 *Comparative and International Law Journal of South Africa* 103 123-124. For further discussion on how courts in the area of delict continue to grapple with the distinction between fault and unlawfulness, see eg A Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *South African Law Journal* 90; J Neethling 'The conflation of wrongfulness and negligence: is it always a bad thing for the law of delict?' (2006) 123 *South African Law Journal* 204; RW Nugent 'Yes, it is always a bad thing for the law – a reply to Professor Neethling' (2006) 123 *South African Law Journal* 557; J Neethling & JM Potgieter 'Wrongfulness and negligence in the law of delict: A Babylonian confusion?' (2007) 70 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 120; FDJ Brand 'Reflections on wrongfulness in the law of delict' (2007) 124 *South African Law Journal* 74; A Fagan 'Blind Faith: A Response to Professors Neethling and Potgieter' (2007) 124 *South African Law Journal* 285.

<sup>59</sup> The leading judicial recognition of these principles is the Constitutional Court's unanimous decision in *Khumalo v Holomisa* (n 17 above) paras 19-20. See also *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 6 SA 329 (SCA) (*Mthembi-Mahanyele*) paras 45-46.

law of privacy – more particularly liability based on intention – had not been challenged under the Constitution.<sup>60</sup> The facts of *NM v Smith* raised squarely the issue of the fault element of liability in privacy cases: assuming that Ms Smith, Ms De Lille and the publisher held the view that consent had been provided to reveal the plaintiffs' identities and that this view was mistaken, was it necessary for them to prove that such a mistake was reasonable? As stated, the majority of the Court did not reach this issue; it found that the defendants published with knowledge that the plaintiffs had not provided the requisite consent (or at least with reckless disregard as to whether consent had been granted).<sup>61</sup> On the other hand, the minority judges grappled with the issue at some length. Their judgments raise a number of issues of profound significance to media liability in privacy cases, and we deal with each in turn: the distinction between media and non-media defendants for purposes of privacy (and defamation) liability and the desirability of a negligence test in this context; and how negligence on the part of media defendants should be assessed where journalists rely on official reports.

## 5 The distinction between media and non-media defendants and the negligence test

In *Bogoshi*, the Court expressly perpetuated the distinction between media and non-media defendants that was created in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*,<sup>62</sup> where the Appellate Division opined that strict liability applied in defamation cases to members of the mass media.<sup>63</sup> Although the Court in *Bogoshi* rightly jettisoned the restrictive principle of strict liability, it held that it would not be just to allow media defendants to escape liability on the same basis as non-media defendants, that is, by relying on the absence of *animus injuriandi*.<sup>64</sup> Hefer JA relied for this distinction on the Australian High Court's judgment in *Lange v Australian Broadcasting Corporation*.<sup>65</sup> 'the damage that can be done when there are thousands of recipients of a communication is obviously greater than when there are a few

<sup>60</sup> A number of academic commentators had, however, expressed the view (albeit without much analysis) that the developments in defamation law had the effect that equivalent principles now applied in the law of privacy. See eg D McQuoid-Mason 'Privacy' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2003) 38-19; Burchell (n 58 above) at 429.

<sup>61</sup> See text accompanying n 8 & 9 above. Madala J, for the majority, stated at para 57 that this was not an appropriate case to depart from 'the age-old approach to the *actio injuriarum*. I do not, by any means, wish to be understood to say the common law should or could never be developed in this regard'.

<sup>62</sup> 1977 3 SA 394 (A).

<sup>63</sup> *O'Malley* (n 62 above) 403. This was confirmed by the Appellate Division in *Pakendorf en Andere v De Flamingh* 1982 3 SA 146 (A).

<sup>64</sup> *Bogoshi* (n 10 above) 1214.

<sup>65</sup> (1997) 189 CLR 520 (*Lange*).

recipients';<sup>66</sup> this made the 'additional burden' of proving lack of negligence 'entirely reasonable'.<sup>67</sup>

These principles were developed by the minority in *NM v Smith* in judgments that are now the leading discussions in South African law with respect to the question of how to distinguish between media and non-media defendants, and why such a distinction is necessary. All the minority judges were clear that, as in defamation law, a higher level of care is required in privacy law for media defendants as opposed to non-media defendants. As O'Regan J stated:

For purposes of this case, I accept that the legal principles developed in *Bogoshi* should apply not only in the law of defamation but also to the infringement of privacy rights by the media ... Modern electronic, print and broadcast media are immensely, and indeed, increasingly powerful. Publications often reach hundreds of thousands of readers, viewers and listeners. It is accordingly appropriate, given the scale of damage to an individual that can be caused by such widespread publication, to confer special obligations upon the media in respect of publication. In so doing, we recognise that the media are not only bearers of rights under our constitutional order, but also bearers of obligations.<sup>68</sup>

Given the immense power wielded by the media,<sup>69</sup> we submit that, while a negligence test for breaches of privacy by the media clearly limits their rights to media freedom, such a limitation is justifiable. We agree with Sachs J in this context that 'the principles developed in [the *Bogoshi*] case are eminently transportable to the law of privacy',<sup>70</sup> at least in the

<sup>66</sup> *Lange* (n 65 above) 572.

<sup>67</sup> *Bogoshi* (n 10 above) 1214.

<sup>68</sup> *NM* (n 6 above) para 177. See also Langa CJ at para 94: 'It is ... constitutionally appropriate that the media should be held to a higher standard than the average person'.

<sup>69</sup> For foreign studies in this regard, see generally J Curran & J Seaton *Power without responsibility: The press, broadcasting, and new media in Britain* (6<sup>th</sup> ed, 2003). For an interesting South African perspective, see R Calland *Anatomy of South Africa: Who holds the power?* (2006) 194-204.

<sup>70</sup> *NM* (n 6 above) para 203. See also J Neethling 'The right to privacy, HIV/AIDS and media defendants' (2008) 125 *South African Law Journal* 36-45. For a different view, see H Scott 'Liability for the mass publication of private information in South African law: *NM v Smith* (*Freedom of Expression Institute as Amicus Curiae*)' (2007) 18 *Stellenbosch Law Review* 387-398. Scott argues that the analogy between privacy and defamation law in this context is flawed, amongst other things, because in *Bogoshi* the result was to extend much greater protection to the media than was previously thought to be the case, whereas the impact in relation to breach of privacy is to significantly limit freedom of the media (398). However, we submit that this was only the case because of the unconstitutional imposition of strict liability on the media; the point is that media defendants, post-*Bogoshi*, are not treated as generously as non-media defendants in the law of defamation. We consider that there is no principled objection to utilising defences that have developed in defamation law in the privacy context, in clearly analogous contexts, as the common law of privacy itself recognises. See eg *Jansen van Vuuren and another v NNO v Kruger* 1993 4 SA 842 (A) 850.

context of fault liability.<sup>71</sup> The Constitutional Court in *Khumalo v Holomisa* stated that the defence of reasonable publication – which is in many respects akin to a negligence test – strikes the correct balance between freedom of expression and reputation and thus limits each right as little as possible. O'Regan J stated in that case for a unanimous court:<sup>72</sup>

The defence of reasonable publication avoids ... a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity. Moreover, the defence of reasonable publication will encourage editors and journalists to act with due care and respect for the individual interest in human dignity prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to do so.<sup>73</sup>

We submit that, in principle, assessing the media's conduct through the prism of a negligence test achieves a reasonable balance between the competing considerations of privacy and dignity on the one hand, and freedom of the media on the other. On this approach, unless a defence negating unlawfulness (such as consent) applies, the media would have to establish lack of negligence in order to escape liability, such as, on the facts of *NM v Smith*, that its mistake as to the existence of consent was not negligent.<sup>74</sup> Requiring the media to establish lack of negligence does not in our view constitute a disproportionate restriction on media freedom; indeed, the standards expected of reasonable journalists are often reflected in codes of conduct, such as the Press Council's Code, which media houses

<sup>71</sup> Another respect in which the *Bogoshi* principles seem to us to be capable of application in privacy actions is in the context of the defence of truth and public interest. While the 'truth' aspect of this defence is seldom in issue in privacy cases (which typically turn on information that is true but invasive: see eg E Barendt 'Privacy and the press' 1995 *Yearbook of Media and Entertainment Law* 22 26), the truth of an allegation that implicates the privacy of the plaintiff may nevertheless need to be established by the media in order to rely upon the defence of public interest (see also *Tshabalala-Msimang and others v Makhanya and others* [2008] 1 All SA 509 (W) para 48). Thus a plaintiff is entitled in principle to vindicate her right to privacy and dignity where false but non-defamatory facts are published, where the matter 'is by its nature such as to attract the law of [privacy]': *Ash v McKennitt and others* [2007] 3 WLR 194 (CA) para 80. We submit that the application of *Bogoshi* to the law of privacy in this context has the result that facts which may not be true but which have been published reasonably, should also benefit from the defence of public interest. See also the approach to defences to breach of confidence actions in England: *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283. See also the decision of the English High Court in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) para 143 and what follows (testing the invasion of privacy in issue against the test of whether the journalist acted responsibly based on information then available to him).

<sup>72</sup> *Khumalo v Holomisa* (n 17 above) para 43.

<sup>73</sup> Compare also the decision of Cameron J in *Holomisa v Argus Newspapers* (n 57 above) 617.

<sup>74</sup> We submit that there is also no reason in principle why the qualification that a mistake need be reasonable should not extend to mistakes about other elements of the delict, such as whether the information constituted a private fact.

themselves espouse,<sup>75</sup> and negligence is a concept with which our law is familiar.<sup>76</sup> Moreover, a negligence standard represents a reasonable compromise between the extremes of strict liability, on the one hand, and a purely subjective test of intention, on the other. While the former provides no protection to media freedom, the latter may have the deleterious result that privacy concerns are effectively eviscerated.<sup>77</sup> A standard based on negligence also finds support in the analogous context of defamation law in such jurisdictions as England<sup>78</sup> and Australia,<sup>79</sup> and in the jurisprudence of the Privy Council<sup>80</sup> and the European Court of Human Rights.<sup>81</sup>

Accepting that negligence should apply to ‘media defendants’, the difficulty that remains is a definitional one: how should the line be drawn between media and non-media defendants? While traditional print and electronic media entities are easily recognisable, the digital revolution has the result that ‘[l]ines between different forms of media are blurring, making it difficult to apply medium-specific definitions’.<sup>82</sup> O’Regan J’s guidance in *NM v Smith* in regard to the definitional category of media defendants is instructive:

Professional and commercial purveyors of information are well placed to ensure that appropriate systems prevent the unreasonable disclosure of private facts and the negligent disclosure of those facts. This is not the case for ordinary citizens. Moreover, generally, disclosure by ordinary

<sup>75</sup> As Lord Hoffmann recently stated in an English defamation case, ‘the standard of responsible journalism is made more specific by the Code of Practice which has been adopted by the newspapers and ratified by the Press Complaints Commission’ (*Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL) (*Jameel*) para 55). Expert evidence as to reasonable conduct on the part of journalists could also be led, as it was in the *NM*, where Professor Anton Harber led evidence as to what is expected of a journalist reporting the identity of persons living with HIV/AIDS.

<sup>76</sup> See Sachs J in *NM* (n 6 above) para 204.

<sup>77</sup> We submit that the experience of the US courts with the actual malice standard that applies in defamation and false light privacy cases is instructive in this regard. This rule – first articulated by the US Supreme Court in *New York Times v Sullivan* 376 US 254 (1964) – has had a disproportionate impact on the rights of the plaintiff and has also adversely affected the quality of public discourse. See generally D Milo *Defamation and freedom of speech* (2008) 203-206. This was, however, not the outcome on the approach of the majority in *NM v Smith*, who found intention on the part of the defendants.

<sup>78</sup> See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) at 202, 205. See also *Jameel* (n 75 above) paras 32, 55, 149.

<sup>79</sup> *Lange* (n 65 above) 573.

<sup>80</sup> See eg *Bonnick v Morris* [2003] 1 AC 300 (PC) paras 22, 23.

<sup>81</sup> See eg *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125 (*Bladet*) para 65. For a discussion of the respects in which these jurisdictions articulate a negligence test for media liability, see Milo *Defamation and freedom of speech* (n 77 above) 188-99.

<sup>82</sup> DA Anderson ‘Freedom of the press’ (2002) 80 *Texas Law Review* 429-438.

citizens will not be as widespread as disclosure by those involved in professional or commercial dissemination of information.<sup>83</sup>

On the basis of this test, the minority judges rightly regarded the publisher and Ms Smith as media defendants, but viewed Ms De Lille as a non-media defendant.<sup>84</sup> As we have discussed, our courts in defamation cases have adopted the proposition that the primary rationale for imposing a negligence standard on the media is the increased capacity to cause harm *inter alia* because of the widespread manner in which allegations may be published. We note that it is not only the traditional media that has the capacity to cause severe harm to a person's reputation and privacy because of the extent of the publication; the wide circulation of a leaflet containing private information may also have this effect.<sup>85</sup> It remains an open question whether the negligence standard should apply beyond the traditional media categories, as is the case in Australian law.<sup>86</sup> This will require an assessment of various factors, including the capacity to cause harm; the resources available to the publisher to guard against such harm occurring;<sup>87</sup> whether professional codes of conduct – such as the Press Council's Code and the Broadcasting Complaints Commission Code – govern the publishers;<sup>88</sup> the credibility attached to the medium of communication in issue;<sup>89</sup> and the commercial motive of the publication.<sup>90</sup> We caution that the imposition of a negligence standard on publishers other than the traditional media

<sup>83</sup> *NM* (n 6 above) para 181. See also Langa CJ at para 94: 'It makes sense that media defendants, who are experts in the field and who routinely distribute facts to vast numbers of people, with a particular air of authority and for commercial gain, should be held liable for disclosures which they should reasonably have foreseen would cause harm'.

<sup>84</sup> *NM* (n 6 above) per Langa CJ paras 98-9; O'Regan J para 182. It is more difficult to understand Sachs J's decision in this regard. Sachs J concludes that all three defendants 'did not meet the standard of reasonableness', albeit that he accepted that the *Bogoshi* test applied to media defendants. It is not clear whether Sachs J regards Ms De Lille as a media defendant, thus attracting the higher standard of care, or whether he means to impose the higher standard of care beyond the traditional categories of media defendants.

<sup>85</sup> In one High Court case, *Marais v Groenewald en 'n ander* 2001 1 SA 634 (T), it was precisely such reasoning that led to the Court imposing defamation liability based on gross negligence on the defendant, who had widely disseminated a letter to various political party structures. Van Dijkhorst J held that '[s]kriftelike laster kan anders as deur die media – soos hier deur partystrukture – tog ook wyd versprei word en 'n goeie naam skaad. Publikasie kan soveel wyer wees as in 'n plaaslike koerantjie' (646). See further our comments in the text in regard to imposing negligence liability on non-media defendants.

<sup>86</sup> See also *Lange* (n 65 above) 572. O'Regan J in *NM* (n 6 above) para 181 left open the issue of whether harmful targeted disclosure of information, e.g. to a small community, should also trigger a negligence standard of fault.

<sup>87</sup> See also O'Regan J in *NM* (n 6 above) para 181.

<sup>88</sup> See the dictum of Lord Hoffmann in *Jameel* (n 75 above).

<sup>89</sup> See *Bogoshi* (n 10 above) 1213.

<sup>90</sup> See *NM* (n 6 above) para 98 (Langa CJ) & para 181 (O'Regan J).

should be carefully considered on a case-by-case basis, in view of the serious consequences for freedom of expression that are involved.<sup>91</sup>

## 6 The negligence test and reliance on official reports

The final aspect of *NM v Smith* that we address in this note is the application by the minority judges of the negligence standard to the facts. It is here that O'Regan J parts ways with Langa CJ and Sachs J; while O'Regan J held that the media defendants did not act negligently, Langa CJ and Sachs J reached the opposite conclusion. The crisp issue for resolution was whether a reasonable journalist and publisher would have assumed from the Strauss Report that the plaintiffs had consented to their identities and HIV-status being revealed.

Langa CJ held that the Strauss Report was not a public document and was not widely distributed; in these circumstances:

The reasonable media defendant would ... not have relied on the Strauss Report as a document that removed their duty to ensure informed consent had been obtained ...

The inescapable conclusion is that a reasonable journalist or a reasonable publisher would have foreseen the possibility that there was not consent. Because the possible harm was great, the effort necessary to avoid the harm minimal and the benefit of publishing the names negligible, a reasonable journalist or publisher would have taken steps to avoid that harm.<sup>92</sup>

A diametrically opposed factual conclusion was reached by O'Regan J, who would have exonerated Ms Smith and the publisher from any negligence liability.<sup>93</sup> The interesting aspect of O'Regan J's judgment

<sup>91</sup> As Langa CJ stated in *NM* (n 6 above) para 94: 'However, to extend that standard to ordinary people, and thus to everyday relationships, would be to extend the law too far into intensely personal space ... [This] is not a matter that is appropriate for the law to regulate'.

<sup>92</sup> *NM* (n 6 above) paras 110-111. Langa CJ also attached significance to the expert evidence of Professor Harber, that a journalist cannot assume that consent has been given in relation to HIV/AIDS reporting. Compare Sachs J at para 205, who held that Ms Smith 'should have left no stone unturned in her pursuit of verification'. We submit that this dictum, which Langa CJ also adopted (para 111) sets the bar too high for media defendants. Even allowing for the nature of the private information in issue, it is, we submit, not correct as a matter of principle to postulate that reasonableness required that every possible step available to verify whether consent had been given, should have been followed. Rather, what is required of Ms Smith is that, within the context of a book publication (as opposed to, for instance, the reportage of breaking news in a daily newspaper), she ought to have taken reasonable steps to verify the issue of consent.

<sup>93</sup> A conclusion also reached by the High Court (*NM* High Court (n 3 above) para 41).

for media freedom is her treatment of whether a reasonable journalist and publisher would be entitled to rely on the contents of the Strauss Report, which had disclosed the identities of the plaintiffs. O'Regan J reasoned as follows:

To hold that in the circumstances ... [Ms Smith and the publisher] were under a further duty to contact either the University [of Pretoria] or the [plaintiffs] to ensure that they had in fact consented to publication of their names would impose a significant burden on freedom of expression. The result of such a finding would be that where personal private facts have been published already by a reputable organisation, another organisation may not rely on that publication as having been done lawfully and without infringement of privacy.<sup>94</sup>

While we agree with much of O'Regan J's reasoning, it is difficult to fault Langa CJ's analysis on the facts. We consider that it may well be that O'Regan J did not attach enough significance to the expert evidence of Professor Anton Harber and the nature of the privacy interests at stake, which would seem to us to require that a reasonable author and publisher of a book – presumably not under significant time pressures of the kind experienced by daily newspapers and broadcasters where breaking news is reported – ought to have taken additional steps to ascertain whether consent had been given for widespread disclosure to the public at large.<sup>95</sup> This is more particularly so given that the inclusion of the names of the plaintiffs could not, in the circumstances, have added much of value to the discussion in the biography of Ms De Lille's role in the saga.<sup>96</sup>

What is ground-breaking about O'Regan J's judgment from the perspective of media freedom is her view that, as a general rule, a reasonable journalist is entitled to rely on the contents of official documents:

Journalists must be entitled to publish information provided to them by reliable sources without rechecking in each case whether the publication was lawful, unless there is some material basis upon which to conclude that there is a risk that the original publication was not lawful. If there is a reasonable basis for suspecting that the publication of private information was without consent, a journalist will, of course, bear an

<sup>94</sup> *NM* (n 6 above) para 185.

<sup>95</sup> Langa CJ in *NM* (n 6 above) para 111 suggests that a reasonable journalist would have taken on the facts included finding the annexures to the Strauss Report containing the terms of the consent by the plaintiffs or contacting the plaintiffs directly.

<sup>96</sup> Michelman 'Interpretive charity' (n 37 above) [current page 45 of article; editors to insert] of this volume.] attaches great significance to this point in rejecting O'Regan J's analysis on the facts.

obligation to check. If there are no grounds for such suspicion, it cannot be said that a journalist acts negligently in not checking.<sup>97</sup>

This observation takes our reasonable publication law a significant step further than the *Bogoshi* progeny to date. In *Bogoshi*, Hefer JA set out a number of relevant factors to determine reasonableness of media conduct, including the ‘character and known provenance’ of the information, ‘the nature, extent and tone of the allegations’, ‘the reliability of their source as well as the steps taken to verify the information’, and ‘the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner’.<sup>98</sup> However, it has been disappointing that, in the ten years since *Bogoshi* was handed down, very little guidance has emerged from the Courts as to how the reasonable publication test should be applied in a concrete set of circumstances.<sup>99</sup> The leading decision on the application of the *Bogoshi* case, *Mthembi-Mahanyele v Mail & Guardian Ltd*,<sup>100</sup> muddied the waters, with the Supreme Court of Appeal split evenly on the issue of whether the newspaper could benefit from a reasonable publication defence. Whereas Lewis JA – with whom Howie P concurred – regarded the journalists’ conduct as reasonable, *inter alia* on the basis that the tone of the article was irreverent and that the newspapers had relied on information in the public domain,<sup>101</sup> Mthiyane JA – with whom Mpati DP concurred – ruled that none of the guidelines suggested in *Bogoshi* was followed by the newspaper.<sup>102</sup> *Mthembi-Mahanyele* did little to illustrate how to concretise some of factors that Hefer JA had enunciated in the *Bogoshi* case.

O’Regan J’s approach in *NM v Smith* that a journalist is, all things being equal, entitled to publish information derived from a reliable source, and particularly to repeat allegations made by a reputable organisation, therefore represents a desirable development in our jurisprudence in favour of media freedom. We submit that O’Regan J

<sup>97</sup> *NM* (n 6 above) para 187. Langa CJ endorsed this suggestion; he held that ‘journalists should not be forced to verify disclosures made by reputable organisations’, but this would depend on ‘the nature of the document, the nature of the institution that produced the document, the importance of the interests involved and the relevant circumstances of the case’ (para 102).

<sup>98</sup> *Bogoshi* (n 10 above) 1212-1213.

<sup>99</sup> There have been only a handful of reported decisions applying *Bogoshi*, and not much clarity as to its application has emerged. For instance, in *Sayed v Editor, Cape Times* 2004 1 SA 58 (C), Davis J held that the defence was available for a story that had been produced with ‘considerable care’, whereas the defence failed in *Lady Agasim-Pereira v Johnnic Publishing Eastern Cape (Pty) Ltd* [2003] 2 All SA 416 (SE), *inter alia* on the basis that obvious sources had not been contacted to verify the allegations.

<sup>100</sup> n 59 above.

<sup>101</sup> *Mthembi-Mahanyele* (n 59 above) 74.

<sup>102</sup> *Mthembi-Mahanyele* (n 59 above) para 110. The fifth judge, Ponnar AJA, held that the publication was not defamatory to begin with; he therefore did not need to address defences available to the media (para 85).

is correct to observe that, in general, it would set the standard of reasonableness too high to require journalists to verify the contents of official reports or documents, and that to require this would have a chilling effect on freedom of the media. This position is in harmony with the developing reasonable publication jurisprudence in England and in the European Court of Human Rights.

In England, the responsible publication defence has been held to entitle publishers to argue that their reporting of an important issue of public interest qualifies for protection under the 'neutral reportage' doctrine. In one leading case, *Charman v Orion Group Publishing Group Ltd and others*,<sup>103</sup> the Court of Appeal confirmed that a responsible publication defence will be available where 'judging the thrust of the report as a whole, the effect of the report is not to adopt the truth of what is being said, but to record the fact that the statements which were defamatory were made'.<sup>104</sup> In such cases, journalists will not be required to verify the truth of the underlying allegations.<sup>105</sup>

The European Court of Human Rights has expressly adopted the proposition contended for by O'Regan J. In *Bladet Troms and Stensaas v Norway*,<sup>106</sup> the facts were that defamation proceedings were brought against a newspaper and its editor in relation to an article alleging breaches of seal hunting regulations. The Court held that an interference with the article 10 rights<sup>107</sup> of the press was not justifiable. The newspaper had relied on the official report prepared by a seal hunting inspector for the Ministry of Fisheries. The Court held as follows:

In the view of the Court, the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined ...

[T]he Court considers that the paper could reasonably rely on the official ... report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.<sup>108</sup>

The sanctioning in this jurisprudence of reliance on official reports and other documents of solid providence has the potential to grant

<sup>103</sup> [2008] 1 All ER 750 (CA) (*Charman*).

<sup>104</sup> *Charman* (n 103 above) para 48.

<sup>105</sup> See also *Roberts v Gable* [2008] 2 WLR 129 (CA) para 53.

<sup>106</sup> n 81 above.

<sup>107</sup> Article 10 of the European Convention on Human Rights protects freedom of expression.

<sup>108</sup> *Bladet* (n 81 above) paras 68, 72.

the media significant breathing space to pursue important stories on matters of public interest. For instance, where a media publisher repeats allegations made in an official report, it should not be required of the media publisher to take extensive steps to verify the contents of the report (although the subject of the allegation should generally be provided with a right of reply). Stated differently, the media defendant's conduct in not verifying the truth of the allegations emanating from such a source should not count against it when assessing its conduct, both for purposes of the reasonableness defence (which negates unlawfulness) and for the defence of lack of negligence (which negates fault).

## 7 Conclusion

*NM v Smith* is a fascinating – and disappointing – decision of the Constitutional Court on many levels. We have discussed some aspects of the decision in this note. From the perspective of constitutional jurisprudence, it is unfortunate that the majority of the Court treated the factual enquiry as to whether the defendants acted with intention in publishing the plaintiffs' identities as a constitutional matter, without undertaking any substantive analysis of this difficult issue. This is particularly the case where the majority's approach is difficult to reconcile with previous decisions of the Constitutional Court on what is and what is not a 'constitutional matter'. The majority of the Court in our view also appeared to reach the incorrect conclusion on the facts, finding that the defendants had intentionally violated the plaintiffs' privacy. We prefer the judgments of the minority judges, who reached a conclusion on the major constitutional issue involved in the case – that the media need to establish absence of negligence in publishing private information. The decision of Langa CJ on the facts – visiting negligence liability on the media defendants – appears to us to be defensible. Further, O'Regan J's endorsement of a general rule that journalists are entitled to rely on reliable sources and information from reputable organisations, represents a significant advance in our media freedom jurisprudence.