REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, JOHANNESBURG

CASE NO: 34062/2017

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED.

15/9/2017 RKeightley
DATE SIGNATURE

In the matter between:

NT	**Applicant**
v	
THAPELO KENNETH KUNENE	**First Respondent**
WEEKLYXPOSÉ	**Second Respondent**
WEEKLY TEAM	**Third Respondent**

JUDGMENT

KEIGHTLEY, J:

[1] This is an urgent application in which the applicant, Ms NT, seeks an order directing the respondents to remove certain video material (and any derivative content) from their online news site, and to prohibit the respondents from publishing similar material in the future. The videos in

question belong to, and feature, the applicant. They are of a graphic sexual nature.

[2] For reasons that will become apparent shortly, the matter received a fair amount of publicity. Consequently, the media showed an interest in covering the hearing. Before the hearing commenced three media houses requested permission from the court to permit television cameras to record the hearing and to broadcast the proceedings live. The applicant opposed the requests.

[3] For reasons that I advanced *ex tempore* I refused that request. I also directed that the journalists present at the hearing refrain from using the applicant's name in their reporting (including any reporting via Twitter and similar social media portals), and to observe their journalistic obligations not to make gratuitous reference in their coverage to any details of the case involving the sexual nature of the video material in question. None of the journalists present objected to these directions.

[4] The preliminary issue of urgency can be dealt with very briefly. Although the respondents contended in their answering affidavit that the matter should be struck for want of urgency, they did not pursue this submission with much vigour at the hearing. I am satisfied that the applicant has established the requisite urgency. It is so that she did not launch her application until five days after the publication of the videos. However, this is not an unreasonably long period. The applicant explained fully what steps she took before instituting her application, and why there was some (albeit minor) delay. Despite publication having taken place some days before the application was launched, the videos remain on the internet and are thus

widely accessible to the public on an ongoing basis. For this reason, the element of urgency continues to persist for so long as the videos remain on the respondents' website. Having dealt with these preliminary issues, I turn to the main issue raised in the application.

[5] The first respondent, Mr Kunene, is the owner of the second respondent, the WeeklyXposé, which is an online newspaper. The third respondent is the team of journalists who wrote the article in which the videos that form the subject matter of this case appeared.

[6] Mr Kunene, who deposed to the affidavit filed on behalf of the respondents, says that the WeeklyXposé seeks to "*expose and highlight key issues plaguing our country and the rest of the world*". He states that it employs professional journalists and applies journalistic standards to the stories it publishes on its website. It also engages in investigative journalism and, Mr Kunene says, "*where exposes are made of persons, it affords them the right to reply before publishing*".

[7] On 4 September 2017 the WeeklyXposé published an online article headed "*How Ramaphosa Turned a Young Mother into his Personal Porn Star*" ("the article"). This followed articles published in Sunday newspapers on 3 September 2017. The applicant refers to one of these articles in particular, which appeared in the Sunday Independent. The editor of the Sunday Independent was one of the founders of the WeeklyXposé with Mr Kunene, although he has since moved on from that publication. It is common cause that they remain friends.

[8] The Sunday Independent article was headed "*Ramaphosa in womanising e-mail shock*". It reported that the newspaper had seen documents, including emails, showing that the Deputy President, Mr Ramaphosa, had engaged in extra-marital relationships with eight women. That article did not provide the names of the woman alleged to have been involved. It did, however, include details of what it reported to be email evidence showing that one of the women had been sending "*erotic pictures*" and "*intimate videos*" to Mr Ramaphosa.

[9] The WeeklyXposé article was published the following day. Unlike the Sunday Independent article, it named the applicant, and identified the area in which she resides. It repeated, with added emphasis, the allegation in the Sunday Independent that the applicant had been sending erotic and "*very*" intimate videos to Mr Ramaphosa. It provided extensive details of the content of the email exchanges. The article also gave graphic details of at least one of the videos, which, it alleged, was aimed at Mr Ramaphosa. This portion of the article describes exactly what the applicant can be seen doing in the video, and it quotes what she can be heard saying.

[10] As if the details contained in the text of the article were not enough, the WeeklyXposé team went even further. As an online news site, it is possible to "embed" video footage in the body of the articles published. This enables the reader to play and view the videos simply by clicking on the "boxes" inserted between the paragraphs of text. It was this mechanism that the WeeklyXposé team used to embed the applicant's videos in the article.

[11] At the commencement of the article, under the title, the following warning appears: "*Please note that some of the nude material published here might offend sensitive viewers. Viewer discretion is advised.*" The two videos are positioned a mere 7 lines into the article. The graphic descriptions of the videos I referred to earlier appear much later in the article, at around line 32. The link to the emails, which is also embedded in the article, appears after the videos, at around line 21. I will have more to say in this regard later.

[12] I was requested by the respondents to view the article and the videos. I did so. The article appears as a lead story on the website (at least they did when I checked the website). There is no need for me to describe in any detail what the videos show. A few relevant observations will suffice. My first observation is that the videos are quite clearly "home-made", probably by the applicant herself on her cell phone. They take place in relatively dim lighting in a bedroom. The respondents have "blurred" the film. However, it is still possible to see general identifying features of the applicant, such as her body shape, the shape of her face and her hairstyle. Her voice is also recognisable on the audio component of the video. I have no doubt that if the viewer knew the applicant, she would be easily recognisable to them, regardless of the blurring. Importantly, despite the blurring, the videos show close-up and intimate details of what is transpiring on screen. This is explicitly sexual in nature.

[13] One important feature of the videos must be highlighted. The applicant is the only participant in the conduct depicted on film. No-one else is visible, or can be heard. The video does not show the applicant engaging in sexual acts

with another person, let alone with Mr Ramaphosa. The videos were plainly intended to be personal and intimate to the applicant.

[14] There is a further important feature about this case. The respondents do not say that the applicant posted these videos on any public platform, or that she provided them to the respondents. The respondents' case is that some months ago it "*received information*", in the form of hundreds of emails, video clips and photos, about the alleged extra-marital affairs. Thus, the respondents accept that the videos were intended by the applicant to be personal and private, in the sense that she never intended them to be distributed more broadly than to a person or persons of her choosing. The respondents also concede that they did not obtain the consent of the applicant before publishing the videos on their website.

[15] It is also important to stress that the applicant does not seek any relief in respect of the written content of the article. She limits the focus of the application and the relief she seeks to the videos themselves. The applicant's case is simple. In short, she says that by posting her private and intimate videos on their website without her consent, the respondents violated her rights to dignity and privacy.

[16] By way of elaboration, the applicant says she is a young mother. The publication of the videos has made it possible for her family and friends to see her engaging in the activities depicted. This has been very distressing for her and for them. It amounts to, as she puts it, a violation of the highest order. This is aggravated by the publicity that the matter is receiving. The applicant also fears that her private videos are being used in what appear to

be disputes between political factions in our country. She describes how she tried to avoid reading anything on the matter after the Sunday Independent article for fear of the trauma this might cause her. When she eventually viewed the WeeklyXposé article, she stayed at home and cried for most of the day. She describes how she has had several encounters with strangers who have made unpleasant remarks about her following the publication of the article with the videos.

[17] Significantly, the applicant expressly stated in her affidavits that she is conscious of media freedom, and that she accepts that her rights to privacy and dignity may be limited by the right to freedom of expression when this is in the public interest. However, she avers that it is inconceivable that it is in the public interest to publish her private and intimate videos, with their graphic sexual content, on an online news site. She accepts that her right to privacy and dignity must be balanced against the right to freedom of expression and media freedom. Her case is that the publication of the videos exceeds the legitimate bounds of media freedom, and unjustly encroaches on the core of her rights to privacy and dignity.

[18] The respondents, too, accept that this case turns on a balancing exercise between the applicants' rights to privacy and dignity, and the respondents' right to media freedom. They assert that the publication of the videos without the applicant's consent is in the public interest, and that the manner in which they have dealt with the videos represents an acceptable balance between these competing rights. They point in this regard to the blurring of the images, and the nudity warning posted at the beginning of the article.

[19] Before dealing with the core submissions made by the respondents, I should mention that there is a dispute between the applicant and Mr Kunene about the events preceding the publication on 4 September 2017. Mr Kunene avers that he had various conversations with the applicant on 3 September and that, as a result, she knew that the WeeklyXposé would be publishing the videos the following day. The respondents submit that in failing to take proactive measures on 3 September to prevent it, the applicant implicitly acknowledged the publication of the videos. The applicant denies that these conversations with Mr Kunene took place.

[20] I do not need to make a determination on whose version is more plausible. Even if one were to accept Mr Kunene's version (and for present purposes I make no decision in this regard), I am unpersuaded that the applicant's failure to act on 3 September constituted an implied acknowledgement of the publication of the videos. She is an ordinary layperson who, according to her affidavits, has no ready access to legal advice. While a corporate entity may be in a position to undertake extremely urgent legal action to protect its interests, the same expectation simply does not apply to laypersons. Further, in Mr Kunene's version set out in his answering affidavit, he does not say that he told the applicant that the videos would be published the following day. Finally, and in any event, an implied acknowledgement could never have amounted to consent in these circumstances. Indeed, the respondents themselves do not go so far as to suggest that it does. For these reasons, this matter need detain us no further.

[21] The core of the respondents' case is that the videos are a necessary element of the article. This is because, so they contend, the videos authenticate the

textual content of the article, which gives details of the alleged extra-marital relationship that Mr Ramaphosa had with the applicant. The respondents argue that as an online news source, the WeeklyXposé faces more hurdles than print publications in establishing itself as a genuine and serious news source. It is often perceived as being a purveyor of what, in the rather unfortunate language of the day, is referred to as "fake news". For this reason, the WeeklyXposé takes the authentication of its news stories seriously.

[22] The respondents contend that the authentication of media reports serves an important public purpose. It ensures public confidence in the media and in what is reported. It means that readers can regard the information gleaned as being credible. This makes a significant contribution to the constitutional imperative that the press should be permitted to foster a free flow of ideas among citizens. Hence, there is a strong public interest element in the need for the media to authenticate what they are reporting.

[23] Further, so the argument continues, in this particular case, Mr Ramaphosa was on record as having dismissed the WeeklyXposé as a fake news site. This being the case, and given the intense public interest in the exposure of the alleged extra-marital affairs revealed in the Sunday Independent article, the WeeklyXposé took the view that it had to provide evidence to substantiate its story. It was justified in using the videos without the applicant's consent for this specific purpose. The respondents aver that the videos allow the public to judge for themselves whether the allegations contained in the article are true. They say that having viewed the videos, "*no*

reader could be left in any doubt that the information contained in the article was authentic and correct" (my emphasis).

[24] The respondents assert that they were aware of the need to protect the applicant's dignity and privacy, as the WeeklyXposé is not a pornographic site. They did this by resorting to the self-censorship mechanism of blurring the videos. This, they contend, represents the appropriate point of balance between the applicant's rights to privacy and dignity, on the one hand, with the public interest in the authentication of news stories on the other.

[25] I accept without hesitation that there is an inherent public interest element in the authentication of media reports. This is particularly so when high profile public persons are involved, and even more so when the media reports in question involve allegations of unlawful, immoral or otherwise reprehensible conduct on the part of our constitutional leaders.

[26] The respondents highlight this as an important feature of the case. They point out that the WeeklyXposé published the article with the videos after receiving and investigating information indicating that the Deputy President of this country had engaged in what they believed to be morally corrupt conduct. They submit that this is contrary to the public position the Deputy President holds as the leader of the National Aids Council, and that it contradicts his public stance against the "blesser" phenomenon prevalent in our society. Consequently, the respondents submit, there is a high level of public interest in the story detailed in their article. For this reason, they say that providing authentication for the allegations contained in the report was an important public interest imperative.

[27] It may well be so that, in principle the respondents are correct in this assertion. However, that does not mean that their conduct in publishing the videos was justifiable.

[28] In the first instance, I do not believe that the public interest in providing authentication for media reports requires a level of proof beyond any doubt. This is the level of authentication the respondents claim was provided by the videos. The press serves the critical function of facilitating the free flow of information and ideas to and among citizens. Its function is not to provide a channel for a trial by media. It is only in criminal trials that proof beyond any form of doubt is required, and even then it is reasonable doubt. The same obligation does not rest on the media. This means that in determining what is appropriate evidence to use for purposes of authenticating its reports, the media must be sensitive to, consider very carefully, and respect counter-veiling rights. Although the level of authentication might be much greater by publishing material that violates these rights, it may be necessary for the media to hold back in the interests of avoiding that violation.

[29] One of the counter-veiling rights that is often implicated in this conundrum facing the media is the right to privacy. The right to dignity is another. Where a high profile person is reported to have conducted himself or herself in a reprehensible manner, authentication by way of publishing private information may be justified. Arguably, this might even, in some cases, include the publication of material involving private sexual conduct.

[30] Our law reports are replete with judgments upholding the right to freedom of expression, and correctly so. The success of our constitutional democracy

largely depends on media freedom. However, the right to privacy and the right to dignity are also jealously guarded by the courts. The Constitutional Court has noted that individual sexual choices lie at the heart of the right to privacy. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Ackerman J held as follows in this regard:

> "[T]he manner in which people give expression to their sexuality is at the core of this area of private intimacy. If, in expressing our sexuality we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy."[1]

[31] In the judgment of *Prinsloo v RCP Media Limited T/A Rapport*, this court noted the high value placed by our current society on "*the respect for privacy, intimacy and freedom in the bedrooms and bathrooms of consenting adults*".[2] The court went on to note that there is a difference between the public interest (for purposes of the balancing exercise) and simply what members of the public may be interested in.[3] Of significance in this regard is the court's finding that:

> "When it comes to the publication of sexual conduct between consenting adults in the privacy of their own homes, the concerns of press freedom and he public interest would have to be of an extremely serious and important nature to outweigh the privacy and dignity of individuals as protected by the Constitution."[4]

[32] This latter dictum establishes a useful yardstick for determining the question of whether the correct balance was struck in the present case between the public interest and the applicant's rights to privacy and dignity. The videos

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[1] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at 476A-B
[2] *Prinsloo v RCP Media Ltd T/A Rapport* 2003 (4) SA 456 (T) at 471E
[3] At 472G and 473B
[4] At 476A-B

involved are, as I have already said, of an extremely intimate, personal and private nature. The videos are private in various senses: they were made for the applicant's private use, and she did not consent to their publication by the respondents or, for that matter, anyone else. Furthermore, the content of the videos are of a highly private nature. They involve that innermost sphere of privacy, the sexual sphere. They depict only the applicant, her body and her voice. The videos show acts of personal sexual intimacy. They are the result of the applicant's own choices as to what she does with her own body in the privacy of the bedroom. It is clear from the videos themselves that they were intended to be shared, or not, at the applicant's sole election, and then only to that person, or those persons, chosen by her.

[33] As I have already indicated, this is not a situation where a video depicts a high profile person engaging in sexual conduct with someone else. The applicant is not a high profile person in her own right (if one discounts the unfortunate infamy that she may currently have attracted). The allegation is that these videos were sent to Mr Ramaphosa. However, this cannot be established from viewing the videos themselves. Viewed on their own, the videos show no more than an ordinary person engaging in sexual activities in her private space. The conduct depicted in the videos does not authenticate the alleged relationship with Mr Ramaphosa.

[34] In the audio component of the second video the applicant is recorded using a name that the article alleges was her nickname for Mr Ramaphosa. The text of the article goes into specific detail in this regard. It draws a link between the emails and the alleged use of the nickname, and then it describes precisely how that name was used during the course of the recording. The

emails are accessible in full in a link embedded in the article. This aspect of the second video provides the only possible connection between it and Mr Ramaphosa, and then only if the article and the emails are also read. In reality, the link that the article seeks to establish between Mr Ramaphosa and the applicant is facilitated by the text of the article, read with the emails, rather than by the videos. As I have indicated, the text of the article provides a comprehensive description of what the applicant says in the audio component of the video. In fact, the article quotes the relevant portion of the audio verbatim, in the original isiZulu, with an English translation (usefully) provided. In these circumstances, there was no justifiable need to insert the second video in the article for authentication purposes.

[35] In my view, there may have been some probative value in the publication of the videos if their existence or authenticity was placed in dispute. In those circumstances, it could be argued that the publication of the videos settled this dispute. Of course, this still does not mean that the publication necessarily would be justified. That would depend on many factors, and in this case, the nature and provenance of the videos would be important considerations. However, the existence and authenticity of the videos themselves was not placed in dispute prior to publication. This is because the journalists responsible for the story did not tell the applicant what videos they intended to publish, and they did not ask her to comment on their authenticity. Although Mr Kunene says that the journalists tried to contact her, when this failed, they simply went ahead with the article and published the videos at the same time without her consent or comment. This was despite Mr Kunene's assertion that the WeeklyXposé affords an affected

person a right to reply before publication. Be that as it may, the simple point is that it was not necessary to publish the videos referred to in the text of the article to prove that they existed or to prove their authenticity.

[36] For these reasons I find that no, or at best, very little value can be attached to the videos as a means to authenticate the allegations contained in the article.

[37] There is a further aspect I wish to consider regarding the respondents' contentions that the videos were inserted in the article with the intention that they act as authenticating material, and that the videos indeed serve this purpose. I earlier provided an outline of the layout of the article in which I noted that the videos are positioned "up front" (i.e. at line 7 of the article). I also noted that the description of the relevant portions of the second video was placed towards the end. This positioning does not support the respondents' case that it used the videos for authentication purposes.

[38] If this indeed had been the purpose of the videos, one would expect that they would have been placed immediately after the detailed description of the sexual conduct depicted. Instead, one is left with the distinct impression that the videos were prominently and strategically placed as early in the article as possible to attract the attention of viewers. In this position, they become the immediate focus of the piece, rather than playing the backup, authenticating role claimed by the respondents

[39] This perception is exacerbated by the use of the term "*personal porn star*" in the heading of the article, appearing shortly before the videos. The innuendo is inescapable: the videos were used to support the portrayal of the applicant

as a "*porn star*". This demonstrates that, despite their protestations to the contrary, the respondents displayed a wholesale disregard, and indeed, a denigration of the applicant's rights to privacy and dignity by publishing the videos without her consent.

[40] I have no doubt that many, many members of the public will be interested in the videos. Some of these will be attracted by the reference to "porn" in the title of the article, and by the content of the videos themselves. They may well have no real interest in the broader issues raised. The publication of the videos thus exposes the applicant to the risk of being the object of further public exploitation and degradation. She never sought to be a public porn star, but the videos now expose her to the risk that this is how she will be regarded and treated by the public. There can be no justifiable basis to permit this in the name of the public interest.

[41] It should be obvious from my views set out above that I am not persuaded by the respondents' case. Taking all of the facts into account, I conclude that in publishing the videos the respondents crossed the line. They did not act responsibly and with due regard to the applicant's rights to privacy and dignity. They failed to exact the appropriate balance between her rights and the public interest. It is alleged that applicant has a relationship with a high profile person. Unfortunately, those allegations are in the public sphere and she has to face them. However, it is important to bear in mind that regardless of the interest the public may have in the allegations, the applicant did not consent to having her intimate personal videos displayed for the world to see at the click of a mouse.

[42] Whether or not she had a relationship with Mr Ramaphosa, and whether indeed the videos were made for, and sent to him is not something I need to determine. The point is that even if this were the case (and I make no comment, let alone finding in this regard), it would not assist the respondents. This is because any public interest element attached to these videos is far outweighed by the need to protect the applicant's privacy and dignity.

[43] Accordingly, I am satisfied that the applicant has demonstrated that she is entitled to an order directing the respondents to remove the videos from the website, together with the other relief sought in prayer 2 of the notice of motion. It makes no difference that the publication has already taken place and that the videos have been in the public domain for over a week. The applicant avers that for so long as the videos remain on the website, she is subjected to an ongoing violation of her rights. This was the finding of the court in *Prinsloo*, and I accept the correctness of the applicant's submission in this regard. In that judgment it was held that:

> "[D]espite the fact that a considerable number of people had already viewed the material, possession of the images by someone who was not authorised by the original author or those depicted on them could, in principle, amount to an ongoing violation or, at least, a continuing threat of violation, of their privacy. Every instance when the images were viewed, even by someone who had already seen them, could constitute a renewed intrusion into their privacy." [5]

[44] The remaining relief is concerned with preventing the respondents from publishing other, similar videos or photographs of the applicant, or from forwarding them to others. It is common cause that the respondents have in

[5] *Supra* at 468G/H - I

their possession other videos and photographs belonging to the applicant that may fall into the same category as those described in this application. The respondents refused a request by the applicant for an undertaking that they would not publish this material. I should add that at the hearing they gave a limited undertaking, pending judgment in this matter.

[45] If the respondents were not entitled to publish the original videos, it follows that they have no entitlement to publish other, similar material without the applicant's consent. She is thus entitled to this relief as well.

[46] For all of these reasons, I make the following order:

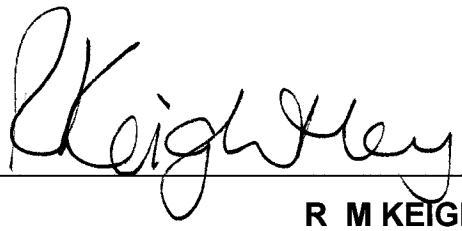
[46.1] The applicant's non-compliance with the rules of this court relating to the service and time periods, and the hearing of this application on an urgent basis in terms of Rule 6(12) is condoned

[46.2] The first to third respondents are directed to remove private, graphic and/or sexual videos (including any audio content), photos and/or any visual presentations of the applicant produced from such videos or photos from the online publication website known as WeeklyXposé and/or any other publication where the first to third respondents have published such videos, photos and/or visual presentations of the applicant

[46.3] The first to third respondents are interdicted and restrained from further publishing in any manner whatsoever private, graphic and/or sexual videos (including any audio content), photos of the applicant and/or any visual presentation produced from such videos or photos.

[46.4] The first to third respondents are interdicted and restrained from duplicating and/or distributing and/or transmitting and/or transferring in any manner whatsoever private, graphic and/or sexual videos or photos of the applicant and/or visual presentations produced from such videos.

[46.5] The first to third respondents are to pay the costs of this application.



R M KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard:	13 September 2017
Date of Judgment:	15 September 2017
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