

**ONLINE PRIVACY AND THE LIMITATIONS PLACED ON RELATIVES ACCESS TO
INFORMATION OF A DECEASED PERSON IN TERMS OF SOUTH AFRICAN LAW**

NO: 01

By: Jesca Genius Machokoto¹

Abstract:

Privacy concerns have become more acute with computerisation of personal information, which enables companies to store individual personal information without any practical difficulties of locating and accessing information. If a record is computerised, it can be searched using different fields such as the name, surname and identity number of individuals; it can be manipulated and disclosed without any difficulties. As such, computerisation has provided opportunities for public access to information. The extent to which the law permits relatives' access to information of a deceased family, presents concerns that demands an examination of the contents and application of the right to privacy and access to information. This paper explores the interaction between the right to privacy and access to information; circumstances under which information may be refused by a public or private body; and how the law protects information of a deceased person.

The opinions expressed and arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the PROLAW program.

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¹ **Jesca Genius Machokoto** holds an LLB degree in law from the University Of Limpopo; an LLM in Commercial and Business Law from the University of Witwatersrand, South Africa; And is also a member of the Institute of Risk Management South Africa and Institute of Information Technology Professionals

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Key words: a) Privacy; b) Limitations; c) Access; d) Information

1. INTRODUCTION

The research focuses on online privacy and the limitations placed on a deceased individual's relatives' access to their information. The term 'privacy' is generally defined as 'an individual condition of life characterised by exclusion from the public and publicity. This condition comprises all those personal facts which a person has considered to be made private from the knowledge of outsiders'.² Privacy concerns have become more acute with computerisation of personal information, which enables companies to store individual personal information without any practical difficulties of locating and accessing information. If a record is computerised, it can be searched using different fields such as the name, surname and identity number of individuals; it can be manipulated and disclosed without any difficulties. As such, computerisation has provided opportunities for public access to information.

The privacy concerns in this research relate to any personal information that can be acquired from a computer and which is maintained by a public³ or private body.⁴ Information held by a public or private body may be required for business related matters, or may contain information about identifiable individuals. The question that arises for consideration is, whether information that is held by a private or public body is private or public for all purposes and without limitation on its access, or whether some of the rules with respect to fair information practises continue to apply? Stated differently, should a relative be able to access a record of a family member after they have passed on? In essence, does the right to privacy continue even after death?

The purpose of this research is to investigate the extent to which the law allows a relative to access information of a family member in the event of death. This will be done by examining the contents and application of the right to privacy and access to information. The research will explore the interaction between the right to privacy and access to information. In addition, it will show under what circumstances information may be refused by a public or private body. Furthermore, the research will consider how the law protects information of a

²S Papadopoulos 'Revisiting the public disclosure of private facts in cyber world' 2009 *Obiter* Vol 3 issue 1 30-43. See Neethling, Potgieter and Visser *Neethling Law of Personality* 2nd ed (2005) 31 ff. See *National Media v Jooste* 1996 3 SA 262 (A) 271-272.

³Section 1 of PAIA defines a public body to include national and provincial departments and municipalities, as well as any functionary or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation.

⁴ Section 1 of PAIA defines a private body to include defines private body as a natural or legal person or partnership that conducts (or has conducted) any trade, business or profession.

deceased person. This research will conclude by asserting that the right to privacy is terminated upon death and thus relatives can be granted access to a family member's data.

2. PRIVACY

The term privacy embraces the right to not be subjected to any intrusion and any intervention by the state and others in one's private life.⁵ This submission is supported by the Supreme Court of Appeal in *National Media Ltd and Another v Jooste*,⁶ where the court pointed out that an individual has a choice as to when and under what circumstances personal facts may be made public. Privacy covers a wide range of aspects relating to information, sensibility, movement and personal property.⁷ According to Rosenbaum,⁸ privacy can be divided into three different inter-related concepts:

a) information privacy, relates to a person's ability to have control over information divulged to another. This category of privacy allows an individual to have control over his/her personal information. An individual can decide at any time to disclose, retain or destroy his/her personal information.

b) personal privacy, concerns a person's right to be free in movement and from any intrusions. Personal privacy is attached to an individual's perceived sense of dignity and is based on social and cultural norms;

c) territorial privacy, concerns the limitations placed on one's privacy especially on public platforms. When said differently, this right entails one's right to be physically left alone without any undue interference from any third parties.

The preamble of the Protection of Personal Information Act 4 of 2013 (hereinafter referred to as 'POPI') also introduces a new category of privacy namely: information management, which relates to a person's right to information in the hands of another person or

⁵David Mc-Quoid Mason Constitutional law of South Africa 2nd ed (1998) 38. In *Bernstein v Bester* the court noted that privacy seeks to protect the 'inner sanctum' of a person which should be shielded from invasion by conflicting rights of the community.

⁶1996 (3) SA 262 SCA.

⁷Roger Clarke 'Beyond the OECD guidelines: Privacy Protection for the 21st Century' (2000) 3-4. <http://www.anu.edu.au/people/Roger.Clarke/DV/PP21.html> Accessed on 20 November 2014.

⁸Joseph I Rosenbaum 'Privacy on the internet: Whose information is it anyway?' 38 (1998) *Jurimetrics* 566-67.

entity. This category allows an individual to have control over his personal information that is in the possession of another person.

From the above concepts, one may argue that the digital age is mainly concerned with information privacy. This research focuses mainly on personal and information privacy. Personal information is defined in terms of section 1 of POPI, as information identifiable to a natural living person but not limited to the personal opinions, views and name of the person.

2.1 Traditional concept of right to privacy

The South African common law is derived from the Roman Dutch law, which provides that a dead person neither has rights nor duties.⁹ The common law right to privacy has been identified by the courts as an independent personality right which every person is entitled to enjoy. Personality rights are characterised by the fact that they cannot be transferred to others, cannot be inherited, cannot be attached or relinquished and they come into existence at birth consequently terminating upon death.¹⁰ The right to privacy under common law applies only to natural persons.¹¹ The court in *University of Pretoria v Tommie Meyer Films (Edms) Bpk*,¹² noted that corporations cannot claim the right to privacy because they did not have a personality right such as *dignitas* and a body that could be kicked or privacy to be invaded like a natural person.

The right to privacy under common law is actionable under *actio iniuriarum*.¹³ *Actio iniuriarum* protects personality rights which include the mental and physical integrity (*corpus*) and a good name (*fama*).¹⁴ A breach of a person's privacy constitutes *iniuria*.¹⁵ It occurs when there is an unlawful and intentional infringement of the privacy of another person without his/her will. Unlawfulness arises where there was an infringement of a subjective right or breach of a legal duty. In *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and*

⁹ McQuoid-Mason 'Overturning refusal of a hospital to terminate life support for a brain-dead mother until the foetus was born: What is the law in South Africa?' (2014) *South African Medical Journal* para14.

¹⁰ Neethling J, Potgieter JM, Knobel JC. *Law of Delict*. 6th ed. Durban: LexisNexis Butterworth, 2010: 253.

¹¹ Robert Brand *Media Law in South Africa* (2011) 72.

¹² 1977 (4) SA 376 (T).

¹³ *S v A* 1971 2 SA 293 T.

¹⁴ Neethling, JM Potgieter and JC Visser *Law of Delict*, 6thed ((2010) 347 and 349. See also *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 C, *Bernstein and others v Bester and others* NNO1996 (2) SA 751 para 69

CC at para 68. See also *S v A* 1971 2 SA 293 T. *University of Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T).

¹⁵ Iain Currie Johan De Waal *The Bill of Rights Handbook* (2005) 296.

another,¹⁶ a juristic person sued for an invasion of privacy against the Financial Mail which had unlawfully obtained information from private memorandum and tape recordings. The court found that the telephone tapping constituted an unlawful intrusion and as such, the corporation was entitled to sue for invasion of privacy. In *S v I and Another*,¹⁷ an alienated wife who was with a police officer, peeped into the marital bedroom with the intention of finding out if her husband was committing adultery. The court held that the peeping constituted a severe invasion of privacy; however, such invasion was justified because it was for evidence purposes. In this case the court had to balance two competing interests: the husband's right to privacy as opposed to the wife's interest in getting hold of proof of his unfaithfulness.

In *Mpumalanga MEC for Health v Mnet & another*,¹⁸ the court dealt with the issue of unlawfulness in the case of illegal acts. In this case, the defendants placed secret camera recorders at a hospital intending to use the footage for media publication. The court noted that the secret camera footage, which showed serious malpractice in carrying out abortions in a Philadelphia hospital, constituted an unlawful intrusion because the defendant had acted with intention to conceal the process of recording. In *Minister of Justice v Hofmeyr*,¹⁹ the court noted that intention does not merely encompass a plan to achieve a particular result, but also the consciousness that such a result would be wrongful. In support of this submission, the court in *Kidson v SA Associated Newspapers Ltd*,²⁰ noted that intention is presumed unlawful if an infringement to privacy has been proved. This implies that for a plaintiff to succeed in proving intention, they must show that the defendant acted with purpose in performing an action that lead to the damages.²¹

The unlawful and intentional infringement can either be by way of an intrusion or disclosure.²² Intrusion can be defined as an illegal act of invading one's privacy whereas disclosure is an act of revelation. In asserting whether there was a discloser of another person's private facts, the court in *Katz v United States*,²³ and *Bernstein and others v Bester and others*²⁴ noted that a person must have exhibited an actual (subjective) expectation of privacy and that

¹⁶1993 ZASCA 3.

¹⁷1976 (2) SA 781 RAD at 788 H-789B.

¹⁸2002 (6) SA 714.

¹⁹1993 (3) SA 131.

²⁰1957 (3)SA 461 (W)

²¹*Delange v Costa*1989 2 SA 857.

²²J Neethling, JM Potgieter and JC Visser *Law of Personality* 221,

²³389 U.S. 347 (1967).

²⁴1996 (2) SA 751.

the expectation be the one that the community considers reasonable. An example of a subjective expectation, with which most people would agree, is that by posting private facts onto a social networking platform, a user has no will to keep the facts private because the information will be available to an indefinite number of people.

2.2 *Constitutional right to privacy*

The right to privacy is protected under section 14 of the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the ‘Constitution’) which provides that:

‘Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed’

The right to privacy under the Constitution is not exhaustive; it extends to any unlawful methods used to obtain information or used to make a disclosure. In *Klein v Attorney-General, WLD and Another*,²⁵ the applicant had been accused on charges of fraud, theft and forgery arising from his employment at a certain company and as such lost his job. Afterwards, the company managed to restore and retrieve privileged information on his computer. The court noted that reinstatement of information on a computer system which was previously sent to trash by the owner constitutes a violation of that person’s privacy. The court further noted that the applicant was entitled to declare his information inadmissible.

In preserving a protected sphere of the right to privacy, the court in *Mistry v Interim Medical and Dental Council of South Africa & others*,²⁶ addressed the issue of privacy concerning personal information. In this case, the aggrieved party’s information had been disseminated without their consent. The issue before the court was whether the dissemination was a violation of their right to privacy. When addressing the issue, the court recommended that the following factors should be considered: a) the way in which the information had been obtained e.g. an invasive way, b) whether it concerned intimate personal details, c) whether the

²⁵1995 (3) SA 848 (W) at 865.

²⁶1998 (4) SA 1127 (CC).

purpose it was collected for was not fulfilled, d) whether it was disseminated to the press or any person from whom the applicant could have reasonably expected privacy. The court held that the dissemination of the aggrieved party's information was not a violation of their privacy because the information had been communicated to a person who had a statutory right to receive such information.

In spite of the protections upheld in the rulings and literature above, there are limitations to the right to privacy that are contained in section 36 of the South African Constitution.²⁷ The limitations must be effected by way of a law of general application and must be justifiable and reasonable in a democratic society. The law that governs the limitation of privacy in respect to communications are the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA),²⁸ Electronic Communications Transactions Act 25 of 2002 (ECT) and Protection of Personal Information Act (POPI).

2.3 Online Privacy

Online privacy relates to the technological practises that protect personal or sensitive information online, but can also be used as an umbrella term to any matter relating to privacy online.²⁹ In South Africa, the telecommunications industry is regulated by the Electronic Communications Transactions Act 25 of 2002 (ECT) and Protection of Personal Information Act (POPI). These Acts are briefly discussed below.

2.3.1 Electronic Communication Transaction Act

The ECT has been recognised as the most significant legal step that South Africa has taken to log on to the world of e-commerce and electronic communications. The ECT aims at removing barriers to the legal recognition of electronic transactions. It is there to enable and

²⁷ Act 108 of 1996.

²⁸ Regulation of Interception of Communications and Provision of Communication-related Information Act. Section 6 allows the interception of indirect communication in connection with carrying on of a business as follows: by means of which a transaction is entered into in the course of that business; a communication which otherwise relates to that business; or a communication which otherwise takes place in the course of the carrying of that business. The affected indirect communication should be in the course of its transmission over a telecommunication system

²⁹ Joy L Pritts JD 'The Importance and Value of Protecting the Privacy of Health Information: The Roles of the HIPAA Privacy Rule and the Common Rule in Health Research' <http://www.iom.edu/~media/Files/Activity%20Files/Research/HIPAAandResearch/PrittsPrivacyFinalDraftweb.ashx> Accessed 25 April 2015.

facilitate electronic transactions and to create public confidence in said transactions.³⁰ The Act applies to personal information identifiable relating to an individual. Section 51 of the ECT provides that a data controller may not collect or disclose personal information of a data subject prior to a data subject's written consent or when disclosure is permitted by the law. In *S v Bailey*,³¹ the court noted that the unauthorised collection of personal information on an individual, without justification constitutes a wrongful intrusion of their privacy.

2.3.2 Protection of Personal Information Act

The common law position on the right to privacy is reinforced by the introduction of the POPI act. The right to privacy under POPI includes the right to protection against unlawful collection, retention, dissemination and use of anyone's personal information. The objective of the Act is to promote the protection of personal information in the public and private hands, and to regulate how such information should be processed. This law is enacted to give effect to the privacy right in the Constitution with a view of creating a balance between the right to privacy and other rights.³²

POPI regulates the 'processing' of personal information. The definition of processing is wide enough to include any aspect of handling personal information. Chapter 3 of POPI sets out conditions for lawful processing of personal information. According to Roos, the processing of data can only be considered lawful if the conditions that justify the processing of personal information are satisfied.³³ Personal information as defined in terms of POPI relates to information relating to an *identifiable, living, natural person* (my emphasis). This means that the Act does not apply to a person who is dead. It is worth noting that POPI presides over all legislations that regulate the processing of personal information.

3. ACCESS TO INFORMATION

³⁰ Sect 2(1)c.

³¹1981(4) SA 187 (N).

³²Ibid short title.

³³Anneliese Roos 'Core principles of data protection law' (2006) *Comparative and International Law Journal of Southern Africa* at 108.

3.1 CONSTITUTIONAL ACCESS TO INFORMATION

Section 32 of the Constitution gives every South African the right of access to information in the hands of a public or private body. This section provides that:

‘(1) everyone has the right of access to –

(a) Any information held by the state; and

(b) Any information that is held by another person and that is required for the exercise or protection of any rights.

(2) ‘National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state’

Although the PAIA is now a pre-eminent source of access to information law, the constitutional right still plays a pivotal role. It can be argued that s32 of the Constitution can be relied upon directly to claim access to information which the PAIA does not cover, such as a record of the cabinet.

3.2 PROMOTION OF ACCESS TO INFORMATION ACT (PAIA)

PAIA’s emphasis falls on facilitating access to information rather than protecting privacy. The purpose of this Act is to ‘ensure that the state takes part in promoting a human rights culture and social justice’. This should ‘encourage openness and to establish voluntary and mandatory mechanisms or procedures which give effect to the right of access to information in a manner that is speedy and effortless and to promote transparency, accountability and effective governance of all public and private bodies’.³⁴ According to Klaaren³⁵ the right of access to information should be seen as a right to have the mechanisms in place in order to allow one to gain access to information they require. This right includes access to information online.

³⁴PAIA purpose.

³⁵Klaaren ‘The right to a Cell phone?’ in the right to know and the right to live 2009 20.

3.2.1 *Who may request for information in terms of PAIA and Why?*

PAIA provides that every South African has a right to access information that is held by public or private bodies. This implies that a natural or juristic person can request access to information from a public or private body. PAIA distinguishes between two types of requester namely a requester and a personal requester. Section 1 of PAIA defines a requester ‘in relation to any department as any person who makes a request for access to a record of the office, on behalf of another person, whereas a personal requester is defined as a requester who is seeking access to a record containing personal information about the requester’. In this case, the definition of personal information **excludes** information about an individual who has been dead for more than 20 years.³⁶ This implies that a requester, who in this case is a relative or a family member of the deceased, can be denied access to the deceased’s information after 20 years.

Sections 18 and 50 of PAIA provides that a request must be made in a prescribed form. The distinction that PAIA provides between private and public bodies may be viewed as the first enquiry which a requester must answer. If it is required by a private body, the next question would be whether a requester must be given access to any record of a private body if that record is required for the exercise or protection of any right.³⁷ If not, then the document or record cannot be released. If yes, the next question would be whether a request for access to that record is not refused in terms of any ground of refusal contemplated in the Act. If there is a ground of refusal, the next question is whether there is public interest override. If yes, then the document must be released and if not, the next question would be whether there is any possibility to make the document available to the requester in a prescribed form. If yes, then the document must be released, but if not then the document cannot be released.

The question of whether a record is ‘*required*’ for the exercise or protection of any rights was addressed by the court in *Khala v Minister of Safety and Security*.³⁸ The court noted that ‘*required*’ is a factual question which depends on the circumstances of a particular case relating to the protection of any right. These rights may include delictual rights, contractual rights and constitutional rights. In *Clutcho ltd v Davis*,³⁹ the court noted that ‘*required*’ means

³⁶Section 1 of PAIA.

³⁷ Section 50.

³⁸1994 4 SA 218 (W). The plaintiff in this case instituted an action against a defendant from damages arising from on unlawful arrest and detention. The defendant considered the docket for such an arrest privileged hence why he denied access to it. The plaintiff then launched an application requesting the docket. The court rejected the claim of docket privileged and granted to the defendant leave to the file.

³⁹[2003] ZAWCHC 23 (10 June 2003).

'*reasonably required*' to assist in exercising, protecting rights, a substantial advantage or an element of need. In *Unitas v Van Wyk*,⁴⁰ the court held that a report into nursing conditions at ICU were not reasonably required because open and democratic societies do not encourage what is commonly referred to as fishing expeditions which could as well arise if something is used to facilitate pre-action discovery as a general practise. Accessing a public record is more advantageous because a requester does not have to justify why the document is required.

3.2.3 LIMITATIONS OF THE RIGHT OF ACCESS TO INFORMATION IN TERMS OF PAIA

The PAIA has been criticised as being 'over' restrictive and 'under' inclusive.⁴¹ An illustrative example is the *Pee international Inc. (BVI) and v Industrial Development Corporation of South Africa*,⁴² case where the court dealt with an issue in which applicants claimed that they were entitled to the disclosure of certain documents held by the IDC. The IDC argued that they were not entitled to those documents in terms of PAIA on the basis that the request to such information was governed by the Uniform Rules of the Court. The court held that PAIA was not applicable to gaining access to information held by the IDC on the basis of the Uniform Rules.

Section 1 of PAIA defines a 'record' as any recorded information regardless of form or medium under the control of that private body and whether or not it was created by that private body. It is apparent from the wide definition of the term 'record' that it includes any information in any form or medium as long as it is recorded. PAIA limits a requester to gain access to information that has not been recorded.⁴³ Chapter 4 of the PAIA contains grounds of refusal in relation to a request of certain information. Many grounds of refusal are the same for both public and private bodies, but some are only applied to public and not private bodies. These grounds are necessary to protect sensitive information from disclosure and can be justified for a number of reasons which include the following:

3.2.3.1 Privacy Protection

⁴⁰2008 (4) BCLR 442 (CC) (6 December 2007).

⁴¹Currie & Klaaren The Promotion of Access to Information Act Commentary (2002) 27.

⁴² Africa 2012 ZACC 21.

⁴³ Beukes 'Access to information: The bedrock of just administrative action' 2003 SAPL 17-29.

Sections 34 and 63 of PAIA are mandatory grounds for protection of privacy subject to public interest override. The act provides that a public or private body may deny access to a record if it is an unreasonable disclosure of personal information about a third party, including a deceased person. According to Klaaren and Penfold,⁴⁴ a disclosure is unreasonable if it amounts to an infringement of privacy. In the *Travel gate case*,⁴⁵ the request of access sought to schedule an agreement listing of names of MPs, nature and quantum claims was brought in terms of PAIA. The ground of refusal was that it was an unreasonable disclosure of personal information of MPs.⁴⁶ In coming to its decision; the court had to apply the two-stage reasonable expectation test, whether or not the information was protected by the constitutional right to privacy.

In *De Lange and another v Eskom Holdings Limited and Other*,⁴⁷ the court weighed third party access to information against the right to privacy. In this case, the SCA was called upon to adjudicate an application by a journalist and his employer who had requested Eskom to furnish them with documents relating to the pricing formulas between Eskom and the listed company Billiton. The court noted that although Billiton had put forward reasonable grounds indicating that disclosure would cause it commercial harm in that this would have an effect in revealing some of its trade secrets, the case concerned issues of considerable public interest. Thus the court held in favour of the applicants and Eskom was ordered to disclose the information.

3.2.3.2 Protection of Personal Information

Under POPI, organisations in South Africa are required to be open and transparent about how they handle personal information and allow individuals to access and correct their personal information which the organisations hold. POPI broadly provides for the strict requirements in its application that are summarised as follows:⁴⁸

⁴⁴ Klaaren & Penfold 'Access to Information' in Woolman, Bishop & Brickhill (eds) Constitutional Law of South Africa 2 ed 2011.

⁴⁵ 2007.

⁴⁶ S34(1) PAIA.

⁴⁷ (10/10063) [2011] ZAGPJHC 75.

⁴⁸ Werksmans Attorneys 'Protection of Personal Information' (2012) <http://www.werkmans.com>. (Accessed on 22 October 2014).

‘The data subject must consent to the collection and processing of information; Organizations are expected to ensure the integrity and safekeeping of personal information they process. They must safeguard the information against loss, damage or unlawful access; Personal information collected must be purpose-specific, information may not be used for a purpose other than what it was collected for; The information owner needs to be alerted of the reasons for data collection and processing and whether the provision of such information is compulsory or voluntary; and where information is received from a third party, the processing thereof must be compatible with the initial reasons for obtaining the information.’

Consent is the mantra of POPI. In the *Jooste case*,⁴⁹ the court noted that consent can be used as a defence only if an action falls within the limits of the consent given. If the owner of the personal information does not consent to the use or purpose of the personal information other than what the information was granted for, the owner of such information may have recourse against the abuser of the information. In *Kidson v SA Associated Newspapers Ltd*,⁵⁰ the court held that the plaintiffs had consented to their photographs appearing in the nursing journal to assist a campaign for recruitment of nurses not for purposes of an appeal of funds.

3.2.3.3 *Mandatory disclosure in the public interest*

Sections 46 and 70 deals with the mandatory public interest override over public and private bodies respectively. A public interest override applies where there is a mandatory ground of refusal. According to Currie and Klaaren⁵¹ the act confines public interest override to three identifiable aspects of public interest namely: breach of law, harm to public safety or environment. The public interest has to outweigh the harm to the rights or interests that would result in the disclosure of the record. The harm has to be imminent and serious in order to justify invocation of the override.

The courts also had another chance to deal with access to information in the *Khampepe – Moseneke Report*.⁵² In 2008, the Mail & Guardian newspaper submitted an application to the presidency to access a report on the Zimbabwean national elections on the basis of PAIA. The report had been prepared by Judge Sisi Khampepe and

⁴⁹ Supra note 5.

⁵⁰ Supra note 19.

⁵¹ Supra note 43.

⁵² <http://mg.co.za/tag/dikgang-moseneke> Accessed 19 November 2014.

Dikgang Moseneke who were sent to Zimbabwe during the 2008 election as electoral observers. Access to this report which had been commissioned by the office of the president (then Thabo Mbeki) was then requested by the Mail & Guardian in terms of PAIA. The president refused based on the grounds of refusal in s44 (1) (a) & (b) that the report was used to assist in policy formulation towards Zimbabwe. The court noted that s46 allowed public interest to override this refusal if the disclosure would reveal evidence of (1) substantial contravention or failure to comply with the law; or (2) imminent and serious public safety and environmental risk. The court held that the high court should have exercised the power available to it in terms of PAIA to examine the content of the report before deciding whether it should be released (judicial peek).⁵³ The court ruled that the report potentially disclosed evidence of a substantial contravention or failure to comply with the law. In conclusion, the court held that the contents of the report did not support grounds of refusal in that public interest did override the right to privacy.

Cameron J's minority decision was that there is no need for a judicial peek at the report because evidence presented by the state was not sufficient to discharge burden. Rulinga J noted that the contents of the report do not support grounds of refusal. The report potentially discloses evidence of a substantial contravention or failure to comply with the law. Therefore, the report was to be released as there were no grounds of refusal and in any event there is a public interest override.

3.2.4 MASTER OF THE HIGH COURT

Once a person dies, his interests are protected by the Master of the high court. The question that follows is who may be entitled to the right of access to the deceased's records after his death. The deceased's designated personal representative or the legal executor of their estate has a right under law to access the records. This can be done through applying to the Master of the high court in terms of section 5 of the Administration of Estates. This section provides as follows:

2) 'Any person may at any time during office hours inspect any such document (except, during the lifetime of the person who executed it, a will lodged with the Master under section fifteen of the Administration of Estates Act, 1913 (Act No. 24 of 1913), and make or obtain a copy

⁵³Cameron J's minority decision was that there is no need for a judicial peek at the report because evidence presented by the state was not sufficient to discharge the burden.

thereof or an extract therefrom, on payment of the fees prescribed in respect thereof: Provided that any executor, trustee, tutor or curator, or his surety, may inspect any such document or cause it to be inspected without payment of any fee' (my emphasis).

If the person died without identifying a personal representative or executor, state law regulates who by default possesses the right. States often establish a hierarchy of persons based on their relationship to the deceased person. Normally, this begins with an adult member of the immediate family, such as a spouse, child, or sibling. The application to access the records from the Master of the high court can also be declined in terms of any ground of refusal under PAIA if it infringes individual personal information.

4. CONCLUSION

In the final analysis, the question that could be asked is whether a dead person who is a family member has the right to privacy after death and whether a relative can be allowed access to the deceased's information. A deceased person does not have personality rights which are characterised by the fact that they cannot be transferred to others; they cannot be inherited, and cannot be attached or relinquished. These rights only come into existence at birth and are terminated upon death. A relative can be able to access the deceased's personal information in terms of PAIA as long as it is within a period of 20 years.

The reason why a relative could not be able to access a dead person's information while they are still alive is because of the privacy protection of personal information provided by POPI that only applies to natural identifiable living persons. After a person dies, POPI no longer applies. In adopting the *Bernstein*⁵⁴ principle that when one moves out of their private space into social interactions his/her privacy shrinks, the person cannot have a reasonable expectation of privacy online. Social media communications that publish posts to a mass readership and that are operated without privacy locks and are in the public domain, cannot expect privacy after death.

A relative may request a deceased person's information in terms of Sections 18 and 50 of PAIA which requires the request to be made in a prescribed form. Access will be granted if that record is required for the exercise or protection of any right. The document will only not

⁵⁴Supra note 35.

be released if there are any grounds of refusal contemplated in the Act. For instance, the Master of the high court may consider that the disclosure of those documents could be highly detrimental to the individuals involved and could reasonably be expected to endanger their lives or physical safety or if the request would constitute an unreasonable disclosure of highly personal information in terms of s 34(1) of PAIA. It can only be released if there is a public interest override. Having said this, the Master of the High court may grant access to record to the deceased's relative if they were a close relation (blood related). One of the important duties of the Master of the High Court is to supervise the administration of the deceased's estate and other estates in order to protect the interests of all parties involved. The process of the administration of the deceased's estate is regulated by the Administration of Estates Act.

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