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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A200/2024

Before: The Hon. Mr Justice Nuku
The Hon. Ms Justice Holderness
The Hon. Mr Acting Justice O'Brien

In the matter between:

CHRISTINE PHILLIPS

First Appellant

BARRY VARKEL

Second Appellant

and

STUART BRADBURY

Respondent

Hearing: 21 July 2025

Further submissions: 12 August 2025

Judgment delivered electronically: 17 September 2025

JUDGMENT

HOLDERNESS J (NUKU J and O'BRIEN AJ concurring)

Introduction

[1] The proliferation of residential security systems, particularly closed-circuit television (CCTV) cameras, has created new tensions between legitimate security concerns and fundamental privacy rights. In South Africa, where high crime rates drive widespread adoption of security measures, the intersection of property rights, security imperatives, and the right to privacy has become increasingly complex. The issue at the heart of this appeal is whether the surveillance of a neighbouring property is a justifiable limitation of the constitutionally enshrined right to privacy.

[2] The appellants have come on appeal from the judgment of Wathen-Valken AJ (the court *a quo*) granting the respondent, Mr. Stuart Bradbury, an order in the following terms:

- 'a) That the respondents are jointly and severally liable under this order;
- b) That the respondents remove and reposition the security cameras at their home situate at [...] B[...] Road, Camps Bay, Western Cape (formally known as erf 5[...], Camps Bay) without a line of sight into the applicant's property situate at 1[...] V[...] Road, Camps Bay (formally known as erf 5[...], Camps Bay);
- c) That the respondents shall refrain from installing cameras and/or other recording devices in the future which have a direct line of sight into the Applicant's private property;
- d) The respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.'

[3] The appeal to the full court was brought with the leave of the judge at first instance.

Background

[4] The parties to this appeal all reside in Bakoven, an exclusive, secluded and built-up residential suburb on Cape Town's Atlantic Seaboard, nestled between the more bustling suburbs of Camps Bay and Llandudno.

[5] The first appellant is the registered owner of the property situated at [...] B[...] Road, Camps Bay, Western Cape (the property). The second appellant, Mr. Barry Varkel, the first appellant's life partner and a practising attorney, lives with her at the property. The second appellant installed the cameras at the heart of this dispute.

[6] The respondent is the owner of the property situated at 1[...] V[...] Road, Camps Bay (the neighbouring property).

[6] These neighbours have been at war with each other for almost two decades. Their protracted and litigious history dates back to 2008, when the respondent redeveloped his property. The first appellant unsuccessfully applied to this court for the review of the City of Cape Town's approval of the respondent's building plans. The respondent's counter-application for the removal of the first appellant's contravening structure succeeded. The first appellant thereafter brought a damages claim against the respondent, which was pending when the proceedings *a quo* were brought.

[7] The first appellant also instituted an application against the respondent in terms of the Protection from Harassment Act,¹ alleging that he had plotted to have her killed. The application was dismissed with costs. The court in those proceedings expressed serious reservations about the first appellant's 'fair-mindedness' and described the complaints as 'bizarre.'

¹ 17 of 2011.

The security cameras

[8] In June 2022, the respondent became aware that two of the security cameras (the cameras) installed at the first appellant's property had a clear line of sight into his pool and entertainment area, patio/courtyard and one of his bedrooms. The curtains of this bedroom had to be permanently drawn to protect the occupant's privacy.

[9] On 6 June 2022, Mr. Carel Hofmeyr the attorney acting for the respondent, addressed a letter to the second appellant, the first appellant's attorney at the time, stating that the cameras were not installed for security purposes, but were rather intended to spy on him and invade his privacy. He demanded that the cameras be removed or repositioned.

[10] The second appellant responded by stating that he purchased and installed the cameras, 'for the sole purpose of personal safety and security, given the worsening economic situation taking place right now in South Africa and the ongoing increase in crime rates in our city.' The letter went on to state, with reference to the respondent, that *he 'would not even wish to breathe the same air as him, never mind look at him, or at his guests, or at his family members. Perhaps your client needs to resolve his unchecked paranoia and what seems to be an imaginary holocaust type complex he is suffering from.'*

[11] This vitriolic response did not include a denial that the cameras, in fact, had a line of sight into the respondent's property. In argument, it became clear that this crucial aspect appears to be a common cause, the only point of departure being the extent of such a line of sight. The second appellant informed Mr. Hofmeyr that 'the cameras shall remain as they are.'

[12] In the proceedings *a quo*, the first appellant and the second appellant delivered separate answering affidavits, after the second appellant expressly invited the respondent to join him as a respondent in the threatened application. The second appellant filed a notice of withdrawal as the attorney of record for the first appellant

on 3 February 2023, shortly before she delivered her 451-page answering affidavit (including annexures), which she avers she drafted as a layperson, on 14 February 2023.

[13] The first appellant, after seeking to distance herself from the offending cameras, nonetheless deposed to an 89-page affidavit, to which 358 pages of annexures were attached, where she delved in exhaustive detail into the history of her acrimonious relationship with the respondent, and sought to justify the placement of the cameras.

[14] Indeed, the first appellant herself states in the introductory paragraphs of her affidavit:

'11. *Much of what I state below has no direct bearing on the security cameras installed by Second Respondent on the property. However, the applicant has made his bed and opened this door in his application by introducing this material and he must now walk through the door and lie in his bed - once and for all.*

12. *Even though some of the below content has no direct bearing on the security cameras aspect, I simply cannot permit Applicant's unpalatable and malevolent allegations about me to remain unanswered by me. I am entitled to defend myself in law, and to protect myself, and what I state below paints the full picture of the context and history of the baseless and nasty allegations and innuendo by the Applicant against me and the complete lie that I have a vendetta against the applicant. It is, in fact, the applicant who is seeking revenge against me for my having caught him out in his fraudulent property development.'*

.....

13. *I am also stating the below to protect my good name and reputation and to show that the applicant is a malicious and petty individual who is intent on causing me harm.*

14. *Nothing I state below is scandalous, vexatious, defamatory, slanderous or could fall under any other legal exception which Mr. Hofmeyer, Applicant's attorneys, will no doubt employ to attempt to strike items out from record. Everything is based on hard and factual evidence.'*

[15] The first appellant describes herself as a retired filmmaker and an activist for workers' rights.' It was emphasised during argument by Adv. Essa, who stepped into the shoes of Mr. Timothy Dunn (Mr. Dunn) and represented the first appellant at the hearing of the appeal, that as a layperson, it ought not to be held against the first appellant that she filed an affidavit replete with irrelevant material. I shall revert to this aspect below.

Procedural Aspects: The Practice Note Issue

[16] Practice Directions 46 and 49 of this Division establish clear obligations for appellants to deliver practice notes containing specified information, including 'a list reflecting those parts of the record, if any, the party regards as irrelevant to the appeal and to which they do not intend to refer.'² This requirement serves the vital function of directing judicial attention to relevant material in lengthy records.

[17] The appellants failed to deliver compliant practice notes. The respondent's counsel correctly noted in his practice note that the appellants' papers contained 'an array of irrelevant information which unnecessarily burdened the record,' yet the appellants provided no guidance to assist the court in navigating this material.

[18] The Supreme Court of Appeal confirmed in *Rossitter & Others v Nedbank Ltd*³ that practice directives have the same force and effect as the Uniform Rules. The appellants' failure to comply with PD 46(5) undermined efficient case management and wasted judicial resources.

² PD 46(5)(d).

³ (96/2014) [2015] ZASCA 196 (1 December 2015) at para 15.

[19] As was observed by Peter AJ in *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd*⁴:

‘The efficient conduct of litigation has as its object the judicial resolution of disputes, optimising both expedition and economy... Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner... with the attendant increase in costs and delay in its finalisation...’

[20] Practice Direction 49(2) restates the obligation on the parties to deliver a practice note as contemplated by PD 46(5) above. The obligation on the parties to file the requisite practice note is clear.

[21] The appeal record was delivered on 27 August 2024. It was at this juncture that the appellants were required to deliver a practice note as envisaged in PD 46(3). This does not appear to have been done from the record which I was furnished with. The practice note in terms of PD 46(5) was required to be filed with the heads of argument filed in the appeal.

[22] The failure by the appellants’ attorneys to comply with PD 46(5) is an issue which garnered some attention at the hearing of the appeal. It is for this reason that I have set out the applicable practice directives and the timeline of the filing of documents in some detail.

[23] The issue in respect of the practice note relates principally to the failure by Mr. Dunn and Ms. Essa to comply with PD 46(5) and to inform the court of the relevant parts of the record which needed to be read, particularly considering the respondent’s contention that the appellants’ papers are replete with irrelevant matter.

[24] As a result, the full court had to read almost 800 pages when there were two or three issues, and only a small portion of the record was dispositive of the issue on appeal.

⁴ 2016 (1) SA 78 (GJ) at para 7.

[25] These procedural failings, the ill-conceived application to adduce further evidence and the inclusion of vast amounts of irrelevant material demonstrate a pattern of litigation conduct that aggravated the dispute and undermined efficient justice administration. The conduct of the appellants' legal representatives will have a bearing on this court's discretion when determining an appropriate costs order.

The application for leave to adduce further evidence on appeal

[26] On 19 February 2023, the first appellant brought an application consisting of almost 100 pages, to lead further evidence on appeal, regarding the respondent's departure application, with claims that the respondent's diagrams were inaccurate and not approved by the City of Cape Town. This application was brought five months after the first appellant apparently discovered the impugned plans, and the first appellant did not explain this delay. The application was opposed by the respondent.

[27] The departure application in issue related to a satellite dish and a balustrade. This evidence was clearly irrelevant to the issues to be determined, as the original judgment was based on the appellants' admission that cameras had a line of sight into the respondent's property, and not on the accuracy of any of the respondent's plans. The court *a quo*'s decision would not have changed, even if the plans were found to be unlawful.

[28] Ms. Essa attempted to distance herself from the deficient application and made unsupported submissions about the respondent's alleged concession of plan inaccuracy. Upon inquiry by the court, she changed tack, however she was not able to point to evidence supporting the submissions she had made.

[29] In *KSL v AL*⁵ the SCA held that:

⁵ *KSL v AL* (Case no 356/2023) [2024] ZASCA 96 (13 June 2024) (references omitted).

‘Section 19(b) of the Superior Courts Act 10 of 2013, empowers this Court to receive further evidence on appeal. The criteria as to whether evidence should be admitted are: the need for finality; the undesirability of permitting a litigant who has been remiss in bringing forth evidence and to produce it late in the day; and the need to avoid prejudice. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*, the Constitutional Court, referring to s 22 of the repealed Supreme Court Act 59 of 1959 which is similar to s 19(b) of the Superior Courts Act, cautioned that the power to receive further evidence on appeal should be exercised ‘sparingly’ and that such evidence should only be admitted in ‘exceptional circumstances’. Furthermore, in *O’Shea NO v Van Zyl NO and Others*, this Court held that one of the criteria for the late admission of the new evidence is that such evidence will be practically conclusive and final in its effect on the issue to which it is directed.’⁶

[30] The first appellant failed to meet the threshold required for new evidence on appeal. The application for leave to adduce further evidence is accordingly refused.

[31] Reverting to the aspect alluded to above, namely that the court was informed by Ms. Essa that the unlawfulness of the plans had been conceded by the respondent, when no such concession was made, it is necessary to emphasise the paramount duty of legal practitioners to the court over clients, requiring scrupulous honesty, integrity, and compliance with professional conduct standards.

[32] Legal practitioners are officers of the court, with onerous duties to uphold justice and the rule of law. The key duties of an advocate were summarised in the English Court of Appeal’s judgment in *Lumsdon v Legal Services Board* as follows⁷:

‘It is well established that on occasions the need to comply with the twin duties to the court and to the client may, in Mr Dutton’s phrase, pull the

⁶ At para 13.

⁷⁷ *Lumsdon v Legal Services Board and Others*, [2013] EWHC 28 (Admin) at para 57. See: <https://ethics.bar/wp-content/uploads/2019/02/lumsden-others-v-lsb-others-extract.pdf> .

advocate's loyalty in opposite directions. In *Hall v Simons* [2002] 1 AC 615 Lord Hoffmann said (at 686E):

'Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not waste time on irrelevancies even if the client thinks that they are important.'

[33] Having regard to the principles adumbrated above, the manner in which this appeal has been conducted by the appellants is to be strongly deprecated.

[34] I turn now to the merits of the appeal.

The merits

[35] The appellants separately rely on a total of 42 separate grounds of appeal. This court will focus on the dispositive issue, namely, whether the installation of cameras with a line of sight into the respondent's property amounts to an unjustified infringement of his right to privacy.

[36] In determining the matter before it, the court *a quo* considered various factors, including the extent of interference (line of sight into the property), duration of interference (24-hour surveillance capability), sensitivity of the harm caused, possibility of avoiding or mitigating harm by repositioning cameras and whether the nuisance was accompanied by malice.

[37] The court found that the repositioning of the cameras to eliminate line of sight into the respondent's property, which the appellants refused to contemplate, was the most '*fair, reasonable and least invasive means of resolving the dispute.*'

[38] The first appellant's case centres firstly, on her being improperly joined as a party since cameras were installed, owned and operated by the second appellant, and secondly, challenges to the respondent's allegedly fraudulent floor plans.

[39] Ms. Essa expressly abandoned the misjoinder defence. She also did not pursue the argument that motion proceedings were inappropriate due to a foreseeable dispute of fact, an argument that had been pursued by the second appellant.

[40] The argument advanced by Mr. Dunn in his heads of argument was that 'the most critical and devastating aspect of the first appellant's case was her comprehensive challenge to the accuracy and legitimacy of the Respondent's floor plans, upon which the entire case was premised.'

[41] This line of argument appears to proceed from the premise that the respondent's case was somehow based upon floor plans. This contention is baffling. The impugned plans do not have any bearing on the issues which the court *a quo* was called upon to determine. The crucial fact, which is not in dispute, is that the second appellant has had cameras installed with a line of sight into the respondent's property. Where the parties part ways is the extent of such line of sight, and whether this intrusion is justified considering the appellants' security concerns.

[42] Regarding the extent of the line of sight, most revealing are the first appellant's screenshots of the view of the cameras into the respondent's property. It is apparent from these screenshots that the viewing angle includes the respondent's side of the boundary wall, the courtyard, and a part of his swimming pool and entertainment area.

[43] Ms. Essa conceded that this constituted an invasion of the respondent's privacy. The only pertinent question which then arises is whether such an invasion is justifiable.

[44] The second appellant's evidence was that he installed the cameras to protect the first appellant and himself and the property, especially in the face of 'extreme load shedding and extended periods of blackouts, which leave it vulnerable in the dark, and more so when it is next to a vacant property'. He states as follows:

'I have a right to my safety and protection and to take steps in accordance thereto. I'm uncertain why the applicant, who is never even present, nor resides at the property for approximately 11 months a year, would assume that such an installation has anything at all to do with him.'

[45] When pressed as to why the cameras suddenly became necessary when the respondent's property is unoccupied for 'approximately 11 months' of the year, and that this has been the case since 2008 when the respondent redeveloped the property, Ms. Essa contended that it is due to security concerns and the rise in crime in the area. This appears to be the high watermark of the appellant's argument that the invasion of the respondent's privacy is justified, considering their security concerns.

[46] The first appellant, who contended before the court *a quo* that she should never have been joined, sought to introduce photographic evidence 'showing how the Respondent's unlawfully constructed structures created easy access points that could be used by intruders to access the Appellants' property.' She averred that contractors regularly access these 'unlawful structures' and this makes the appellants vulnerable.

[47] The further string to the appellants' bow is that the areas that the cameras could potentially observe are already subject to existing court orders and agreements that rendered them 'non-trafficable' and restricted the respondent's use of them. The appellants contend that the respondent is in contempt of the order of Bozalek J, despite no such finding or order having been made.

[48] The only reference to 'non-trafficable area' in the order of Bozalek J, issued on 10 October 2016, is in paragraph 1.3 thereof, in terms of which the respondent was directed 'to retain the roof of the garage as a non-trafficable area.'

[49] Even on the appellants' version, the line of sight of the cameras extends beyond merely capturing the roof of the garage. It captures the respondent's courtyard, a corner of the swimming pool, and, according to the respondent, the interior of one of the bedrooms. In any event, the fact that an area is described as non-trafficable (and should therefore not be used as a thoroughfare) does not mean that it can be surveilled around the clock by neighbours for any reason whatsoever.

[50] Which brings us to the issue at the heart of this matter, privacy.

[51] The startling proposition advanced by the first appellant in her first set of heads of argument⁸ is that 'the actual line of sight was less than minimal and related only to areas where the respondent had no legitimate expectation of privacy due to existing legal restrictions'. This contention has no foundation, either in fact or in law. By the appellants' own admission, the cameras capture 'trafficable' areas, including the respondent's pool, entertainment area and courtyard. This intimate and private domain of the respondent's is under 24-hour surveillance and video monitoring.

[52] It was shown in the proceedings *a quo* that in respect of camera 'C1', approximately 50% of its viewing angle in respect of camera 'C2', and approximately 90% of the viewing angle, is directed at the respondent's property.

[53] Mr. Deon February (Mr. February), who installed the cameras at the behest of the second appellant, states *inter alia* that the positioning of the cameras is 'simply to provide surveillance of a potential intruder gaining access from a neighbouring property.' He concludes that:

'The current views of the camera cannot be adjusted any further without affecting their utility and the security benefit they give to the second appellant as, by adjusting them, this will then cause a decrease in the picture quality by generating a glare at night. Were the cameras to be angled more towards the wall of [...] B[...]. This would defeat the entire purpose of the security system.'

⁸ Supplementary Heads of Argument were delivered on her behalf on 7 July 2025, and a further note on 12 August 2025.

[54] Notably, Mr. February does not deny that there are alternative locations where the cameras can be mounted to enhance the appellants' security, but without intruding on the respondent's privacy.

[55] Considering the evidence in totality and in particular the 451-page answering affidavit⁹ of the first appellant, which is replete with not only irrelevant matter, but also vexatious and scurrilous allegations against the respondent and various other parties, the ineluctable conclusion is that the security concerns are secondary to the first appellant's ire at the structures on the respondent's property which she claims do not conform to the applicable regulations.

[56] The first appellant annexed photos which she took of the respondent's open bedroom door to her papers, to demonstrate that he does not have the curtain permanently drawn. The respondent describes this as 'familiar conduct'. He states that the first appellant has, on several occasions, taken photographs and recordings of the goings-on at his property. He describes the first appellant as a 'habitual offender of his privacy.'

[57] Turning now to the relevant legal principles, in the first appellant's supplementary heads of argument, Mr. Dunn cites as 'The Most Directly Relevant Precedent' the decision in this division of *Dorland and another v Smits*¹⁰ (*Dorland*). The argument advanced on behalf of the first appellant, both in her heads of argument and during oral argument by Ms. Essa, was that *Dorland* 'provides the most directly relevant authority for balancing legitimate security measures against neighbour privacy concerns.'

[58] In argument, the court enquired from Ms. Essa how reliance could be placed on this decision when it dealt solely with a neighbour's objection to electrified fencing of a common boundary wall as constituting a nuisance and danger and did not touch upon issues of privacy.

⁹ Including annexures.

¹⁰ *Dorland and another v Smits* 2002 (5) SA 374 (C).

[59] Ms. Essa again sought to distance herself from Mr. Dunn's heads of argument. Mr. Dunn, in his further note, referred to an excerpt from the judgment where the court held that the installation of electrified fencing represents a '*proper exercise of their rights.*'

[60] What is clear is that *Dorland* is not authority for what Mr. Dunn contended it was. It does not at all deal with the right to privacy at all.

The right to privacy: The Evolution of Privacy Rights Through Constitutional and Common Law

[61] Section 14 of the Constitution guarantees constitutional protection of privacy, reinforcing and strengthening common law standards.¹¹ The Supreme Court of Appeal has determined that the right to privacy is a basic right safeguarded by the Constitution. Individuals possess the right to be free from intrusion or public disclosure of personal information or affairs.

[62] The jurisprudence of the Constitutional Court has evolved a nuanced interpretation of privacy standards. In *Khumalo and Others v Holomisa*¹² (*Holomisa*), the Constitutional Court observed that:

‘..there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity.’

[63] The Constitutional Court in *Gaertner v Minister of Finance*¹³ emphasised that the right to privacy is an important constitutional right which, ‘embraces the right to

¹¹ Section 14 of the South Africa Constitution of the Republic of South Africa enshrines the right to privacy which provides:

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 was infringed.’

¹² 2002 (5) SA 401 (CC) at par 27.

¹³ *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) at para 47

be free from intrusions and interference by the state and others in one's personal life'.

[64] In *Hyundai Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.*¹⁴ Langa DP held that 'privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings and less intense as it moves away from that core'.

[65] It is abundantly clear that the cameras limit the respondent's right to privacy. The question which then arises is whether that limitation is reasonable and justifiable under section 36(1) of the Constitution.¹⁵

[66] Section 36 provides as follows:

'Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

[67] The Constitutional Court has held that the invasion of an individual's privacy infringes the individual's cognate right to dignity,¹⁶ a right so important that it infuses

¹⁴ 2001 (1) SA 545 (CC) (*Hyundai*) at para 18.

¹⁶ See *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* 2021 (3) SA 246 (CC) at para 28, citing at n 48 the relationship between the rights to privacy and dignity as highlighted by O'Regan J in *Khumalo v Holomisa* at para 27.

virtually all other fundamental rights, and has been aptly described as ‘a cornerstone of our Constitution’.¹⁷

[68] The appellants have manifestly failed to show that the limitation of the respondent’s right to privacy is justified. They failed to deal with the less restrictive means which could have been employed to achieve the purpose of securing their property, such as electric fencing or a sophisticated alarm system.

[69] The case made out by the appellants is woefully short of what is required in terms of section 36. It is accordingly clear that the limitation of the respondent’s right to privacy and to dignity is not justified.

Nuisance

[70] The respondent contended that the appellants’ conduct also constituted an actionable nuisance. Nuisance occurs when a neighbour interferes with an owner’s use and enjoyment of his or her land. Nuisance inherently arises when a neighbour disrupts or interferes with an owner’s use and enjoyment of their property.

[71] In the case of *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and others*¹⁸, nuisance is defined as ‘a type of delict resulting from a wrongful infringement of the obligation imposed by common law on an individual towards their neighbours, this obligation being the counterpart of the right that neighbours possess to utilise and occupy their properties without undue interference.’

[72] The essential factor is whether the interference is deemed unreasonable. Not all interferences qualify as actionable nuisances. The reasonableness test necessitates an evaluation of many variables, including the degree and scope of interference, length, timeliness, the plaintiff’s vulnerability to injury, potential for

¹⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 28.

¹⁸ *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and others* 2010 (5) SA 367 (WCC) at par 141.

mitigation, and the presence of malice in the action. The following have served as guidelines¹⁹:

- 72.1 The measure or extent of the interference.
- 72.2 The suitability of the plaintiff's use.
- 72.3 The duration of the interference.
- 72.4 The time the interference took place.
- 72.5 The sensitivity of the plaintiff to the harm.
- 72.6 The possibility of avoiding or mitigating the harm; and
- 72.7 What the motive of the nuisance was and whether it was accompanied by malice.

[73] In surveillance scenarios, these conventional annoyance elements immediately correlate with privacy issues. Continuous and relentless monitoring, as outlined in the case material, constitutes a type of interference that transcends physical intrusion, encroaching on a person's psychological and emotional well-being. The 24-hour permanent and invasive scrutiny is a form of incessant intrusion that surpasses typical neighbourhood tolerance thresholds.

[74] As contended by Mr. Steenkamp on behalf of the respondent, if the appellants' complaint was about a proverbial nosy neighbour who peeked over the common boundary wall from time to time, it may well have been arguable that the interference was not an unreasonable, actionable nuisance. The infringement *in casu*, however, is persistent and unrelenting. There is no reprieve for the respondent, his family and his guests, who must live under 24-hour permanent and invasive scrutiny. This leads into the issue of the infringement of the respondent's constitutional right to privacy and dignity.

[75] The court *a quo* found, correctly in my view, that considering *inter alia* the extent and duration of the interference created by the surveillance of the respondent's property, the sensitivity of the respondent to such harm, the possibility of avoiding or mitigating the harm and the likelihood that such interference was

¹⁹ LAWSA (Online ed) *Nuisance* at para 175 – 181; Van der Walt, *The Law of Neighbours*, 1st Ed at page 282.

accompanied by malice the appellants' conduct was unreasonable and constituted an actionable nuisance.

The Intersection of Nuisance and Constitutional Right to Privacy

[76] The integration of nuisance doctrine with constitutional privacy rights establishes a robust protective framework. The pool and entertainment areas mentioned in the cases serve as essential private spaces where individuals can reasonably anticipate a lack of intrusion. These areas deserve increased constitutional protection due to their association with recreational activities, possible stages of undress, and the most intimate and private family interactions. The interplay of location (private property), activity (recreation), and reasonable expectation (freedom from observation) establishes what constitutional jurisprudence acknowledges as areas warranting protection.

[77] In *Huey Extreme Club v Mcdonald t/a Sport Helicopters*²⁰, one of the parties filmed conduct which it deemed unlawful on the part of the other even though such filming was taking place in a public setting, the court stated as follows:

'The applicant operates in the public sphere, hence he has chosen to operate outside the 'intimate core of privacy'. However, to suggest that the applicant has lost the right to privacy *in toto* does not sit well in my mind. The invasion of privacy will only be justified where the *boni mores* of the community, such as public safety, dictate that the limitation is reasonable in the light of the interests sought to be protected. The invasion of privacy, even if permissible, must only go as far as is reasonably necessary. Therefore, in this instance, the filming of the applicant's activities by the respondent should only be as necessary as to ensure that the interests of public safety are met.'

[78] It follows that the bar for the justification of the filming of another in a private setting will be significantly higher. The appellants sought to rely on the *Huey*

²⁰ 2005 (1) SA 485 (C) at par 33.

judgment in support of their appeals; however, this decision in fact militates against their argument.

[79] Traditional nuisance analysis evaluates whether interference was ‘accompanied by malice,’ whereas constitutional privacy doctrine is increasingly acknowledging that malicious surveillance is especially concerning. The significance of malice in the analysis of both nuisance and privacy should not be overlooked. The deliberate design of surveillance systems distinguishes them from unintentional breaches of privacy. For a nuisance to be actionable, it may not require the same standard of malicious intent, rather emphasising the objective reasonableness of the interference.

[80] The persistence and scope of surveillance are crucial considerations. Systematic and continuous monitoring is significantly different from occasional observation. Courts acknowledge that digital cameras have become more affordable, compact, and easily connected, thereby making extensive surveillance more readily accessible and potentially more invasive.

[81] Although few South African judgments expressly address neighbour surveillance infringements by monitoring cameras, our courts have established a strong body of privacy law through the *actio iniuriarum* and constitutional privacy rights.

[82] In the recent decision of *Botha v Smuts*²¹ (*Botha*), the Constitutional Court observed that privacy ‘is an individual condition of life characterised by seclusion from the public, publicity and public scrutiny’.²² Referring to *Bernstein v Bester NNO*²³, the seminal case on the constitutional right to privacy, the apex Court acknowledged the difficult task of defining the scope of the right to privacy:

²¹ *Botha v Smuts and Another* 2025 (1) SA 581 (CC) (9 October 2024).

²² *Ibid* at par 84.

²³ *Bernstein v Bester NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (*Bernstein*).

‘The nature of privacy implicated by the ‘right to privacy’ relates only to the most personal aspects of a person’s existence, and not to every aspect within his/her personal knowledge and experience’.²⁴

[83] The case of *Botha*, although not relating to CCTV surveillance between neighbours, establishes principles that are clearly applicable to such disputes. Common law safeguards individuals against neighbour surveillance under certain conditions, such as when the surveillance is criminal or voyeuristic in nature, when the monitored area is one where privacy is reasonably expected, where the intensity of the surveillance results in a nuisance, or when the cameras are installed as part of threatening conduct in a neighbourhood conflict.

[84] In *Holomisa*²⁵, the court recognised that the constitutionally protected right to privacy acknowledges that individuals possess a right to a domain of intimacy and autonomy that must be safeguarded from intrusion. The court’s definition of privacy, which includes both intimacy and autonomy, holds considerable importance.

[85] The intimacy component acknowledges that individuals possess a rightful expectation to preserve personal relationships, thoughts, and experiences without external interference. The autonomy dimension recognises the importance of privacy in fostering self-determination and shaping individual identity. The combination of these elements establishes a thorough understanding of privacy, which underpins contemporary applications of the *actio iniuriarum*.

[85] The Constitutional Court’s unequivocal acknowledgement that privacy ‘extends beyond physical intrusion to include unwarranted observation and surveillance’ constitutes an important broadening of conventional *actio iniuriarum* protections. Historically, the action relied mainly on physical violations of dignity, including assault and defamation. The *Holomisa* decision acknowledges that in contemporary society, infringements on personal rights can manifest through more nuanced, yet equally intrusive methods.

²⁴ *Bernstein* at para 79.

²⁵ *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 27.

[86] This expanded interpretation recognises that advancements in technology and changes in social conditions demand a more evolved understanding of what defines an injury to personality. Unjustified observation and surveillance can inflict psychological damage and undermine human dignity as effectively as physical intrusion.

[87] The court's approach in *Botha* demonstrates a recognition that the harm safeguarded by *actio iniuriarum* extends beyond physical injury to include the more comprehensive notions of human dignity and personal autonomy.

[88] Having regard to the principles set out above, community norms or *boni mores* would likely deem systematic surveillance of a neighbour's private property as unjust and excessive.

[89] The portions of the respondent's property which are constantly surveilled by the cameras, including the pool and entertainment area, are clearly a zone of 'intimacy and autonomy,' warranting constitutional safeguarding from intrusive observation.

[90] The designation of the respondent's pool and entertainment facilities as 'intimacy and autonomy' zones directly reflects the Constitutional Court's rationale in *Holomisa*. These areas, albeit perhaps observable from specific viewpoints, represent private territories where individuals justifiably anticipate conducting personal activities without systematic surveillance.

[91] The constitutional safeguarding of such areas acknowledges that privacy encompasses more than total isolation; it involves maintaining environments where persons can genuinely conduct themselves without the constraining influence of unwarranted observation.

[92] The recognition that privacy includes both intimacy and autonomy guarantees that constitutional safeguards cover the entirety of human actions, which may be potentially jeopardised by technology surveillance.

[93] The safeguarding of geographical privacy and shielding specific physical locations from unwarranted observation constitutes a fundamental aspect of constitutional democracy that technology monitoring jeopardises.

Conclusion

[94] The appellants' concerns regarding security, whether real or perceived, cannot trump the respondent's fundamental and constitutionally protected right to privacy. The cameras constitute a clear violation of the respondent's inner sanctum.²⁶

[95] The respondent in the proceedings *a quo* established that he has a subjective expectation of privacy that society recognises as objectively reasonable. This was described in *Botha*²⁷ as the 'test of dual expectations' or the *Bernstein* test.

[96] For all the reasons set out above, the installation of the cameras has not met the threshold of reasonableness, particularly in circumstances where the appellants failed to consider the alternative and far less intrusive options proposed by the respondent, such as electrified fencing, burglar bars or a security system with motion detector beams.

[97] I am of the view that the court *a quo*'s findings, in particular that the current positioning of the cameras, which allows visual monitoring of the respondent's property, constitutes an invasion of his privacy, cannot be faulted. I can find no material misdirection in the court's analysis of the evidence.

[98] In the circumstances, there is no merit to the appeal, which accordingly falls to be dismissed.

Costs

²⁶ See *Bernstein* at para 67.

²⁷ *Botha* above n 13 at para 96.

[99] In *Public Protector v South African Reserve Bank*²⁸, the Court held that costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. The Constitutional Court cited the Labour Appeal Court in *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA*²⁹, where it was stated as follows:

“[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

[100] The conduct of the appellants’ legal practitioners, which has been addressed in exhaustive detail above, is, in my view, objectionable, vexatious and deserving of a punitive costs order.

[101] The following order shall issue:

1. The first appellant’s application to introduce further evidence on appeal is dismissed, with costs.
2. The appeal is dismissed.
3. The first and second appellant’s shall pay the costs of the respondent on an attorney and client scale, the one paying the other to be absolved.

M HOLDERNESS
JUDGE OF THE HIGH COURT

²⁸ *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 8.

²⁹ *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC).

I agree and it so ordered

L NUKU
JUDGE OF THE HIGH COURT

I agree

S O'BRIEN
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Appearance for First Appellant:	Adv. N Essa
Instructed by:	TJC Dunn Attorneys
Appearance for Second Appellant:	Adv. N Essa
Instructed by:	Barry Varkel Consulting
Appearance for Respondent :	Adv. JP Steenkamp
Respondent's Attorneys:	Hofmeyr Attorneys