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HAS THE BALANCE BEEN STRUCK? THE DECISION IN *JOHNCOM MEDIA INVESTMENTS LIMITED v M* 2009 4 SA 7 (CC)

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1 Introduction

In 2002 the South African Law Commission (SALC)¹ prepared a report on the constitutionality of section 12 of the Divorce Act², and highlighted various reasons why this section could not pass constitutional scrutiny. However, section 12 was declared unconstitutional only in 2008 by the High Court in *M v Johncom Media Ltd; Johncom Media Ltd v M*³ and later confirmed by the Constitutional Court in *Johncom Media Investments Limited v M*.⁴

The case, which involved, in essence, the competing constitutional rights to privacy,⁵ human dignity,⁶ and freedom of expression,⁷ had been referred to the Constitutional Court (CC) for confirmation of the *court a quo*'s finding that section 12 is unconstitutional. The CC viewed the route it took as the best under the circumstances. If this is indeed so is, however, debatable. This note consists of a summary of the SALC's report, the facts of the case, the *court a quo*'s judgment, the CC's judgment, and a critique of the latter judgment.

2 Law Commission Report

Section 12 of the Divorce Act provides:

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¹ South African Law Commission August 2002 Report, Project 114: Publication of Divorce Proceedings: Section 12 of the Divorce Act (Act 70 of 1979) (hereafter "Law Commission Report").

² *Divorce Act 70 of 1979*.

³ *M v Johncom Media Limited; Johncom Media Limited v M* (2007/06719) [2008] ZAGPHC 36 (11 February 2008) – unreported case.

⁴ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC).

⁵ S 14 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

⁶ S 10 of the Constitution.

⁷ S 16 of the Constitution.

- (1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.
- (2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information-
 - (a) for the purposes of the administration of justice;
 - (b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law;
 - (c) for the advancement of or use in a particular profession or science.
- (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987.
- (4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

The above provision prohibits the publication of any particulars of a divorce action or any information which comes to light during the course of such action, other than the names of the parties to the action, that a divorce action between the parties is pending, and the judgment or order of the court. However, the prohibition does not apply to the publication of any particulars or information for the purposes of the administration of justice; in a *bona fide* law report; or for the advancement of or use in a particular profession or science.⁸

The SALC highlighted the fact that section 12 was an attempt to reflect the *boni mores* prevalent at that time, and that the purpose of the section was to protect spouses and children against unwarranted publicity.⁹ However, developments in the media, both in South Africa and abroad, impacted on the effect of Section 12. Section 12 was also of application in South Africa only. Consequently, the foreign media were not prohibited from publishing the particulars and information relating to divorce proceedings, resulting in the purpose of section 12 being defeated.¹⁰

⁸ Law Commission Report 3.

⁹ Law Commission Report 18.

¹⁰ Law Commission Report 3.

It was also apparent to the SALC that the South African media were not complying with section 12, being of the opinion that the provision was unconstitutional.¹¹ Thus, the constitutionality of section 12 was considered a pressing issue, especially since non-compliance with the provision could endanger legitimate areas of non-disclosure.¹² A balance had to be struck between the competing constitutional rights, namely the rights to privacy, human dignity and freedom of expression. The best interests of a child also played an important role in the SALC's investigation.¹³

With regard to the right to privacy, it is said to be in the truly personal realm¹⁴ and encompasses the right of a person to live his or her life as such a person chooses.¹⁵ However, as a person moves into communal relations and activities, the protection afforded by this right minimises.¹⁶ The South African courts regard the invasion of a person's privacy as an impairment of *dignitas*.¹⁷

With regard to the media's right to freedom of expression, it has been held that the media plays a vital role in our democracy by providing the public with information and a platform for the exchange of ideas which are crucial for the development of a democratic culture.¹⁸

The purpose of the section was to avoid situations where intimate details of the marriage, the parties, and their children are divulged, and in that way to safeguard the individuals' rights to privacy and dignity.¹⁹ In this sense the section could be seen as serving a legitimate government purpose.²⁰ However, at the same time the

¹¹ Law Commission Report 4-5.

¹² Law Commission Report 5.

¹³ Law Commission Report 22.

¹⁴ Currie and de Waal *Bill of Rights Handbook* 318 relying on *Bernstein v Bester* 1996 2 SA 751 (CC); Law Commission Report 65-66.

¹⁵ *NM v Smith* 2007 5 SA 250 (CC) 261G.

¹⁶ *NM v Smith* 2007 5 SA 250 (CC) 261G; Currie and de Waal *Bill of Rights Handbook* 318; Law Commission Report 65-66.

¹⁷ Law Commission Report 54.

¹⁸ *Khumalo v Holomisa* 2002 5 SA 401 (CC) 417D; see further *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 608H–609B; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1209H-I in which it was said that it is the right and a vital function of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity, and thus to contribute to the formation of public opinion.

¹⁹ *Khumalo v Holomisa* 2002 5 SA 401 (CC) 409A, in which it was said that there is a close link between human dignity and privacy in our constitutional order.

²⁰ Law Commission Report 16, 63; Sloth-Nielsen and Du Toit *Trials and Tribulations* 270–271; ss 10 and 12 of the Constitution.

general rule is that our courts are open to the public, and that the media has the right to provide citizens with information and the public the right to receive it.²¹

Although section 12 served a valuable purpose, the SALC was of the view that the effectiveness of the provision could be achieved through less restrictive means, and that if the right to press freedom was weighed against the purpose of section 12, the latter was overly broad.²² The SALC provided four options for reform.²³ Option one involved the repeal of section 12, which would result in no general prohibition on the publication of divorce proceedings. A person wanting to prevent publication would have to request the court to close proceedings in terms of section 16 of the Supreme Court Act.²⁴

Option two provided for the amendment of section 12 by granting courts the discretion to make an order prohibiting any person from publishing any particulars of a divorce action or any information or evidence which comes to light in the course of such action. The order would not apply if the publication was for the purposes of the administration of justice in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law, or for the advancement of or use in a particular profession or science.²⁵

Option three provided that section 12 be amended to grant a court the discretion to make an order granting leave to any party to publish any particulars of a divorce action or any information or evidence which comes to light in the course of such an action.²⁶ A court would, in exercising its discretion, take into consideration section 28(2) of the Constitution. This option would amount to a general prohibition on the publication of any information relating to divorce proceedings, but a court could lift the prohibition in particular circumstances. However, the names of the parties, the date on which the divorce action is pending in a court of law, and the judgment or

²¹ Law Commission Report 8; Sloth-Nielsen and Du Toit *Trials and Tribulations* 269, *Islamic Unity Convention v Independent Broadcasting Authority* 2002 2 SA 294 (C) 310C-D; *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 608D–609B; *Khumalo v Holomisa* 2002 5 SA 401 (CC) 416F–417F; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1209H–1210G.

²² Law Commission Report 73.

²³ Law Commission Report 94.

²⁴ *Supreme Court Act* 59 of 1959; Law Commission Report 94.

²⁵ Law Commission Report 97.

²⁶ Law Commission Report 98.

order of a court may be published, unless the court orders otherwise. A court would be allowed to prohibit publication if, in its opinion, it would not be in the interests of the child or spouses that publication be permitted. Thus, a court hearing the matter would have a discretion to prohibit or allow publication.²⁷

Option four provided for the amendment of section 12 to ensure the anonymity of the parties. Information regarding divorce proceedings could be published without divulging the identities of the parties, especially where children would be involved. The facts of the case and court decisions could be published, provided that the names of the parties; their residential or business addresses; the suburb, town, township or village where they lived; or any other information which would make it easy to identify the parties was not divulged. However, the name of the presiding officer and of the court where the case was heard could be published.²⁸

Although the SALC was of the view that option four was a worthwhile goal, it felt that it would be difficult to ensure the anonymity of the parties in practice, and thus was of the opinion that this option was not the sole solution to the problem.²⁹ In evaluating the submissions received, the SALC came to the conclusion that option three was its preferred option, as it would still amount to a general ban on publication, but courts could be expected to lift the ban in appropriate cases.³⁰

3 Facts of the case

An action was instituted by Mr D who claimed damages from Ms M for the restoration of certain benefits that had been paid to her in terms of a settlement agreement; a partial rescission of the divorce order in which it referred to PD as his son; and an order declaring that PD was not his son, which was based on the allegation that Ms D had misrepresented to him that the PD was his biological son.³¹

²⁷ Law Commission Report 98-99.

²⁸ Law Commission Report 100.

²⁹ Law Commission Report 109.

³⁰ Law Commission Report 109.

³¹ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 10G-H.

While the matter was pending, a newspaper owned by the applicant became aware of it and wished to publish the story, being of the opinion that it would interest its readers. The newspaper approached the parties for comment, which resulted in an urgent application for an interdict against the applicant being brought in the High Court. A similar order was made against the Independent Group of Newspapers, which resulted in no newspaper being able to publish the story.³²

The applicant opposed the confirmation of the interim order in the High Court, and launched a counter-application in which it averred that section 12 of the Divorce Act was unconstitutional as it was too broad, in that it prohibited publication of information falling beyond the scope of the rights it sought to protect.³³

4 High Court Decision

The High Court found that section 12 infringed the right to freedom of expression, which right, the Court held, lies at the heart of democracy. It was held that the free and open exchange of ideas carries its own inherent worth, is a necessary conduit for the proper functioning of a participatory society, and assists in ensuring accountability and responsiveness.³⁴

In reaching his decision Cassim, AJ held that he was influenced by the general rule that courts are open to the public. However, section 12 has an absolute prohibition, which is also unlimited as to time. The provision prohibits publication of all information which comes to light during the course of divorce proceedings, even if such information does not require protection. Furthermore, publication of matters which could be of public interest, even where there are legitimate reasons for such matters being made public, are prohibited by section 12.³⁵

³² *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 11A-E.

³³ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 11E-F.

³⁴ *M v Johncom Media Limited; Johncom Media Limited v M* (2007/06719) [2008] ZAGPHC 36 (11 February 2008) 5[9].

³⁵ *M v Johncom Media Limited; Johncom Media Limited v M* (2007/06719) [2008] ZAGPHC 36 (11 February 2008) 5-6[9].

Cassim, AJ was persuaded that a finding that section 12 is unconstitutional would not result in any injustice as a court retains a discretion to order the non-publication of material which unduly and unfairly infringes the private lives of litigants. In such instances, a court will weigh up the competing interests of the right of freedom of expression and that of privacy in arriving at a just and fair decision. Similarly, the rights of children will be protected, bearing in mind that the court is the upper guardian of all children and that section 8(3) of the Child Care Act³⁶ prohibits the publication of any information relating to proceedings in a children's court which reveals or may reveal the identity of any child who is or was concerned in those proceedings unless the Minister or the presiding commissioner are of the opinion that this would be just and equitable in the circumstances. The court as upper guardian of all children will always bear in mind the need to protect children.³⁷

Regarding the interim order, Cassim, AJ held that the judge who granted it should have weighed up the rights to privacy as compared to the public's interest in what was regarded as the first paternity fraud suit in South Africa. Access to the matter was not prohibited and outsiders were not prevented from perusing the pleadings, but publication of such proceedings was banned. According to Cassim, AJ the judge who granted the interim order should have interpreted section 12 restrictively, placing greater emphasis on prejudice and a balance of convenience, and the right of the public to information.³⁸

Section 12 was thus declared unconstitutional and the matter was referred to the CC for confirmation.

5 The Constitutional Court's Decision

The CC was faced with the task of maintaining the correct balance between the competing interests involved.³⁹ In order for the CC to confirm the High Court's decision, two questions required answering: firstly, if section 12 is unconstitutional,

³⁶ Child Care Act 74 of 1983; repealed by S. 74 of the Children's Act 38 of 2005.

³⁷ *M v Johncom Media Limited; Johncom Media Limited v M* (2007/06719) [2008] ZAGPHC 36 (11 February 2008) 6-7[12].

³⁸ *M v Johncom Media Limited; Johncom Media Limited v M* (2007/06719) [2008] ZAGPHC 36 (11 February 2008) 8[16].

³⁹ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 10C.

and secondly, if the High Court's decision was a just and equitable order as contemplated in section 172(1)(b) of the Constitution.⁴⁰

The answer to the first question lies in the interpretation of section 12 measured against the provisions of section 16 of the Constitution.⁴¹ It was held that textually section 12 of the Divorce Act resulted in the prohibition of the publication of information that comes to light during the hearing of a divorce case, regardless of the nature of the information and whether or not the publication would infringe the rights of the divorcing parties and the interests of their children.⁴² Section 16 of the Constitution, the Court said, defines the ordinary limits of the right to freedom of expression, and that over and above the defined scope there may be limitations placed on this right, provided that they meet the requirements of section 36 of the Constitution.⁴³

In determining whether section 12 infringes the right to freedom of expression, a two-stage test must be applied: if the disputed legislation limits the rights in the Bill of Rights, and if so, whether or not the limitation can be justified in terms of section 36 of the Constitution.⁴⁴ The Court held that section 12 did not fall within any of the exceptions listed in section 16(2)⁴⁵ of the Constitution, yet it prohibited publication of any information which became known during a divorce action or any proceedings related to such an action. Thus, the media's right to impart information is limited.⁴⁶

To determine whether a limitation is reasonable and justifiable in terms of section 36 involves the balancing of competing interests, which requires taking into account the considerations contained in the section.⁴⁷ To effect a proper balance, the right infringed must be identified and its nature and importance in a particular context

⁴⁰ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 13B-C.

⁴¹ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 13D-E.

⁴² *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 14A.

⁴³ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 14E-F.

⁴⁴ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 15A-C; this is in accordance with the test formulated in *Coetzee v Government of South Africa; Matiso v Commanding Officer, Port Elizabeth* 1995 4 SA 631 (CC). It should be noted that the case dealt with provisions in the Interim Constitution.

⁴⁵ Which deals with the types of expression that are not protected.

⁴⁶ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 15D.

⁴⁷ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 15E-F.

must be considered.⁴⁸ The purpose of the limitation must be determined, together with its extent, in order to ascertain the relation between the limitation and the purpose it is designed to achieve. Also, whether the purpose can or cannot be achieved through less restrictive means must be considered.⁴⁹

According to the Court, section 12 limited the right to freedom of expression in a manner that not only affected the media, but also the right of members of the public to receive information. At the same time, the purpose of the legislation was apparent. Its objective was to protect the privacy and dignity of people involved in divorce proceedings, particularly children. However, the section affected the general rule that courts are open to the public.⁵⁰

With regard to protecting the rights of children, it was said that apart from going too far, the provision was not efficient in achieving its purpose. According to the Court, almost thirty years ago the legislature chose to allow the publication of the identities of children as well as of parties to a divorce action, and at the same time prohibited publication of any evidence at a divorce trial, whether or not publication or non-publication would protect the dignity and privacy of the relevant parties. The Court was of the view that another way of protecting children and parties would be to prohibit the publication of the identities of such persons as well as any evidence which could reveal the identities of such persons. Thus, the purpose could be achieved by less restrictive means.⁵¹

The Court held that the limitation could not be justified and in terms of section 172(1)(a) of the Constitution, the Court was empowered to declare legislation inconsistent with the Constitution invalid, to the extent of its inconsistency. According to the Court, there was no other alternative but to declare the whole of section 12 inconsistent with the Constitution.⁵²

⁴⁸ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 16C.

⁴⁹ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 16C-D.

⁵⁰ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 17A-D.

⁵¹ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 18B-D.

⁵² *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 18D-F.

The only issue argued before the Court related to whether or not any order should be made in terms of section 172(1)(b)(ii) and the ambit of such an order. Three options were provided during argument.⁵³

The Minister had requested that the declaration of invalidity be suspended for approximately 18 months so as to afford an opportunity to have the section amended to conform to the principles of the Constitution. The Court felt that such an order would not be just as it would entail that an overly broad law would remain in force.⁵⁴ One cannot fault the Court for not giving effect to the Minister's request. To have done so would have meant that while the provision was being amended, the right to freedom of expression, which was the very reason for the legislation's being challenged, would continue to be limited.

The second option that the Court considered was the applicant's contention that there was no need for an order of suspension,⁵⁵ based on the High Court's reasoning that a court retains a discretion to order non-publication of material which unfairly infringes on the private life of a litigant; and that children's rights are also protected in terms of section 8(3) of the Child Care Act, which prohibits the publication of the identities of children or any information which could reveal the identities of children who are involved in proceedings in a children's court.⁵⁶

The Court held that, if no order that mitigates the effect of striking down the provision is made, the difference between the position of a children's court and high court would be manifest. With regard to children's courts, there is a limited prohibition on publication. However, a high court is required in the absence of any order mitigating the resultant position to consider in every case before it what information should or should not be published. This, the CC felt, would place an undue burden on high courts and would require in many cases that the party being prejudiced place relevant information before the High Court before such a decision is made. This

⁵³ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 18H-I.

⁵⁴ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 19C-D.

⁵⁵ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 18I.

⁵⁶ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 19F-H.

proposal would thus favour the media, as no responsibility would be placed on it, and would not protect the indigent litigant.⁵⁷

The *Amicus Curiae*⁵⁸ provided the Court with the option of suspending the order of constitutional invalidity coupled with an order of reading-in. A court would be able to prohibit publication during the period of suspension. Like the option proposed by the applicant, the Court felt that this option would similarly place an undue burden on the courts. A court must in every case decide whether, and the extent to which, publication should be allowed. This proposal would also make it more difficult for the media to publish.⁵⁹

The order made by the Court was to prohibit all publication of the identity of and any information that might reveal the identity of any party or child in any divorce case before any court, which was one of the options provided for in the SALC Report⁶⁰ and the position adopted in the Child Care Act.⁶¹ The Court emphasised that it had adopted the approach of not disclosing the identities of children and vulnerable parties in appropriate cases. This, the Court felt, would not place an undue burden on the courts, nor would it impose a particular burden on parties seeking publication or those parties seeking remedies on the basis that they might be prejudiced by publication.⁶² The Court held that the order was binding and would apply to all court proceedings and a failure to comply with such order would amount to contempt of court. The Court, however, left room for the publication of the identity of and any information that might reveal the identity of the parties or any child in divorce proceedings in exceptional circumstances.⁶³

⁵⁷ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 20A-B.

⁵⁸ The Media Monitoring Project.

⁵⁹ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 20B-G.

⁶⁰ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 19B.

⁶¹ *Child Care Act* 74 of 1983, s 8(3), repealed by s 74 of the *Children's Act* 38 of 2005; see also s 11(2)(a) of the *Domestic Violence Act* 116 of 1998 which provides that no person shall publish in any manner any information which might directly or indirectly reveal the identity of any party to the proceedings.

⁶² *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 21A-C.

⁶³ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 21G-H-22A.

5 Criticism

Although section 12 has been declared unconstitutional, the CC by no means prevented the legislature from intervening.⁶⁴ It is unfortunate that, despite being aware that section 12 was possibly⁶⁵ unconstitutional, the legislature never remedied the problem, an omission which has ultimately resulted in a court having to clarify the issue. The reality of the legislature's lack of intervention meant that during this time, where non-disclosure was legitimate, the interests of the parties to divorce proceedings, as well as of their children, were endangered as a result of non-compliance with the provision by the media.⁶⁶ As said by Cassim, JA, inaction on the part of a decision-maker is tantamount to indifference.⁶⁷

Anonymous publication was one of the options proposed by the SALC as acknowledged by the CC. However, what is not apparent from the judgment is whether or not the CC considered the concerns raised by the SALC regarding anonymous publication. In the SALC Report it was said that this option might have limited value for parties involved in a high-profile case, and that the chances of preventing such information leaking out were slight. The effect of anonymous publication might further create social problems as a result of curiosity on the part of the public, which could consequently cause speculation as a result of which the private lives of many unsuspecting personalities might come under scrutiny, which would in turn create a loss of privacy.⁶⁸ Could high-profile cases possibly be those which would fall under "exceptional circumstances"? If so, the court would have to decide whether the identity of the parties or information which would reveal the identity of the parties could be published. Would courts look at whether or not publication would be in the interests of justice (which is a difficult concept in itself)⁶⁹ to determine if a particular matter falls within the category of "exceptional

⁶⁴ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 21D-E.

⁶⁵ See Law Commission Report and Sloth-Nielsen and Du Toit *Trials and Tribulations* 266-277 on why it was argued that s 12 would most likely not survive constitutional scrutiny.

⁶⁶ Law Commission Report 5.

⁶⁷ *M v Johncom Media Limited; Johncom Media Limited v M* (2007/06719) [2008] ZAGPHC 36 (11 February 2008) 6[11].

⁶⁸ Sloth-Nielsen and Du Toit *Trials and Tribulations* 277, Law Commission Report 101.

⁶⁹ Carstens 2008 *Obiter* 297.

circumstances"? When would it be in the interests of justice to allow the publication of the parties' identities?

A further concern raised was that this option is unworkable in practice, since it is not possible to determine if the details in a story would enable the public to establish a party's identity.⁷⁰ It could also be argued that the public has an interest in knowing the status of the parties concerned, and should therefore be informed accordingly.⁷¹ These concerns were not addressed by the Court.⁷² It is therefore not clear how the Court could state that the order it made was the most suitable under the circumstances.

It is thus recommended that measures be put in place to assist the media in this regard, especially where the proceedings involve a high-profile case, in order to ensure that the media does not overstep the boundaries of the court order.

What we know is that the identities of the parties are not to be revealed, nor any information that could lead to revealing the identities of the parties. The CC provided no guidance as to which information could possibly fall within the latter category. In its report the SALC highlighted the following as information which could result in the identity of the parties being identified: the name, title, pseudonym or alias of the person; the address of any premises at which the person resides or works, or the locality in which such premises are situated; the physical description or the style of dress of the person; any employment or occupation engaged in, profession practised, or calling pursued by the person, or any official or honorary position held by the person; the relationship of the person to identified relatives of the person, or the association of the person with identified friends or identified business, official or professional acquaintances of the person; the recreational interests or the political, philosophical or religious beliefs or interests of the person; or any real or personal property in which the person has an interest or with which the person is otherwise associated.⁷³ Does one assume that this information is the same as that which the

⁷⁰ Law Commission Report 108.

⁷¹ Law Commission Report 101.

⁷² *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) 21D.

⁷³ Law Commission Report 101-102. See Clause 38 of the Draft Judicial Matters Amendment Bill, 2010 (DOJ 2010 www.justice.gov.za), which provides a list of information which could result in

CC had in mind? If so, then the concerns raised by the SALC regarding the practical difficulties which anonymous publication could result in, especially in high-profile cases, should not only have been obvious to the Court but should have been addressed as well.

It is also not clear whether the order applies internationally. If not, then the purpose of the order is defeated, as was that of section 12. The order would serve no purpose if it did not apply equally to the foreign media, as the very information which the CC sought to protect could be divulged in foreign newspapers.

Although the CC felt that the order it made would be less burdensome on the High Courts, it still gives the courts discretion to decide in "exceptional circumstances" whether the information should be published or not. Does deciding in exceptional circumstances if the identity of the parties may be published not amount to exercising a discretion? It thus appears that the High Courts will unfortunately be burdened with the very task which the CC attempted to avoid when making its order, namely that of having to decide whether particular information can or cannot be published, a responsibility which could result in a piecemeal approach to striking a balance between the rights involved.

That the CC provided the legislature with an option to intervene also leaves one with the impression that it was not as confident about its decision as it made itself out to be. If the balance between the competing rights had indeed been struck, then there would be no need for the legislature to intervene.

The judgment was criticised for its lack of information also, as substantial submissions had been made to the Court with suggested solutions regarding the development of the rights to privacy and freedom of expression. Although the order aims at protecting the privacy of the adults and children involved in divorce matters, the Court failed to fully engage with the law relating to privacy. Instead, the CC

the identity of the parties being revealed. It should be noted that the type of information is identical (although the wording in Clause 38 is different from the wording in the SALC's Report) to that which was provided by the SALC. It is thus argued that although a context may be given to the type of information the CC had in mind, the legislature should have had regard to the practical difficulties the SALC highlighted in its Report. See further Heaton 2010 *JQR* regarding the various amendments the Bill will bring about in respect of the Divorce Act.

focused mainly on a limitations argument in relation to freedom of expression. This approach, it is felt, resulted in the Court merely replacing one broad law with another, in a matter which required a carefully reasoned decision based on constitutional law.⁷⁴

According to Currie, if one opens almost any work on the right to privacy, whether on law or philosophy, it will begin by lamenting the difficulty of defining the concept.⁷⁵ Neethling is of the opinion that providing clarity on the *de facto* nature of privacy would create legal certainty and enhance the ability of the courts to articulate, develop and apply the principles protecting privacy.⁷⁶ Davis states that recent controversies in the legal community indicate that South Africans may not even be able to agree on the meaning and implications of freedom of expression, much less on the nature of privacy.⁷⁷ The case thus created the perfect opportunity for the CC to assist in giving the conflicting rights a proper context. However, it failed to do so, and it is now up to the High Courts to authorise publication in exceptional circumstances and to develop precedents as to what constitute exceptional circumstances.⁷⁸

It is thus recommended that the legislature make use of the opportunity afforded it by the CC to intervene in order to clarify these concerns and to avoid a piecemeal approach by the High Courts in attempting to strike the balance which the CC failed to do.

6 Conclusion

Although the CC declared section 12 of the Divorce Act unconstitutional, it is felt that the judgment did not do justice to the issues involved in striking a balance between the competing rights involved. It is unfortunate that the CC did not address the matter fully, as this omission now leaves room for possible litigation in respect of an issue which the CC should have addressed. If the legislature fails to intervene, a

⁷⁴ Du Toit 2009 *JQR*.

⁷⁵ Currie 2008 *TSAR* 550; see also Neethling 2005 *SALJ* 18.

⁷⁶ Neethling 2005 *SALJ* 27-28.

⁷⁷ Davis 2008 *SALJ* 214.

⁷⁸ Du Toit 2009 *JQR*.

piecemeal approach in striking a balance between the conflicting rights will be the end result, and it may be a long wait before a balance between rights is finally struck.

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List of abbreviations

CC	Constitutional Court
DOJ	Department of Justice and Constitutional Development
JQR	Juta's Quarterly Review of South African Law
SALC	South African Law Commission
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg