OPINION

UNIVERSITY OF WITWATERSRAND – GENDER EQUITY OFFICE

concerning

THE DISCLOSURE OF DISMISSALS FOR SEXUAL MISCONDUCT

STEVEN BUDLENDER SC

MAWANDE SETI-BAZA

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TABLE OF CONTENTS

INTRODUCTION

1 Our advice is sought by the Gender Equity Office of the University of the Witwatersrand ("**the GEO**").

2 The advice sought relates to the legal risks of the University proceeding to publish the outcome of disciplinary matters, where the employee concerned has been dismissed for misconduct related to gender-based violence.

3 We are instructed as follows:

3.1 The University has a Policy and Disciplinary Procedure on Sexual and Gender-Related Misconduct ("**the Policy**").

3.2 Appendix D of the Policy provides that:

> *"The VCO [Vice-Chancellor's Office], in consultation with the GEO, has the right to publicly disclose the name of the perpetrator and the nature of their offence/s when found guilty. The VCO also retains the right to inform prospective employers, higher education institutions, or other relevant bodies regarding the name of the perpetrator and the nature of their offence/s."*

3.3 This provision confers on the Vice-Chancellor's Office a <u>discretion</u> regarding whether to publish the name and misconduct of a person found guilty of gender-based violence to prospective employers, higher education institutions, or other relevant bodies. However, it does not create an <u>obligation</u> to do so.

3.4 The difficulty, from the point of view of those instructing us, is that the discretion afforded by the Policy to the Vice-Chancellor's Office has

never been exercised in favour of disclosure due to a fear of adverse legal repercussions.

3.5 Instead, the University's practice has been that dismissals are communicated internally, with the perpetrator's identity being kept anonymous and with no information being made available to the public.

3.6 The GEO is concerned about the perceived adverse effects of this practice. It has become aware of several instances in which dismissed perpetrators have subsequently secured alternative employment within the education sector due to the non-disclosure of their GBV-related misconduct. Preserving the anonymity of persons dismissed for gender-based violence may also cause victims to hesitate to pursue accountability. It is accordingly exploring the possible amendment of the Policy to ensure that the reporting of such matters is the norm rather than the exception.

4 Against this backdrop, we are asked for our advice on three main issues:

4.1 Whether such publication may expose the University to liability for defamation;

4.2 Whether such publication may be in breach of the Protection of Personal Information Act 4 of 2013 ("**POPIA**"); and

4.3 Whether such publication may be in breach of the Code of Good Practice on the Prevention and Elimination of Harassment in the

Workplace ("**the Code of Good Practice**") issued in terms of the Employment Equity Act 55 of 1998 ("**EEA**").

5 We deal with each issue in turn.

6 At the outset, however, it is important to clarify that what we are considering is not the disclosure of the alleged wrongdoer before a finding of guilt. As we explain in what follows:

6.1 Disclosing the identity of the alleged wrongdoer before a finding of guilt is made by the University's disciplinary bodies would, as a general matter, give rise to significant legal risks.

6.2 The position is materially different once the person concerned has been found guilty of the misconduct. We limit ourselves to a discussion of this position.

6.3 The position is even stronger where the person concerned has unsuccessfully exhausted or failed to exercise any rights of appeal or review in respect of the finding of guilt and consequent dismissal.

THE RISK OF LIABILITY FOR DEFAMATION

7 Where a statement is made by an entity about a given person, and that person sues for defamation, two key questions arise:

7.1 First, was the statement defamatory?

7.2 Second, if so, can the wrongfulness of the defamatory statement be negated by establishing the existence of one or more defences?

Would the statement be defamatory?

8 In the present case, the answer to the first question is self-evident.

8.1 The question of whether the statement is defamatory has nothing to do with whether the statement was correct, incorrect, justified or unjustified.

8.2 It turns only on the question of whether the statement is likely to injure the good esteem in which the person about whom it is made is held by the reasonable person in society, or in a particular segment of society, to whom it has been published.[1] In other words, does the statement make those who receive it think less of the person concerned?

8.3 In the present context, the answer is clear. A statement by the University that person X has been found guilty of gender-based violence (whether or not he has been dismissed) would unquestionably make those who hear it think less of person X.

8.4 Gender-based violence is rightly regarded with extreme condemnation in our society and public discourse and to have an institution state that person X was guilty of such conduct would certainly make people think less of them.

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[1] *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) at para 91; *Mohamed v Jassien* 1996 (1) SA 673 (A) at 703E-F.

8.5 The statement would therefore be defamatory.

9 We also point out that the University's current practice of communicating dismissals for misconduct associated with gender-based violence internally, whilst keeping the identity of the perpetrator anonymous, may in many cases constitute the publication of defamatory statements. Due to the nature of the University environment, the identity of the perpetrator will be readily identifiable to members of the University community to whom the dismissal is communicated. University employees may, for example, be aware when a colleague has been called for a disciplinary inquiry. Even if the individual's name is not explicitly mentioned in any subsequent communication, many University community members will likely deduce who it pertains to based on their prior knowledge.

The role of the defences

10 But concluding that such a statement is defamatory is only the starting point – not the endpoint. Defamatory statements are frequently made in our society in various contexts, but in many instances, they are lawful and do not give rise to liability under the law of defamation.

11 Once a litigant establishes that a person has published a defamatory statement about them, it is presumed that the publication was both unlawful and intentional.[2] A publisher wishing to escape liability for defamation must then raise

[2] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 13.

a defence that rebuts the presumed unlawfulness of the statement or shows that it was not made to injure its subject.[3]

12 That takes us to the second question: would the University (as the institution making the defamatory statement and potential defendant) be able to invoke one or more defences to exclude liability successfully?

13 It is important to bear in mind that it is the University that would bear the onus of establishing the existence of these defences. Our courts have made clear that this is a full onus – in other words, the University would have to prove its defence on a preponderance of probabilities by pleading and proving the requisite facts.[4]

14 In this regard, while there is no closed list of defences, there are four main defences that have been recognised by our courts to rebut the unlawfulness of a defamatory statement:

14.1 truth and public benefit;

14.2 qualified privilege;

14.3 fair/protected comment; and

14.4 reasonable publication.

15 The last two defences are not especially helpful in the present context.

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[3] *Le Roux* at para 85.

[4] *Le Roux* at para 85; *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1202H.

15.1 The fair/protected comment defence relates to statements of opinion – not statements of fact.[5] A statement that person X has been found guilty of gender-based violence and has been dismissed is a statement of fact.[6] The fair/protected comment is therefore likely of little assistance.

15.2 The reasonable publication defence was developed in the *Bogoshi* matter.[7] It concerns the reasonable publication of false, defamatory statements of fact. But the defence is applicable in the context of publication of defamatory statements by the media, not necessarily other defendants. While there have been some attempts to develop the law to apply to non-media defendants, there is certainly no finality on that issue.[8] There are compelling reasons why defamatory statements made by the media should be treated differently from those made by other persons.[9] It therefore cannot be safely assumed that the reasonable publication defence would apply to a non-media defendant like the University.

15.3 We, therefore, do not focus on the possibility of the University relying on the defences of fair/protected comment or reasonable publication.

16 That leaves the two other defences: truth and public benefit; and qualified privilege.

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5 *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) at para 80.

6 Crawford v Albu 1917 AD 102 at 118-9.

7 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

8 See: *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) at paras 65-68.

9 *Bogoshi* at 1214F-G.

Truth and Public Benefit

17 It would be lawful for the University to publish a defamatory statement which is substantially true, provided that such publication is for the public benefit.[10]

18 The determination of whether a true defamatory statement is made for the public benefit is context-specific and depends on the time, manner and occasion of the publication in question.[11] However, this should cause little difficulty. This is because the publication of the truth about the character or conduct of an individual is also, generally, for the public benefit.[12]

19 Thus the real question is whether the University can prove "truth". In this regard, the University would be required to lay a factual foundation by adducing evidence to demonstrate that the defamatory statement is true and for the public benefit.[13]

20 If all that the University has to do is prove that it is true that an employee has been found guilty at a disciplinary enquiry and has been dismissed, this would obviously be straightforward.

21 But we are concerned that the position may be more complex.

21.1 This is because a court may well find that a statement by the University that an employee has been found guilty of misconduct related to gender-based violence by a University disciplinary body implies to the

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[10] *Independent Newspapers Holdings Ltd v Suliman* [2004] 3 All SA 137 (SCA) at paras 34-38.

[11] *Allie v Foodworld Stores Distribution Centre (Pty) Ltd* [2004] 1 All SA 369 (SCA) at paras 55-6.

[12] *Graham v Ker* (1892) 9 SC 185 at 187. See *Khumalo* at para 36.

[13] *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* 2023 (1) SA 353 (CC) at para 52.

reasonable reader that the employee concerned in fact committed the misconduct at issue.

21.2 The University's envisaged publication is distinguishable from a statement that a complaint of misconduct has been laid against a person which would, self-evidently, have a lesser impact on a reasonable reader.[14] It is not as likely that the reasonable reader would be led to infer that the person against whom the complaint was been laid in fact committed the alleged misconduct.

21.3 If this risk we have highlighted eventuates, the University would have to prove afresh that it is true that the person committed the misconduct concerned. That would be an onerous task, especially given that the onus would rest on the University.

22 We therefore do not consider that truth and public benefit is an attractive defence for the University to rely on.

23 But, in any event, it is likely not necessary for the University to rely on the truth and public benefit defence because the defence of qualified privilege stands on a different footing and is much more attractive.

[14] *Manyatshe* at para 16;

Qualified Privilege

24 The basic premise of this defence is that it is in the public interest that the communication of certain defamatory statements uttered on specified occasions should not be prevented or inhibited by the threat of defamation proceedings.[15]

25 A defence of qualified privilege exists where:

> *"a person publishing the defamatory matter is under a legal, moral or social duty to do so or has a legitimate interest in so doing, and the person to whom it is published has a similar duty or interest to receive it."*[16]

26 The protection conferred by this defence is qualified in that it will be forfeited if the publisher acted with an improper motive.[17] In *Basner v Trigger*, Schreiner JA explained why this is so:

> *"Privileged occasions are recognised in order to enable persons to achieve certain purposes and when they use the occasion for other purposes they are actuated by improper or indirect motives, that is, by 'malice'."*[18]

27 Although the defence of qualified privilege is not concerned with the truthfulness of the publication,[19] proof that the publisher did not believe that the facts were

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[15] Benson v Robinson & Co (Pty) Ltd 1967 (1) SA 420 (A) at 421; *May v Udwin* 1981 (1) SA 1 (A) at 11.

[16] *Ehmke v Grunewald* 1921 AD 575 at 581. See also: *Borgin v De Villiers and Another* 1980 (3) SA 556 (A) at 577 C-G and *Byrne v Masters Squash Promotions CC* (GSJ) 2010 (1) SA 124.

[17] *Tuch v Myerson* 2010 (2) SA 462 (SCA) at paras 11-2.

[18] 1946 AD 83 at 95.

[19] *Borgin* at 578H–579A; *Mohamed* at 710H.

true may give rise to the inference that they were actuated by malice–that is with improper motive.[20]

28 The defences available under the rubric of qualified privilege have been distilled by our courts into various categories, although these categories are not exhaustive.[21] Whether a particular instance is privileged depends upon public policy considerations,[22] which must be grounded in the Constitution and its values.[23]

29 Currently, our law recognises three categories of occasions that enjoy qualified privilege. These are:

29.1 statements published in the discharge of a moral or social duty, the exercise of a right or the protection of a legitimate interest to persons who have a reciprocal duty or interest to receive it;

29.2 statements published in the course of judicial or quasi-judicial proceedings; and

29.3 reports of proceedings of courts, Parliament or public bodies.[24]

30 The category of qualified privilege that provides the strongest defence in favour of the University in these circumstances is the defence that the University made the publication in the discharge of a moral or social duty, the exercise of a right

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[20] *Naylor v Jansen* 2006 (3) SA 546 (SCA) at para 11; *Borgin* 1980 (3) SA 556 (A) at 578H.

[21] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at para 48.

[22] *De Waal v Ziervogel* 1938 AD 112, 120–122.

[23] *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) at para 30.

[24] *Dikoko* at para 48.

or the protection of a legitimate interest to persons who have a reciprocal duty or interest to receive it.[25] In order to successfully invoke the defence of qualified privilege, the University (as the potential defendant) bears the onus of establishing:

30.1 first, that in the circumstances, a reasonable person in the position of the University would believe that a social or moral duty, right or legitimate interest exists that entitles them to make the statement about a particular subject matter or issue;[26]

30.2 second, in the circumstances, a reasonable person in the position of the University would believe that that the audience of the publication has a reciprocal duty, right or interest to receive it;[27] and

30.3 third, that the defamatory statement in question is relevant or "*germane*" to the subject matter or issue.[28]

31 While the University should evaluate each case to determine whether these requirements are met, in our view it would in general be reasonable for the University to conclude that it has a social or moral duty, right or legitimate interest in publicly disclosing the identities of dismissed employees and the nature of their misconduct when found guilty to prospective employers, higher education institutions, other relevant bodies and members of the University community, and

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[25] *Mohamed* at 140 to 141.

[26] *De Waal* at 122–3; *Jordaan v Van Biljon* 1962 (1) SA 286 (A) at 296G–H; *Benson* at 426E–F; *Borgin* at 577E–F; *Neethling v Du Preez, Neethling v The Weekly Mail 1994 (1) SA 708 (A)* at 7801–J.

[27] *Neethling* id.

[28] *Naylor* at para 11; *Borgin* at 579A.

that such parties have reciprocal duties, rights or interests to receive the information.

31.1 It is reasonable to believe that such disclosures would inform prospective employers about the character of the dismissed employees. If a dismissed employee seeks employment elsewhere or associates with other institutions, it is important for those entities to be aware of the dismissed employee's past conduct to ensure the safety of their own members.

31.2 It is also reasonable to believe that the publications would promote accountability, deter gender-based violence, encourage the reporting of gender-based violence and increase transparency. Disclosing the names and nature of the misconduct of employees dismissed for gender-based violence would send a clear message that gender-based violence will not be tolerated and reinforce the University's commitment to address gender-related misconduct and create a safe institutional environment.

31.3 It is also reasonable to believe that the disclosure of such information can empower victims of gender-based violence, showing them that their experiences are taken seriously and that the University supports them.

32 To bring a statement within the ambit of the defence of qualified privilege, the University would also bear the onus of proving that it was relevant or "*germane*"

to the privileged occasion.[29] Ultimately, the question of relevance must be determined with reference to reason and common sense, having its foundation in the facts, circumstances and principles governing each particular case.[30]

33 Once the University established the existence of a privileged occasion and that the published statement was relevant to that occasion, the onus would shift to the dismissed employee to defeat the qualified privilege by proving that the University's publication was actuated by malice.[31]

34 Our courts have stressed that it should not be too readily concluded that a person making a statement on a privileged occasion was actuated by malice. In particular:

34.1 It is <u>not</u> enough to show that the statements made are untrue. Rather it must be shown that untrue statements were knowingly or deliberately made.[32]

34.2 The high bar that must be met was made clear in *Tuch*, where the SCA explained:

> *"The allegation is so devoid of any merit that, in the absence of any evidence to the contrary, the inference must be drawn that the first and third respondents used the occasion not to advance their case but for an ulterior purpose namely to besmirch the name and reputation of the deceased."*[33]

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29 *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at para 22.

30 Id at para 26; *Hardaker v Phillips* 2005 (4) SA 515 (SCA) at para 17.

31 *Van der Berg* at paras 16 and 17.

32 *Borgin* at 579E-F

33 *Tuch* at para 14.

34.3 Nor is it sufficient that the statements could have been framed more accurately or carefully or that the conclusions reached were, with the benefit of hindsight, illogical or unsustainable.[34]

35 In all the circumstances, provided that:

35.1 the person has in fact been found guilty of the sexual misconduct concerned; and

35.2 the University's statements are measured and dispassionate,

we are of the view that qualified privilege would likely render the publication of the statements concerned lawful. This would mean that no liability for defamation could flow.

36 It should be added that if a person has indicated his intention to challenge the ruling (or was in fact doing so), this should also be recorded in the statement. In other words, the University would record the finding of guilt and also record that the party concerned had indicated his intention to challenge the ruling or was already doing so.

COMPLIANCE WITH POPIA

General Overview of Lawful Processing under POPIA

37 Section 14 of the Constitution provides that every person has the right to privacy.

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[34] *Vincent v Long* 1988 (3) SA 45 (C) at 50C-I; *Yazbek v Seymour* 2001 (3) SA 695 (E) at 704 D-G; *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) at para 111, fn 128.

38 POPIA was enacted to promote the protection of processing personal information by public and private bodies.[35]

39 The processing of personal information gives rise to competing interests.

39.1 On the one hand, the unlawful collection, retention, dissemination and use of personal information infringes the right to privacy set out in section 14 of the Constitution.[36] The regulation of the processing of personal information in POPIA therefore seeks to realise the state's duty to promote and fulfil the right to privacy.[37]

39.2 On the other hand, there is a need in our constitutional democracy for openness. The systemic requirement of openness in our Constitution flows from its founding values, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way all organs of state function.[38] This requires the removal of unnecessary impediments to the free flow of information, including personal information.[39]

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35 POPIA's long title.

36 POPIA, preamble; POPIA, section 2.

37 In terms of sections 7(2) and 14 of the Constitution.

38 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) at para 40.

39 POPIA, preamble.

40 POPIA therefore aims to regulate the processing of personal information in a manner that gives effect to the right to privacy, whilst recognising that such right may be justifiably limited to protect other rights and important interests.[40] It does so by setting out a number of minimum conditions for the processing of personal information that responsible parties must adhere to.

41 The following definitions in section 1 of POPIA are relevant to the current matter:

41.1 The "*data subject*" is the person to whom the personal information relates. The "*data subject*" in the current instance is the dismissed employee of the University.

41.2 "*Personal information*" is information relating to an identifiable, living, natural or juristic person, including any "*information relating to the employment history of the person*" and their name (the latter only if used alongside other personal information).

41.3 "*Processing*" is broadly defined as <u>any</u> operation, activity or set of operations concerning personal information, including, *inter alia*, collecting, receiving, storing, recording, using, disseminating, distributing, or making available personal information.

41.4 A "*public body*" for purposes of POPIA includes any functionary or institution exercising a public power or performing a public function in terms of any legislation.

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[40] POPIA, preamble; POPIA, section 2.

41.5 A "*record*" is any recorded information, regardless of form or medium, in the possession or under the control of a responsible party. It is irrelevant whether or not it was created by the responsible party and when it came into existence.

41.6 A "*responsible party*" is a party who determines the purpose of and means for processing personal information. The "*responsible party*" in the current instance is the University.

42 The processing of personal information entered into a record by or for a responsible party must comply with the conditions set out in sections 8 to 25 of POPIA.[41] There are 8 conditions that must be complied with. These are:

42.1 Accountability;[42]

42.2 Processing limitation;[43]

42.3 Purpose specification;[44]

42.4 Further processing limitation;[45]

42.5 Information quality;[46]

42.6 Openness;[47]

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41 POPIA, sections 3(1)(a) and 4(1).

42 POPIA, section 8.

43 POPIA, sections 9-12.

44 POPIA, sections 13-14.

45 POPIA, section 15.

46 POPIA, section 16.

47 POPIA, sections 17-18.

42.7 Security safeguards;[48] and

42.8 Data subject participation.[49]

43 Personal information must be processed lawfully, in a reasonable manner that does not infringe on the privacy rights of the data subject, and in a manner that is adequate, relevant and not excessive for the purpose for which it is processed.[50]

44 In general, POPIA prohibits the processing of personal information of a data subject, unless certain grounds exist for doing so. In terms of section 11 of POPIA, personal information may only be processed if:

> *"(a) the data subject or a competent person where the data subject is a child, consents to the processing;*
>
> *(b) processing is necessary to carry out actions for the conclusion of performance of a contract to which the data subject is a party;*
>
> *(c) processing complies with an obligation imposed by law on the responsible party;*
>
> *(d) processing protects a legitimate interest of the data subject;*
>
> *(e) processing is necessary for the proper performance of a public law duty by a public body; or*
>
> *(f) processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied."*[51]

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48 POPIA, sections 19-22.

49 POPIA, sections 23-25.

50 POPIA, sections 9-10.

51 POPIA, section 11.

45 Where processing is done on the basis of one of the grounds is subsections (d) to (f), a data subject may object *on reasonable grounds* to such processing, unless legislation provides for such processing. Where a data subject has so objected based on *reasonable grounds*, a responsible party may no longer process the personal information.[52]

46 In *Smuts N.O.*, the Court held that section 11 of POPIA permits the processing of personal information, despite the objection of a data subject, if, for example, the processing is necessary for the proper performance of a public law duty by a public body or processing is necessary for the pursuit of the legitimate interests of a third party to whom the information is supplied.[53]

47 The Court in *Divine Inspiration Trading* further recognised that the processing of personal information under section 11(c) of POPIA may allowed irrespective of an objection from the data subject.[54]

48 The Court in *Divine Inspiration Trading* further held that section 11 of POPIA:

> "*makes provision for the processing of information in certain instances. Two such instances are (i) where there is a legal obligation to do so, imposed by law, on the responsible party, and (ii) where processing is necessary for pursuing the legitimate interest of the responsible party or of a third party (in this case the applicants) to whom the information*

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[52] POPIA, section 11(3)(a) and (4).

[53] *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism* (1199/2021) [2022] ZAECMKHC 42 (26 July 2022) at para 34.

[54] *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* 2021 (4) SA 206 (WCC) ("***Divine Inspiration Trading***") at para 34.

is to be supplied. The data subject may object in respect of the second instance, but not in respect of the first."[55]

49 This accords with section 11(3)(a) of POPIA which provides that a data subject may object, at any time, to the processing of personal information in terms of subsection (1)(d) to (f), in the prescribed manner, on reasonable grounds relating to his, her or its particular situation, unless legislation provides for such processing. The Regulations relating to the protection of personal information set out the prescribed manner through which data subjects may object to the processing of personal information in terms of section 11(3)(a) of POPIA.

50 Section 15 of POPA applies to "*further processing*". "*Further processing*" is not defined in POPIA, but we understand it to refer to where additional processing, other than that which was initially justified or for which purpose the personal information was originally collected, is to be done. Such further processing must be in accordance with, or compatible to, the purpose for which the information was initially collected.[56]

51 When personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of, *inter alia*, the information being collected, the purpose for such collection, and any particular law authorising or requiring the collection of such information.[57] This

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[55] Id at para 36.

[56] POPIA, section 15.

[57] POPIA, section 18(1).

step is not necessary where compliance is not reasonably practicable in the circumstances of the particular case.

52 We also point out that section 26(a) and (b) of POPIA define "*special personal information*" to include information concerning the sex life of a data subject or the criminal behaviour of a data subject to the extent that such information relates to:

52.1 the alleged commission by a data subject of any offence; or

52.2 any proceedings in respect of any offence allegedly committed by a data subject or the disposal of such proceedings.

53 We turn now to address the question: would the disclosure by the University of dismissals for gender-based violence related misconduct breach POPIA?

The Classification of the University's Envisaged Disclosures

54 Given the wide definitions of "*processing*" and "*personal information*" under POPIA, there is little doubt that the envisaged disclosures by the University of dismissals for GBV-related misconduct would amount to processing personal information.

55 It is, however, less clear whether the University's disclosure of information regarding conduct that constitutes gender-based violence would be considered to relate to a data subject's sex life or:

55.1 the alleged commission by a data subject of any offence; or

55.2 any proceedings in respect of any offence allegedly committed by a data subject or the disposal of such proceedings.

56 If so, then such publication would thus fall to be regulated as the processing of special personal information.

57 The question of whether the University's disclosure would constitute the processing of special personal information is context-specific and will entail evaluating if the intended publication relates to:

57.1 the dismissed employee's sex life, which we understand to mean the part of their life that involves sexual activities;

57.2 the criminal behaviour of a data subject to the extent that such information relates to:

57.2.1 the alleged commission by a data subject of any offence. Many of the forms of gender-related misconduct set out in the Policy will also constitute criminal offences. The publication by the University of the details of misconduct which could reasonably give rise to criminal liability is likely to constitute the processing of special personal information; or

57.2.2 any proceedings in respect of any criminal offence allegedly committed by a data subject or the disposal of such proceedings. This would include the proceedings conducted by the University's disciplinary bodies concerning forms of

gender-related misconduct set out in the Policy which could reasonably give rise to criminal liability.

Lawful Basis for the University's Processing under POPIA

58 We have been asked to consider whether there is a lawful basis under POPIA for the University to disclosure the name and offence of a person found guilty of gender-based violence.

59 We start with considering the lawful basis on which the University may publish personal information, and thereafter consider whether there is any lawful basis for it to publish special personal information.

Personal information

60 As set out above, personal information may only be processed if a data subject consents to the processing, or if the processing falls within one of the other five grounds in section 11(1).

61 We note that the grounds for processing under section 11 of POPIA are inextricably linked to the purpose for which the personal information is being processed. It may therefore be the case that when the University is processing information for one purpose, the lawfulness of such processing falls under a different justification from when it seeks to process the information for a different purpose.

Consent to processing

62 The publication of the envisaged statements would be lawful if the dismissed employees, as the data subjects, furnish their consent.

63 Consent is defined as "*any voluntary, specific and informed expression of will in terms of which permission is given*".

64 The dismissed employee may withdraw their consent at any time, provided that the lawfulness of the processing of personal information before such withdrawal will not be affected.[58]

Processing complies with an obligation imposed by law on the responsible party

65 Section 11(1)(c) of POPIA states that personal information may be processed if the "*processing complies with an obligation imposed by law on the responsible party*."

66 There are two possible interpretations of section 11(1)(c):

66.1 The first is that the processing of personal information without consent is justified when a responsible party processes personal information in the execution of an obligation imposed on them by law.

66.2 The second is that processing is only permitted under subsection (c) where the *processing complies with [a different processing] obligation imposed by law on the responsible party*. In other words, the focus is

[58] POPIA, section 11(b).

not on the fact that the processing was required to perform an obligation under another law, but rather on whether the processing complies with the processing obligations under another Act, as referred to section 3(2)(b) of POPIA.[59]

67 There is not yet any case law regarding the correct interpretation of this section in POPIA and consequently no authority on this point. In our view, however, the first interpretation is more likely to be the correct one.

67.1 First, POPIA must be interpreted in a manner that does not prevent any party from exercising or performing its powers, duties and functions in terms of the law, as far as these relate to the processing of personal information and such processing is lawfully done.[60] If the second interpretation were to be preferred, there would be no ground in section 11 that allows a responsible party to lawfully process personal information where necessary to perform its powers or functions in terms of the law, unless doing so happened to fall within the parameters of one of the other sections.

67.2 Second, one of the purposes of POPIA is that the processing of personal information is regulated in harmony with international standards.[61] When POPIA was drafted, it was principally based on the EU Data Protection Directive 95/46/EC ("**Directive 95/46**").

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[59] Section 3(2)(b) of POPIA states that where other legislation provides for conditions for lawful processing that are more extensive than those set out in POPIA, the more extensive conditions prevail.

[60] POPIA, section 3(3).

[61] POPIA, section 2(b).

Subsequently, the General Data Protection Regulation, 2016/679 ("**GDPR**") has since repealed Directive 95/46. Section 11(1) of POPIA is substantially similar to both the current GDPR (Article 6) and Directive 95/46 (Article 7). Under the GDPR, Article 6(c) states:

> *"Processing shall be lawful only if and to the extent that at least one of the following applies:*
>
> *. . .*
>
> *(c) processing is necessary for compliance with a legal obligation to which the controller is subject".*[62]

68 The first interpretation accords with the formulation of this justification for processing personal information under the GDPR. Adopting the first interpretation is therefore an approach that is in harmony with international standards.

69 Does the University then fall within the bounds of section 11(1)(c) when it publishes the outcomes of disciplinary processes for employees who have been dismissed for misconduct associated with gender-based violence?

70 In certain circumstances, the law may impose an obligation on the University to publish the outcomes of the disciplinary processes. The University could, for example, be held liable under the common law of delict if it negligently fails to disclose the fact that the employee was dismissed for misconduct associated with gender-based violence and this causes damage that is not too remote. Such a negligent omission would be regarded as being wrongful only if it occurs in

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[62] Article 7(c) of Directive 95/46 was worded the same. The "*controller*" under the GDPR is the responsible party.

circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.[63] It would also be arguable whether any damage which is caused by the dismissed employee is too remote as a new intervening event may intrude.[64]

Processing is necessary for the proper performance of a public law duty by a public body

71 Section 11(1)(e) of POPIA provides that personal information may be processed "*if processing is necessary for the proper performance of a public law duty by a public body*."

72 A "*public body*" is defined as:

> *"(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or*
>
> *(b) any other functionary or institution when—*
>
> *(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or*
>
> *(il) exercising a public power or performing a public function in terms of any legislation."*[65]

[63] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12.

[64] *De Klerk* at paras 29 to 30.

[65] POPIA, section 1. Our emphasis.

73 In *AMCU v Chamber of Mines of South Africa*, Cameron J held that in order to determine whether a power or function is "*public*", one must look at what the power "*looks and feels like*" rather than who exercises it or where it comes from.[66]

74 The University is established as a public higher education institution under the Higher Education Act 101 of 1997. As an organ of State,[67] the University exercises public power and performs public function on a daily basis in terms of the Higher Education Act and other legislation.

75 It follows that the University, as a public body, may lawfully process personal information in terms of section 11(1)(e) of POPIA when such is necessary for the proper performance of a public law duty.

76 The Constitutional Court has recognised that the state has a duty to protect against all forms of gender-based violence that impair the enjoyment of fundamental rights and freedoms.[68] It has a public law duty to take reasonable and appropriate measures to prevent the violation of those rights.[69] The standard of a reasonable public body is sourced from the Constitution which requires the State to take reasonable measures to advance the realisation of rights in the Bill of Rights.[70]

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66 2017 (3) SA 242 (CC) at para 74

67 Section 239 of the Constitution defines an organ of state to include any institution exercising a public power or performing a public function in terms of any legislation and any administration in the national, provincial or local sphere of government.

68 *AK v Minister of Police* 2023 (2) SA 321 (CC) at para 3.

69 Id.

70 *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) at para 40-1.

77 In certain circumstances, the University's public law duty to take such reasonable and appropriate measures may include disclosing the dismissal of an employee for gender-based violence-related misconduct.

Processing is necessary for pursuing the legitimate interests of the responsible party

78 Section 11(1)(f) of POPIA states that personal information may be processed if the "*processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied*."

79 As set out above in the discussion of qualified privilege, the University as the responsible party has legitimate interests in publishing the names and nature of offences of employees dismissed for gender-based violence. This seems to us to apply equally here.

80 This provides a lawful basis for the University to make the envisaged publications that contain the personal information of the dismissed employees.

81 This means that the publication of the information would not likely be unlawful under POPIA.

Special Personal information

82 In general, POPIA prohibits the University from processing the special personal information of a dismissed employee, unless certain exclusions apply. These exclusions include, *inter alia*:

82.1 processing carried out with the consent of a data subject.[71] As explained above, the publication of the envisaged statements would be lawful if the dismissed employees, as the data subjects, furnish their consent; and

82.2 processing is necessary for the establishment, exercise or defence of a right or obligation in law.[72]

Processing is necessary for the establishment, exercise or defence of a right or obligation in law

83 As set out above, the University may, in certain circumstances, be legally required to publish the names and nature of misconduct by employees dismissed for gender-based violence.

84 It may also be necessary for the University to make such publications in order to defend the rights in the Bill of Rights and protect against all forms of gender-based violence that impair such rights.

85 It follows that the University's processing of special personal information of employees who are dismissed for misconduct associated with gender-based violence may, depending on the circumstances of the case, fall within this ground.

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[71] POPIA, section 27(a).

[72] POPIA, section 27(b).

Conclusion and potential steps to ensure compliance with POPIA

86 We have explained above that the envisaged publication would likely not be unlawful under POPIA.

87 If, however, the University wishes to achieve greater certainty it could apply to the Information Regulator for an exemption in terms of section 37 of POPIA. An exemption may be granted by the Information Regulator to a responsible party to process personal information, even if such processing is in breach of a condition for processing, if the Regulator is satisfied that:

87.1 the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result; or

87.2 the processing involves a clear benefit to the data subject or third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party.

88 It is arguable that the envisaged processing by the University could fall within either of these grounds for exemption.

89 Another option is for the University, together with other members of Universities South Africa, to develop a code of conduct that can be issued by the Information Regulator in terms of section 60 of POPIA. A code may be issued by the

Regulator on the application by a body which is sufficiently representative of any industry, profession or vocation, as defined in the code.[73]

90 The purpose of a code of conduct is for the industry to establish a voluntary accountability tool that will promote transparency on how personal information in a particular industry should be processed.

91 The Information Regulator has published Guidelines to Develop Codes of Conduct, GN 75 of 26 February 2021[74] ("**Guidelines**") to work as a practical guide outlining minimum criteria and a framework for the evaluation of codes. A few of these include:

91.1 If the interested parties are interested in considering developing a code, the body developing the code must have the adequate administrative capacity to develop a code. This should include the ability to consult with relevant stakeholders.[75] The body should also ensure it has sufficient resources for the development and implementation of the code.[76]

91.2 If a body, such as the Universities South Africa, decides to develop a code, it should notify the Regulator of its intention to do so.[77]

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[73] POPIA, section 61(1)(b)

[74] *Government Gazette* No. 44191

[75] Guidelines, para 9

[76] Guidelines, para 10

[77] Guidelines, para 11

91.3 There are general principles set out in paragraph 13 of the Guidelines that are appliable to the issuing of a code. These should be carefully adhered to increase the likelihood of the code being issued.

91.4 The application for the issuing of a code must be in the form of Form 3 to the Regulations to POPIA[78] and must comply with paragraph 16 of the Guidelines.

COMPLIANCE WITH THE CODE OF GOOD PRACTICE

92 The Code of Good Practice, which has been published in terms of the EEA, seeks to eliminate all forms of harassment in the workplace and in any activity linked to, or arising out of work.[79]

93 It identifies certain steps that employers must take to eliminate harassment, including the development and implementation of policies, procedures and practices that will lead to the creation of workplaces that are free of harassment and in which employers and employees respect one another's integrity, dignity, privacy and their right to equality in the workplace..[80]

94 The Code of Good Practice requires employees to adopt a harassment policy that complies with its provisions.[81]

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[78] POPIA Regulations, regulation 5

[79] Para 5, page 10 Code of Good Practice.

[80] Para 1.3, page 20 of the Code of Good Practice.

[81] Para 9, page 37 of the Code of Good Practice.

95 Employers are required to develop clear procedures to deal with harassment.[82]

96 Section 11.1 of the Code of Good Practice provides that:

> "*Employers and employees must ensure that grievances about harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential for the purpose of the protecting the confidentiality of all parties involved*."

97 Section 11.1 of the Code of Good Practice must be must also interpreted to promote the spirit, purport and object of the Bill of Rights. This includes the right to freedom of expression, as enshrined in section 16(1) of the Constitution, as well as the right to privacy in section 14 of the Constitution.

97.1 On the one hand, the University's right to freedom of expression supports a narrow interpretation of section 11.1.

97.2 On the other hand, the right of a dismissed employee to privacy would militate in favour of a wide interpretation of section 11.1.

98 It follows that the spirit, purport and object of the Bill of Rights is not decisive in interpreting Section 11.1 of the Code of Good Practice.

99 The correct approach to interpreting section 11.1 of the Code of Good Practice requires that the meaning of the text used should be deduced based on a unitary consideration of:

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[82] Para10, page 38 of the Code of Good Practice.

99.1 the language used in the relevant section in the light of the ordinary rules of grammar and syntax. There is nothing in the language used in section 11.1 that suggests that it prohibits the publication of the outcomes of disciplinary processes for dismissed employees in the context of gender-based violence. Instead, the language indicates that the University's duty to preserve confidentiality is limited to the investigation and handling of grievances about harassment. It is silent on the confidentiality of the outcomes of disciplinary proceedings;

99.2 the context in which the words in the section appear. Nothing in the context in which the words in section 11.1 appear suggests that it prohibits the publication of the outcomes of disciplinary processes for dismissed employees and

99.3 the apparent purpose to which the section is directed.[83] This section appears to be directed at preserving the confidentiality of raising and handling grievances about harassment rather than the outcomes of disciplinary proceedings.

100 It follows that, in our view, section 11.1 of the Code of Good Practice does not prohibit the University from publishing the outcomes of disciplinary processes for dismissed employees in the context of misconduct associated with gender-based violence.

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[83] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

CONCLUSION

101 For the reasons set out above, our views on the questions on which our advice is sought are as follows:

101.1 The envisaged publication would certainly be defamatory but would very likely be lawful on the basis of the defence of qualified privilege.

101.2 The envisaged publication would very likely amount to the processing of personal information and maybe even special personal information under POPIA, but would likely be lawful.

101.3 Section 11.1 of the Code of Good Practice does not prohibit the University from making the envisaged publications.

STEVEN BUDLENDER SC

MAWANDE SETI-BAZA

Chambers, Sandton
14 September 2023