

Dear CSOS,

Please see below my final submission regarding Mrs Viljoen's application.

Just to clarify, I have not had any legal assistance in preparing my CSOS submissions. My wife and I are currently both enrolled as LLB students and are studying to become attorneys.

I am surprised by Mrs Viljoen's claim that the photograph of my house and my CCTV cameras that she has submitted is conclusive proof that I am invading her privacy.

Firstly, that photograph seems to have been taken from the property next to hers and not from inside her own house where the alleged privacy invasion occurs.

Secondly, surely someone who represents clients in court, as she has indicated she does, and which was her reason for not attending our first conciliation meeting, would be aware of how the *Civil Proceedings Evidence Act* is applied in court and what the most recent and relevant legal precedents are that are relevant to her case.

Mrs Viljoen has also clearly not read or understood the Kleinbron Estate Constitution or the Kleinbron Estate HOA rules, which I will discuss below.

Nevertheless, Mrs Viljoen is one of my neighbours in Kleinbron Estate and she has lodged a complaint at CSOS alleging that my CCTV cameras are invading her privacy on her property.

Mrs Viljoen's house is on the opposite side of the road to me, three houses up the road.

Mrs Viljoen has a double story house, which is at a slight elevation in comparison to my single story house.

The house next to Mrs Viljoen's house, on the same side of the road as her, blocks the view of most of her house from my house.

I have never seen Mrs Viljoen before in my life and would not be able to recognise her if she walked past me in the road, or her daughter, for that matter, into whose bedroom she claims I am looking.



Image taken from google maps indicating the positions of our houses.

My cameras have a PTZ (pan, tilt, zoom) function, which means I am able to change their angle from inside my house.

My cameras are to ensure the safety of my property and they are turned towards my property, except for where they are able to see some of the publicly visible areas in front of my house.

My cameras are also able to record audio, but this function is switched off. Even if they were switched on, they would not be able to hear audio outside the boundaries of my property.

Mrs Viljoen is firstly attempting to rely on Kleinbron Estate's new HOA Rules which do not permit cameras with PTZ or audio capabilities.

Please see **Addendum 01 - 2022.05.20 Kleinbron Estate HOA Rules**

When I installed my cameras there were no HOA Rules regarding CCTV installations, and there were also no rules indicating that I had to obtain permission to install them.

Please see **Addendum 02 - 2015.09.07 Kleinbron Estate HOA Rules**

Despite me not having had to ask for permission, I did inform both the Kleinbron Estate manager and the owner of SJC Security, who manages the estate's security, that I was going to install CCTV cameras, and I also asked them to be present during the installation.

Neither Kleinbron Estate nor SJC Security replied, and they also did not indicate that I needed permission to install the cameras. Neither were present when I installed the cameras.

Please see **Addendum 03 - 2022.01.14 Email with Estate Manager**

Please see **Addendum 04 - 2022.01.20 Whatsapp with SJC Security's Owner**

I started installing my cameras on 15 January 2022.

After apparently numerous complaints to the Kleinbron Estate manager from various residents regarding my cameras, Kleinbron Estate held a trustee meeting on 14 February 2022. After having consulted with various municipal departments, law enforcement and legal advisors, they found that I was not transgressing any of the estate's rules.

Please see **Addendum 05 - 2022.03.23 CSOS M.Johnson Estate Manager Email**

The new HOA Rules which do not permit PTZ cameras with audio were put into effect on 20 May 2022, which was four months after I installed my cameras.

The Kleinbron Estate Constitution indicates that new HOA Rules are not retroactively enforceable, so their new rule that my kind of cameras are not permitted is not applicable to me.

36. "...no regulation made by the Association in general meeting shall invalidate any prior act of the Trustee Committee which would have been valid if such regulation had not been made."

Kleinbron Estate Constitution, pg. 18

Please see **Addendum 06 - Kleinbron Estate Constitution**

I have received no indication from Kleinbron Estate that I am in breach of their new rules. Surely if my cameras were causing me to be in breach, they would have contacted me and taken the relevant steps to ensure compliance.

Furthermore, if I were in breach, which I am not, it is Kleinbron Estate's responsibility to ensure that I am compliant, not Mrs Viljoen's. I am not sure why Mrs Viljoen is under the impression that she can enforce a rule that even Kleinbron Estate cannot.

Therefore, Mrs Viljoen cannot rely on the new HOA Rules regarding my cameras.

Mrs Viljoen is secondly attempting to accuse me of invading her right to privacy.

She complains that some of my cameras are recording publicly visible areas in front of my house.

The cameras in my front yard only record the publicly visible areas around my house for surveillance purposes and they are not "pointed" at anyone's house.

The most recent legal precedent and case law that I was able to find that is relevant to this complaint is *Fearn and Ors v Board of Trustees of the Tate Gallery* which was heard in the England and Wales High Court. The verdict was appealed in the Supreme Court, but the appeal was dismissed.

According to the Law of Evidence Amendment Act, 1988,

1. (1) Any court may take judicial notice of the law of a foreign state [...]
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Please see the following links for the full judgement and the appeal:

<https://www.bailii.org/ew/cases/EWHC/Ch/2019/246.html>

<https://www.bailii.org/ew/cases/EWCA/Civ/2020/104.html>

*Fearn and Ors v Board of Trustees of the Tate Gallery* involved the owners of some flats which neighbour the Tate Gallery on the South Bank in London.

The Tate Gallery built a 360-degree viewing platform whose panoramic view included the general living areas of the Claimants' flat interiors.

Many visitors took photographs and videos which included the insides of the Claimants' flats, and posted them on social media.

The Claimants felt that their privacy was being invaded, and they asked the Court to order the Tate Gallery to prevent members of the public and others from "observing" the publicly visible areas of their flats to ensure their privacy.

The Court found in favour of the Tate Gallery and indicated that the mere viewing of a neighbouring property was not enough for a nuisance claim to succeed.

The intended use of the viewing gallery was to view, and not to invade privacy, and the Claimants should have implemented measures to ensure their own privacy.

Similarly, the intended use of my CCTV cameras is also to view and not to invade privacy.

The Judge found that even though individuals have a reasonable expectation of privacy inside their homes, the Claimants had engaged in a self-induced exposure to the outside world where there was no legitimate expectation of privacy.

People in publicly visible areas, such as those in front of my house, do not have a legitimate expectation of privacy.

I copy relevant parts of the judgement below.

It can hardly be disputed that a person has a reasonable expectation of privacy in relation to much of what occurs in the home and in relation to the home itself.

Not all overlooking becomes a nuisance. Whether anything is an invasion of privacy depends on whether, and to what extent, there is a legitimate expectation of privacy.

[...] one does not expect so much privacy in a balcony [...]

Some remedial steps could be taken. There are several.

(a) The owners could lower their solar blinds. [...]

(b) The owners could install privacy film. [...]

(c) They could install net curtains. [...]

(d) At least one occupant has put some medium height plants in the winter gardens. As a matter of screening they are not hugely effective, and taller plants could restore some privacy. However, the other three measures are the significant ones which fall for consideration.

The victim of excessive dust would not be expected to put up additional sealing of doors and windows; the victim of excessive noise would not be expected to buy earplugs. However, privacy is a bit different. Susceptibilities and tastes differ, and in recognition of the fact that privacy might sometimes require to be enhanced it has become acceptable to expect those wishing to enhance it to protect their own interests. I refer, for example, to net curtains. In the present case, if the occupiers find matters too intrusive they can take at least one of the measures referred to above. It will, of course, detract from their living conditions, but not to an unacceptable degree. Looking at the overall balance which has to be achieved, the availability and reasonableness of such measures is another reason why I consider there to be no nuisance in this case.

Mr Fetherstonhaugh sought to meet the claimants' objections to having to take these steps by saying that what they were really seeking was a right to a view, which is a right unknown to the law. I do not consider that to be a relevant point. There are authorities which indicate that a right to a view, as an easement and absent agreement, is not a right known to the law, but that is not what the claimants are seeking. It is true that they want to be able to maintain an unrestricted view from their windows (without compromising their privacy) but they do not rely on a legal right to a view. They are saying they should not have to obstruct their view to protect themselves from an inwards intrusion by others.

I should mention one further factor relied on by at least two of the claimants, and that is the effect of there being children in the flats. As appears above, some of the occupants will not allow their children or grandchildren to be exposed in the flats. Mr Weekes sought to pray in aid the particular need to protect children. He relied on *Weller v Associated Newspapers* [2016] 1 WLR 1541. While I do not ignore that factor, I do not think that it has much weight in the calculation I have to make or the balance I have to strike. The children do not have their own privacy claim under

nuisance because they are not the owners of the land. Their privacy interests are part of the greater privacy interests of the parent owners, but do not add anything substantial to the latter's significant interests. The viewing gallery has not been constructed, and is not used, deliberately so as to give a view of children, and children would not necessarily be on view in the flats all the time though it is, of course, a perfectly "normal" activity to bring up children in a residential area. I am far from sure that every parent would feel quite the same level of sensitivity (though I respect the views of those who do), and if there is felt to be a danger then the remedial steps which are open to the parents and grandparents (identified above) are steps which they could reasonably be expected to take.

The assessment that I have carried out is the usual one applicable to nuisance, even if privacy protection now arises via the application of Article 8. That Article generally requires an assessment (among other things) of whether the claimant has a reasonable expectation of privacy. As stated elsewhere in this judgment, in my view an assessment of that nature would be almost identical to the balancing exercise between the defendant's use of the land in the locale in question and the sort of give and take that would be reasonable for the claimant. It would arrive at the same result. The sort of factors which mean that the claimants cannot claim that the use of the viewing gallery is a nuisance mean that they do not have a reasonable expectation of privacy, if that is relevant. I need say no more about it than that.

Subsequent UK cases where individuals complained about a neighbour's CCTV viewing the publicly visible areas in front of their houses were bound by the above precedent, and their CCTVs were allowed.

Mrs Viljoen complains that I am not allowed to record her minor children in the publicly visible areas around my house.

The POPI Act makes express provision for the recording of children if the recording is "necessary for the establishment, exercise or defence of a right or obligation in law", such as the safety of my property.

*Part C*

*Processing of personal information of children*

25

**Prohibition on processing personal information of children**

34. A responsible party may, subject to section 35, not process personal information concerning a child.

**General authorisation concerning personal information of children**

35. (1) The prohibition on processing personal information of children, as referred to in section 34, does not apply if the processing is—

(a) carried out with the prior consent of a competent person;

(b) necessary for the establishment, exercise or defence of a right or obligation in law;

**Image 1: Excerpt from the Protection of Personal Information Act, 2013**

Mrs Viljoen complains that my cameras have the ability to record audio.

My cameras' audio is switched off, and even if they were on, they would not be able to hear anything outside the boundaries of my property, unless it was a very loud noise.

According to the *Civil Proceedings Evidence Act 25 of 1965*,

2. -No evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible.

I contend that the photograph of my house and my cameras that Mrs Viljoen submitted in her application is irrelevant and immaterial to her claim that my cameras are invading her privacy, since that photograph is not able to prove that my cameras are invading her privacy.

Mrs Viljoen's photograph of my house and my cameras is just that – a photograph of my house and my cameras.

It is not evidence of privacy invasion.

Therefore, Mrs Viljoen's photograph is inadmissible as evidence.

Mrs Viljoen's only "evidence" that my cameras are recording her conversations are her allegation, and photo of my house, that they are, which is not admissible as evidence.

He who alleges must prove.



We have no interest in recording any audio unless it is of an unacceptable and illegal volumes or regularities.

We confirm that we will only use the audio recording for law enforcement purposes.

#### **4. RELEVANT LAWS**

##### **4.1 Right to Equality**

###### **South African Bill of Rights**

###### **9. Equality**

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic for social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

I contend I am being unfairly discriminated against by Mrs Viljoen based on the fact that I am a male, and because of the shock factor she can create by merely saying I am recording her daughter's bedroom, with the implication that I am a pedophile.

##### **4.2 Right to Human Dignity**

###### **South African Bill of Rights**

###### **10. Human dignity**

Everyone has inherent dignity and the right to have their dignity respected and protected.

Mrs Viljoen's baseless sexually related allegations that I am recording her daughter's bedroom are also depriving me of my right to dignity and the right to have my dignity respected and protected.

##### **4.3 Right to Security of Person**

###### **South African Bill of Rights**

## **12. Freedom and security of the person**

1. Everyone has the right to freedom and security of the person,

The purposes of my CCTV cameras are to:

- detect, deter and prevent crime;
- enhance the safety of my property and my family;
- assist in the apprehension and prosecution of offenders or to institute a civil case against them; and
- assist law enforcement agencies, including private armed response and security companies, with regard to the investigation of any apparent or actual crime.

### **4.4 Right to Privacy**

#### **South African Bill of Rights**

#### **14. Privacy**

Everyone has the right to privacy

Mrs Viljoen has the right to privacy, and I am not invading her privacy.

### **4.5 Children's Rights**

#### **South African Bill of Rights**

#### **28. Children**

1. Every child has the right [...]
  - d. to be protected from maltreatment, neglect, abuse or degradation;
2. A child's best interests are of paramount importance in every matter concerning the child.

I am not infringing on the rights of any children.

### **4.6 City of Cape Town Policy**

There is nothing inherently illegal about installing privately owned CCTV cameras with a PTZ function.

As can be seen in the policy below of the City of Cape Town, the application form to install CCTV cameras on City Property asks applicants to indicate whether their CCTV cameras are PTZ or static.

**Regulation of External and Privately Owned CCTV Cameras on City Property  
- (Policy number 21207) approved on 25 June 2014)**

**Annexure 10.2**



CITY OF CAPE TOWN CCTV CAMERA REGISTRATION FORM				
INFORMATION REQUIRED FOR CCTV DATABASE				
No	Location	At intersection or between which roads	Purpose	PTZ or Static
1				
2				

**Image 21: Annexure 10.2 of the CoCT CCTV Policy**

**4.7 Limitation of Rights**

**South African Bill of Rights**

**36. 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.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

## **Protection of Personal Information Act, 2013**

### PREAMBLE

#### RECOGNISING THAT-

- section 14 of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to privacy,
- the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information,
- the State must respect, protect, promote and fulfil the rights in the Bill of Rights,

#### AND BEARING IN MIND THAT-

- consonant with the constitutional values of democracy and openness, the need for economic and social progress, within the framework of the information society, requires the removal of unnecessary impediments to the free flow of information, including personal information,

#### AND IN ORDER TO-

- regulate, in harmony with international standards, the processing of personal information by public and private bodies in a manner that gives effect to the right to privacy subject to justifiable limitations that are aimed at protecting other rights and important interests.

The major benefit of a greatly increased chance of criminal prosecution with certain functions that I can switch on in my PTZ cameras in the event of a crime far outweighs Mrs Viljoen's imagined privacy invasion.

Therefore, Mrs Viljoen's claim that I am invading her privacy cannot succeed.

### **6. REQUEST FOR ADJUDICATOR TO DO A SITE VISIT**

I request a site visit by the adjudicator to ensure my cameras do not invade anyone's privacy.