

When disclosure has nothing to do with free speech. Pretoria News Weekend (South Africa), 19 September 2009. Written by Dario Milo.

Over the past month, international and local media have reported in detail on the controversy involving South Africa's Caster Semenya. The athlete entered the international spotlight when she was awarded a gold medal at the recent International Association of Athletics Federation (IAAF) Berlin World Championships for her winning time of 1:55.45 in the 800m event.

Soon thereafter, it was revealed that the IAAF had asked Semenya to undergo a sex verification test. The IAAF then announced that the findings of the test would be made public only once Semenya had been informed and other experts had been afforded the opportunity to study them. It appeared that, at least for the time being, the controversy would die down.

But that was to be. The cat was placed among the pigeons the day after the announcement by the IAAF when an Australian newspaper, the Daily Telegraph, sensationally published an article, billed as an "exclusive", quoting a confidential source close to the testing process as having informed the paper that "there certainly is evidence that Semenya is a hermaphrodite... The problem for us is to avoid it being an issue now which is very personal: of the organs being a hermaphrodite, of not being a 'real' woman".

As was to be expected, the South African media then reported on the Daily Telegraph article, both in the form of news reports, as well as commentary. Cartoonist Jonathan Shapiro, aka Zapiro, appears to have summed up much of the outcry from this saga in his cartoon published in the Sunday Times last week, which, evoking The Wizard of Oz, depicted the Australian newspaper editor as having "no heart", Athletics South Africa as having "no brain", and the IAAF as having "no spine".

One of the interesting legal questions that this saga gives rise to is the conduct of the media in prematurely reporting on the alleged results of the IAAF's tests in relation to Semenya. A starting point is to ask whether, if a South African newspaper had obtained the test results, it would have been within its free speech rights to publish.

The test in our law is whether Semenya has a reasonable expectation of privacy in relation to the results of the IAAF's tests. The information about Semenya clearly passes this test.

By way of illustration, our courts have dealt with numerous cases in the context of sensitive medical information, and have been at pains to point out that such information lies at the core of an individual's right to privacy and dignity. In general, individuals are therefore entitled to tell the public to mind their own business when it comes to their medical information.

For instance, in *NM vs Smith*, the Constitutional Court held that the publication of the plaintiffs' HIV status, in a biography of Patricia de Lille, amounted to the wrongful publication of private facts.

And in the famous case involving the then-health minister Tshabalala-Msimang vs Makhanya, Judge Mohamed Jajbhay stated unequivocally that the medical records of a person are private and confidential; indeed the National Health Act buttresses this protection.

The House of Lords in the UK recently alluded to the issue of the privacy of one's sex in *A vs Chief Constable of West Yorkshire Police*.

The chief constable had rejected Ms A's application to become a constable of the police force on the ground that, as a male-to-female transsexual, she could not perform the full body-searching duties required of a constable in terms of British legislation. The House held that the chief constable had unfairly discriminated against Ms A.

The judges also endorsed the decision of the employment tribunal in the case to protect Ms A's identity: she had feared that "disclosure might lead to unwarranted attention affecting her private and personal life".

Apart from the common law, there is proposed legislation in South Africa that makes it plain that a person's sex is "personal information": once the Protection of Personal Information Bill becomes law, an intersex person will be entitled to seek redress for any unlawful disclosure of private information relating to their sex.

So the hypothetical South African publisher that publishes details of Semenya's IAAF test results prematurely would have been treading on very risky territory indeed: the only possible answer to such a case, in the courts and before the Press Ombudsman, would be that the publication was justified in the public interest.

While disclosure of the test results by the IAAF to certain regulatory bodies who need to know the information is defensible (and Semenya would be taken to have consented to such limited publication by virtue of her participation in the sport), there can be no public interest justification, in our view, for parading Semenya's test results in public - at least before an official media release is made by the regulatory authorities (presumably after consultation with Semenya).

The case is a far cry from the exposure of hypocrisy rationale that often justifies the media in publishing private facts about public officials and public figures.

For instance, the English media could expose the fact that Naomi Campbell was a drug addict who was receiving treatment at Narcotics Anonymous because Campbell had earlier lied in public about not being addicted to drugs.

And the Sunday Times, in the Tshabalala-Msimang vs Makhanya case, succeeded in fending off an application by the health minister to prevent the paper publishing details of her medical records because the information was "relevant to the... performance of her constitutional and ministerial duties".

In Semenya's case, claims of public interest ring hollow.

The balancing act here is between the dignity right of Semenya and the public's entitlement to know the information. In the absence of a compelling justification for why the test results should receive public scrutiny, the balance clearly favours Semenya.

A separate question is whether the South African media were within their rights to report on the Australian article. It would be absurd to contend otherwise - to take such a position would be to accept that while members of the public could access the allegations on the internet and in foreign countries, the South African media are obliged to remain silent.

Once information is in the public domain, it will always be difficult - if not unconstitutional - to prevent its republication. The real question is then one of editorial sensitivity to the tone of the reportage. What this sorry saga should teach the media is that a person's dignity and privacy should not be trampled on without a significant public interest overriding such a disclosure, whether that person is a private or a public figure. This is a case where shouting "free speech" in a crowded courtroom will not win the day.