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23/05/2012

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 17978/2012

PH NO. 342

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	First applicant
AFRICAN NATIONAL CONGRESS	Second applicant
DUDUZILE ZUMA-SAMBUDLA	Third applicant

and

GOODMAN GALLERY	First respondent
CITY PRESS	Second respondent
BRETT MURRAY	Third respondent

FIRST AND THIRD RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. This is an urgent application by the President of South Africa ("**the first applicant**") and the ruling party, the African National Congress ("**the second applicant**" or "**ANC**"), for final relief compelling the Goodman Gallery ("**the gallery**") to take down an artistic work. The first applicant sues in his personal capacity as well as his capacities as President of the country and of the ruling party. The work is entitled *The Spear* and it appeared on display as part of the exhibition titled *Hail to the Thief II* by internationally and locally renowned artist Brett Murray (it was defaced on Tuesday 22 May 2012). The work appears on the website of the gallery, with images of the other works on exhibition.

2. The artwork is protected under section 16(1) of the Constitution. It is an *artistic work* specifically protected by section 16(1)(c). Moreover, the artwork is a form of *political expression*. Both categories of speech lie at the heart of the constitutional guarantee of freedom of expression. The order sought by the applicants - which is indistinguishable from a censorship ban - would unjustifiably limit the gallery's right under section 16(1) to display the artwork and the reciprocal right of the public to view the artwork.

3. The applicants contend that they are entitled to such an order from the urgent court because the continued display of the artwork violates the dignity and privacy of the first applicant and of the ANC. The applicants appear also to argue that the artwork violates their reputation, image and privacy, and "makes a mockery of the office of the presidency"; but, as is confirmed in the applicants'

replying affidavits (at paras 11 and 35), the gravamen of their complaint is based on an alleged infringement of dignity and privacy. These heads of argument address why such an argument is entirely misplaced.

4. These heads of argument are structured as follows:

4.1 First, we consider the artistic work and the context in which it appeared in the gallery and on its website. The artwork is clearly protected expression as both artistic and political expression, as appears from the evidence of artists and academics in the supporting affidavits.

4.2 Secondly, against that background we examine the claim by the applicants that this contextual publication of *The Spear* infringes their dignity.

4.3 Thirdly, we briefly examine the applicants' argument that their privacy has been invaded.

4.4 Fourthly, on the assumption that the artistic work infringes the first applicant's dignity (which is denied), we argue that the work is protected and legitimate comment and the publication of the artistic work in its context was not unlawful.

4.5 Fifthly, we summarise the requirements for final relief and argue that the applicants have not made out a case for such relief.

4.6 Finally, we address the issue of urgency.

I THE CONSTITUTIONAL PROTECTION OF ARTISTIC CREATIVITY

5. The Constitution does not simply protect artistic expression as an implied instance of freedom of expression. It expressly protects this form of expression. Moreover, in the case of artistic expression, the protection extends not only to the expressive act but conspicuously to the artist's act of creativity itself. This is peculiar to artistic expression.

Constitution, s16(1)(c)

6. It is submitted therefore that the conception of artistic freedom under the Constitution is a particularly broad one. Expressive acts which might not otherwise be justifiable in an open and democratic society, or which might not be justifiable in certain contexts, are justifiable in an artistic context. This has been recognised by Constitutional Court, which has held that whether an expressive act represents a "serious work of art" is relevant to assessing the over-breadth of a proposed restriction.

***Phillips v DPP, WLD* 2003 (3) SA 345 (CC) at para 15**

7. We address specifically below the specific artwork at issue and the specific context in which the work was produced and displayed. However, it is important to recognise from the outset that it is beyond reasonable dispute that the work concerned is a "serious work of art" intended for display only in an "art space" ie. a gallery and its website.

8. It is submitted that there is good reason for the particularly broad conception of the constitutional protection when it comes to art. Contemporary art is often by

its very nature highly provocative and controversial. It may inspire high emotions or cause offence to some. The Constitution extends greater protection to these forms of expression where they are contained in specific spaces reserved for this purpose, virtual or otherwise, like a gallery or a theatre, where consenting adults may critically view and consider them.

***The Spear* in its proper context**

9. In order to properly interpret the artwork, context is paramount. Chaskalson CJ held that:

> **"Different and sometimes conflicting interests and values may have to be taken into account. <u>Context is all-important</u> and sufficient material should always be placed before a court dealing with such matters to enable it to weigh up and evaluate the competing values and interests in their proper context." (Emphasis added.)**
>
> ***Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at para 38**

10. In ***S v Mamabolo***, in considering whether the elements of the offence in question had indeed been met by the publication of certain expression, the Court specifically noted that this "*question must be addressed in its context*."

> ***S v Mamabolo* 2001 (3) SA 409 (CC) at para 13**

11. It is submitted that the following principles enunciated in relation to scandalising the court are analogous to a situation where a person has taken offence to a work of art:

> **"It would be unwise, if not impossible, to attempt to circumscribe what language and/or conduct would constitute scandalising the court. Virtually the only prediction that can safely be made about human affairs, is that none can safely be made. The variety of circumstances that could arise, is literally infinite and <u>each case will have to be judged in the context of its own peculiar circumstances</u>: what was said or done; what its meaning and import were or were likely to have been understood to be; who the author was; when and where it happened; to whom it was directed; at whom or what is was aimed; what triggered the action; what the underlying motivating factors were; who witnessed it; what effect, if any, it had on such audience; what the consequences were or were likely to have been." (Emphasis added.)**
>
> ***S v Mamabolo* at para 46**

12. A contextual analysis in this case involves many aspects, including:

12.1 *The Spear*'s identity as an artwork and specifically a satirical artwork;

12.2 *The Spear* appeared in the context of a larger exhibition, both in the art gallery and on its website;

12.3 *The Spear* was exhibited in a private gallery, and on its website; and

12.4 a private art gallery and its website attract a certain audience.

The meaning and impact of *The Spear* can be determined only within this multifaceted context.

13. As is attested to by the supporting affidavits, *The Spear* is a work of art and a creation of artistic creativity.

> **Kentridge, paras 7 - 9, p 217; Marasela, para 9, p 224; Nel, para 11, p 233; Nyoni, para 9, p 242**

14. The language of fine art is nuanced, and draws on diverse reference points and visual cues. This means that *The Spear,* as an artwork, is not necessarily accessible to a mass market. However, the typical visitor to the Goodman Gallery is "educated, art-loving, knowledgeable and opinionated".

Essers para 14, p 58

15. Those who come to visit the Goodman Gallery are interested in art and generally familiar with the concepts and visual cues referenced by contemporary artists, and the art-historical context in which the works on display were created. Books and electronic resources are available to those that want to know more, and knowledgeable gallery staff are also on hand to discuss work on display and to help visitors contextualise this work, should they seek out their assistance.

Essers paras 14.1-14.2, p 58

16. The fact that *The Spear* was created for and exhibited in an art gallery and on its website that attracts this type of audience is crucial to the determination of whether it harms dignity, and, if so, lawfully. In ***Mthembi-Mahanyele v Mail & Guardian Ltd & Another***, the SCA held :

> **"One must have regard … to what the ordinary reader of the particular publication would understand from the words complained of."**
>
> ***Mthembi-Mahanyele v Mail & Guardian Ltd & Another* 2004 (6) SA 329 (SCA) at para 26**

17. In ***Channing v South African Financial Gazette Ltd*** the court held that :

> **"It is no doubt fair to impute to the ordinary reader of the South African Financial Gazette the somewhat higher standard of education and intelligence and a greater interest in an understanding of financial matters the newspaper readers in general have."**
>
> ***Channing v South African Financial Gazette Ltd* 1966 (3) SA 470 (W) at 474A-C**

18. The Goodman Gallery never intended the artwork for mass distribution.

Essers para 24, p 61

19. Prior to the controversy concerning *The Spear* that has been sparked by the applicants' objection to the work, the exhibition proceeded very much as exhibitions usually do at the Goodman Gallery. It was viewed by no more than a few hundred discerning people and its inclusion on the Gallery's website was an ordinary incident of exhibiting artistic works.

Ibid

20. Another contextual factor critical to determining the meaning of the artwork is the fact that visitors to the Goodman Gallery and its website viewed *The Spear* in the context of Murray's larger exhibition, *Hail to the Thief II.*

Essers para 24, p 61

21. In ***Tsedu & Others v Lekota & Another***, the court held that :

> **"Words that are used in a newspaper heading must not be read in isolation – the ordinary reader must be taken to have read the article as a whole albeit without careful analysis."**

***Tsedu & Others v Lekota & Another* 2009 (4) SA 372 (SCA) at para 14**

22. The applicants have interpreted *The Spear* in a literal manner – as depicting the President's "private parts".

See, for example, prayer 2 of the notice of motion

23. But this meaning cannot be sustained in the context the exhibition as a whole. Professor Karel Nel testifies that Murray's symbolic, non-realistic use of images in *The Spear* is quite evident in the context of the other artworks in the exhibition. In his exhibition, Murray creates a visual chronicle of the socio-political topography of our time:

> **"[Murray] casts this commentary into a well-defined historical language of emblematic images, powerfully used for propagandistic purposes, be it in the well-known images relating to Stalinist Russia, communist red China, struggle posters of the apartheid years".**
>
> **Nel para 5, p 231**

24. Professor Nel refers in particular to three other works in the exhibition, namely, *Hail to the Thief, Glory* and *Crown Jewels.* In these works, Murray transforms "heraldic imagery", like ancient European crests of powerful family dynasties into phallic images:

> **"The eagle-like forms with wings outstretched and legs astride in the manner we are accustomed to seeing, reveal, on closer inspection, that the tail feathers have been morphed into a substantive penis with testicles".**
>
> **Nel para 6, p 231; and annexure "LE3", p 118**

25. Viewed in the context of these images, no reasonable viewer could understand the image of the genitalia as anything other than highly symbolic. It is one of

many gendered images of power that populate the exhibition; one of many that alludes to masculine power, prowess and heredity. "Nobody could possibly believe", comments Professor Nel, that "the first applicant himself posed for these 'portraits'. They are generic images of figureheads, not of individuals *per se*."

Nel para 8, p232

26. South Africa's preeminent artist, William Kentridge, offers a similar interpretation:

> **"The image, *The Spear*, is a composite. It is an image of Lenin with the head of President Zuma. Generic genitalia are pasted on top of his clothes.**
>
> **The image and the genitals are used in service of a pun, a double *entendre* of the word 'spear'.**
>
> **The combination of image and title making an idea rather than a portrait.**
>
> **The idea is the relation of power to sexuality."**

Kentridge paras 7-9, p 217

27. Artist and lecturer Vulindlela Nyoni is one of the many viewers of *The Spear* who does not like the painting but values the contribution it makes to the artistic and intellectual milieu in which he works and teaches:

> **"I am not a fan of Brett Murray's painting *The Spear* but I do take the work in context of the rest of the show. I would like to believe that in any other circumstance, (for example if another artist had done the same) that the rights of the Gallery and the artists would be protected."**

Nyoni para 13, p 244

28. Nyoni's tolerance of an artwork that he personally does not like but nevertheless values typifies the social *mores* of the people who frequent the Goodman Gallery. In William Kentridge's view, *The Spear*

> **"seems to me in line with the change in attitude towards a public discussion of political power and the sexuality that accompanies power. One just has to think of the discussions, description and representation of Bill Clinton and Monica Lewinsky compared to the discretion accorded Kennedy and other US Presidents and their sexual lives in the White House. More recently still the Dominique Strauss-Khan story brought up the question of politicians and their sexual histories into the public domain. The usually discreet French press changed their attitude to what previously had been seen as the private matters of an individual. The same in Italy with Berlusconi. Risible depictions by artists are reflections of the risible actions of the politicians depicted."**
>
> **Kentridge para 10, p 217**

29. Nyoni believes that "… perhaps of utmost relevance to this case [is] Margaret Sutherland's nude portrait of the Canadian Prime Minister, Stephen Harper."

Nyoni para 5, p 241; and annexure "VN4", p 249

30. In that painting, the Canadian Prime Minister is satirically portrayed as a reclining nude with his genitals exposed.

31. Nyoni is "stymied and stunned" by "the unwillingness to regard the most basic and fundamental marker of human existence (the human body) as acceptable".

Nyoni para 12, p 244

32. Marasela takes umbrage at the fact that the "public display of male genitalia" is labelled "un-African, and disrespectful to our culture". "We cannot assume that all Black men collectively agree that they have one uniform culture that opposes

public display of male genitalia, or that all Black people think in any one particular way".

Marasela, paras 7 and 8, p 223

33. We submit that the visitor to the gallery and its website is likely to locate the exhibition as a whole and *The Spear* in particular as a work of political satire. This artwork is thus not only artistic but also political speech.

Essers para 17, p 59

34. Humorous expression, including satire, parody and pastiche, enjoy special constitutional protection, both in South Africa and internationally.

35. In ***Laugh It Off Promotions CC v SAB International (Finance) BV t/a SAB Mark International***, Sachs J in his concurring judgment, articulated the importance of protecting humorous images as follows:

> **"A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health."**
>
> ***Laugh It Off Promotions CC v SAB International (Finance) BV t/a SAB Mark International* 2006 (1) SA 144 (CC) at para 110**
>
> **"Laughter too has its context. It can be derisory and punitive, imposing indignity on the weak at the hands of the powerful. On the other hand, it can be consolatory, even subversive in the service of the marginalised social critics. What has been relevant in the present matter is that the context was one of laughter being used as a means of challenging economic power, resisting ideological hegemony and advancing human dignity. We are not called upon to be arbiters of the taste displayed or judges of the humour offered."**

Laugh It Off Promotions CC v SAB International (Finance) BV t/a SAB Mark International **at para 109**

36. Professor Nel locates Murray as a political satirist emerging from and speaking to a centuries'-old tradition. He characterises Murray as –

> **"The court jester, who would traditionally amuse the king, noblemen and courtiers with stories pertinent to their lives within the circumscribed power of the court … The jester was always the commentator on trouble in the land, focussing on the age-old controversies that abound within the misbehaviour of the ruling class, issues around the abuse of wealth, power, sex, resources and labour."**
>
> **Nel para 4, p 230**

37. Both Professor Nel and William Kentridge understand that *The Spear* satirises an iconic image of Lenin.

> **Nel para 9, p 232**
>
> **Kentridge para 11, p218**

37.1 By satirising that particular image, Professor Nel comments that **"**The crux of the matter is this, 'who do the genitals belong to?'"

37.2 Kentridge comments that "the genitals in the image are worn like the coat of Lenin – almost as a badge of office."

> **Nel para 9, p 233**
>
> **Kentridge para 11, p 218**
>
> **A reproduction of the image of Lenin is attached at annexure "LE4", p 140**

38. Brett Murray's exhibition is "tongue-in-cheek".

Nel para 4, p 230

39. It forms part of "the long established historical tradition of political satire … that reflects on the nature of society, perception and, like the jester, constantly cajoles or stings us to question our preconceptions".

Nel para 10, p 233

40. In short, the audience of the Goodman Gallery understand that *The Spear* exemplifies the type of political satire that "is at the heart of what we as artists and academics understand protected artistic expression to encompass, being fine art dealings in themes of power, politics and sex". (**Nel para 11, p 233**). The artwork is protected political and artistic speech. Its restriction requires to be justified in an open and democratic society.

II THE DIGNITY CLAIMS OF THE FIRST APPLICANT AS PRESIDENT AND THE SECOND APPLICANT AS POLITICAL PARTY

The second applicant

41. The second applicant is the African National Congress.

42. Our law does not recognise the right to dignity of a juristic entity such as a political party. Only natural persons have subjective feelings of dignity that may be infringed.

43. The Constitutional Court has confirmed that "juristic persons are not the bearers of human dignity".

> ***Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re: Hyundai Motor Distributors (PYT) Ltd and Others v Smit NO and Others*** **2001 (1) SA 545 (CC) at para 18**

44. In ***Media 24 Ltd v Taxi Securitisation (Pty) Ltd****,* the Constitutional Court held that while a corporation may enjoy a right to both privacy and reputation, that is only so because "both privacy and reputation fall outside the ambit of the narrow meaning of 'human dignity' which a corporation cannot have."

> ***Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and Others as amici curiae)*** **2011 (5) SA 329 (CC) at para 47**

45. The second respondent therefore has no *locus standi* in respect of the impairment of its dignity. We deal with the question of privacy below.

The first applicant

46. In order for the first applicant's claim to succeed he must show :

46.1 Firstly that he was personally injured; and

46.2 Secondly that he feels insulted in circumstances where the reasonable person would also have felt insulted.

De Lange v Costa **1989 (2) SA 857 (A) at para 27**

47. In evaluating whether this onus has been discharged by the first applicant, regard must be had to the averments made by the respondents and such facts as are common cause between the parties.

Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd **1984 (3) SA 623 (A) at p 634E – G**

48. The first applicant says that "I depose to this affidavit in my personal capacity and in my capacity as President of both the ANC and the Republic of South Africa."

Founding affidavit para 1, p 2

49. The first applicant also says that he brings "this application in my capacity as the President of the ANC whose image is a liberation movement and governing party which [sic] is seriously tarnished by the portrait in question".

Founding affidavit para 23, p 6

50. He further says, "I also bring this application in my capacity as the President of the Republic of South Africa. This portrait is not only damaging to [sic] but is also making a mockery of the office of the Presidency."

Founding affidavit para 24, p 7

51. The first applicant defines himself as both an individual and a public figure. Indeed, he elides these two components of his identity. This is inevitable, and the law recognises it as such.

52. In order for the first applicant to sustain a claim he must show that he feels insulted in circumstances where the reasonable person in the position of the first applicant would also have felt insulted. In other words, the first applicant must prove that the insult he feels is one that the reasonable person in the position of the President of the country and the ANC would have felt.

53. The principle that public figures and politicians are required to withstand greater scrutiny and criticism pre-dates the advent of the Constitution. As stated in one leading casein one leading case:

> **"Businessmen who engage in competition (like politicians who take part in public life) expose themselves to, and must expect, a greater degree of criticism than the average private individual." (Emphasis added.)**
>
> ***De Lange v Costa* at 861-862**

54. In ***Pienaar v Argus Printing and Publishing Co Ltd***, the court held that:

> **"A certain robustness of language which is used when political subjects are under discussion … I think that the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public**

and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses! Some support for this view is to be found in a passage in Gatley on Libel and Slander, 3rd ed. p. 468. It reads:

> **'In cases of comment on a matter of public interest the limits of comment are very wide indeed. <u>This is especially so in the case of public men.</u> Those who fill public positions must not be too thin-skinned in reference to comments made upon them.'" (Emphasis added.)**
>
> ***Pienaar v Argus Printing and Publishing Co Ltd* 1956 (4) SA 318 (T) at 322**

55. This approach holds good in the constitutional era. In ***Mthembi-Mahanyele v Mail & Guardian Ltd and Another***, the SCA held as follows:

> **"That does not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their dignity and their reputations. As Burchell puts it:**
>
> > **'There are limits to freedom of political comment, especially in regard to aspects of the private lives of politicians that do not impinge on political competence. Politicians or public figures do not simply have to endure every infringement of their personality rights as a price for entering the political or public arena, <u>although they do have to be more resilient to slings and arrows than non-political, private mortals.</u>'" (Emphasis added.)**
> >
> > ***Mthembi-Mahanyele v Mail & Guardian Ltd and Another* at para 67**

56. The robustness expected of public figures extends to some of the most private aspects of their lives.

56.1 In ***Malema v Rampedi & Others*****,** *City Press* had approached the plaintiff for comment on allegations of corruption and bribery. The plaintiff applied to Court for urgent interdictory relief in the form of a pre-publication

interdict. The Court held that the public is entitled, in general terms, to full disclosure concerning persons in a public position, who have high profile personalities and who invite comment about themselves:

> **"[I]t is apparent that the applicant is a public person and that the intrusion into his private life would be warranted. The aspects of his private life which are considered are in the public interest in that they are topical and concern attempts to cast light upon claimed inconsistency in the applicant's lifestyle."**
>
> ***Malema v Rampedi & Others* [2011] JOL 27601 (GSJ) at 13**

Le Roux v Dey

57. It is useful to consider the recent Constitutional Court decision in ***Le Roux v Dey* 2011 (3) SA 274 (CC)**, where the court found that the publication of the image had indeed infringed the applicant's dignity.

58. This case concerned a claim for damages arising from a publication by schoolchildren of a computer generated image in which the face of the deputy principal was superimposed along that of the principal on images of two naked men sitting in sexually suggestive postures.

59. Two primary claims were brought: first, it was claimed that the images were defamatory to the extent they sought to create the image that the principal and the deputy principal were involved in a homosexual relationship; second, it was claimed that the image infringed the dignity of the claimants. Both the defamation and the dignity complaints succeeded.

60. The facts in the ***Dey*** case are, however, clearly distinguishable from those in the current matter in at least five important respects:

60.1 First, unlike the image that was an immature expressive act, created as a schoolboy prank, *The Spear* is a serious work of art;

60.2 Secondly, the image in the ***Dey*** case was carelessly disseminated electronically; *The Spear* was displayed in a virtual and physical space specifically preserved for viewing contemporary art, a private art gallery;

60.3 Thirdly, the image created by the schoolboys was not – and nor was it ever held out to be – fair or protected comment (see below);

60.4 Fourthly, the subject of the image in ***Dey*** was a headmaster, not a prominent political figure; and

60.5 Fifthly, the artwork was displayed in the context of a broader exhibition at the gallery which deliberately and self-consciously examines challenging issues of politics and power that confront our society. We elaborate on these issues below.

61. We submit that in light of the authorities discussed above, the first applicant ought to expect robust commentary and criticism - even offensive criticism - in a democracy. The first applicant cannot claim to have objectively suffered an impairment of dignity in circumstances where he argues that this has been brought about by:

61.1 an artistic and political work;

61.2 a work which is displayed in a gallery and on its website;

61.3 a work which, it is common cause, is not a portrait of the first applicant or an anatomical depiction of the first applicant's genitals;

61.4 he is the pre-eminent public official in the country and that the controversy in regard to his exercise of political power and aspects of his private life are notorious and in the public domain

Essers, para 27, p 62.

III THE PRIVACY CLAIMS OF THE APPLICANTS

62. The violation of the right to privacy by disclosure includes :

62.1 the disclosure of private facts which have been acquired by a wrongful act of intrusion

***Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 463**;

62.2 the disclosure of private facts contrary to the existence of a confidential relationship

Eg *Culverwell v Beira* 1992 (4) SA 490 (W); and

62.3 the publication of the private facts by the mass media

Eg *National Media Ltd v Jooste* 1996 (3) SA 262 (A).

63. The applicants have not established that *The Spear* discloses any private facts relating to the applicants. It is common cause that the genitalia depicted in the image are not those of the President. It is a symbolic and highly stylised artwork.

64. Since the applicants have failed to establish a factual infringement of privacy, it is not necessary to determine the question of wrongfulness. But even if they surmount that formidable hurdle, the facts they are alleging to be private are in fact now so firmly in the public domain that no privacy protection can arise. We deal with this issue further in the section discussing the requirements for a final interdict below.

IV *THE SPEAR* IS PROTECTED FAIR AND LEGITIMATE COMMENT

65. Even assuming that *The Spear* infringes the first applicant's dignity, the artwork nevertheless was not published by the first and third respondents unlawfully because viewed in its proper context (as set out above) the artwork clearly benefits from the defence of fair or protected or legitimate comment.

The test of unlawfulness

66. Our courts have repeatedly held that South African society places a premium on protecting the expression of opinions, and that these opinions need not be palatable for the entire community in order to enjoy protection. Ideas and images which may be offensive, shocking and disturbing may warrant protection:

67. In ***Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC)** the Constitutional Court endorsed the famous dictum in ***Handyside v The United Kingdom***, in which the European Court of Human Rights held that freedom of expression is applicable

> **"not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".**"
>
> ***Handyside v The United Kingdom* (1976) 1 EHRR 737 at para 49**

68. The Constitutional Court again endorsed this dictum In ***Laugh It Off Promotions v South African Breweries*:**

"The constitutional guarantee of free expression is available to all under the sway of our Constitution, even where others may deem the expression unsavoury, unwholesome or degrading."

Laugh It Off Promotions v South African Breweries **2006 (1) SA 144 (CC) at para 55**

69. Courts in many other jurisdictions have expressed this view.

69.1 The Supreme Court of Sri Lanka has stated the following:

"The unfettered interchange of ideas from diverse and antagonistic sources, however unorthodox or controversial, however shocking or offensive or disturbing they may be to the elected representatives of the people or any sector of the population, however hateful to the prevailing climate or opinion, even ideas which at the time a vast majority of people and their elected representatives believe to be false and fraught with evil consequences, so long as they are lawful, must not be abridged."

Lerins Peiris v Neil Rupasinghe, Member of Parliament and Others **[1999] LKSC 27**

70. The Supreme Court of India has held that:

"It is our belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, <u>that there must be freedom not only for the thought we cherish but also for the thought we hate</u>. As was pointed out by Mr Justice Holmes in Abramson v United States ... 'The ultimate good desired is better reached by free trade in ideas ... the best truth is the power of the thought to get itself accepted in the competition of the market." (Emphasis added.)

S. Rangarajan etc. v. P. Jagjivan Ram **1989 (2) SCR 204 at 224**

71. It is therefore clear that an image is not necessarily unlawful because it shocks, angers or disgusts.

72. The test for unlawfulness or wrongfulness is an objective test of reasonableness. It requires the conduct complained of to be tested against the

prevailing norms of society in order to determine whether such conduct can be classified as wrongful.

***De Lange v Costa* at 862**

73. The question that then arises is how a court determines what the prevailing *mores* are, once a dignity infringement has been established by a plaintiff.

73.1 Our courts have held that the answer to that question is not public opinion. For the purposes of determining wrongfulness, the court must not equate popular opinion with the legal norm. On the contrary, the Constitution must in certain contexts protect individuals from the views of the majority. In ***S v Makwanyane***, the Constitutional Court held that:

> **"Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. <u>If public opinion were to be decisive there would be no need for constitutional adjudication</u>. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. ...**
>
> **<u>This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public</u>. Justice Powell's comment in his dissent in *Furman v Georgia* bears repetition:**
>
> > **...the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery - not the core - of the judicial process in constitutional cases. The**

> **assessment of popular opinion is essentially a legislative, and not a judicial, function." (Emphasis added.)**
>
> ***S v Makwanyane and Another* 1994 (3) SA 868 (CC) at paras 88 - 89**

74. In a similar vein, when interpreting an image such as *The Spear*, the courts adopt an objective approach and do not consider the meaning adopted by the plaintiff, or any other person. As was stated by the Constitutional Court in ***Le Roux v Dey*** (also referred to below as "**the *Dey* case**"):

> **"As to his main case, which relies on a statement being defamatory per se, it matters not how Dr Dey [the plaintiff] understood the picture or what he said in his pleadings or in his evidence. The primary or ordinary meaning of the picture is something for the court to decode. The Supreme Court of Appeal can therefore not be faulted when it held that the ordinary meaning of the picture, express or implied, is not a matter for evidence, because interpretation is an objective issue."**
>
> ***Le Roux and Others v Dey* at para 96**

75. There is no South African case that speaks directly to the issue of the content of the legal norm against which to test the balance between the right to freedom of expression in the case of an artwork and the right to dignity. There are a few international cases, however, that address the question directly. The most important of these is ***Vereinigung Bildender Kunstler v Austria*** (also referred to below as "**the *Meischberger* case**").

75.1 In the ***Meischberger*** case, the European Court of Human Rights ("**ECHR**") was presented with facts similar to the present case. The ECHR, was required to decide the appropriateness of the continued publication of highly provocative forms of artistic expression, where the content of such

expression was directed at political figures. The applicant association, Vereinigung Bildender Künstler Wiener Secession, is an association of artists based in the Secession Building, Vienna. The Secession, an independent gallery, is one of Austria's best-known art galleries and is devoted entirely to exhibitions of contemporary art. As part of the association's 100th anniversary celebrations, the applicant association held an exhibition entitled "The century of artistic freedom" and among the works shown was a painting entitled "*Apocalypse*", which had been produced for the occasion by the Austrian painter Otto Mühl.

75.2 The painting, measuring 450cm by 360cm, was a collage of 34 public figures – including Mother Teresa, the Austrian cardinal Hermann Groer and the former head of the Austrian Freedom Party ("**FPÖ**"), Jörg Haider – all naked and involved in sexual activities. The bodies of those figures were painted but the heads and faces were depicted using blown-up photos taken from newspapers with the eyes of some of the people hidden by black bands. Among those portrayed was Mr Meischberger, a former general secretary of the FPÖ. At the time of the events he was a member of the National Assembly. Mr Meischberger was shown gripping the ejaculating penis of Mr Haider while at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa.

75.3 In a parallel with the present case, the painting raised a considerable amount of controversy in the Austrian press and was ultimately vandalised by a visitor to the exhibition, who covered the part which showed Mr Meischberger, among others, with red paint.

75.4 On 22 June 1998 Mr Meischberger brought proceedings under section 78 of the Copyright Act against the applicant association, seeking an injunction prohibiting it from exhibiting and publishing the painting, and requesting compensation. He argued that the painting debased him and his political activities. The Vienna Court of Appeal ultimately found that the painting constituted a debasement of Mr Meischberger's public standing, and issued an injunction against the applicant association prohibiting it from displaying the painting at exhibitions and ordering it to pay compensation.

75.5 In upholding the appeal by the association, the ECHR made pointed remarks on precisely the same issues raised in the present case. On the importance of freedom of expression, the ECHR found that:

> **"The Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual."**
>
> ***Vereinigung Bildender Kunstler v Austria*** **(Application no. 68354/01, 25 January 2007) at para 26**

75.6 Regarding the character of speech that is protected, the Court enunciated the sentiments expressed throughout the heads of argument, particularly that:

> **"It [Article 10] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". Those who create, perform, distribute or exhibit works of art contribute to**

> **the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression. Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities"; their scope will depend on his situation and the means he uses."**
>
> ***Vereinigung Bildender Kunstler v Austria* at para 26**

76. Against this background, it is appropriate to consider the work sought to be banned *in casu*. *The Spear* is a composite image with generic genitalia pasted on top of the subject's clothes. The image and genitals are used in service of a pun, a *double entendre* on the word "spear". The combination of image and title make an idea rather than a portrait. Importantly, the idea conveyed is the relationship of power to sexuality.

Kentridge paras 7-10, p 217

77. The applicants have chosen to ascribe a meaning to the portrait that is purely subjective and have thus concluded that its continued publication is unlawful. That cannot be the test. The work is further condemned on the basis of views and considerations that cannot conclusively be said to be held by the wider demographic that the applicant purports to represent. Even if the interpretation volunteered by the applicants find favour with the Court, there can be no doubt that the image constitutes fair or protected comment and is intended to stimulate legitimate and robust debate on the various political issues raised by the exhibition, viewed in context, as a whole. We discuss this issue further below.

78. The painting cannot be interpreted to be a portrayal or representation of real life events. On this point the court in the ***Meischberger*** case held:

> **"The Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care."**
>
> ***Vereinigung Bildender Kunstler v Austria* at para 33**

79. If it is the first applicant's view that the painting in some way addresses aspects of his private life, this is legally irrelevant. *The Spear,* in any event, constitutes fair or protected comment on an issue that has come to characterise the first applicant's tenure as President of the Republic.

The protection of honest comment

80. The law of *injuria* singles out comment as a protected form of speech and allows for the widest possible latitude. The pertinent question in this context is whether the comment is honest: more importantly, whether the jibe is 'fair' does not (in law) depend solely or even principally on reason or logic. Cameron JA, quoting Innes CJ in ***Crawford v Albu* 1917 AD 102 at 114**, suggested that the use of the word 'fair' in connection with the defence "is not very fortunate". This is because it is not what the court thinks is fair (a critical comment or opinion, Innes CJ said, need not "necessarily commend itself to the judgment of the court"). Nor does the comment have to "be impartial or well-balanced". Indeed,

'fair' in this context means only that the opinion expressed must be one that "a fair man, however extreme his views may be, might honestly have, even if the views are prejudiced": ***Hardaker v Phillips*** **2005 (4) SA 515 (SCA) at para 32**.

81. ***Hardaker v Phillips*** reinforces the proposition that comment that demeans and infringes dignity is nonetheless protected because it is comment and the viewer can make up his or her own mind as to whether that comment is justified.

82. Likewise in ***The Citizen 1978 (Pty) Ltd v McBride****,* the Constitutional Court held that:

> **"Protected comment need thus not be "fair or just at all" in any sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true."**
>
> ***The Citizen 1978 (Pty) Ltd v McBride*** **2011 (4) SA 191 (CC) at para 84**

83. Honest comment is never unlawful under the law of defamation. There is no reason as to why art that offers honest comment should be judged more strictly by our courts than spoken comment, as in the ***Hardaker*** and ***McBride*** cases.

84. Brett Murray's artwork, *The Spear*, is undoubtedly honest comment.

85. The artist himself testifies that a great deal of his professional life has been dedicated to creating satirical images which attach abuses of power. He did so in the apartheid years and continues to do so now. His satire has, for many years, employed the use of symbols with sexual connotations representative of the political power and patriarchy.

Murray paras 4.3 – 4.4, p 210

86. Artist Senzeni Marasela confirms these views. "If you view the art [Murray] has produced throughout his career", she testifies, "he has a long series of works that look critically at what we deem is normal or accept as such".

Marasela para 5, p 222

87. The director of the Goodman Gallery, Liza Essers, testifies that central to her vision for the gallery is the promotion of cultural activism and social commentary.

Essers para 5.2, p 50

87.1 The *raison d'etre* of the Goodman Gallery is to –

"show work that challenges the *status quo,* ignites dialogue and shifts consciousness, the work of Brett Murray is typical of the Goodman Gallery's mandate."

Essers para 5.3, p 51

87.2 Along with Murray, several artists represented by the Goodman Gallery have broached contentious issues within their work. It has become the signature of the Goodman Gallery to present provocative statements about religious, political and social conditions without aligning itself to any one view.

Ibid

87.3 Another priority for the Goodman Gallery in recent years has been to broaden the dialogue about issues of race, identity, post-colonialism and politics.

Essers para 5.4, p 51

87.4 Essers continues that:

> **"I do not want to suppress anyone's views and nor do I want to align myself with anyone's views. That is not the role of the Goodman Gallery. I want to protect the space for the debate that is the lifeblood of the Goodman Gallery."**

Essers para 5.10, p 54

87.5 And to the extent that the work comments on the exercise of public power most powerful public official in the country, the first applicant, it is based on notorious facts that are in the public domain.

Essers para 27, p 62 (and relevant annexures)

88. In ***De Lange v Costa***, the Appellate Division held that criticism which is fair and honest can never constitute an *injuria*. This applies to *The Spear*.

> **"There is no such thing as an absolute right not to be criticised. A person must be prepared to tolerate legitimate criticism, ie criticism which is fair and honest. Put differently, an act done in the exercise of a right is not a wrongful act, and can therefore not constitute an injuria. Honest criticism is such an act. … Whether in given circumstances criticism may be regarded as legitimate must depend upon, inter alia, the relationship of the parties involved and the nature of the affairs they engage in. Businessmen who engage in competition (like politicians who take part in public life) expose themselves to, and must expect, a greater degree of criticism than the average private individual." (Emphasis added.)**

***De Lange v Costa* at 861-862**

V THE APPLICANTS HAVE NOT MADE OUT A CASE FOR FINAL RELIEF

Absence of a clear right

89. The applicants seek final relief. They must therefore show that they have a clear right to the relief they seek in their notice of motion.

90. Prayer 2 of the notice of motion asks this court to order :

> **"that the first and second respondents ('the respondents') be interdicted from displaying exhibiting, publishing or distributing the image of the first applicant by one Brett Murray, entitled 'The Spear' depicting his private parts ('the portrait')".**

91. The applicants must therefore show that there are no circumstances whatsoever that would permit either the artist or the gallery to show anyone whatsoever the image of *The Spear.* Since this is final relief, the ban they seek is of a permanent nature.

92. The applicants are requesting an absolute restriction on the fundamental right of the respondents to freedom of expression. The Constitutional Court has held, however, that to be legitimate, a limitation of a fundamental right must achieve benefits that are in proportion to the costs of the limitation. The limitation will not be proportionate if other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent. If a less restrictive alternative method exists to achieve the purpose of their imitation, then that less restrictive method must be preferred.

> ***S v Makwanyane and Another*** **1994 (3) SA 868 (CC) at paras 123 and 128**

93. The applicants have not made out a case that supports the proposition that if the applicants displayed the work, for example, to post-graduate students of satirical art, their right to dignity would be infringed. Similarly in the case of scholarly work or an academic institution. The artists may not take the artwork home and hang it in his living room. In other words, the applicants have not shown, and nor can they conceivably show, that there are no possible circumstances in which the Goodman Gallery or the artist can show the artwork.

94. It is difficult to think of any situation in which such a comprehensive and permanent ban could be acceptable. It is conceivable only in the instance of highly classified documents the disclosure of which would threaten public safety. But even in those circumstances there are limits. By way of analogy, even when the State approached this Court for an order in terms of which certain parts of a criminal trial relating to the non-proliferation of nuclear weapons to be held *in camera* the Court found that the State's application was overbroad and constituted an unconstitutional infringement of the right to a fair trial.

> ***S v Geiges & Others (M&G Media Ltd & Others intervening)* 2007 (2) SACR 507 (T) at para 47**

95. Another example where less restrictive means were adopted by the Court in preference to a blanket ban on freedom of expression is ***Media 24 Limited and Others v National Prosecuting Authority and Others; In re S v Mahlangu and Another***. As Raulinga J put it:

> **Indeed if the application [for access to the trial] is refused, it will have the effect of substantially limiting the right to receive**

> **information of members of the public and, therefore the right to freedom of expression. The public will not know the circumstances of the killing. In the converse, if the media is allowed access into the court-room, this may prejudice the right of the minor accused to be tried in camera. The minor accused may suffer emotional trauma and he may feel intimidated by the presence of the media.**
>
> **A choice will therefore have to made between limiting the rights of the accused to a trial by hearing the matter behind closed doors, and by that limit the rights of the public or to limit the rights of the accused in terms of section 36 of the Constitution and yield to the rights of freedom to receive information.**
>
> ***Media 24 Limited and Others v National Prosecuting Authority and Others; In re S v Mahlangu and Another* 2011 (2) SACR 321 (GNP) at para 16**

96. The Court in that case resolved the conflict by a less restrictive approach than completely banning the media from attending the proceedings, and instead ordered that the media and certain members of the public would be permitted to witness the proceedings in a closed-circuit television room.

> ***Media 24 Limited and Others v National Prosecuting Authority and Others; In re S v Mahlangu and Another* 2011 (2) SACR 321 (GNP) at para 27**

97. *The Spear* does not contain classified information that might constitute a threat to national security. It is an artwork. The first respondent and the artist have a constitutionally protected right to freedom of expression. There can surely be no infringement that warrants the total ban of its display in any circumstances whatsoever until the end of time.

98. In addition, as ***S v Geiges*** indicates, any infringement of the expressive right must be narrowly-tailored. There has been no attempt whatsoever by the

applicants to tailor their relief. The relief is permanent and makes no distinction or provision for the spaces in which the artwork may be displayed. Even in the event that some restriction were justified (which we submit is not the case) the relief sought does not seek to differentiate between the places where the work is displayed, (eg on the internet or in the physical gallery), possible restrictions to the internet or physical spaces or in respect of who may view the work (eg. restricted to adult viewers only). In this respect the relief sought is clearly over-broad.

99. The relief sought by the applicants is formulated in broad and overreaching terms that cannot be justified. On this point the court in the ***Meischberger*** case held:

> **"The Court lastly notes that the Austrian court's injunction was not limited either in time or in space. It therefore left the applicant association, which directs one of the best-known Austrian galleries specialising in contemporary art, with no possibility of exhibiting the painting irrespective of whether Mr Meischberger was known, or was still known, at the place and time of a potential exhibition in the future [...] In sum, having balanced Mr Meischberger's personal interests and taking account of the artistic and satirical nature of his portrayal, as well as the impact of the measure at issue on the applicant association, the Court finds that the Austrian court's injunction was disproportionate to the aim it pursued and therefore not necessary in a democratic society within the meaning of Article 10 § 2 of the Convention."**
>
> ***Vereinigung Bildender Kunstler v Austria*** **at paras 37-38**

100. There is simply no authority for the type of order the applicant seeks. The order does not pend the determination on some other process. It simply extinguishes the respondent's rights in perpetuity. This Court is being asked to be the first

court post- the Constitution to ban an artistic work, in perpetuity, and regardless of context.

101. Moreover, as we have submitted above, *The Spear* does not infringe the applicants' dignity or privacy. And if the first applicant's dignity is infringed, *The Spear* is clearly honest and protected comment. Its publication and exhibition in the context of the gallery and the website are not unlawful.

The remedy sought will not repair any harm that the first applicant may have suffered

102. The first applicant also cannot argue that the relief he seeks will repair the harm he alleges he has suffered.

103. In the words of the first applicant, the artwork has "been displayed or been accessible to millions within and outside the country".

Founding affidavit para 42, p 14

104. That the image of the artwork is so extensively in the public domain also emerges clearly from the evidence put up by the gallery. The image has appeared extensively on the Internet, on media websites or social networks, and in national newspapers.

Answering affidavit, annexure "LE5", pp 141-144; and annexure "LE6", pp 145, 151, 154-156, 162-166, 168, 175-176, 186, 188, 191, 193-194, 196, 199

105. It is submitted that in the circumstances, granting the applicants the remedy of an interdict would not address the alleged harm suffered by the applicants at all. To the extent that the first applicant claims that his privacy or dignity has been infringed, a ban on the exhibition of the artwork will be entirely ineffective. This much has been recognised in a number of foreign decisions in analogous contexts.

106. In ***Giggs (previously known as "CTB") v News Group Newspapers Ltd*** the Court could not order an injunction to restrain the publication of the identity of a footballer, Ryan Giggs, who had earlier obtained an injunction against the revelation of his name as the applicant in a privacy case, in circumstances where his identity was widely available in the public domain, including the Internet. The court held as follows:

> **"NGN further submits that, as matters now stand, an injunction to restrain publication of the identity of Mr Giggs as the person referred to in the Article would be futile and unreal. The world at large has known that for many months. On any view, his identity as the subject of the Article is in the public domain. NGN also submits that Mr Giggs is not entitled to any, or any substantial, damages for the publication by it of the anonymised Article. And as Mr Spearman submitted, Mr Giggs has achieved vindication of his rights against Ms Thomas, and there is little if anything that he can obtain by way of further vindication in continuing the action against NGN."**
>
> ***Giggs (previously known as "CTB") v News Group Newspapers Ltd*** **2012 EWHC 431 (QB) at para 11**
>
> **"The claim for an injunction has equally been overtaken by events, for the reasons given in para 11 above."**
>
> ***Giggs (previously known as "CTB") v News Group Newspapers Ltd*** **at para 72**

107. Indeed, even in the context of national security, courts internationally will not restrain the publication of information which has been widely published. The leading case is the famous case of ***Attorney-General v Guardian Newspapers (No 2)*** ("**the Spycatcher case**"), where the House of Lords was requested by the government to interdict the distribution of a book by a former MI5 agent, the contents of which contained names of colleagues, details of operational techniques, and of specific operations (including a plan by MI6 to assassinate President Nasser of Egypt). The book had already been widely published worldwide. Lord Keith held that:

> **"[G]eneral publication in this country would not bring about any significant damage to the public interest …. All such secrets as the book may contain have been revealed to any intelligence services whose interests are opposed to that of the United Kingdom. "**
>
> ***Attorney-General v Guardian Newspapers (No 2)*** **[1990] AC 109, [1988] 3 All ER 545, [1989] 3 WLR 776 at 642**

107.1 See also the decision of Lord Griffith, who stated that if the injunction had been issued, "the law would indeed be an ass, for it would seek to deny to our citizens the right to be informed of matters which are freely available throughout the rest of the world".

> ***Attorney-General v Guardian Newspapers (No 2)*** **at 652**

Lord Goff's decision is also instructive:

> **"[T]he principle of confidentiality only applies to information to the extent that it is confidential …. [O]nce it has entered … the public domain … then, as a general rule, the principle of confidentiality can have no application to it. "**
>
> ***Attorney-General v Guardian Newspapers (No 2)*** **at 659**

See also: *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153

108. In the circumstances, it is clear that the relief sought by the applicants would not be effective at all. The fact that "the horse has bolted" clearly militates against the final relief sought.

Satisfactory remedy of damages

109. Finally, the first applicant has an obvious satisfactory alternative: that of damages. As Nugent JA stated in an analogous context in ***Midi-Television***:

> **"Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose. Where there is a risk to rights that are not capable of subsequent vindication a narrow ban might be all that is required if any ban is called for at all. It should not be assumed, in other words, that once an infringement of rights is threatened, a ban should immediately ensue, least of all a ban that goes beyond the minimum that is required to protect the threatened right."**
>
> ***Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para 20**

110. The applicants have, therefore, not made out a case for final relief.

VI URGENCY

111. This application is brought by way of extraordinary urgency, having been launched in the evening of Friday, 18 May 2012, for enrolment on Tuesday, 22 May 2012 (the initial date for the hearing) - a mere two court days after its launch. The first and third respondents contend that the ostensible urgency is impermissibly self-created in the circumstances.

112. In contrast to the submission made in the founding affidavit that the first and second applicants only became aware of the work being displayed in the middle of the week beginning 14 May 2012, members of government (including the Minister of Arts and Culture, Mr Paul Mashatile) were in fact aware of this at least by Sunday, 13 May 2012 - five working days prior to the application being launched. Given that these members are agents of the second applicant, with a reporting obligation to the first applicant, this renders their knowledge imputable to the applicants.

Founding affidavit para 18, p 9

Answering affidavit para 35.2, p 65

113. It is a trite principle that "an applicant cannot create its own urgency by delaying bringing the application until the normal rules can no longer apply." It is submitted that the delay due to the applicants' own conduct nullifies their claim of urgency and their complaints of the continued exhibition, given that the painting has been allowed to stand for more than an additional week in which time it has been widely published by various parties over a number of forms of print and electronic media.

114. It is further not open to the applicants to argue that the delay was caused due to their prior engagement with the respondents, as the respondents were only contacted on Thursday, 17 May 2012 prior to the application being launched on Friday, 18 May 2012.

***Transnet v Rubenstein* 2006 (1) SA 591 (SCA)**

115. Were this court to entertain this application, it would be sanctioning a serious abuse of process. Any party who seeks to have an application heard on an urgent basis even though there are no grounds for urgency, can then simply contrive to do so by bringing an unfounded application in urgent court without there being any proper basis for this.

CONCLUSION

116. There is no hierarchy of rights in the Bill of Rights. The right to dignity cannot trump the right to freedom of expression. The task is to balance the two competing rights at hand. We submit that *The Spear* does not infringe the dignity (or privacy) of the applicants, and in any event, constitutes honest and legitimate comment on a public figure. Our courts give the widest possible latitude to the category of fair comment. Our courts have held that legitimate comment, particularly of a public figure, can never be seen as an insult to dignity.

117. The legal norm against which *The Spear* must be tested, we have argued, cannot be that of the general public. Nor should the court substitute popular sentiment for judicial consideration of the appropriate legal norm. The first respondent displayed the artwork in a private gallery to a few hundred art-

literate and discerning members of the public. It is their understanding of *The Spear*, in its context of the exhibition as a whole, that is germane to the investigation of wrongfulness.

118. The evidence of the first respondent, the third respondent, leading academics of fine art and practising artists shows that this audience, at least, understands the work as a symbolic and metaphorical satire. They have testified that, like it or loathe it, *The Spear* has made an important contribution to the milieu in which they work. It is also quite evidently provoked widespread debate in the community at large. In other words, *The Spear* has been a catalyst for the type of deliberation that characterises and is indeed the lifeblood of a democracy.

119. We respectfully submit that the application should be dismissed with costs, including the costs of two counsel.

David Unterhalter SC

Matthew Welz

Carol Steinberg

Tembeka Ngcukaitobi

Mmusi Seape

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 17978/2012

PH NO. 342

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	First applicant
AFRICAN NATIONAL CONGRESS	Second applicant
DUDUZILE ZUMA-SAMBUDLA	Third applicant

and

GOODMAN GALLERY	First respondent
CITY PRESS	Second respondent
BRETT MURRAY	Third respondent

FIRST RESPONDENT'S INDEX OF AUTHORITIES

CONSTITUTION

- Constitution of the Republic of South Africa, 1996

DOMESTIC CASE LAW

- *Channing v South African Financial Gazette Ltd* 1966 (3) SA 470 (W)

- *Crawford v Albu* 1917 AD 102
- *Culverwell v Beira* 1992 (4) SA 490 (W)
- *De Lange v Costa* 1989 (2) SA 857 (A)
- *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E-TV* 2006 (3) SA 92 (C)
- *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A)
- *Hardaker v Phillips* 2005 (4) SA 515 (SCA)
- *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 and Another* 2008 (8) BCLR 771 (CC)
- *Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC)
- *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SAB Mark International* 2006 (1) SA 144 (CC)
- *Le Roux v Dey* 2011 (3) SA 274 (CC)
- *Malema v Rampedi & Others* [2011] JOL 27601 (GSJ)
- *Media 24 Ltd and Others v National Prosecuting Authority and Others; In re S v Mahlangu and Another* 2011 (2) SACR 321 (GNP)
- *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and Others as amici curiae)* 2011 (5) SA 329 (SCA)
- *Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA)
- *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC)

- *Mthembi-Mahanyele v Mail & Guardian Ltd & Another* 2004 (6) SA 329 (SCA)
- *National Media Ltd v Jooste* 1996 (3) SA 262 (A)
- *Phillips v DPP, WLD* 2003 (3) SA 345 (CC)
- *Pienaar v Argus Printing and Publishing Co Ltd* 1956 (4) SA 318 (T)
- *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A)
- *Setlogelo v Setlogelo* 1914 AD 221
- *Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re: Hyundai Motor Distributors (PYT) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC)
- *S v Geiges & Others (M&G Media Ltd and Others intervening)* 2007 (2) SACR 507 (T)
- *S v Makwanyane and Another* 1994 (3) SA 868 (CC)
- *S v Mamabolo* 2001 (3) SA 409 (CC)
- *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC)
- *Transnet v Rubenstein* 2006 (1) SA 591 (SCA)
- *Tsedu & Others v Lekota & Another* 2009 (4) SA 372 (SCA)

FOREIGN CASE LAW

- *Attorney-General v Guardian Newspapers (No 2)* [1990] AC 109, [1988] 3 All ER 545, [1989] 3 WLR 776
- *Giggs (previously known as "CTB") v News Group Newspapers Ltd* 2012 EWHC 431 (QB)

- *Handyside v United Kingdom* (1979) 1 EHRR 737
- *Lerins Peiris v Neil Rupasinghe, Member of Parliament and Others* [1999] LKSC 27
- *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153
- *S. Rangarajan etc. v. P. Jagjivan Ram* 1989 (2) SCR 204
- *Vereinigung Bildender Kunstler v Austria* (Application no. 68354/01, 25 January 2007)