

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG**  
**(REPUBLIC OF SOUTH AFRICA)**

**CASE NUMBER: 17978 / 2012**

In the matter between:

**JACOB GEDLEYIHLEKISA ZUMA**

First Applicant

**AFRICAN NATIONAL CONGRESS**

Second Applicant

and

**GOODMAN GALLERY**

First Respondent

**CITY PRESS**

Second Respondent

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**FILING SHEET: APPLICANTS' HEADS OF ARGUMENT**

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Presented for Service and Filing: **Applicants' Heads of Argument**

SIGNED AT ROSEBANK ON THIS THE 23rd DAY OF MAY 2012



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Reference : Ms. Z Mbuyisa/ Willem de Klerk

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**APPLICANTS' HEADS OF ARGUMENT**

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**1. INTRODUCTION**

- 1.1 In terms of the amended Notice of Motion the First Applicant seeks an order in the following terms:

- 1.1.1. Declaring the image/portrait of the First Applicant by Brett Murray, entitled "The Spear" depicting the First Applicant's private parts ("the portrait") to be unlawful and unconstitutional;
- 1.1.2. That the First and Second Respondents ("the Respondents") be interdicted from displaying, exhibiting, publishing or distributing the portrait; and
- 1.1.3. That the Respondents pay the costs of this application.

**Notice of Motion, paras 2, 3 and 4**

- 1.2 This application raises the following issues:
  - 1.2.1 Whether a person's right to inherent human dignity as contained in section 10 of the Constitution can be infringed or impugned;
  - 1.2.2 If the answer to the above question is in the affirmative, the second question is whether such limitation is justifiable in an open and democratic society based on human dignity, equality and freedom. Linked to this question is the most important question regarding where the line ought to be drawn and by whose standards;
  - 1.2.3 The third question is what the standard is for assessing or determining the justification for the infringement of the right. The standard is a combination of the subject's subjective feeling and the objective assessment by the court;
  - 1.2.4 The fourth question is whether the portrait, which is the subject matter of this application, tested subjectively in the eyes of the subject and objectively in

the eyes of the hypothetical reasonable viewer limits or impugns the First Applicant's right to inherent human dignity;

- 1.3 In the event that the right to dignity may be justifiably impinged upon the court has to engage in an exercise of creating a balance between the right to dignity and and the respondents' reliance on the right to freedom of expression in the form of freedom to artistic creativity under section 16(1)(c). The question is what factors will the court take into account when striking that balance.
- 1.4 At the heart of this case is the question whether the right to dignity is immune from being diminished or taken away under any circumstances and whether if the right may be encroached upon what factors may be taken into account when striking a balance between competing rights.
- 1.5 Accordingly, it will be argued that the right in terms of section 10 cannot be infringed and that if it can, the Constitution enjoins the court to do so taking into account factors such as the nature of the right to be infringed upon, other relevant rights and values enshrined in the Constitution. It will be argued that the Constitution especially calls upon the court not to adopt an elitist approach and disregard the factors that may be viewed as backward or unsophisticated.
- 1.6 Lastly, the issue to be determined is whether the relief sought can be effected to protect the inherent dignity of the First Applicant.
- 1.7 We have structured these heads of argument as follows:

- 1.7.1 First, we will argue that the right to human dignity is a foundational right whose value should not be opportunistically made subsidiary to the right to freedom of expression, in particular the right to artistic creativity. In this regard, we deal with case law emerging from the Constitutional Court, which has emphasised the need to strike the right balance between the right to human dignity and the right to freedom of expression.
- 1.7.2 Second, we will argue that seen objectively and in the context which seeks to respect all cultural sensibilities in terms of section 30 and 31 of the Constitution, it cannot be disputed that viewed from the cultural perspective of many, the portrait represents an injurious insult upon and an impairment of the First Applicant's human dignity. The fact that the majority of those with such cultural sensibilities are African and regarded as species of an inferior culture and status is irrelevant in the objective analysis of whether or not an unlawful infringement has occurred. It is simply a relic of the dominant and pervasive colonial mind-set. It has no place in our constitutional dispensation, even if it parades as progressive thought;
- 1.7.3 Third, in so far as the Respondents have sought to suggest rather bizarrely, that the First Applicant has "brought this upon himself", it will be argued that one's conduct, no matter how perceived cannot diminish constitutionally enshrined rights. In this regard, it will also be argued that the antipathy towards an individual should never drive the analysis of whether or not such individuals are worthy of constitutional protection. Further, the suggestion that had the First Applicant not challenged the portrait, it would not have received prominence has no place in these proceedings. It is simply an unfortunate

statement made without requisite thought and consideration of its real import. The Second Respondent's answering affidavit is replete with silly references to the utterances of the First Applicant in his other cases as if to suggest that such utterances or life style are a legitimate and lawful way of limiting one's right to human dignity. These references are simply motivated by a misplaced belief that they will create or perpetuate in the court's mind the sufficient antipathy towards the First Applicant, for the Second Respondent to win the sympathy of the court against the First Applicant. It is such an obvious and patent stratagem that it betrays a pathetic level of disrespect for the integrity of the court;

- 1.7.4 Fourth, it will be argued that the infringement of the First Applicant's right to human dignity is not justified in an open and democratic society. It will be argued further that an open and democratic society is also the one that seeks to recognize African cultural perspectives as legitimate as the Western lenses which have inspired the suggestions that this case should be dismissed;
- 1.7.5 Fifth, it will be argued that applying an objective test, the portrait crosses the line between the right to freedom of expression and the right to human dignity. Accordingly, it is an unlawful and unjustified violation of the First Applicant's right to human dignity.
- 1.7.6 Lastly, we set out the theoretical background relevant to the issues raised by the application. In view of their relevance to the determination of the balance to be struck between the right to human dignity and the right to artistic creativity, we deal at length with the obvious collision of two world



views, one regarding itself as superior and the other perpetually demanded to justify its legitimacy and the right to exist. We will argue that this state of affairs is driven by a class and racist superiority complex and the viewing of certain cultural sensibilities as inherently inferior and illegitimate.

- 1.8 At the outset, we emphasize a peculiar feature of these proceedings in that they relate not to the drawing of the work of art, but the publication and display of such work of art. In this regard, the argument that the relief sought seeks to limit the right to artistic creativity is misplaced. The Respondents have simply misconceived the nature of the relief sought. No order is sought preventing the artist from creating the portrait and placing it on his wall for his curious pleasure. It is the dissemination, display and further publication of the portrait that the First Applicant seeks to prevent. The freedom to express himself in art form is not significantly affected by the order sought in this application.

## **2. THE ESSENTIAL FACTS**

- 2.1 The facts in this case are largely common cause. In so far as such facts are relevant to the determination of urgency, they are as follows:
- 2.1.1 The Third Respondent's exhibition entitled "Hail to the Thief II" (the exhibition) and with the themes including "the betrayal of ideals, the abuse of power, corruption and despair " (the theme) (Bundle, p 59 para17), opened on 10 May 2012. (Bundle, p 9 para 14) It will run until 16 June 2012. (Bundle, p 12 para 30)
- 2.1.2 On 13 May 2012 the Second Respondent published the First Applicant's portrait and reported on it. (Bundle, p 269 para 50)

- 2.1.3 During the course of the week during which this application was filed, the ANC spokesperson, Mr. Jackson Mthembu ("Mthembu"), was alerted to the fact that a portrait depicting the First Applicant with his private parts fully exposed was being displayed at the First Respondent's premises (Bundle, p 11 para 25);
- 2.1.4 Mthembu investigated the allegations and indeed found that the portrait was in display also in the website of the First Respondent (Bundle, p 11 para 26);
- 2.1.5 It was also found that the portrait had also been published by the Second Respondent in its 13 May edition and its website;
- 2.1.6 On 17 May 2012 Mthembu advised the office of the First Applicant of the existence of the portrait. He also sent a copy of the portrait to the office of the First Applicant. It is only then that the First Applicant became aware of the portrait (Bundle, p11 para 29);
- 2.1.7 The First Applicant was shocked, and felt personally violated and personally hurt by the nature of the portrait and how it depicted him. He also felt that it unlawfully infringed his right to human dignity. (Bundle, p11 para 29) As will be submitted, viewed from his own cultural perspective, such portrayal constituted a gross insult to his dignity as a human being, regardless of how certain people feel about him and his life;
- 2.1.8 He also felt that the continued display of the portrait would further violate and/or perpetuate the violation of his constitutionally enshrined right to human dignity (Bundle, p 11 para 29);

2.1.9 As things stand the portrait will remain in display in the First Respondent's premises until the end of the exhibition on 16 June 2012;

The First and Second Applicants took exception to the symbolism that the portrait uses in order to portray the ANC through its President as responsible for "the abuse of power, corruption and political dumbness" as the exhibition of the artist is described as its theme on the website of the First Respondent.

2.1.10 The First and Second Applicant sought to resolve this matter without approaching the courts. On 17 May 2012 the legal representatives of the First and Second Applicant addressed a letters to the First and Second Respondents seeking an undertaking that they would stop the continuing exhibition or display of the portrait from all media.

**Founding Affidavit, para 33, Annexures "GJZ 6" and "GJZ 7"**

2.1.11 The First and Second Respondents' legal representatives responded to the letters on 17 May 2012 and stated that their clients were not willing to give the undertakings.

**Founding Affidavit, para 34, Annexures "GJZ 8" and "GJZ 9"**

2.1.12 The director of the First Respondent was also quoted in the Mail and Guardian electronic newspaper dated 17 May 2012 as saying that the First Respondent would not remove the portrait;

**Founding Affidavit, para 35, Annexure "GJZ 10"**

2.2 The First and Second Respondents have filed answering affidavits that are replete with irrelevant references to the past utterances of the First Applicant, as well as their own interpretations of art, or the interpretations of other artists whose affidavits are provided as expert evidence, presumably. With respect, the court does not require experts to deal with the question of whether viewed objectively, the portrait may well offend or violate another person's right to dignity.

2.3 As will be submitted below with reference to authority, what the experts express are their own interpretations of art. Their opinions are particularly unhelpful and inadmissible because they do not represent the hypothetical ordinary reasonable viewer but are championing a right under section 16(1)(a) and thereunder the most liberal and elitist interpretation of freedom of expression based on their own worldview that is informed, we submit, by their cultural and class perspectives among other influences. Their interpretations are neither universal nor more legitimate than those held by the First Applicant and others from different class, cultural, religious, gender, upbringing, racial and other perspectives. They are different perspectives, but equally legitimate. That the respondents' opinions and interpretations of what art is are projected as standard, universal and valueless is simply a function of a colonial and civilising mind-set that individuals and societies or communities that do not accept Eurocentric norms are backwards. That represents the arrogance of elitist or dominant cultures that hold that only theirs are the superior or legitimate cultures and/or class positions.

- 2.4 The First Respondent dedicates a significant portion of the answering affidavit to the history and stature of Brett Murray in the world of arts and as a protest artist. No one doubts the talent and reputation of Brett Murray as an artist. However, this is of no help in determining the question of the balance to be struck between the right to human dignity and the right to freedom of expression.

**First Respondent's Answering Affidavit, page 52, paras 5.5 – 5.13**

- 2.5 The First Respondent contends that it opposes the application since **“no member of the public should be able to tell these artists which artworks they should exhibit and which they should not.”**

**First Respondent's Answering Affidavit, page 54, para 5.11**

- 2.6 With respect, this contention of the First Respondent misses the point of the application. The application does not seek to “tell” the artist which artworks to display *per se*. It seeks to protect the right to human dignity, which is a foundational right contained in the Constitution. The desire of the artists to exhibit their work cannot reign supreme over this constitutionally enshrined right.

- 2.7 The First Respondent has also relied on the fact that the Minister of Arts and Culture, Mr Paul Mashatile (Mashatile) and/or his advisor were apparently aware of the exhibition before 13 May 2012. With respect, this assumption is simply unfounded. The First Respondent does not state the contents of her conversation with Mashatile's advisor. The court does not know in what context the exhibition was discussed or that Mashatile and/or his advisor had been aware of the portrait.

**First Respondent's Answering Affidavit, page 65, para 35.2**

- 2.8 Significantly, the First Respondent recognises in paragraph 5.12 of its answering affidavit the possibility that the court may well rule that the portrait infringes the right to dignity. She acknowledges that the First Applicant may be outraged by the painting (Bundle, p.54, para 5.10) and that she has "every sympathy for any hurt caused to him." (Bundle, p 69 para 42.2)
- 2.9 The Second Respondent on the other hand cannot fathom the possibility that its superior culture and class position can be challenged or questioned by the court or anyone for that matter. (Bundle, p 258-264 paras 27-36) The cornerstone of its defence is its obvious antipathy towards the First Applicant in determining the outcome of this application. As will be demonstrated in greater detail later in these heads of argument, perceptions against the First Applicant, no matter how strong, are not a legitimate mechanism or regime for limiting his right to human dignity. Further submissions will be made below regarding the mainstay of the Second Applicant's basis of justification being that the First Applicant deserves what he got.
- 2.10 The Second Respondent contends that since there is no precedent in law for an order sought by the Applicants, the application should fail.

**Second Respondent's Answering Affidavit, page 252, para 8.1**

- 2.11 The Second Respondent also submits that since in its view the relief sought cannot be effective, the application must fail.

**Second Respondent's Answering Affidavit, page 252, para 8.2**

- 2.12 The Second Respondent also submits boldly that the publication of the portrait is lawful and does not breach any of the Applicants' constitutional rights.

**Second Respondent's Answering Affidavit, page 252, para 8.3**

- 2.13 The Second Respondent mischaracterises the relief sought by the Applicants as constituting a blanket ban on an artistic work.

**Second Respondent's Answering Affidavit, page 253, paras 10, 11 and 12**

- 2.14 This is clearly unnecessary hyperbole. The Applicants do not seek to prevent the artist from producing work of art. The portrait has already been produced. What the Applicants seek is an order declaring that the depiction, its publication and exhibition constitute an infringement of the First Applicant's right to dignity. Accordingly, they seek an order preventing its further exhibition and publication.
- 2.15 The Second Respondent in its answering affidavit also states that the relief sought does not seek to prevent future wrongs. This is incorrect. The nature of this application is indeed to prevent the future exhibition and publication of the portrait. The contention of the Second Respondent in this regard is without any basis. The Second Respondent argues that the "horse has bolted".

**Second Respondent's Answering Affidavit, page 254, paras 17-23**

- 2.16 This is mistaken. The Applicants recognise that some publication has already occurred, but seeks to prevent further exhibition and publication which perpetuates the violation of the right to dignity and privacy.

- 2.17 To suggest that simply because the portrait seeks to criticise the ANC and its leader the publication of the portrait cannot be unlawful is simply wrong. Criticism of the ANC and its leaders happens on the pages of our media almost on a daily basis and is welcomed. It is incorrect to suggest that the desire to criticise the ANC and its leaders is sufficient to found legality in an act which otherwise is unconstitutional. Hatred of the ANC cannot be a decisive factor nor is it relevant in determining the lawfulness or otherwise of conduct or more specifically the exhibition of the portrait.

**Second Respondent's Answering Affidavit, para 33**

- 2.18 The attachment of Mr Mondli Makhanya's (Makhanya) affidavit is simply unhelpful. One can see why the Second Respondent considered it a scoop. However, nothing in the submissions by Makhanya deals with the balance to be struck between the right to human dignity and the right to freedom of expression. Accordingly, his affidavit does not lend the legitimacy for which it was obviously solicited. Nor is it relevant or admissible as evidence.

**Second Respondent's Answering Affidavit, para 34**

- 2.19 What then follows in the Second Respondent's Answering Affidavit is an attempt at analysing art and its role. This attempt is legitimate, but not valueless or superior to other forms of analysing art form. It is simply a different way of looking at the portrait. It does not in any legitimate way demonstrate that the right balance has been struck between the right to human dignity and the right to freedom of expression.
- 2.20 The fundamental difference between the Applicants and the Second Respondent is that the Applicants recognise the right to freedom of expression, but submit that in this



instance it cannot trump the right to human dignity. The Second Respondent on the other hand, does not seriously recognise the First Applicant's right to dignity at all. Instead, it seem that the Second Respondent is of the view that its natural antipathy towards the First Applicant is a sufficient basis for violating his right to human dignity.

- 2.21 Similar to the First Respondent, the Second Respondent makes the following significant concessions that will inevitably lead to the conclusion that the depiction is an unlawful infringement of the First Applicant's right to dignity in his eyes and those of a reasonable viewer.
- 2.22 It does not endorse all the sentiments conveyed by the portrait (Bundle, p 264 para 38);
- 2.23 The depiction of the penis constituted an indignity, hence it was covered by a price tag in the Second Respondent's report (Bundle ,p 406)
- 2.24 The portrait is not something that the Second Respondent's editor would hang up at home. (Bundle, p 406 )
- 2.25 President Zuma may have felt personally offended by the portrait (Bundle, p 279 para79)

### 3. THE RIGHT TO HUMAN DIGNITY IS A FOUNDATIONAL RIGHT

3.1 Section 10 of the Constitution provides that:

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

3.2 Section 1 of the Constitution entrenches human dignity as the foundational value and a "cornerstone" of South Africa's new society. It provides that:

**"1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:**

**(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.**

**(b) Non-racialism and non-sexism**

**(c) ..."**

3.3 The Constitutional Court has considered the right to dignity against other rights, in particular the right to freedom of expression. Although the Second Respondent has sought to couch its case as if the right to freedom of expression is the foundational right, literature and case law make a different emphasis.

3.4 The Constitutional Court defines dignity in the case of *Dawood & Another v Minister of Home Affairs* in the following terms:

**“Human...dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights...Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected...”**

**Dawood & Another v Minister of Home Affairs & Others 2000 (3) SA (CC)**

**Dendy v University of Witwatersrand 2005 (5) SA 357 (W)**

- 3.5 Relevant for this case and the interplay between diverse cultural world views, is the Constitutional Court's further comment on the value of human dignity. It held at paragraph [35] of the judgment that:

**“The value of dignity in our Constitutional framework cannot...be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.”**

**Dawood case *supra***

3.6 As already submitted, it is clear that the courts enjoin everyone engaged in the balancing of rights at all times to be aware that when it comes to issues of dignity, the dignity of the previously down-trodden has to be asserted and restored. Key to the factors to be taken into account is race because of the coincidence in South Africa of race being associated with privilege or disadvantage. Even matters of culture, religion, up-bringing and education coincide with race.

3.7 In *Khumalo and Others v Holomisa* the Constitutional Court defined the nature of human dignity as follows:

**“[45] Human dignity is of paramount importance in our Constitution. It must always take precedence over freedom of expression, which, although foundational to democracy, is not a paramount value. Because the law of defamation vindicates a constitutionally entrenched right to human dignity, it constitutes a reasonable and justifiable limitation to freedom of expression....”**

**Khumalo and Others v Holomisa 2002 (5) SA 401 (CC)**

3.8 It is submitted, on this authority that has not been deviated from, that the paramouncy of the right to dignity requires that the court be slow before finding any justification for the erosion of the right to dignity. It must remain paramount until the ideal promised in the Constitution is attained. Until true freedom and equality are attained black people must not be stripped of the only of the only right that is inherent to all human beings.

- 3.9 In so far as the Respondents' argument are replete with suggestions that the First Applicant is embroiled in controversy and therefore cannot complain or his constitutional protection diminishes, the Constitutional Court settled the issue in *S v Mankwanyane*. It held that:

**"[144] The rights to life and dignity are the most important of all rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby."**

***S v Mankwanyane* 1995 (3) SA 391**

- 3.10 In the same matter of *State v Mankwanyane* Mahomed J stated as followed about the constitution :

**[The constitution... provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.]**

***S v Mankwanyane supra***

- 3.11 The suggestion therefore, that the First Applicant deserves the indignity with which he is being visited has no foundation in our constitutional jurisprudence. It is an irrelevant expression of antipathy towards the First Applicant and should not be taken into account. Disputing this approach to dignity Alan Gewirth, an American academic, writes about dignity as follows:

**"...if inherent human dignity, as the ground of human moral rights, must belong to all humans equally, then it must be a characteristic of criminals as well as saints, of cowards as well as heroes, of fools as well as sages, of mental defectives as well as mentally normal persons, of slaves as well as masters, of subjects as well as lords, of disease-ridden invalids as well as athletes, of drug addicts as well as persons of self-control, of starving proletarians as well as well-fed capitalists, and so forth."**

**Michale J Meyer, W A Parent; The Constitution of Rights: Human Dignity and American Values: Chapter on Dignity as the basis of Rights; by A Gewirth**

- 3.12 The Second Respondent relies, inter alia on the incidents, that are set out in paragraph 31 of its answering affidavit to justify in the portrait and its publication. These incidents include instances where President Zuma was acquitted, where charges were withdrawn or where prosecution was stayed permanently and where the Second Respondent wishes to impose and dictate how state affairs should be run as opposed to the manner preferred by President Zuma in a constitutional State. It is submitted that even if President Zuma were guilty of all these accusations, which we submit there is no basis to regurgitate since they have not been proven, he cannot be stripped of his inherent human dignity as democratic South Africa does not do so even to persons who have committed the most heinous crimes.
- 3.13 The same submission applies to the other respondents in so far as they seek to justify the painting or its publication on similar grounds.
- 3.14 In *Le Roux and Others v DEY* the Constitutional Court held that the test for determining an affront to one's dignity is an objective one. It stated that:

**"To succeed on a claim based on an affront to dignity, the act must be wrongful. The test is objective. The conduct of the applicants must be 'tested against the prevailing norms of society' to determine whether it is wrongful."**

***Le Roux and Others v DEY* (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC)**

- 3.15 At [paragraph 143 it was stated as follows:

"[143 broadly stated, the claim for impement of dignity comprises both a subjective and an objective element. The subjective element requires that the plaintiff must in fact feel insulted. To satisfy the objective element our law requires that a reasonable person would feel insulted by the same conduct".

- 3.16 The distinction between definition and an injury to dignity was stated as follows in the separate judgment of Fronenan J and Cameron J:

"[154] our common law recognises that people have different claims for injuries to their reputation (fama) and to their own sense of self-worth (dignitas). ... the distinction is important to our new constitutional order. It illuminates the tolerance and respect for other people's dignity expected of us by the constitution in our public and private encounters with one another. We may be deeply hurt and insulted by the actions of others, in calling or portraying us as what we have chosen, freely, not to be, or to keep private, even though we are not deviant. It may be that the personal insult or injury may not be considered, in the public eye as something that harmed our reputation. But within limits our common law, and the constitution, still value and protect our subjective feelings about our dignity."

- 3.17 It is submitted that the **Dey** case is particularly relevant in this case because, save for the fact that a claim for injury to dignity imports the subjective test to sit side by side with the objective test, the facts of the two cases are similar in that in the **Dey** case too, a composite image had been created in order to convey a meaning that impugned the dignity of the Deputy School Principal.



- 3.18 We submit that the Respondents' answers and veiled lectures about how art should be interpreted are symptomatic of an attitude that their world view constitutes the totality of South African society and its norms. We submit that the Constitution recognises the plurality of cultural and other backgrounds and obliges the courts to strike the necessary balance in determining matters of this nature.
- 3.19 In so far as the Respondents rely on the right to freedom of expression as a justification, the Constitutional Court in *S v Mamabolo* has stated as follows in a different context:

**"The balance which our common –law strikes between protection of an individual's reputation and the right to freedom of expression differs fundamentally from the balance to be struck in the United States. The difference is even more marked under the two respective constitutional regimes...The fundamental reason why the test evolved under the First Amendment cannot lock onto our crime of scandalizing the court is because our Constitution ranks the right to freedom of expression differently. With us it is not a pre-eminent freedom ranking above all others. It is even an unqualified right...the Constitution in its opening statement and repeatedly thereafter, proclaims three conjoined reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression...freedom of expression does not enjoy superior status in our law."**

**S v Mamabolo;**

**Afri-Forum and Another v Malema and Another 2011 (6) SA 240 (EqC) C**

- 3.20 In cases like the Laugh It Off case in which freedom of expression was emphasized, the case dealt with the protection of intellectual property rather than the right to human dignity. Even in cases where the right to freedom of expression has been emphasized, the Court has recognised limitations to freedom of expression.

**Laugh It Off Promotions CC v SAB International (Finance) BV t/a  
SABMARK INTERNATIONAL (Freedom of Expression Institute as Amicus  
Curiae) 2006 (1) SA 144 (CC)**

**See also Midi Television (Pty) Ltd t/a E-TV v Director of Public  
Prosecutions (Western Cape) 2007 (5) SA 540 (SCA)**

- 3.21 In Midi Television case the Supreme Court of Appeal held that:

**“[9] Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36. That they are to be reconciled within the constraints of s 36 is apparent from the following observation of Langa CJ in *Islamic Unity Convention v Independent Broadcasting Authority and Others*:**

**‘There is thus recognition of the potential that [freedom of] expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36 of the Constitution.’**

[11] In determining the extent to which full exercise of one right or the other or both of them might need to be curtailed in order to reconcile them what needs to be compared with one another are the 'extent of the limitation' that is placed upon the particular right, on the one hand, and the 'purpose, importance and effect of the intrusion', on the other hand. To the extent that anything needs to be weighed in making that evaluation it is not the relative values of the rights themselves that are weighed...but it is rather the benefit that flows from allowing the intrusion that is to be weighed against the loss that the intrusion will entail. It is only if the particular loss is outweighed by the particular benefit, to an extent that meets the standard that is set by s 36, that the law will recognise the validity of the intrusion."

3.22 We submit that the portrait, which depicts the genitalia of the First Applicant, is an affront to his dignity. Such affront cannot be justified in an open and democratic society. It is not sufficient for the Respondents to suggest the superiority of their cultural norms and instincts at the expense of those of the First Applicant and his community. The suggestion that the Respondents' sensibilities in this regard are valueless is simply disingenuous.

3.23 We submit that the Constitution recognizes all cultural communities including those of African communities. The lectures about how to interpret art as contained in the Second Respondent's affidavit fail to recognize that its interpretations of art are deeply

rooted in certain orientations and cultures. The grave error by the Respondents is not that they come from a particular cultural perspective, as they are entitled to do so, but is the arrogance of viewing their cultural perspective as the norm and superior. This is manifest from annexure "FM29" (bundle, page 406) where the Chief Editor of the second respondent argues that only her understanding and interpretation of our constitutional values is progressive. Any other view point is characterized as cultural chauvinism and dignity dogmatism. The respondents are guilty of what they accuse ordinary South Africans off.

- 3.24 We submit that depicting another person's genitalia, even in a portrait, is viewed from some cultural communities as an affront to the person's human dignity. This upfront will be recognized by the court when applying the objective test.
- 3.25 The portrait is therefore wrongful in that it depicts the First Applicant's genitalia in a manner that is regarded as an insult in his community. The Respondents have not contended why the cultural community from which the First Applicant comes is to be disregarded.
- 3.26 We submit further that the Respondent's argument that the First Applicant "brought it upon himself" is bizarre. The suggestion that if the First Applicant had not approached court the portrait would not have gained prominence is equally untenable. It is a suggestion that rape victims would find offensive in the extreme, if they were to be advised that not reporting their violation would protect their "good name". After all, we live in a world where some communities still believe that people who have been violated in that way have brought dishonor to their families and communities.

3.27 The Second Respondent has gone to great lengths to pull out references to the utterances of the First Applicant, including his testimony in his previous cases. It has even given examples of the First Applicant's private life in an effort to justify the violation of his right to dignity.

3.28 We submit that these references cannot justify the removal of constitutional protection. Accordingly, they have no basis in law. The limitation of the right to dignity in this regard is not justified in an open and democratic society.

#### 4. URGENCY

4.1 It is submitted that the continued display of the portrait constitutes a continued violation of the rights to dignity and privacy.

4.2 It is further submitted that the continued display of the portrait is manifestly serious and has the effect of impugning dignity in the eyes of all who see it. In particular, the portrait depicts the First Applicant in a manner that suggests that he is a philanderer, a womanizer and one with no respect. It is an undignified depiction of his personality in the eyes of his fellow citizens, family and children.

4.3 We accordingly submit that the continued display of the portrait is a continuing violation of rights and the more days it stays displayed, the more such rights to dignity and that of the ANC are impugned.

4.4 It is undisputed that the portrait was first published from or about 10 May 2012 by the First Respondent and published on 13 May 2012 by the Second Respondent, neither the First Applicant nor the Second Applicant became immediately aware thereof until

the cause of the complaint was brought to their attention in the middle of the week beginning 14 May 2012.

**Bundle, page 9, Founding Affidavit, paras 15 - 21**

- 4.5 It is not sufficient that the First Respondent had some contact with Mr. Mashatile or his advisor in this regard. The fact remains that the Applicants only became aware of the portrait in the middle of the week beginning 14 May 2012.

**Bundle, page 65; First Respondent's Answering Affidavit, para 35.2**

- 4.6 It is submitted that in the light of the above undisputed facts this is a matter that warrants to be heard on an urgent basis in terms of the rules.

**5. REQUIREMENTS FOR AN INTERDICT**

- 5.1 The Applicants seek an interdict to secure a permanent cessation of an unlawful cause of conduct as set out above.
- 5.2 In order to succeed in an interdict, an applicant must establish the following requirements:
- 5.2.1 A clear right
  - 5.2.2 Harm or injury; and
  - 5.2.3 No alternative remedy

### *Clear Right*

5.3 It is submitted that the First Applicant has a clear right in the depiction of his genitalia in a prurient manner as the portrait has done. It bears what is clearly his face. It is acknowledged as is the case with most of the artist's work, that other parts of his work are borrowed from others rather than his original. In this particular portrait it is clear that it is borrowed from an old Lenin statue.

5.4 It is submitted that the First Applicant has a clear constitutional right to dignity in this regard.

### *Harm or Injury*

5.5 The First Applicant's clear right to dignity has undoubtedly been violated by the respondents and this violation is of a continuous nature. This is so because even if the portrait is removed from exhibition by the First Respondent on 16 June 2012, the image will continue to exist on the respondents' other media such as websites.

5.6 The portrait has been displayed or been accessible to millions within and outside the country. In addition, despite its removal, it will continue to exist in the minds of those people who have seen it or had access to it. However, the removal of the portrait will ensure that the harm caused by its continuous publication and accessibility is limited to only those that have seen it or had had access to it. In other words it will limit the harm already caused by the portrait.

### *No Alternative remedy*



- 5.7 It is submitted that there is no other satisfactory remedy available to the First Applicant and/or the Second Applicant. It is only through an interdict that the removal of the portrait can be obtained. Even if the First Applicant sues for defamation or institute *crimen injuria* proceedings, such proceedings do not achieve the removal of the portrait from the website or display in the premises of the First Respondent.
- 5.8 This being the case of violation of dignity, reputation and integrity, there can be no monetary value attached to it that can be said to constitute alternative remedy for the continued violation of the right to dignity.
- 5.9 It is submitted that the requirements for a final interdict have been established and accordingly, the application should succeed.
- 5.10 To the above issues, it must be added the fact that the remedy is discretionary. It is submitted that in this case discretion must be exercised in favour of granting the interdict.

**Hix Networking Technologies v System Publishers (Pty) Limited and another 1997 (1) SA 391 (A) at 398 I-J**

**Janse van Rensburg NO and another v Minister of Trade and Industry and another 2001 (1) SA 29 (CC) at para 32**

## 6. REMEDY

6.1 In *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997) it was held that:

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights<sup>1</sup>.

“Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal”<sup>2</sup>

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<sup>1</sup>At para 19

<sup>2</sup>at para 69

6.2 The court also held in *Dikoko v Mokhatla* (CCT62/05) [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) (3 August 2006) that:

“The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one’s honour, dignity and reputation, and not to one’s pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of ubuntu, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the amende honorable is part of our law or not, our law in this area should be developed in the light of the values of ubuntu emphasising restorative rather than retributive justice. The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social inter-dependence. It is an area where courts should be pro-active encouraging apology and mutual understanding wherever possible<sup>3</sup>.

It seems to me that the delict of defamation implicates human dignity<sup>4</sup> (which includes reputation)<sup>5</sup> on the one side and freedom of expression<sup>6</sup> on the other. Both are protected in our Bill of Rights. It may be that it is a constitutional matter because although the remedy of sentimental damages is located within the common law, it is nonetheless “appropriate relief” within the meaning of section 387 of the Constitution. In *Fose v Minister of Safety and Security*<sup>8</sup> this Court assumed but stopped short of deciding whether “appropriate relief” in section 7(4)(a)<sup>9</sup> of the interim Constitution includes an award for

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<sup>3</sup>At paras 68 – 69

damages where the award is required to enforce or protect rights in the Bill of Rights<sup>4</sup>.

“[T]here is no reason in principle why ‘appropriate relief’ should not include an award of damages, where such an award is necessary to protect and enforce [Chapter] 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature’s intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.”<sup>10</sup>  
(footnotes omitted)

## 7. CONCLUSION

- 7.1 For the reasons set out above, it is submitted that the application has satisfied all the requirements for the remedies sought. Accordingly, the application ought to be granted.
- 7.2 The applicants have not been able to file and serve these heads of arguments before 12:00 hours today as directed by the court. The applicants ask the indulgence of the court in this regard and condonation thereof.

G MALINDI SC

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<sup>4</sup>At paras 90 -91.

**M SIKHAKHANE**

**22 My 2012  
SANDTON CHAMBERS**