

**MAGISTRATES' COURT JUDICIARY
REPUBLIC OF SOUTH AFRICA**



IN THE EQUALITY COURT IN THE MAGISTRATES' COURTS FOR THE DISTRICT OF CAPE TOWN
HELD IN CAPE TOWN

CASE NUMBER EC02/2017

In the matter between

CAPE PARTY-KAAPSE PARTY

COMPLAINANT

And

IZIKO – SOUTH AFRICAN NATIONAL GALLERY

RESPONDENT

JUDGMENT

INTRODUCTION.

[1] This is a complaint in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 8 of 2000) (hereinafter referred to as the Act). No oral evidence was led by any of the parties. The complaint was adjudicated solely on the affidavits filed. There was no dispute of fact. The matter was determined after hearing legal argument.

[2] The complainant instituted proceedings in which they allege unfair discrimination based on race and hate speech in violation of sections 7, 10 and 12 of the Act. The applicant seeks an order in the following terms:

- (a) a declaratory order that it is hate speech to say, print, display or communicate the word "Fuck White People".
- (b) an order for the payment of damages in the amount of R150 000-00.

- (c) an order restraining further discriminatory practices and the removal of the offending display.
- (d) an unconditional public apology.
- (e) an order of a deterrent nature.
- (f) a referral to the Director of Public Prosecutions and
- (g) a cost order.

[3] The respondent alleges that the work does not fall within the sections of the Act on which the complaint is based and that in any event Iziko is protected by section 12 of the Act and the constitutional right afforded in section 16 of the Constitution. The Respondent further alleges that the work complained of must be viewed in its context in the exhibition and for that reason is not a contravention of the Act. The respondent alleges that the work and the exhibit are, in general, designed to enhance the critical debate on issues of race and discrimination, which it has done, and prays for the dismissal of the complaint, and an order that the complainant be ordered to pay the costs.

FACTS.

[4] The complainant is a duly registered political party with the Independent Electoral Commission of South Africa with registration number 467.

[5] The respondent is a cultural institution established in terms of section 6 of the Cultural Institutions Act, 119 of 1998 and is a State entity under the direction and control of the Department of Arts and Culture that focuses on the preservation of natural and cultural heritage. Its mission is to manage and promote the unique combination of South Africa's heritage collections, sites and services for the benefit of present and future generations. It administers the platform for the appreciation and enjoyment of artistic artworks and encourages public commentary, debate and engagement.

[6] The work complained of was loaned to the respondent to form part of the exhibition titled "The Art of Disruptions". It was created and is owned by a student at the University of Cape Town, Dean Hutton, who is studying for a Master's Degree in Fine Art. It is part of their research towards a Master's Degree. The aim of the "Art of Disruptions" exhibition was to collect and create dialogue.

[7] The "Art of Disruptions" exhibition included other works which are not the permanent collection of the respondent, loaned from contemporary artists which were all part of the theme. These works included the works of Gerard Sekoto that depict the violent scenes of the Sharpeville massacre of 1960, the Russian revolutionary protestors and the sculptures by Jane Alexander that represents the lack of humanity during the state of emergency in the 1980's.

[8] A synopsis of the meaning and the creation of "The Art of Disruptions" exhibition, is displayed prominently on the wall of the exhibition, for visitors to see and be made aware of

the curatorial intention. The synopsis appears as Annexure A to the respondent's answering affidavit and reads as follows:

"This year, 2016, marks several milestones in the history of South Africa. The 70th anniversary of the 1956 Women's March to Pretoria against pass laws, the declaration of District Six as a whites-only area in 1966 (under the Group Areas Act of 1950), the 50th anniversary of the 1976 youth protests (mainly against the introduction of Afrikaans as a medium of instruction), and the 1986 declaration of a state of emergency (the first was in 1985) by the South African government intended to repress and curb mass action.

Reflecting on these events and on the contemporary times, the exhibition questions the role of "protest" art in society and highlights some of the strategies employed in the current milieu to deal with and comment on the various issues that plague our society. Such issues include racism, sexism, homophobia, inequality and privilege, migration and environmental degradation. In examining the strategies employed, the exhibition also explores the role of media and technology in expressions of freedom and justice (or lack thereof).

At its core, the exhibition is intended to create dialogue. Guests to the exhibition will be presented with an opportunity to have their say and participate in further disruptions.

While foregrounding artworks from permanent collections of the Iziko South African National Gallery, the exhibition will also feature contemporary loans and interventions which speak to this theme. Furthermore, the exhibition attempts to situate and link current struggles and expressions within trajectories and histories of protest internationally."

[9] The background of and motivation for the work is explained by the artist in a text on a label displayed next to the work in the exhibition, and was available to be read by anyone taking the time to view the work, as part of the work. What appears on the label is attached as Annexure B to the respondent's answering affidavit and reads as follows:

DEAN HUTTON (b. 1976)

Fuckwhitepeople wall, chair and goldendean boots

2016

On loan from the artist

From the artist:

"if you are white, you're probably feeling some type of way right now. White people have been having a lot of feeling lately about 'reverse racism' as if it's a thing.

White people made racism and made sure it is deeply embedded in our social systems, laws, economies, institutions and individuals. So this provocation is here to make you feel that 'white pain'. Breathe deeply through it.

Earlier in this year I photographed a student Zama Mthunzi wearing a t-shirt with the words 'Fuck White People' smeared in black pain(t). He was threatened with expulsion and a case at the Human Rights Commission. None of the complainants said anything about the front of the t-shirt which read "Being Black is Shit".

You see, white pain demands attention all the time, while black pain flows constantly. So I made a suit to fuck white people. It began as an experiment to see what happens when a white body wears this. It makes people angry, sometimes to the point of violence. But I can do it- that is white privilege. I'm here for your pain because white people think empathy can cure racism but what we must strive for is complete dismantling of the systems of power that keep white people racist.

Learn to fuck the white in you too. Fuckwhitepeople.org #fuckwhitepeople".

[10] The work includes a multi-media installation which consists of wallpaper mounted on a board, a chair and golden boots. The wallpaper on the board consists of the words "Fuck", "White" and "People" repeatedly written on each line in capital letters. The words "Fuck" and "People" are black and written on a white background. The word "Fuck" is in italics. The word "White" is white on a black background.

FINDINGS ON THE FACTS.

[11] There is nothing that the complainant has said in their papers that stands in contradiction to the direct evidence by the respondent, that the work is part of a research in fulfilment of a Master's Degree program in Fine Art by a student at the University of Cape Town. There is no evidence to countervail the evidence of the respondent that the work was designed to cause a debate and a response that would create a dialogue regarding race and racism in the country. The work was intended to be challenging and provocative.

[12] If there is one thing that the work has achieved, through this complaint and others to which my attention has been drawn in this matter, is to draw South Africans to a moment of self-reflection, if we are serious about building one nation, one collective with the same values and agreed principles. That self-reflection avails a choice. You either elect an extremist, sectarian, destructive, alarmist, factually emaciated and pity-me-I-am-a-victim attitude that seeks to suppress the other view, which poses a challenge to social cohesion and peace; or you elect an objective, inclusive, constructive, optimistic, factually based and courageous attitude that does not avoid the challenge of throwing in your own to prove the cogency and supremacy of your own thoughts in the festival of ideas of a nation at work to reconstruct a new South Africa. In this festival of ideas, one needs to be sensitive to Black pain and White fear.

[13] In that festival of ideas, my view is that one cannot at all times seek to understand the meaning of words and texts as used in South Africa, from their understanding as used by the English and defined by their intellectuals at Oxford University and published by the Oxford University Press in the Oxford Dictionary.

[14] In my view, the word "Fuck" in its general usage in this country, is a facility to convey two propositions:

1. Rejection of an idea.
2. Declaration of preparedness to confront the idea.

[15] The word "White" in my view, must be understood in the context in which it is used, which is within protest art and debate around issues that plague society.

[16] The President of the African National Congress between 1952 and 1967, Inkosi Albert Luthuli, received a Nobel Peace Prize in 1960. In his acceptance speech in Oslo, on December 10, 1961, he said the following:

"Indeed the challenge is for us to ensure the world from self-destruction. In our contribution to peace we are resolved to end such evils as oppression, white supremacy and race discrimination; all of which are incompatible with peace and security. This is indeed a threat to peace.

In some quarters it is often doubted whether the situation in South Africa is a threat to peace, it is no doubt that any situation where men have to struggle for their rights is a threat to peace. We are encouraged to know by the very nature of the award made for 1960 that in our efforts we are serving our fellow men in the world."

[17] In April 1964 in his treason trial, the man who is now celebrated as the founding father of the new democratic and constitutional South Africa, uTata Nelson Mandela, said then to the Judge:

"During my lifetime I have dedicated myself to this struggle of the African people. I have fought against White domination, and I have fought against Black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die."

[18] In 1961, Inkosi Albert Luthuli described it as "*oppression, white supremacy and race discrimination*". In 1964, Nelson Mandela described it as "*White domination*". In 2016, Dean Hutton describes it as "*systems of power that keep White people racist*." This is the "White" in Whites that Dean Hutton says South Africa must strive to dismantle. It cannot be denied, in my view, that whatever one chooses to call it, the three thought leaders refer to what plagues the South African society.

[19] It follows in my view, that Hutton makes a distinction in his use of the word "White". On the one hand, there is "White" which refers to structures, systems, knowledge, skills and attitudes which keep White people racist which are to be rejected, confronted and dismantled. It is this "White" that Hutton says to others "*Learn to fuck the White in you*". Hutton is here referring to something "in" the White person. The "something" includes the state of mind, heart, meaning, appreciation, judgment and purpose. Hutton is calling for a "Damascus experience". On the other hand, the "White" used refers to persons of a particular race, which is a race to which Hutton self-belongs. Neither Luthuli, Mandela nor Hutton in their struggle called for anything adverse against Whites as a race. At most, Hutton's advice to Whites as a race is that showing care and compassion is not enough to cure racism or redress the imbalances of the past in South Africa.

[20] In my view, properly contextualised and understood, the words complained of by the complainant against respondent, to wit, "Fuck White People", is Hutton's main message, which viewed in the totality of the work means:

"REJECT, CONFRONT AND DISMANTLE STRUCTURES, SYSTEMS, KNOWLEDGE, SKILLS AND ATTITUDES OF POWER THAT KEEP WHITE PEOPLE RACIST."

ISSUE.

[21] The issue to be determined is whether the words complained of amounts to unfair discrimination on the ground of race as prohibited in section 7 of the Act, amounts to hate

speech as prohibited in section 10 of the Act and whether its dissemination, publication and display is prohibited in terms of section 12 of the Act.

THE LAW.

[22] Section 7(a) of the Act reads as follows:

“7 Prohibition of unfair discrimination on ground of race

Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

- (a) The dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence.”

Section 6 provides as follows:

“6 Prevention and general prohibition of unfair discrimination

Neither the State nor any person may unfairly discriminate against any person.

[23] Section 10(1) of the Act provides as follows:

“10 Prohibition of hate speech

- (1) Subject to the proviso in section 12, no person may in public, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
 - (a) Be hurtful;
 - (b) Be harmful or incite harm;
 - (c) Promote or propagate hatred.”

[24] Section 12 of the Act provides as follows:

“12 Prohibition of dissemination and publication of information that unfairly discriminates

No person may-

- (a) Disseminate or broadcast any information;
- (b) Publish or display any advertisement or notice,

That could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.”

APPLICATION OF THE LAW TO THE FACTS.

[25] In so far as my command of English as a language extends, Hutton does the opposite of propound, which is the verb that is the constituent part of section 7(a) of the Act. The appropriate antonym for “propound” is “suppress”. In my view, at best Hutton calls on Whites to suppress the racial superiority within themselves, and this is the idea which the respondent displayed. Hutton is calling for the suppression of racial superiority of Whites by Whites. In his text on the label that is part of the work, Hutton clearly addresses Whites in South Africa. Hutton is calling for Whites as a race towards a demonstrable change of mindset, a paradigm shift from the old ways. Hutton suggests that the time has come in the growth of the living system of doing things amongst Whites when old practice and ancient formulae must be modified in order to keep in touch with the expansion of ideas, and also to keep pace with the requirements of changing conditions in South Africa. In my view, Hutton does not participate in nor incite any form of racial violence. It follows that I am unable to find that the respondent, by dissemination of Hutton’s ideas, contravened section 7(a) of the Act.

[26] It is natural that those who have enjoyed and continue to benefit from the alcoves of the privileges of being in the secluded spots reserved for Whites, would be distressed by a call which is disadvantageous to their cubicles of comfort and detrimental to their superiority status. In that sense, one would understand their pain by the call that Hutton makes for their tabernacles to be dismantled. Change is by its very nature painful. Birthing a new nation has its labour pains.

[27] It is to be expected that the dominant interests in those alcoves would strive to stifle genuine engagement and earnestly lobby to sideline other views like that of Hutton, in an attempt to stop the light of the nation to streak on the true issues that plague South Africa, in order to maintain the prevailing conditions. In my view, the Bill of Rights cannot be interpreted to affirm the democratic values of human dignity, equality and freedom by stifling dialogue meant to contribute to healing the divisions of the past. The dialogue which is intended to contribute to the establishment of a society based on democratic values, social justice and fundamental human rights must be allowed.

[28] If South Africa is to build one nation which has harmonious race relations that will sustain and maintain peace, each citizen must be true to their responsibility, as custodians of a South Africa which is held in trust for their children and their descendants into the future. The price to pay, in any intimate relationship, is to sacrifice some aspects of one's ego. Today's comfort and benefit of one race cannot be a reason not to attend to what needs to be done for transformation and redress in order to ensure substantive peace and stability tomorrow.

[29] The fear of losing the debate in the battle of ideas, is not enough reason to take the battle to the legal trenches and hope to have the canons of judgments from the courtrooms to shoot down and repress, curb or kill the opposing views. Issues that plague a nation need to be properly ventilated in all available fora of the nation if that nation is to properly account for a better future.

[30] The question to answer now is whether the pain, anger and disgust suffered by the complainants, as sensitive and volatile as it is, and as part of the outcry of some sections of our White compatriots, is hurtful in accordance with the law as envisaged in section 10 of the Act. For the reasons I have already given, in my understanding of Hutton, I am unable to find that what they said amounts to advocacy of hatred for White South Africans based on their race, which hatred constitutes incitement to cause harm. It is simply far-fetched to suggest that Hutton hate themselves or the race they belong to, so much so that they would incite other races to cause harm to themselves.

[31] Hutton is a Master's student and the work is part of their research in fulfilment of a programme for their degree in Fine Arts and was meant to elicit responses, comments and dialogue in furtherance of their research. The work is Hutton's artistic creativity and part of their academic and scientific research. Even if it were to be found to be unfair discrimination, which it is not, it would be saved from prohibition by the proviso to section 12 of the Act.

RELIEF.

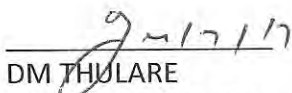
[32] The work in general, and the words "Fuck White People" in particular as used by Dean Hutton in his protest art is not unfair discrimination on the ground of race as envisaged in section 7 of the Act. It is not hate speech as prohibited by section 10 of the Act and its dissemination, publication and display by the respondent is not prohibited as envisaged in section 12 of the Act.

ORDER.

I make the following order:

1. The complaint is dismissed.
2. No order as to costs.

Dated today the 4th day of the month of July in the year 2017 at Cape Town.


DM THULARE
CHIEF MAGISTRATE
CAPE TOWN

