

SOUTH AFRICA / JUDGMENT

Kodisang and Others v THK Gallery and Others (2025/066625) [2025] ZAWCHC 214 (21 May 2025)

[2025] ZAWCHC 214

COURT

Western Cape High Court, Cape Town

BEFORE

Da Silva Salie

CASE / FILE NUMBER

2025/066625

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FLYNOTES: INTELLECTUAL – Passing off – Art exhibition – YOUR BEAUTY IS OUR CONCERN – Respondent plagiarized applicant’s work – Infringes and copies original theme – Both exhibitions delve into same theme of black beauty and spaces where it is cultivated – Striking similarity between titles and themes created a likelihood of public confusion – Amounts to misappropriation and passing off – Irreparable harm to goodwill and creative legacy – Requirements satisfied – Interdict granted.

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 2025-066625

In the matter between:

KELEBOGILE TSHOLOFOLO SYLIA KODISANG First Applicant DAHLIA MAUBANE Second Applicant FHULUFELO MOBADI Third Applicant BONGIWE PHAKHATI Fourth Applicant FIONA DAVHANA Fifth Applicant SIMPHIWE JULIA THABEDE Sixth Applicant And THK GALLERY (Registration Number: 2016/0513847/07) First Respondent TREVOR STUURMAN Second Respondent TREVOR STUURMAN FOUNDATION (Registration Number: 2019/388152/08) Third Respondent

Coram

:

Da Silva Salie J

Date of Hearing

:

21 May 2025

Written Judgment delivered

:

21 May 2025

Counsel for Applicants

:

Adv. N Hammond

Adv. T Ntsewa

Attorney for Applicants

:

Sithi & Thabela Attorneys

Counsel for Respondents

:

Adv. K Mashishi

Attorney for First Respondent :

Maartens & Le Roux Attorneys

Attorneys for Second & Third Respondents:

Maphike Attorneys Inc.

JUDGMENT DELIVERED ON WEDNESDAY, 21 MAY 2025

DA SILVA SALIE J:

- [1] This matter came before me today as an urgent application for interdictory relief (Part A) of the Notice of Motion. This judgment is delivered ex tempore and is of necessity brief. The matter was argued in Court with the issues in dispute and the crux of the matter being fully ventilated during argument. The applicants seek an interdict in the form of a mandamus, that the respondents be interdicted from disseminating and/or continuing the gallery exhibition currently underway as the “YOUR BEAUTY IS OUR CONCERN”, held at THK

Gallery pending the finalisation of Part B of the application. In short, the relief sought is to protect the applicants' intellectual property.

- [2] The background facts are briefly that in and around April/May 2023 the applicants, collaborated as Wozasisi Collective ("WC"), curated and publicly exhibited a body of work titled: "YOUR BEAUTY IS MY CONCERN" in Johannesburg. The exhibition explores themes dealing with the lived realities of socio-economic struggles of female hairstylists operating in downtown Johannesburg. The WC was formed by the applicants as an independent artistic

initiative aimed at amplifying the narratives of marginalized communities through socially engaged creative expression. The

exhibition was a result of community-based research and collaborative engagement with local hairstylists. In addition to critical acclaim, the exhibition also achieved notable commercial success with artwork sales and licensing inquiries further establishing the applicant's reputation and the commercial viability of the concept and intellectual property arising from the get-up as "YOUR BEAUTY IS MY CONCERN". The exhibition critically engaged with the lived realities of inner-city female hairstylists and garnered acclaim on national media platforms such as SABC, Newsroom Afrika and Metro FM. It is not in dispute that the exhibition extended into a soft copy published book: "Wozasisi" and is currently available for purchase and forms an essential part of the applicants' income stream, intellectual legacy and artistic impact. Wozasisi Collective, is a female led organization which was established in 2012 to increase visibility and opportunities for black women artists. (Annexure "RA1", record page 126). The Citi Press article reads: "The group publicly launched a book and held an exhibition called Your Beauty is My Concern from 1 April to 6 May in 2023. The purpose was to tell the realities and socioeconomic struggles of women stylists who have businesses in downtown Johannesburg."

- [3] The second respondent, Mr. Trevor Stuurman ("Stuurman") is a photographer, creative director, multimedia visual artist and gallery owner based in Johannesburg. On or about 23 April 2025 the first respondent (THK Gallery "THK") announced the launch of a solo exhibition by Stuurman titled: "YOUR BEAUTY IS OUR CONCERN", posted on their website and social media platforms. Stuurman also publicized the then upcoming exhibition on his social media platform. The exhibition, currently underway, is publicized and is running from 24 April 2025 until 30 May 2025.
- [4] On 2 May 2025 a letter of demand (Annexure FA6) was transmitted to the respondents, by the applicants' attorneys, Sithi and Thabelo Attorneys, stating that it had come to their client's attention that or about 23 April 2025 the gallery announced the launch of the solo exhibition titled "YOUR BEAUTY IS OUR CONCERN" and that the exhibition would officially open to the public on 24 April 2025. It further addressed that it considered an infringement that both the title and conceptual underpinnings of the exhibition bear a striking and unmistakable resemblance to the original work of their clients.

- [5] In short, the mischief complained of was that the thematic presentation of hairstyles as a central artistic motif, as well as the socio-economic political framing of hairstylists' narratives, has been copied in a manner that strips the original work of its context and message and commodifies the artistic expression of WC without due credit to them nor was it with their authorization. For these reasons, the WC took issue with the fact that the respondents' conduct constitutes an infringement of their intellectual property rights, particularly in respect of the originality and expression of their creative concept. The WC firstly demanded the immediate removal of the exhibition "YOUR BEAUTY IS OUR CONCERN" from public view at THK Gallery and from all associated digital and promotional platforms in addition to two other demands, namely:
- (a) a formal and public written apology by Stuurman in terms of which he acknowledges the unauthorized use of the aforesaid concept and the resultant prejudice; and (b) in the event that any artworks from the exhibition have been sold, payment of 30% of the gross proceeds of each sale. Only the first demand forms the subject of the hearing of this matter, Part A, for relief to interdict the further exhibition under this theme and label.
- [6] The respondents were afforded 48 hours of receipt of the letter on 2 May 2025 failing which the applicants would proceed with this legal action. The application (unissued) was served on the respondents on 9th May 2025, setting out a truncated timetable for the matter to be heard on Tuesday, 14 May 2025. The issued application (identical to the papers of the 9th) was served on the respondents on 12th May 2025. The respondents opposed the application, save for the first respondent, THK, who filed a notice to abide on 19 May 2025. On 14 May 2025 the matter was postponed by agreement to today's roll, providing for the filing of the respondents' answering affidavit by 08h00 on 19 May 2025 and the applicants' reply by 20h00 on the same date followed by heads of argument on 20 May 2025. During argument, it was agreed that the respondent shall be referred to as Stuurman, being the only respondent before the Court.
- [7] In his answering affidavit, Stuurman took issue with two points in limines:
- (a) jurisdiction and misjoinder; and
 - (b) lack of urgency and the defective notice of motion.

Misjoinder:

- [8] It is contended by Stuurman that this Court does not have the jurisdiction to hear this matter because THK's registered address, being in Cape Town, as the gallery lacks the necessary legal personality. It is also contended that the citing of THK in this matter is an incorrect joinder of the gallery as it is not committing the offending infringement complained of insofar as it merely collaborated with Stuurman for the purposes of holding the exhibition for public viewing and or sale of Stuurman's artworks. Stuurman also submitted that the citation of the third respondent, Trevor Stuurman Foundation, registered as 2019/388152/08) is inactive. The argument follows that the first and third respondents do not have any direct

and substantial interest in the subject matter and insofar as there is no causal link between the first and third respondents, the point in limine of a misjoinder ought to be upheld.

Urgency:

- [9] It is argued that the application lacks urgency as the applicants learnt of the imminent exhibition prior to the exhibition. The respondent is of the view that the delay in bringing the application (a total of 17 days) from the time that the applicants learnt of the exhibition in April 2025 is fatal to their ground of urgency. That the applicants lacked funds as the basis for the delay and attempts between the parties to settle the issue in dispute are argued for the respondent as being insufficient to justify the delay in prosecution of the matter. The respondent also argues that there are only 9 days left of the exhibition, and as such the proverbial horse had already bolted.

Discussion of the points in limine:

- [10] I proceed to deal with the points in limine raised by the respondent.
- [11] The cause of action is the alleged infringement which is based at the gallery of the first respondent. I am not persuaded in the argument on behalf of the respondent that the gallery's registered address cannot sustain the jurisdiction of this Court. I am satisfied that the cause of action arose when publications on various platforms were made that the exhibition will take place at the gallery of the first respondent and indeed followed with the exhibition presently underway at the gallery of THK, Waterkant Street, Cape Town, City Centre, within walking distance from this Court. THK filed a notice to abide. Perhaps more cogently is the fact that any relief or directive granted by this Court against the gallery must be capable of enforcement against the gallery. If it had not been cited, a point in limine of non-joinder could have been raised. The gallery played an instrumental role in hosting and publication of the exhibition and

cannot be extricated from the dispute. Accordingly, I find that the joinder of THK Gallery is proper.

- [12] Regarding urgency, while delay is a relevant consideration, I find the applicants acted with sufficient expedition. The WC learnt of the exhibition late in April and by 2 May 2025 a letter of demand was transmitted to the respondents. This kicked off talks to mediate and settle the issues in dispute. The attempt to resolve the dispute ought not to be penalized by this Court, in any event, the exhibition is still ongoing and the argument that as at today's date with only 9 days remaining, cannot be the basis for this Court to adopt an attitude that the time lapsed and therewith the lapse of the exhibition militates against the finding of urgency. Although a time lapse may frequently be perceived by this Court as a factor which weigh against a finding of urgency, I am however of the view that in the circumstances of this matter, taking due note of the communication between the parties to resolve the issue as well as the fact that the matter came before this Court on 14 May 2025, 7 days ago, cannot now be the basis to find that the exhibition had already sailed too far and justify a view that

it might as well run its course, thereby depriving the applicants of a hearing on an urgent basis. The exhibition remains ongoing. Urgency is therefore established.

Allegations:

- [13] The main grievance of the applicants is that Stuurman has plagiarized their work in that it infringes and copies their original theme in that both exhibitions delve into the same theme of black beauty and the spaces where it is cultivated. It is argued for the respondent however that the applicants conflate copyright issues with passing off and that the applicants had not proven either of the requirements to sustain the relief sought. In other words, they do not have a protectable interest as alleged.

Discussion:

- [14] It is not in dispute that WC had lauded critical acclaim in 2023 for conscientizing the theme which is almost identical to that of Stuurman's exhibition. The title is almost identical, with "my" and "ours" being the only differing feature. The distinction is not substantial and is not sufficient to distinguish the two brands. Essentially, the two brands are the same. The respondent's substitution of "my" with "ours" does not meaningfully distinguish the two. On the contrary, it creates confusion.

Requirements for an interdict – mandamus:

- [15] In order to succeed in obtaining final interdictory relief, in this case, a mandamus, the applicants need to establish and satisfy this Court that they have:
- (a) a clear right;
 - (b) reasonable apprehension of harm or breach or ongoing infringement of the right;
 - (c) the absence of a suitable alternative remedy. In other words, no other satisfactory remedy exists unless the interdict is granted.
- [16] In order to consider whether the applicants have a clear right, I have considered the basis put forth by the applicants. I am satisfied that the WC has demonstrated on the papers that it has been well associated and established the movement: "YOUR BEAUTY IS MY CONCERN" by way of the 2023 exhibition, literary works and widespread media and public attention. The thematic and titular similarities between the two exhibitions misappropriate the applicants' intellectual creation and goodwill. In short, the WC has established their goodwill in the concept and that the interests and fruits of its brainchild belong to the WC. Stuurman's exhibition as "YOUR BEAUTY IS OUR CONCERN" amounts to misrepresentation of what is accepted and distilled as that belonging to the applicants.
- [17] In the context of considering the clear right requirement, I consider the intellectual property in question. Passing off is a protection in common law to protect the goodwill of a trader or originator of a product or intellectual property from misrepresentation. Stuurman's attempt to rebrand the concept and movement for which WC had gained

momentum, public and commercial interest amounts to passing off, designed to confuse the mindset of consumers and public. I am satisfied that WC's goodwill in the movement ought to be protected from such passing off and that it has a clear right to this intellectual property. As for the need to show damage to succeed with intellectual property protection of in common law, I am satisfied that the right which WC has established is worthy of protection and that it will suffer financial and reputational loss if the exhibition and social media platform which flows from the exhibition is not put to a halt. The staging of an exhibition is also a showcasing of a concept and a commodity and in addition to sales of art, the concept would continue to gain momentum as that belonging to Stuurman. His rebranding of the applicants' concept into a similarly titled exhibition is calculated to confuse and mislead the public. This amounts to misappropriation and passing off.

- [18] As for the remaining requirements for the interdict sought, I am satisfied that the facts clearly demonstrate that the right of the applicants had been infringed and that the continuation of the exhibition (and therewith social media/media publications) exacerbates this harm, which is neither quantifiable nor remediable by damages. I am persuaded that the continued exhibition would result in harm which is not capable of restoration through a suitable or alternative remedy unless the interdict is granted. The continuation of the exhibition poses a real and ongoing threat of reputational dilution, economic loss and misattribution. The applicants are at risk of having their originality misrepresented as derivative and their creative legacy eclipsed. This constitutes ongoing injury with no alternative meaningful redress.

Conclusion:

- [19] The fruit of intellectual property is premised on the law's recognition to encourage innovation. Intellectual property is not solely dependent on registration or written law. Equitable remedies are available to the creator of intellectual property to protect the creator. In this matter, the WC is a collaboration of women who created a platform to conscientize themes such as anti-blackness, hair culture and the complexities which arise for black women in our society. It is a story by black women for society to embrace the challenges and so too the pride, resilience against oppression and celebration of the shaping of community identities and cultural expressions.
- [20] Black hair culture is not just aesthetics but also an act of resilience, community building, identity, agency and cultural preservation. In essence, the concept of "YOUR BEAUTY IS MY CONCERN" uses art to demonstrate storytelling of voices which have and still are unheard and amplify the recognition of culture and personal narratives in hair practices. It is notable that for our unequal past, which is still a divided society with relics of our unjust and unequal history, this theme is an important one to claim its rightful space in our society and our narratives. The story must be told, it must be echoed, however importantly its originator must be protected and acknowledged in its acclaim. The applicants, six (6) women, started telling and raising of awareness of these stories in a manner which grabbed public, media

and commercial attention through their artistic vision and skills. It received its acclaim and the fruits of their labour warrant protection against appropriation of their narrative, visual expression and conceptual labour.

[21] I am satisfied that on the papers before me, and for the reasons as set out above, that the applicants have made out a case for the relief sought and ought to succeed in Part A of this application. Wherefore I make the following order:

- (i) The respondents are interdicted and restrained from disseminating, exhibiting and proceeding with the presentation of the exhibition titled: “Your Beauty is My Concern” including “Your Beauty is Our Concern”, pending the final

determination

of the relief sought in Part B of this application, including removal of any posts on social media and other public platforms of the label, title and or get-up as “Your Beauty is Our Concern” within 24 (twenty four) hours of the granting of this Order.

(ii) The respondents are interdicted and restrained from selling, transferring or otherwise disposing of any artworks associated with the exhibition under the theme “Your Beauty is My Concern” including “Your Beauty is Our Concern” pending the final determination of the relief sought in Part B of this application.

(iii) Costs shall stand over for determination at the hearing of Part B.

[22] A copy of this order must be served on the first respondent, THK Gallery, by the Registrar of this Court within 24 hours of this order by electronic mail: o[...] as well as service to the legal representatives of the parties.

DA SILVA SALIE, J

JUDGE OF THE HIGH COURT

WESTERN CAPE

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