

# **SPRING WAS REBELLIOUS, BUT IT'S ALL OVER NOW – PUBLIC ART, POLITICS AND THE LAW IN POST-APARTHEID SOUTH AFRICA – PART TWO**

Stephen Allister Peté

*BA LLB LLM MPhil*

*Associate Professor of Law*

*University of KwaZulu-Natal, Durban*

*Attorney of the High Court of South Africa.*

Sarah Pudifin

*BA(Hons) LLB LLM MPhil*

*Advocate of the High Court of South Africa*

*Member of the KwaZulu-Natal Bar*

## **SUMMARY**

As pointed out in part one of this article, politics, art and the law make uncomfortable bedfellows, and the commissioning of public art by public bodies often gives rise to bitter controversy. Part one traced a recent ongoing public spat in the Durban area concerning a sculpture of three large elephants by the acclaimed international artist, Andries Botha. Using that case as a lens, part one attempted to situate the central issues surrounding the commissioning of public art by public bodies in post-apartheid South Africa within a broad historical, political and constitutional framework. Part two of this article examines certain of the more specific and salient legal issues which the authors believe South African courts dealing with matters of this kind will need to address. The possible legal rights of both the South African public when confronted with undue state interference in matters of public art, as well as those of individual artists involved in such matters, are discussed. In relation to the rights of the South African public, the constitutionality of the commissioning process itself (that is, potential constitutional constraint on the actions of public officials who commission public works of art), as well as the potential right of the general public to the preservation of works of art of “recognized stature”, is discussed. As for the rights of individual South African artists, a number of areas of the law – constitutional, contractual and statutory – as possible sources for such rights are examined. In particular, the “moral rights” of South African artists, protected in terms of statute, are analysed and discussed in detail. The authors conclude that the funding and commissioning of public art by public bodies in South Africa should be arms-length, and that artists should be maximally free to determine the content of their creative expression. Furthermore, public art should be as diverse as possible within South Africa’s constitutional democracy, reflective of the beautiful diversity of the country’s

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people. Direct political interference in matters of public art should be strenuously avoided.

## 1 INTRODUCTION

Part one of this article focused attention on the case of internationally acclaimed sculptor, Andries Botha, and his large roadside sculpture of three life-sized elephants located in the city of Durban. Commissioned by the eThekweni Municipality, work on the sculpture was stopped before it could be completed, allegedly because the elephants resembled the logo of the Inkatha Freedom Party, a political rival of the ruling African National Congress. Using this case as a lens through which to examine the inter-relationship between public art, politics and the law in post-apartheid South Africa, the following central question was put forward for consideration: In the context of post-apartheid South Africa, when public works of art are commissioned by public bodies, to what extent do state officials have the right to involve themselves and/or interfere in the process? We sought to sketch the general parameters within which we believe debate around this important issue ought to be conducted, by placing this issue within its political, historical, ideological and constitutional context. We also reviewed certain prominent North American cases on the broad issue of state interference in public art. In particular, we emphasized the importance of liberal values such as tolerance, openness and diversity within the context of South Africa's new constitutional democracy, and expressed our belief that it is these values which should shape state policy in relation to the funding and commissioning of, as well as general response to art.

In part two of this article, we shall proceed to a discussion of certain of the specific legal issues arising out of the facts of the Durban elephant sculptures case. We do not wish to second-guess what a future court hearing in regard to this matter might or might not decide, but rather to raise certain of the most salient legal issues which we believe courts dealing with matters such as this will need to address. We shall examine the possible legal rights of both the South African public at large when confronted with undue state interference in matters of public art, as well as those of individual artists involved in such matters. Distinct but interrelated legal questions arise in relation to these two interest groups. As far as the potential rights of the South African public are concerned, we shall examine the constitutionality of the commissioning process itself (that is, potential constitutional constraint on the actions of public officials who commission public works of art), as well as the potential right of the general public to the preservation of works of art of "recognized stature". As for the potential rights of individual South African artists in such cases, we shall briefly examine a number of areas of the law – constitutional, contractual and statutory – as possible sources for such rights. In the section which follows, we begin with a discussion of the civil law concept of "moral rights", which has been introduced into the South African legal system by statute, and is the natural point of departure in unpacking the potential rights of individual artists in cases such as the one under discussion in this article.

## 2 THE “MORAL RIGHTS” OF THE ARTIST

Historically, the statutory protection of so-called “moral rights” as a part of copyright law was restricted, in general, to those legal systems based upon the civil law as opposed to the common-law legal tradition. It is only during the past twenty years or so that the civil-law concept of moral rights has come to be adopted, by means of statutory incorporation, within the legal systems of countries falling within the common-law tradition.<sup>1</sup> The civil-law concept of moral rights may thus be regarded as a somewhat alien element which has become progressively incorporated within common-law systems.<sup>2</sup> South Africa is among the “common law” countries which now provide protection to “moral rights” as part of its copyright legislation.<sup>3</sup>

One way in which to conceptualize the civil-law concept of “moral rights”, is to distinguish such rights from “economic rights”. Not much need be said about the latter form of rights at this stage, since rights of this type are familiar to lawyers in both civil- as well as common-law jurisdictions. Suffice it to say that the economic rights of persons who hold copyright in respect of particular works of art, or other copyrightable works, are protected in almost all legal jurisdictions. As for rights of the former type referred to above – that is, moral rights – these may be understood as supplementing economic rights. In particular, moral rights protect the personal non-economic interests of the author of a specific copyrightable work. Cyrill Rigamonti explains that: “The non-economic interests of authors are found worthy of protection because of the presumed intimate bond between authors and their works, which are almost universally understood to be an extension of the author’s personhood.”<sup>4</sup>

Rigamonti refers to three “legal characteristics” which are inherent in the civil-law concept of moral rights: 1. moral rights attach only to the *author* of a work that is, “only those human beings who *actually create* the work in question qualify as owners of moral rights”;<sup>5</sup> 2. “moral rights are rights in *copyrightable works* similar in structure to economic rights, which is why moral-rights law is considered an integral part of copyright law – the body of law governing rights in works of authorship”;<sup>6</sup> and 3. “moral rights are

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<sup>1</sup> One factor undoubtedly driving this process has been the desire on the part of common law countries to comply with their international obligations. The most important international source for moral rights is to be found in the Berne Convention for the Protection of Literary and Artistic Works, which has contained a provision protecting moral rights since 1928. See Rigamonti “Deconstructing Moral Rights” 2006 47(2) *Harvard International Law Journal* 356. In terms of Article 6bis of this Convention: “Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” See Article 6bis(1) of the Berne Convention for the Protection of Literary and Artistic Works. South Africa is a member of the Berne Convention and thus bound by this provision.

<sup>2</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 353.

<sup>3</sup> See s 20(1) of the South African Copyright Act 98 of 1978.

<sup>4</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 355 and 356.

<sup>5</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 359.

<sup>6</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 360.

*inalienable* in the sense that they can be neither transferred to third parties nor relinquished altogether”.<sup>7</sup> Rigamonti points out that the third characteristic of the civil-law concept of moral rights – that is, the fact that they are inalienable – “is by far the most controversial characteristic of the civil-law concept of moral rights, because it interferes with the principle of freedom of contract between authors and users of copyrightable works”.<sup>8</sup>

In addition to elucidating the three “legal characteristics” referred to above, which are inherent in the civil-law concept of moral rights, Rigamonti lists the following “standard set of moral rights recognized in the literature” which attaches to the author of a particular work: 1. the “right to claim authorship” which is termed the “right of attribution”; 2. the “right to object to modifications of the work” which is termed the “right of integrity”; 3. the “right to decide when and how the work in question will be published” which is termed the “right of disclosure”, and 4. the “right to withdraw a work after publication” which is termed the “right of withdrawal”.<sup>9</sup> He points out, however, that it is important to go beyond an “abstract presentation” of these four individual moral rights, since the manner in which such matters are decided in practice, means that the scope of these rights is often much narrower in practice than in the abstract.<sup>10</sup>

Although Rigamonti discusses various practical situations in which the issue of moral rights may come to the fore, for the purposes of this article it is useful to focus on what he refers to as the “contract scenario”, that is, those situations in which a dispute arises between the artist who has authored a work, and the person entitled to the work in terms of a valid contract. The question which arises is the extent to which contracts in such matters, however they are phrased, may be impacted by the moral rights of the artist.<sup>11</sup> May an artist, for example, invoke his or her moral rights in order to prevent the purchaser of the work from dealing with that work in a particular way, even though there is no clause in the contract to this effect? And further, will the moral rights of an artist have any effect if the contract specifically includes some or other waiver of these rights by the artist?

In order to address these questions, it is important to understand the Continental European practice in this area of law, since it is in Continental Europe that the concept of moral rights originated. In this regard, Rigamonti

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<sup>7</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 361.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 356.

<sup>10</sup> Rigamonti warns as follows: “Relying on the standard rights approach to moral rights instead of focusing on the concrete rules that courts apply in practice creates the triple risk of overestimating the actual scope of moral rights in civil law countries, underestimating the contractual implications of moral rights, and generating an unreliable basis for the comparison of civil law moral rights with the law of legal systems that do not fully endorse the dominant concept of moral rights.” See Rigamonti 2006 47(2) *Harvard International Law Journal* 367.

<sup>11</sup> Rigamonti points out that: “The function of moral rights in the contract scenario is not so much to establish absolute rights of authors in their works, but to guide contract interpretation, to establish default rules, and to set compulsory terms with respect to very specific issues in copyright contracts.” See Rigamonti 2006 47(2) *Harvard International Law Journal* 372.

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examines the French and German case law, and sums up his findings as follows:

“If there is a general set of rules that has emerged from the case law in France and Germany, it is (i) that authors cannot legally relinquish or abandon the rights of attribution and integrity altogether, (ii) that advance blanket waivers are unenforceable, and (iii) that narrowly tailored waivers that involve reasonably foreseeable encroachments on the author’s moral rights are generally valid. In the context of the right of integrity, this essentially means that courts are inclined to side with the author if the other party to the contract distorts the work then attempts to invoke a generic waiver provision in its defense. Conversely, the courts tend to rule against authors if the authors approve specific modifications either before or after the fact and then try to rely on their inalienable moral rights to reverse their previous decision to the detriment of the other party to the contract.”<sup>12</sup>

Of particular relevance to the facts under discussion in this article, Rigamonti goes on to distil from the Continental case law a number of “decisional rules” which he maintains form the “substantive core of the Continental moral rights doctrine”.<sup>13</sup> Among these is the following:

“the default rule in contracts relating to the dissemination of copyrightable works is that the works may not be substantially modified. While an author may consent to specific modifications both before and after the fact, the author may not validly consent in advance to unknown future modifications of the work left to the discretion of the other party to the contract”.<sup>14</sup>

Of course, for purposes of this article, the important question to be answered is whether or not the substance of this “decisional rule” drawn from Continental European Moral Rights law, has been incorporated into the Common Law legal systems by means of legislation. In particular, it must be established whether or not it has been incorporated into the South African legal system and, if so, to what extent.

Let us begin with certain other Common Law systems. As far as the legal system of the United Kingdom is concerned, it is clear that this rule has, to a certain extent at least, been incorporated into that system. In terms of Sections 77(1) and 80(1) of the Copyright, Designs and Patents Act of 1988, the authors of copyrightable works are entitled, *inter alia*, not to have their work subjected to “derogatory treatment”. In order to qualify as “derogatory treatment”, there must be prejudice to the honour or reputation of the author.<sup>15</sup> From the point of view of authors, however, one of the main problems with the Copyright, Designs and Patents Act, is the extent to which it allows authors to waive their moral rights. Commenting on the “extremely generous waiver regime” put in place by the Copyright, Designs and Patents Act, Rigamonti states as follows:

“The CDPA allows authors and directors to validly consent to any act that violates their moral rights. It also empowers them to fully waive their moral rights in advance with a signed written instrument. Furthermore, the CDPA

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<sup>12</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 377-378.

<sup>13</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 380.

<sup>14</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 379-380.

<sup>15</sup> See *Confetti Records v Warner Music UK Ltd.* [2003] EWHC (Ch) 1274 [150] (Eng.)

states that informal waivers under the general law of contracts and principles of estoppel remain permissible despite the requirement of a written instrument. What makes this regime extremely broad compared to the rules governing waivers developed by French, German, and Italian courts is that the CDPA expressly includes unconditional blanket waivers for future works ... [I]n France, Germany, and Italy, such waivers would be considered invalid as a violation of the very core of moral rights. The breadth of the waiver provisions under the CDPA raises the question of whether the rights enacted under the heading of 'moral rights' in the United Kingdom can really be called moral rights at all because the statutory validity of unconditional blanket waivers extinguishes any trace of inalienability, which is one of the key features of the concept of moral rights in a contractual setting."<sup>16</sup>

In practice, this means that wealthy persons and powerful institutions commissioning art in the United Kingdom may simply insert standard waiver clauses in contracts entered into with artists, in which artists waive all their so-called "moral rights".<sup>17</sup>

The position in the United States of America is similar to that in the United Kingdom. The first federal moral rights statute to be passed in the United States, was the Visual Artists Rights Act of 1990. Although the Visual Artists Rights Act only applies to a very small group of works, the work of sculptors is protected in terms of the Act. For those artists that are covered by the Act, their moral right of integrity is protected, in that they have the right to object to modifications of their work. Such modifications, however, must be intentional and be such that they will prejudice the author's honour or reputation.<sup>18</sup> As far as waivers of their rights by artists are concerned, Rigamonti notes as follows:

"[T]he American waiver regime is similar to the case law developed in France, Germany, and Italy, and dissimilar to the English system that allows unconditional blanket waivers. While waivers of moral rights are expressly permitted, provided that they are undertaken in a written instrument signed by the author, they must identify the work and the uses to which the waiver applies in order to be valid, and consequently blanket waivers are unenforceable. As a result, the VARA is in line with standard moral rights theory in its conceptualization of moral rights as inalienable rights of authors in their works that supplement the traditional set of economic rights listed in Section 106 of the U.S. Copyright Act."<sup>19</sup>

For the purposes of the case under discussion in this article, a particularly interesting aspect of the American Visual Artists Rights Act, is that, in certain instances, it goes further than simply prohibiting *modifications* of work which prejudice the author's honour or reputation. In the case of work of "recognized stature", the Act prohibits the intentional or grossly negligent *destruction* of such work.

<sup>16</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 402-403.

<sup>17</sup> Rigamonti comments as follows: "Whatever rights authors may have under the CDPA, they will be insignificant as a practical matter if market intermediaries can use their bargaining power to pressure authors to sign standard agreements containing express blanket waivers of any and all moral rights claims that could possibly arise in the future." See Rigamonti 2006 47(2) *Harvard International Law Journal* 404.

<sup>18</sup> VARA speaks, *inter alia*, of the right to prevent "distortion, mutilation, or modification" of an art work, which will result in prejudice "to the author's honor or reputation".

<sup>19</sup> See Rigamonti 2006 47(2) *Harvard International Law Journal* 406.

In order to explain the importance of the distinction between the *modification* and *destruction* of work, we must briefly refer back to the legal systems of Continental Europe. Generally speaking, in terms of the moral-rights law of the civil-law systems of continental Europe, the authors of works of art may not prevent the owners of those works from *destroying* them, should the owners so wish. It is only the *modification* of works of art, against the wishes of the authors of those works, that is generally prohibited in terms of European moral-rights law.<sup>20</sup> It is for this reason that it is particularly interesting to note that the American Visual Artists Rights Act has moved beyond the European law in this respect.

As pointed out above, the American Visual Artists Rights Act protects works of “recognized stature”. The authors of such works, in particular, have the right to prohibit the intentional or grossly negligent destruction of their works. This right of certain American visual artists to prevent the destruction of their works – provided of course that such works are considered to be of “recognized stature” – exceeds not only the protections provided to artists in continental Europe in terms of traditional moral-rights law, but also the protections provided at international law in terms of Article 6*bis* of the Berne Convention.<sup>21</sup> It may be argued that this particular piece of the American statutory law is, at its heart, a mechanism aimed at the preservation of art. The question may be posed, however, whether legislative measures related to the preservation of art are not more suited to the area of public law, than to the area of private law within which the moral rights of individual authors receive protection. Gerald Dworkin argues, for example, that responsibility for preventing the destruction of works of art “should shift from the private rights of the author to those public authorities responsible for our cultural heritage, enforceable by public law means”.<sup>22</sup>

The South African Copyright Act does not go as far as the American Visual Artists Rights Act of 1990 in relation to preventing the destruction of works of “recognized stature” in certain instances as explained above. What the South African Act does do is to prohibit, *inter alia*, the “distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author ...”<sup>23</sup> This is clearly similar to the protections afforded in certain other common law jurisdictions such as the United Kingdom, but does not go as far as the American Visual Artists Rights Act of 1990 when it comes to protecting works of “recognized stature”. It seems doubtful that the South African courts will read the moral-rights provisions in the South African Copyright Act in such a way as to extend such protection to South African artists, including sculptors such as Andries Botha. We submit that it is in the area of South African public law that this particular issue – that is, the preservation of works of art of recognized stature – will be dealt with. As far as a South African artist’s

<sup>20</sup> 2006 47(2) *Harvard International Law Journal* 371.

<sup>21</sup> When enacting the Visual Artists Rights Act, the American legislature need not have gone as far as it did in order to bring the country in line with the terms of Article 6*bis* of the Berne Convention.

<sup>22</sup> Dworkin “Moral Rights in English Law” 1986 8 *European Intellectual Property Review* 329 335.

<sup>23</sup> See s 20(1) of the South African Copyright Act 98 of 1978.

moral rights are concerned, we submit that, in relation to the artist's moral right to the integrity of his or her work, it will extend only so far as allowing the artist to prevent "any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation"<sup>24</sup> of such artist.

It is not possible (or desirable) for us to attempt to predict what a South African court might decide in a particular case, such as that of Andries Botha and his elephants at Warwick Triangle in Durban. That said, we may, perhaps, tentatively venture an opinion on the matter. Should the eThekweni Municipality proceed, without the assent of Botha, to modify his sculpture by "culling" some of the elephants and adding other animals to make up the "big five"<sup>25</sup> this would, in our opinion, amount to a violation of Botha's moral rights in his art work. The relevant question a court would consider in such a scenario would be whether or not the proposed modification could be expected to prejudice the honour or reputation of the artist concerned. Since Botha is an internationally acclaimed sculptor, we believe that any attempt to interfere with his work by "adding" to it in this way, would have the effect of prejudicing his honour or reputation. Indeed, Botha has stated in no uncertain terms that he is not a "tourist artist". Furthermore, an interesting additional point that a court may have to consider in this particular case is whether or not placing Botha's sculpture behind walls of shade-cloth and allowing the work to stand unfinished for an extended period is, in itself, a form of "distortion" of the work, which may be prejudicing his honour or reputation.<sup>26</sup>

In order to illustrate how South African courts might approach the question of whether or not an artist's honour or reputation has been prejudiced by alterations or additions to his or her work, it is useful at this point to examine two foreign cases dealing with this issue.

The first case is that of *Snow v The Eaton Centre Ltd.*<sup>27</sup> Michael Snow, a notable artist, was commissioned to create a sculpture "flight stop", which was sold to and installed in the atrium of the Eaton Centre (a shopping centre in Toronto). The sculpture featured sixty flying Canada Geese suspended from the ceiling. During the Christmas season of 1981, the Eaton Centre (as part of the Christmas decorations within the Centre) placed a red ribbon around the neck of each of the geese.<sup>28</sup> Snow considered the adornment a violation of the artistic integrity of the naturalistic composition

<sup>24</sup> S 20(1) of the South African Copyright Act 98 of 1978 states, *inter alia*, as follows: "Notwithstanding the transfer of the copyright in a ... artistic work ... the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author ..."

<sup>25</sup> As suggested in *The Elephant that caused all the trouble*, above.

<sup>26</sup> In a newspaper article published on 26 June 2011 (*Sunday Tribune* 1), Durban artist Greg Streak was said to have been appalled when he visited Botha's elephant installation the day before, and found it to be surrounded by faeces and rubbish. The article quoted Streak as follows: "Even if the art is currently in limbo, you would expect the City to respect the dignity of the piece. There is no respect shown at all."

<sup>27</sup> (1982) 70 C.P.R. (2d) 105.

<sup>28</sup> *Snow v The Eaton Centre Ltd supra* 106.



work, and brought an action in the Ontario High Court of Justice for an injunction against the Centre, to remove the ribbons. Snow's arguments were centred in moral rights. He argued that the ribbons distorted and offended the integrity of his work.<sup>29</sup>

Justice O'Brien relied on the evidence of subjective harm by Snow himself, as well as the testimony of artistic experts and persons knowledgeable in the field, who were able to prove harm on an objective standard (supported by expert or public opinion) in finding that the ribbons violated Snow's rights under Canadian copyright legislation. O'Brien J considered the matter as follows:

"The plaintiff is adamant in his belief that his naturalistic composition has been made to look ridiculous by the addition of ribbons and suggests it is not unlike dangling earrings from the Venus de Milo. While the matter is not undisputed, the plaintiff's opinion is shared by a number of other well-respected artists and people knowledgeable in his field. ... I am satisfied the ribbons do distort or modify the plaintiff's work and the plaintiff's concern [that] this will be prejudicial to his honour or reputation is reasonable under the circumstance."<sup>30</sup>

Accordingly, the judge ordered the ribbons to be removed.

In *Gilliam et al v American Broadcasting Companies Inc*,<sup>31</sup> the creators of Monty Python's Flying Circus (*Gilliam et al*) sold a television show to the British Broadcasting Corporation (BBC). The contract between *Gilliam et al* and the BBC contained a clause to the effect that the BBC was not to make any significant edits to the show after it was recorded. The BBC broadcast the show, and then sold the rights to the American Broadcasting Company (ABC). When ABC broadcast the show, they made significant edits and cuts in order to allow for commercial spots, including cutting out some jokes. Although the contract between BBC and ABC did not regulate modifications of the programme, *Gilliam et al* instituted proceedings against ABC to stop them from broadcasting the show, on the ground that ABC's edits impaired the integrity of the original work. The trial court found for ABC, arguing that it was not clear that *Gilliam et al* owned the copyright to the television show, and therefore they could not control what happened to it. The appellate court reversed this decision, holding that *Gilliam et al* were definitely the owners of copyright to the script, and furthermore, since the television show in issue was a derivative work based on the script, *Gilliam et al* had certain rights concerning what happened to the television show. The ABC could obtain no greater rights to the show than those which *Gilliam et al* had chosen to sell to the BBC. It was held that the ABC, through making the edits and cuts in question, had impaired the integrity of the work. The Court summed up the cause of action (based on the moral right of the authors) as such: "This cause of action which seeks redress for deformation of an artist's work, finds its roots in the continental concept of *droit moral*, or moral right, which may

<sup>29</sup> Lim "Prejudice to Honour or Reputation in Copyright Law" 2007 33(2) *Monash University LR* 290.

<sup>30</sup> *Snow v The Eaton Centre Ltd supra* 106.

<sup>31</sup> 538 F.2d 14 (2d Cir. 1976).

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generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it.”<sup>32</sup>

Of course, the South African courts will have to decide each case on its own merits, and will view the issue in the light of the particular South African legal context. These cases merely illustrate how other jurisdictions have dealt with the application of moral rights to particular disputes about art.<sup>33</sup>

To sum up, it would seem to us that the moral rights of an artist are indeed relevant in situations such as that under examination in this article. We cannot, however, restrict ourselves to a discussion of moral rights since, as explained above, the application of the concept is limited due to the very origins and nature of the concept itself. Moral rights are essentially bound up with the particular artist concerned; with his or her honour and reputation; and with his or her ongoing relationship to the work he or she has created. The concept does not necessarily speak to the *public* dimension of the problem in hand. In this article we are essentially concerned with the commissioning of public works of art by public representatives. In addition to the artist and his or her relationship to the work in question, we also have the public and their relationship to the work, which is, of course, mediated through the actions of the public officials in charge of the commissioning process. It is most important for us to address this important part of equation by examining whether or not the actions of public officials who are charged with commissioning new public art, or with the preservation of public art already in existence, are constrained in their actions by the provisions of the South African Constitution.

Before we move to a discussion of the public and their possible constitutional rights in such matters, however, we need to focus briefly on the possible rights and protections which may be available to the artist in such situations, which do not involve the artist’s moral rights. It is not possible in a wide-ranging article such as this to cover all the possible legal angles which may become relevant in particular cases. In the section which follows, we intend to restrict ourselves to a discussion of the artist’s possible contractual and constitutional rights.

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<sup>32</sup> Although the court went on to find that “moral rights” were not protected under American Law at the time, the court found in favour of the Monty Python creators on analogous grounds, holding: “American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent ... Although such decisions are clothed in terms of proprietary right in one’s creation, they also properly vindicate the author’s personal right to prevent the presentation of his work to the public in a distorted form. (Footnotes and other references removed.)

<sup>33</sup> S 39 of the Constitution states that when interpreting the Bill of Rights, a court “may consider foreign law”.

### 3 BEYOND THE ARTIST'S MORAL RIGHTS – CONTRACTUAL AND CONSTITUTIONAL RIGHTS AND PROTECTIONS WHICH MAY BE AVAILABLE TO ARTISTS

Let us begin by examining the possible contractual rights of artists in situations such as those under examination in this article. At a case-specific level, many rights and duties between an artist and a patron (be it a private patron or a government patron) will be determined by the specific contractual agreement which is in place in a particular case. Christie provides the following interesting example:

“An artist contracts to paint my portrait for a fee. Changing my mind, I tender his fee and purport to release him from his obligation to paint the portrait. He is not obliged to accept the release, because he may have hoped to enhance his reputation as an artist by painting this particular portrait. It is difficult to imagine him succeeding in a claim for specific performance, but less difficult to image circumstances in which he might succeed in a claim for damages.”<sup>34</sup>

Indeed, this point is illustrated in a number of South African cases dealing with analogous issues. In *Union Free State Mining and Finance Corporation Ltd v Union Free State Gold and Diamond Corporation Limited*, Munnik AJ states:

“I do not think that a creditor [in this case a government patron] can by the mere exercise of his will terminate the obligation without the concurrence of the debtor because ... a release, waiver or abandonment is tantamount to making a donation to the debtor of the obligation from which he is to be released and until that donation has been accepted it has not been perfected. *There may conceivably be circumstances in which a debtor does not wish to be released from his obligation. It may for a variety of reasons not suit him to be released.* To allow the release, waiver or abandonment and the consequent making of a donation dependent solely on the will or action of the creditor would be tantamount to creating a contract at the will of one party which is a concept foreign to our jurisprudence.”<sup>35</sup>

In the circumstances, therefore, where an artist wishes to complete a commission agreed to with a patron (as may be the case with Andries Botha and his Durban Elephants),<sup>36</sup> it may be that an action in contract lies against the patron (at least for damages) for any cancellation, even with a tender of

<sup>34</sup> Christie *Law of Contract* 6ed (2011) 454.

<sup>35</sup> 1960 4 SA 547 (W) 549 (authors' own emphasis). This principle was confirmed in *Margate Estates Ltd v Urtel* 1965 1 SA 279 (N) in which it was stated (294F-G): “But I am unable to see how it can be contended that a person can be bound to accept the position that a right, in respect of which he is the debtor, should terminate, merely because the creditor of the right asserts (even expressly) that he abandons the right. *It is conceivable that the debtor may wish the right to continue.* He may, for instance, have sentimental reasons for wishing his property to be burdened with a particular servitude and, if he chooses not to accept the process of waiver, I am unable to see why he should have it foisted on him” (authors' own emphasis).

<sup>36</sup> See Makhanya “Politics is a Collective Lunacy in South Africa – Ask the Elephants” 21 November 2010 *The Times*, in which Botha states: “If they were to demolish the elephants they would be essentially destroying a work of art, and that is not something I would be happy about.”

the full fee. There seems no reason why this principle should not apply equally to both private and public patrons of art.

Turning to the possible constitutional rights of artists in such situations, section 16(1) of the Constitution provides that everyone has the right to freedom of expression, which includes:

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) *freedom of artistic creativity*;<sup>37</sup> and
- (d) academic freedom and freedom of scientific research.

This right applies to all forms of expression and communication, unless specifically limited by section 16(2), (which includes prohibitions on hate speech, propoganda for war, and incitement of imminent violence) or the general limitation clause (section 36), or by another fundamental right. Any speech other than that which is specifically excluded, enjoys the protection of the right.<sup>38</sup> Furthermore, as a result of the Constitutional Court's decision in *Khumalo v Holomisa*, the constitutional right of freedom of expression applies horizontally and can be invoked in certain disputes involving only private parties.<sup>39</sup>

The importance of the constitutional guarantee of freedom of expression was confirmed by O'Regan J in *South Afrigan National Defence Union v Minister of Defence and Another*,<sup>40</sup> in which she stated:

"Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."

Although freedom of expression has been recognized as "fundamental" to our democratic society, indeed "the lifeblood of an open and democratic society cherished by our Constitution",<sup>41</sup> the Constitutional Court has held that it is not of paramount value.<sup>42</sup> In this way, our courts have rejected the US model under which freedom of expression is the pre-eminent right to be protected.<sup>43</sup>

There are two particularly noteworthy aspects of the protection of artistic expression under section 16 of our Constitution. First, unlike many other jurisdictions, artistic expression is expressly included in the right. It is

<sup>37</sup> Authors' own emphasis.

<sup>38</sup> Milo, Penfold and Stein "Freedom of Expression" in Woolman *et al Constitutional Law of South Africa* (2008) 5.

<sup>39</sup> 2002 5 SA 401 (CC) par 33.

<sup>40</sup> 1999 6 BCLR 615 (CC) par 7.

<sup>41</sup> *Dikoko v Moghatla* 2006 6 SA 235 (CC) par 92.

<sup>42</sup> *Khumalo v Holomisa supra* par 25.

<sup>43</sup> Milo *et al* 8.

(textually at least) given the same privilege and protection as other forms of expression, including political and media speech. Secondly, and particularly important for the purposes of this article, it is artistic “creativity” that is protected, and not just expression. This protection of the broader concept of creativity and not just expression expands the range of artistic endeavours to include the process of creation. It is not merely the outcome or end product of the artistic process that is protected, but the process of creation as well.<sup>44</sup>

This express recognition and protection of artistic creativity signals a break with the country’s past, in which artistic expression was extensively circumscribed and curtailed by various legislative enactments under apartheid.<sup>45</sup> Section 16 signals a fundamental rejection of this regime, and an acknowledgment that artistic creativity lies at the core of the right to freedom of expression, not on the periphery or penumbra. Many of the fundamental values underlying freedom of expression are emphasized in artistic expression. Artistic expression is integral to human culture: it is part of individual and social definition.<sup>46</sup>

Threading these themes back to the Elephants in Durban, it may be possible for Andries Botha to rely on the constitutional protection of his artistic creativity, and to argue that the City, by prohibiting him from completing his artistic work, has infringed his constitutional right to artistic creativity – which includes the process of artistic creation. Were this right to be claimed and “activated” before a court, it would be up to the City to indicate which other right (or rights) they were seeking to protect by prohibiting the sculptures from being completed as planned. The court would then weigh up and balance these competing rights in order to determine whether the limitation of the sculptor’s right to artistic creativity was justified. We cannot guess what the outcome of such a process would be, except to say that the courts have demonstrated that freedom of expression (although not absolute) is a right to be “zealously guarded”.<sup>47</sup>

Let us now move to the final stage of our argument involving a discussion of the rights of the public in situations such as those under consideration in this article.

#### **4 BEYOND THE ARTIST’S RIGHTS – THE RIGHT OF THE PUBLIC TO RECEIVE EXPRESSION UNDER THE CONSTITUTION**

The protection of artistic creativity under section 16(1) of the Constitution extends to the public by whom art is viewed. The use of the term “everyone” in section 16(1) entails that the widest possible range of subjects is able to assert the right – including natural and juristic persons, citizens and non-

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<sup>44</sup> Milo *et al* 52.

<sup>45</sup> *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) par 25.

<sup>46</sup> Milo *et al* 53.

<sup>47</sup> *Phillips v the Director of Public Prosecutions* 2003 4 BCLR 357 (CC) par 23.

citizens.<sup>48</sup> The right is both vertical (in that it applies in disputes between government and private persons) and horizontal (in that it may be directly relied upon in certain disputes involving only private parties).<sup>49</sup> As mentioned previously, section 16(1) covers all expression that is not specifically excluded under 16(2). It is clear that any limitation of expression, other than under section 16(2), must satisfy the requirements of section 36 (the Constitutional limitations clause) in order to be constitutionally valid.<sup>50</sup>

Of particular relevance to the issues under discussion in this article is the fact that the protection of freedom of expression in general, and artistic creativity in particular, under the Constitution, extends not only to those who seek to impart information or ideas, but also those who are (or may be) the recipients of expression.<sup>51</sup> In *Case v Minister of Safety and Security*,<sup>52</sup> Mokgoro J emphasizes the importance of the right to receive information in the following terms:

But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients.<sup>53</sup>

Furthermore, the protection of both information and ideas under section 16(1) implies that it is not only the imparting or receiving of factual, empirical content of expression that is protected, but also "the elements of expression which may be novel, controversial or involve creativity".<sup>54</sup> In sharp contrast to the historical suppression of ideas, including artistic creativity in South Africa, the Constitution emphasizes that expression may not be restricted on the basis that it is deemed to be politically or socially subversive.<sup>55</sup> In asserting and guaranteeing this freedom, the Constitutional Court has endorsed a dictum of the European Court of Human Rights (*Handyside v United Kingdom*) that the right to "receive or impart information or ideas" applies "not only to 'information' or 'ideas' that are favourably received or

<sup>48</sup> *Ex parte Chairperson of Constitutional Assembly: In re Certification of Constitution of the RSA* 1996 1 SA 744 (CC).

<sup>49</sup> See *Khumalo v Holomisa supra*.

<sup>50</sup> *Islamic Unity Convention v Independent Broadcasting Authority supra* par 33. This involves an analysis of whether the limitation of the right (by a law of general application) is reasonable and justifiable in an open and democratic society taking into account various enumerated factors.

<sup>51</sup> *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) par 49.

<sup>52</sup> *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC).

<sup>53</sup> *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security supra* par 25. See too *South African Broadcasting Commission v National Director of Public Prosecutions* 2007 1 SA 523 (CC), 2007 1 SACR 408 (CC), in which the right to receive expression was assumed and applied.

<sup>54</sup> *Milo et al* 43.

<sup>55</sup> *Ibid.*

regarded as inoffensive or as a matter of indifference, but also that offend, shock or disturb”.<sup>56</sup>

Applying the above broad principles to the Durban Elephants case, it may be argued, perhaps, that it is not only Andries Botha's constitutional rights which are subject to infringement by the removal/alteration of the artwork as envisaged by the Municipality. Indeed, it is also the “receiver” of the expression – in this case the public at large – whose rights are potentially affected. This line of reasoning is strengthened by the fact that it is the people of Durban who have paid for the construction of the Elephants (through their rates and taxes paid to the Municipal Government). It would therefore seem possible for the public at large (or a certain group thereof) to challenge a decision of the Municipality to remove or alter the artwork, on the ground that this would infringe the public's right to receive (in this case “view”) the artwork in question.

Indeed, constitutional principles speak to the very heart of the issues that this paper has attempted to unpack. We see the Constitution as having implications for every aspect of the public art debate.<sup>57</sup> In particular, the commissioning of new art must accord with the requirements of freedom of expression,<sup>58</sup> dignity,<sup>59</sup> transparency,<sup>60</sup> and non-discrimination.<sup>61</sup> Government officials cannot simply commission art in a “univalent” way, through which art becomes the mouthpiece of the current political regime, and in which history is seen through the eyes of the officials in power. The same principles, we argue, must apply to art under construction (such as the Elephants in Warwick Triangle, Durban). Indeed, we even contend that these same constitutional principles affect how the government can deal with existing art, which must be respected and maintained according to constitutional principles, even if the political convictions of the current government do not accord with or approve of that art, and it would be a violation of the right to freedom of expression for the government to attempt to destroy or hide artworks of a recognized stature which may not accord with the views of the party in power.

## 5 CONCLUSION

The central question posed in the introduction to part one of this article was the following: “In the context of post-apartheid South Africa, when public

<sup>56</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737, 754 (“Handyside v UK”) quoted with approval in *Islamic Unity Convention v Independent Broadcasting Authority supra* par 28; and *De Reuck v Director of Public Prosecutions supra* par 49.

<sup>57</sup> S 2 of the Constitution emphasizes that the Constitution is the supreme law of the Republic, that law or conduct inconsistent with it is invalid, and directs that the obligations imposed by it must be fulfilled.

<sup>58</sup> S 16 of the Constitution, discussed in detail above.

<sup>59</sup> S 10 of the Constitution.

<sup>60</sup> S 41 of the Constitution.

<sup>61</sup> S 9 of the Constitution. In particular, the state may not unfairly discriminate directly or indirectly (including, perhaps, through the mechanism of art?) against anyone on grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, religion, conscience, etc.

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works of art are commissioned by public bodies, to what extent do state officials have the right to involve themselves and/or interfere in the process?" During the course of our discussion, a number of related questions have emerged, ranging from the highly esoteric: "What is art?", to the more pragmatic: "When is it acceptable for the state to censor works of art?" Although the issues raised are difficult (and in some instances seemingly impossible) to resolve, there is much at stake in the debate around public art, politics and the law which has come to the fore as a result of what has happened to sculptor Andries Botha and his Durban Elephants.

We have argued, at a general level, that the public subsidization of art should be encouraged and supported, as long as it is the true cultural foundation of society which is receiving support, and not any particular political ideology or cultural viewpoint. The funding process should be arms-length, and artists should be maximally free to determine the content of their creative expression. Art should be as diverse as possible within a constitutional democracy such as ours. Our courts should grapple with these issues, drawing on the rights and principles entrenched in the Constitution, and the experience of foreign jurisdictions, in order to formulate uniquely South African solutions – in the same way that our unique flag and national anthem were developed. Politics, art and the law may make uncomfortable bedfellows, but there is no way of avoiding the complex issues which arise as a result their interaction. The case of Andries Botha and his Elephants may not be the first to reveal the stresses and strains which result when these worlds collide. It will certainly not be the last.