**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE DIVISION, CAPE TOWN**
**SITTING AS AN EQUALITY COURT**

**Case number: EC 12/2020**

**In the application of:**

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| **NTOMBIZODWA CINGISWA BABA** | First Applicant |
| **LANGATHANI THEMBELIHLE SIBANDA** | Second Applicant |
| **LOZITLA MAHLANGU** | Third Applicant |
| **KATLEGO MENOE** | Fourth Applicant |
| **ZOLEKA RADEBE** | Fifth Applicant |
| **WINKEY MALUWA** | Sixth Applicant |
| **FEZEKA MSHONA** | Seventh Applicant |
| **TSHEPISO MOSIDI** | Eighth Applicant |
| **KHANYISILE HLATSHWAYO** | Ninth Applicant |
| **LESEGO MOTOWANE** | Tenth Applicant |
| **OFENTSE MBHUTI** | Eleventh Applicant |
| **BONGIWE BADELA** | Twelfth Applicant |
| **SIPHOKAZI ZAMXAKA** | Thirteenth Applicant |
| **NWABISA PHILA** | Fourteenth Applicant |
| **ZANELE ZAMXAKA** | Fifteenth Applicant |
| **MBALI MACU** | Sixteenth Applicant |
| **DUDUZILE FAITH MACU** | Seventeenth Applicant |
| **NOMONDE APHANE** | Eighteenth Applicant |

**And**

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| **CLICKS GROUP LIMITED** | First Respondent |

**UNILEVER SOUTH AFRICA PROPRIETARY LIMITED** Second Respondent

**JUDGMENT DELIVERED ELECTRONICALLY ON MONDAY 28 FEBRUARY 2022**

**DOLAMO, J**

**INTRODUCTION**

[1] The applicants, all black women of African descent, brought this application in terms of section 21 of the Promotion of Equality and Prevention of Discrimination Act[1] (Equality Act) seeking declaratory orders and compensation against the respondents. The application is a sequel to an advertisement, which appeared on certain social media platforms which the applicants described as belittling, hurtful, and that it mocked and ridiculed black females.

[2] On the 4 September 2020 an unknown person posted on social media images of four women with the words: "*Dry and damaged hair*"; "*frizzy and dull hair*"; "*fine and flat hair*" and "*normal hair*". The words "*dry and damaged*" and "*frizzy and dull hair*" appeared on the images of black women while "*fine and flat hair*" and "*normal hair*" appeared on images of white women. These images and the inscriptions on them were cropped from an advertisement that was produced by the second respondent and which was published on Clicks Retailers' website as from the 19 May 2019.

[3] The publication of these images on social media led to the outbreak of nationwide protests, a boycott of "*TRESemmé*" products and a call for a consumer boycott against Clicks retail outlets. The Economic Freedom Fighters (EFF), the third largest political party in the country, with representation in the Parliament of the Republic of South Africa, as well as in the Provincial and Local spheres of government,

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[1] Act 4 of 2000.

took a lead in organizing demonstrations against and boycotts of Clicks retail outlets countrywide, and the *TRESemmé* hair products, in particular.

[4] As will appear later in the judgment, it is not clear whether the applicants were offended by the original *TRESemmé* advertisement that appeared on Clicks Retailers' website or the cropped images that appeared on social media platforms. The applicants, however, described in interchangeable terms the effects of whichever images they had viewed, such as that it was offensive to the dignity and repute of black women; contravened and/or offended sections 7 and 12 of the Equality Act; contravened the rights enshrined in section 9[2] and 10[3] of the Constitution[4]; propounds racial inferiority of Black South Africans; could reasonably be construed and/or understood as demonstrating a clear intention to unfairly discriminate against a black person and was commissioned intentionally with the object to belittle, hurt, mock and ridicule Black females.

[5] Reacting to the outbreak of boycotts and protests, and on the 7 September 2020, the Chief Executive Officer (CEO) of Clicks Group Limited (CGL), Vikesh Ramsyunder (Ramsyunder), penned an open letter in which he apologised on behalf of CGL for the hurt and anger ignited by the hair advertisement that saw some stores trashed and others closed as protests swept across the country. The letter read in part that: *"I am*

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[2] Section 9 of the Constitution provides that:*"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

[3] Section 10 of the Constitution provides that: "*everyone has inherent dignity and the right to have their dignity respected and protected".*

[4] Any reference to the Constitution is reference to the Constitution of the Republic of South Africa Act 108 of 1996.

*deeply disappointed that we allowed insensitive and offensive images to be published on our website. I apologise unreservedly for the hurt and anger these images have caused" and further that*: "*whilst the images and content were provided to us by our supplier TRESemmé, this does not absolve us from blame. This is why we took accountability for the error of judgment by issuing a public apology and swiftly removing the offensive material from our website*".

[6] The apology by Clicks was condemned by the applicants and also drew reaction from a Cabinet Minister, Khumbudzo Ntshavheni, who urged Clicks to remove *TRESemmé* products from its shelves as an expression of its disassociation with suppliers who promote racist and insensitive marketing. A statement attributed to her read in part as follows[5]:

> *"The continuous undermining of black people, of women and black young people is because (sic) economically not strong enough. So if Clicks are serious about being a good corporate [company] in South Africa, they must contribute to that inclusive economy and say how many of their products are made by black women and how many of their products are suitable for black hair."*

[7] On or about 10 September 2020, the EFF and Unilever reached a settlement. The terms of the settlement, as narrated in a "*Joint Statement of the EFF and Unilever on the TRESemmé – SA Racist Image*" that appeared on the EFF's letterheads stated that Unilever agreed that the advertisement was offensive and racist. Unilever undertook to investigate and take certain measures to correct the situation. In addition, Unilever expressed its remorse to all South Africans, black women in particular, for the racist *TRESemmé* SA images, and undertook to withdraw all *TRESemmé* products from all retail stores for a period of ten (10) days as a demonstration of its remorse. Unilever also undertook to donate 10000 sanitary towels (pads) and sanitizers to informal settlements that would be identified by the EFF. The conclusion of this agreement was deemed to be in full and final settlement of all issues between the signatories.

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[5] Annexure "*FA1*" to the founding affidavit.

[8] The conclusion of this agreement, however, was not to be the end of the matter. The applicants launched this application on 20 September 2020 seeking an order in the following terms:

> *"1. Declaring that the creation and/or publication of the TRESemmé advertisement by the first and/or second respondent(s) or both first and second respondent(s) on the first respondent's website on or about 4 September 2020 to be:*
>
> *1.1 offensive, unlawful, racist and demeaning to black females:*
>
> *1.2 in contravention and offensive to the provisions of sections 7 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act"); and*
>
> *1.3 in contravention and offensive to the provisions of sections 9 and 10 of the Constitution of the Republic of South Africa No 108 of 1996.*
>
> *2. Ordering the First Respondent or Second Respondent and/or both Respondents to pay 10% (ten percent) of their annual profit, for a period of 10 (ten) years, towards women organizations, in all provinces within the Republic of South Africa, that promote and support gender based issues, wellbeing and upliftment of black females. The selection of the women organizations shall be determined by an independent person agreed to by the Applicants and the Respondents and/or their respective assigns.*
>
> *3. That the Applicants are awarded costs, including the costs of two counsel; and*
>
> *4. Ordering such further and/or alternative relief as this Honourable Court may deem necessary."*

[9] In the founding affidavit, the applicants stated that the court must declare the conduct of the respondents, in the creation and publication or causing the creation and publication of the *TRESemmé* advertisement on the first respondent's website on or about 4 September 2020, offensive to the dignity and repute of Black women in general and the applicants in particular; that the said conduct contravened and/or offended

sections 7 and 12 of the Equality Act and was repugnant, racist, unlawful and contravened the rights enshrined in sections 9 and 10 of the Constitution of the Republic of South Africa.

[10] According to the applicants, by launching this application they sought "*to have the denigration of black women in our society dealt with by our courts once and for all in order to prevent further occurrences of the same in future"*.[6]

[11] The applicants submitted that the advertisement directly contravened sections 7 and 12 of the Equality Act in that, as regards section 7, it propounds the racial inferiority of Black South Africans and, as against section 12, could reasonably be construed and/or understood as demonstrating a clear intention to unfairly discriminate against a Black person. The applicants further stated that the respondents, large corporate entities in South Africa, have a general duty of care that should be exercised when making or publishing advertisements. The applicants concluded that, given this general duty and the assumption that the respondents have internal procedures to ensure compliance with the Equality Act, the impugned advertisement was commissioned intentionally with the object of offending Black females.

[12] On the personal impact the advertisement has had on her the first applicant submitted that hair to her, and other women, was important as it reflects one's personality, mood and expression and was regarded as her own crown and pride. After seeing the impugned advertisement on the first respondent's website and subsequently in various other media platforms, she felt that it was demeaning; aimed at attacking her self-esteem; making her feel inadequate and out of place; judging her for wearing natural hair; stigmatizing; racist and psychologically hurtful to her.

[13] The applicants were not impressed by the respondents' apologies. As regards that of the first respondent, the applicants condemned it and alleged that it referred to

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[6] Paragraph 28 of the founding affidavit.

the black community as the "*black hair community*". This, according to the applicants, created the impression that the first respondent has failed to acknowledge and appreciate the gravity of its hurtful and unlawful discriminatory message which was widely publicized in this country and worldwide. It showed a lack of remorse, shifted the blame, did not take accountability for and did not go far enough in addressing the hurt it caused, the applicants submitted.

[14] The second respondent was castigated for failing to admit that the advertisement was hurtful, discriminatory, unlawful and for failing to give an undertaking that something of this nature will not happen again. The settlement with the EFF was viewed in a poor light and was said to have failed to send a strong message to all companies in South Africa that treat Black people and black lives as if they do not matter. Accordingly, the relief sought, the applicants submitted, was intended to send a strong message to anyone who treats black people and black lives unlawfully that this would not be tolerated.

[15] After the papers in this matter were served, CGL wrote to the applicant's attorneys advising that the company, which the applicants ought to have brought the application against was Clicks Retailers (Pty) Ltd with registration numbers 2000/13054/07. CGL described itself as merely a holding company with no employees and that it has no conceivable direct or material interest in the application. An offer was made to the applicants to withdraw the application and institute a fresh one, citing the correct company. The applicants, however, did not heed this advice and persisted with this application, with their attorneys advising CGL that it can plead misjoinder, non-joinder or bring an appropriate application to address its concerns.

[16] When it became apparent that the applicants intended to proceed against CGL, irrespective of the latter's contentions that it was not the company which published the impugned advertisement, the respondents, in due course, filed their opposing papers. In its opposing affidavit, CGL raised, as a point in *limine,* that it has been cited in error in this proceedings in which it has no interest and that Clicks Retailers, and not it, should

have been cited. It was submitted, in this respect, that CGL was a non-trading listed entity which is the ultimate holding company for the various subsidiary companies making up the Clicks group. Clicks Retailers was described as the subsidiary that operated Clicks pharmacies and retail stores throughout the country, and owned and controlled the domain www.clicks.co.za on which the *TRESemmé* advertisement appeared. The impugned advertisement, according to CGL, was never published on its website, www.clicksgroup.co.za.

[17] On the merits, CGL pleaded that Unilever supplied the TRESemmé advertisement to Clicks Retailers, which is also the supplier of the *TRESemmé* products that were sold by Clicks Retailers. The advertisement was intended for and published on the Clicks Retailers' website and this was indeed the advertisement that was withdrawn when its cropped version drew widespread condemnation. CGL further stated that Clicks Retailers accepted responsibility for publishing the *TRESemmé* advertisement and immediately and publicly apologised through extensive media communications. In these communications it was mentioned that Clicks Retailers took consultative and corrective steps to redress the hurt and to restore the damage that has been caused by the advertisement. According to CGL, the apology was not manufactured contrition but a genuine apology.

[18] On the submission by the first applicant, that the advertisement adversely affected her, CGL pleaded that no case has been made out as to why the advertisement was particularly offensive to her as distinct to other applicants. Accordingly, it was argued, that the first applicant's subjective feelings have no bearing on whether unfair racial discrimination had taken place or not in the publication of the *TRESemmé* advertisement.

[19] CGL denied that there was any basis in terms of the Equality Act for the court to make any declaration to the effect that the advertisement was offensive, unlawful, racist and demeaning to black females. This, according to CGL, was because the Equality Act does not provide remedies for the alleged harm and that there was no basis in law

made out in the founding papers for the court to make findings of offensiveness, racism etc. CGL further submitted that while the applicants' case is premised on unfair racial discrimination as defined in the Equality Act, they have failed to establish their case.

[20] Unilever, the second respondent, on its part, gave background information to the creation, purpose and content of the *TRESemmé* advertisement and contrasted that with the one that circulated on social media platforms. Unilever's point of departure was that the images that appeared on social media, that were likely to have caused the national outcry, were not the advertisement that appeared on the Clicks Retailers' website and for which it was responsible. According to Unilever, and this appears not to be disputed by the applicants, the "*advertisement*" that circulated on social media was cropped by unknown person or persons from the one which was on the website of Clicks Retailers.

[21] Regarding the background to the creation of the advertisement that appeared on Clicks retailers' website, Unilever's version was as follows: Unilever S.A. and Clicks entered into a Digital Marketing Contract (DMC) in November 2015 in terms of which Unilever agreed that it would supply Clicks with its marketing material which Clicks would, subject to necessary amendments, put on what was referred to as the "*store in store*"[7] section of its webpage.

[22] The aim was to have the content in the "*store in store*" section of the webpage that reflected what research, conducted with regard to types of hair and haircare concerns, had revealed and how these concerns could be addressed with the *TRESemmé* hair products. The process it undertook was described as follows:

> *"30. Unilever SA therefore wanted to list a number of different categories of hair care products.*
>
> *30.1 It decided to do so by providing six different categories of hair or hair case concerns and then providing details of the relevant TRESemmé*

[7] The "*store in store*" is defined as: a commercial page hosted within the Clicks website that was designed to enable members of the public to view or order products from the Clicks website.

*products that could be used to treat that type of hair or resolve that particular problem.*

*30.2 Unilever SA decided on six categories: (a) colour treated hair; (b) dry and damaged hair; (c) fine and flat hair; (d) frizzy and dull hair; (e) normal hair; and (f) styling.*

*30.3 Each category would have next to it a visual representation of how the hair this is standard industry practice – hair care products are advertised using pictures of healthy hair as this renders the products more attractive to consumers.*

*30.4 Each of these six images, lined to the six products categories would have a link with a listing of products relevant to the hair needs. The purpose of the item description, once loaded onto the store-in-store page, was to assist a consumer to navigate to a relevant solution. When a consumer clicked on a hair care button, the consumer was directed to products that could be used for the hair case need concerned.*

*34. Unilever SA then observed that the agency had used only pictures of white women. This was inconsistent with the objective of making the TRESemmé brand more inclusive.*

*35. Unilever SA therefore requested that images of Black women with healthy hair be included for some of the six product categories and on the TRESemmé Botanic banner at the top of the page. This was done, including the use of a Black woman to illustrate the category button for "dry and damaged hair" consistent with the market research conclusions referred to above.*

*36. The final product was ultimately shared with Clicks' e-commerce Management and used for the TRESemmé content for the Clicks store-in-store page. It went live on the page on 15 May 2019."*

[23] When the cropped images were noticed on social media, Unilever contacted Clicks Retailers and the latter confirmed that the cropped images were from the advertisement that was on its website. As a result, the *TRESemmé* advertisement was immediately removed. The second respondent did not explain why it was necessary to

remove the advertisement that, according to it, was not offensive when the cropped images appeared on social media.

[24] The images posted on social media only included four of the six product category buttons and did not reflect the *TRESemmé* Botanic banner at the top of the page that showed an image of a black woman with an afro hairstyle next to another woman, who appeared to be white. The women appeared alongside a slogan that read: "*the natural choice for moisturised hair*". Unilever submitted that when the content complained of is viewed in the form it was published and objectively with regard to its intentions it did not give rise to a breach of the law, including the Constitution and the Equality Act. It also submitted that the content by Unilever, which appeared on the Clicks Retailers' website as from 15 May 2019 did not fall within section 16(2)[8] of the Constitution and that the caveat in section 12 of the Equality Act applied.

[25] However, Unilever fully accepted that it made mistakes in the process of creating content that was aimed at promoting greater diversity in the marketing of its products and to ensure that it was speaking to women of all races, including Black women. It submitted that it ought to have ensured that all pieces of content placed on the website, even when viewed out of context, sufficiently clearly reflected Unilever's intention to promote diversity and cater to the hair care needs of all women, including Black women. It regretted how its images were manipulated to reinforce racist stereotypes.

[26] Unilever, accordingly submitted that when the issue arose it immediately tendered an apology and undertook to implement other remedial steps which included setting up a new Diversity and Inclusion Assets Committee to ensure that future advertising campaigns and publicity materials reflect its values and setting up an Advisory Board with internal and external experts to review how hair care products in

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[8] Section 16(2) of the Constitution provides that: *The rights in subsection (1) does not extend to-*
*(a) propaganda for war;*
*(b) incitement of imminent violence; or*
*(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

South Africa can offer consumers the solutions they want. It submitted that it was using these initiatives to build on its ongoing efforts to use the *TRESemmé* brand to promote diversity and inclusion.

[27] Unilever denied that the first applicant saw the content complained of on the Clicks website. It, however, conceded that she may have seen the cropped version of this content as it circulated on social media. It had no knowledge of how the first applicant felt upon seeing the cropped images but reiterated that the contents of its advertisement was not to demean, attack, hurt, or stigmatise the first applicant or to be racist in any way.

[28] Unilever submitted that all these factors indicated that CGL would never intentionally engage in a course of action that would offend or hurt Black women. Unilever further submitted that communication cannot amount to '*unfair discrimination*' merely because it causes hurt or is offensive. This, according to Uniliver, would be unconstitutional.

[29] Arising from the respective contentions of the parties, the issues for determination are:

29.1 whether, in the light of the CGL alleging that it has no substantial or direct interest in the matter, the right company has been cited as the first respondent.

29.2 the test to be applied in determining whether there has been an unfair discrimination on the basis of race.

29.3 whether the *TRESemmé* advertisement unfairly discriminated against the applicants (or any other black woman) on the ground of race.

29.4 whether the *TRESemmé* advertisement disseminated or published information which when reasonably construed or could reasonably understood to demonstrate a clear intention to unfairly discriminate against the applicants (or any other black woman).

29.5 a corollary to subparagraphs 3 and 4, *supra,* is whether it was the *TRESemmé* advertisement as it appeared on the website of Clicks Retailers or

the cropped images that appeared on social media that was the probable cause of the outcry and

29.6 if the respondents are found to be in violation of sections 7 and 12 of the Equality Act by creating and publishing the *TRESemmé* advertisement whether the relief sought by the applicants is an appropriate relief.

[30] At the heart of our new constitutional order is a commitment to the transformation[9] of a society that was based on racial segregation to one free of racial discrimination and united in our diversity. It is for this reason that section 9 of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefits of the law, also mandated the legislature to enact national legislation to prevent or prohibit unfair discrimination and promote the achievement of equality. The National Legislation which was enacted, pursuant to the provision of section 9(4) of the Constitution, is the Equality Act.

[31] To, *inter alia*, prohibit unfair discrimination, any person may in terms of section 20(1), institute proceedings in the Equality Court acting in his own interest, on behalf of another person who cannot act in their own name; as a member of or in the interest of, a group or class of persons or in the public interest. The proceedings may also be instituted by any association acting in the interests of its members or by the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (CGE).

[32] As proclaimed by the applicants, this application is brought in terms of section 20(1) of the Equality Act. The applicants brought these proceedings in their own names, and they submit, in the public interest as well. The applicants invoked the provisions of sections 7, which prohibits unfair discrimination on the ground of race and section 12, which prohibits the dissemination and publication of information that unfairly discriminate, as the basis of their claim against the respondents. It is convenient

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[9] See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 at para [8].

therefore, and as a starting point, to set out the provisions of the Equality Act, particularly those that will come into play in this matter. As stated supra, the Equality Act was enacted to give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination and to prevent and prohibit hate speech. In its preamble, the Equality Act states, *inter alia*, that it endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

[33] Discrimination, which is outlawed, is defined in the Equality Act as:

> *"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly- (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds".*
>
> *The prohibited grounds that are specified are- "(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or (b) any other ground where discrimination based on that other ground:*
>
> > *(i) causes or perpetuates systemic disadvantage;*
> >
> > *(ii) undermines human dignity; or*
> >
> > *(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)".*

[34] Section 7 of the Equality Act, on which the applicants rely, provides that:

> ***"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;*

*(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;*

*(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;*

*(d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;*

*(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons."*

[35] The applicants also rely on section 12, which prohibits the dissemination and publication of unfair discriminatory information that unfairly discriminates. This section provides that:

***"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."*

[36] In terms of section 13(1):

"*if the complainant has made out a prima facie case of discrimination - (a) the respondent must prove, on the facts before the court, that the discrimination did*

*not take place as alleged, or (b) that the conduct is not based on one or more of the prohibited grounds"*.

In terms of subsection (2), if the discrimination did take place:

*"(a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;*

*(b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair-*

*(i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and*

*(ii) unless the respondent proves that the discrimination is fair."*

[37] Section 14 provides for the determination of fairness or unfairness. It does so as follows:

***"14 Determination of fairness or unfairness***

*(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.*

*(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:*

*(a) The context;*

*(b) the factors referred to in subsection (3);*

*(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.*

*(3) The factors referred to in subsection (2) (b) include the following:*

*(a) Whether the discrimination impairs or is likely to impair human dignity;*

*(b) the impact or likely impact of the discrimination on the complainant;*

*(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;*

*(d) the nature and extent of the discrimination;*

*(e) whether the discrimination is systemic in nature;*

*(f) whether the discrimination has a legitimate purpose;*

*(g) whether and to what extent the discrimination achieves its purpose;*

*(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;*

*(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-*

*(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or*

*(ii) accommodate diversity."*

[38] Having outlined the provisions of the Equality Act that may be implicated in this matter, I proceed to immediately deal with and dispose of the question of the jurisdiction of the Equality Court. The first respondent submitted that there is no basis in terms of the Equality Act for the court to make a declaration that the publication is offensive, unlawful, racist and demeaning to Black females and that it does not provide remedies for such harm. This statement triggered a lengthy response from the applicants, including but not limited, to setting out the purpose of the Equality Act and submitting that section 21 provides clear grounds and all the powers of the court to grant the orders sought by the applicants.

[39] The submission by the CGL in this respect, in my view, is nothing more than a denial that, on the facts set out in the applicants' papers, a case has been made out for the grant of the relief sought in the notice of motion. It is not a challenge, *per se*, to the court's jurisdiction to hear and determine a matter of this nature. It is clear from the judgment of Navsa JA in *Manong and Associates (PTY) LTD v Department of Roads and Transport Eastern Cape and Another*[10] that the Equality Court is a specialised court designated to hear matters relating to unfair discrimination, hate speech and

[10] 2009 (6) SA 574 (SCA) at para [50].

harassment. There is no doubt that this a matter that falls squarely within the jurisdiction of the Equality Court.

[40] Equally easy to dispose of is the relief sought in prayer 1.3 of the notice of motion in terms of which the applicants seek a declaration that the *TRESemmé* advertisement is in contravention and offensive to the provisions of sections 9 and 10 of the Constitution. Notwithstanding their pronouncements that the application is brought in terms of section 20(1) and founded on the provisions of sections 7 and 12 of the Equality Act, the applicants still sought to rely directly on the provisions of the Constitution for additional declaratory relief.

[41] As stated *supra*, the Equality Act was enacted to give effect to section 9 of the Constitution and by virtue of the principle of subsidiarity, a litigant cannot circumvent Legislation enacted to give effect to a constitutional right by attempting to rely directly on the Constitutional right. In *MEC for Education: Kwazulu Natal and Others v Pillay*[11] Langa CJ, writing for the majority of the Constitutional Court (CC) has this to say about the principle of subsidiarity and the reason therefore:

> *"[40] The first is that claims brought under the Equality Act must be considered within the four corners of that Act. This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights'. The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins."*

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[11] 2008 (1) SA 474 (CC) at para [40].

[42] The applicants therefore are barred from vacillating between the Equality Act and the Constitution. They cannot, while pursuing their claim in terms of the Equality Act, at the same time try to vindicate their rights by resorting to the Constitution. Doing so runs afoul of the principles of subsidiarity. Prayer 1.3 of the Notice of Motion therefore immediately falls away since reliance by the applicants on the provisions of the Constitution in the circumstances of this case is impermissible.

[43] The applicants cited the first respondent as Clicks Group Limited, a public company incorporated in accordance with the company laws of the Republic of South Africa and with registration number 1996/00645/06. CGL pleaded that it had been cited in error and that the applicants should have proceeded against Clicks Retailers, the company that owned and controlled the domain www.clicks.co.za on which the impugned advertisement appeared. This fact was brought to the attention of the applicants' attorneys as early as when the application was launched. Even after they were provided with the registration number of Clicks Retailers, being 2000/013054/07, as proof of the existence of two separate legal entities, the applicants did not heed the advice to withdraw this application, start afresh, and cite Clicks Retailers. They persisted with this application having been warned that they may be pursuing their claim against the wrong company.

[44] The applicants, though admitting that CGL and Clicks Retailers were two separate legal entities, insisted that CGL has a direct and material interest in the matter since, according to them, it has ultimate control over its subsidiaries. The applicants also made reference to several statements in CGL's answering affidavit to support their argument that they have cited the right entity. They, *inter alia*, pointed out that the deponent to CGL's answering affidavit described himself as the head of legal and the company secretary to the Clicks group of companies, which includes CGL and that CGL argued that the relief sought would entail payment by CGL or Clicks Retailers of billions of Rands.

[45] What appears to be the applicants' main contention in this respect is that CGL's CEO publicly apologised for the offensive advertisement and stated that "*This is why we took accountability for this error of judgment by issuing a public apology…*" and that "*this and other steps were taken in acknowledgement of the need for the Clicks group to self-correct and to ensure that there is no repeat*". Furthermore, the applicants argued that CGL admitted that, in the period following the outcry relating to the *TRESemmé* advertisement, it took consultative and corrective steps in order to redress the hurt that has been caused. The applicants submitted that, taking into account all these factors, there was no doubt that CGL has a direct, material and substantial interest in the outcome of this application otherwise it would have filed a notice to abide and not oppose the application.

[46] The question is whether by publicly admitting that the cropped advertisement has caused public outcry and apologising therefore, has CGL attracted liability for itself? Put differently, do the factors relied upon by the applicants prove that CGL would be legally liable for any of the alleged transgressions of sections 7 and 12 of the Equality Act? This question requires a brief detour into the principles of company law.

[47] Section 1 of the Companies Act[12] defines a company as a company incorporated in terms of the relevant provisions of the Act. The company exists as a separate entity with legal personality from the moment of its registration. Upon incorporation, it can for example, acquire assets, employ people, enter into contracts and sue or be sued in its own name[13]. A Group of Companies, on the other hand, means a Holding Company and all of its subsidiaries. A Holding Company in relation to a subsidiary means a juristic person that controls that subsidiary as a result of any circumstances contemplated in sections 2(2)(i) or 3(1) of the Companies Act[14].

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[12] Act 71 of 2008.
[13] See Corporation law 3rd Edition page 5.
[14] In terms of section 2(2)(a)(1) of the Companies Act, a person controls a juristic person or its business, if, in the case of a juristic person that is a company, that juristic person is a subsidiary of that first person as determined in accordance with section 3 (1)(a). In terms of section 3(1) (a) a company is a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person on any of its subsidiaries, alone or in any combination (i) is

[48] The most important consequence of the fact that a company is a separate entity existing apart from its shareholders is that the company's assets are kept separate from the assets of its shareholders. As a result, the debts of the company and other liabilities, on the liquidation of the company, would not necessarily affect the estates of its shareholders. As such the profits of the company belong to the company until such time as the company would have declared a dividend. The assets of the company are its exclusive property and the shareholders have no proportionate proprietary rights therein. Similarly, any liability that a company incurs is for its account unless negligent or criminal liability can be ascribed to its director(s).

[49] When it comes to representation, no one is qualified by virtue of his/her membership to act on behalf of the company[15]. Only those who, in terms of the articles of association are appointed as representatives of the company, can bind it[16].

[50] The applicants are pursuing their claim against the company that published the allegedly offensive advertisement on the website www.clicks.co.za. This website belongs to Clicks Retailers and not to CGL, the first respondent. The latter stated that it neither commissioned nor published the *TRESemmé* advertisement. It also denied that it had anything to do with the editing thereof, or the subsequent publication of the distorted image on social media. The applicants, according to CGL, should have proceeded against Clicks Retailers as a respondent if it wished to seek relief against it.

[51] The fact that CGL has taken part in apologising for the cropped images and has defended this application, in my view, does not mean that it is the correct legal entity to be sued. The concept of the existence of a company as a separate entity distinct from

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or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company whether pursuant to a shareholder's agreement or otherwise; or (ii) has or have the right to appoint or elect, or control the election or appointment, directors of that company who control the majority of the votes at a meeting of the board.

[15] See *Maasdorp v Haddow* 1959 (3) SA 861 (C) at 866 – 867.

[16] See *RP Crees (Pty) Ltd v Woodpecker Industries (Pty) Ltd* 1975 (2) SA 485 (R) at 489.

its shareholders is not merely artificial and technical but has legal consequences. In the context of a holding company and a subsidiary the Constitutional Court's majority judgment in *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Others*[17] held that:

> *"[37] WEBSA's other defence is that it and Westinghouse USA are part of 'the Westinghouse group'. It adds that it received the support of other entities in the Westinghouse group. The answer to this is that, if WEBSA was not one of the two bidders for the tender in its own right and it instituted the review application in its own right and not as an agent of Westinghouse USA, the fact that it and Westinghouse USA are part of the same group of companies cannot help it. This is because WEBSA and Westinghouse USA are two separate legal entities and each one of them bears its own separate rights and incurs its own separate obligations.*
>
> *[38] When each one of the two separate legal entities acts in its own right, no obligations or rights attach to the other simply by virtue of the fact that they both belong to the same group of companies. This purported defence is no defence at all in law. Just because company A belongs to the same group of companies as company B does not give any one of the two companies locus standi to institute court proceedings in its own right in a matter that only directly affects the other company. So, if company A submitted a bid for a certain tender and lost that tender to company C, company B cannot then institute review proceedings in its own right to set aside the award and to seek an order that the tender be awarded to it just because it and company A belong to the same group of companies."*

[52] The minority judgment in the *Areva* matter (Moseneke DCJ et Bosielo AJ), on the other hand, held differently. It held that[18]:

> *"[50] Westinghouse had the requisite standing in the judicial review it sought. It had a direct and substantial interest under the common law and an own*

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[17] 2017 (6) SA 621 (CC) at 37–38.
[18] *Areva* judgment *supra*, at paragraphs [50] and [57].

*standing conferred by s 38 of the Constitution brought about by the s 33 right to just administrative action by Eskom, a public body. In any event, it is not in the interests of justice for a court of final instance to dispose of a matter, of this constitutional magnitude, commercial import and of high public interest, by way of only a technical and dilatory bar as locus standi.*

*And:*

*[57] Now that the standard for joinder is clear, the High Court and the Supreme Court of Appeal were rightly not impressed by the standing point. They preferred the substantive justice approach which eschews a 'technical or strictly-defined' notion of standing in favour of the enquiry whether it would be in the interests of justice to decide the merits of a dispute even if the claimant's standing may be questionable."* (own emphasis)

[53] I am bound by the principle of *stare decisis* to follow the judgment of the majority in the *Areva* matter, unless I find that the application of the principle is not supported by the facts. I am of the view, that the facts of this case are distinguishable from those of the *Areva* matter. In the present matter, there is no contractual nexus between the applicants and any specific entity within the CGL group of companies, as was the case in the *Areva* matter. That contractual nexus in the *Areva* matter required that the *lis* be between the contracting parties directly. In *casu,* the applicants are not enforcing the terms of an agreement but pursuing the protection of their rights in terms of the Constitution. In this respect they have shown that CGL has direct and material interest to be cited in the proceedings. On this basis I proceed to deal with the merits of the application.

[54] Counsel for the applicants submitted that the impugned advertisement offends against section 7 in that, by portraying black women's hair as *"frizzy and dull"* in one image and as *"dry and damaged"* in another and the depiction of non-black women's hair as *"fine and flat"* and *"normal"* disseminates the idea which propounds the racial inferiority of black females based on their hair texture, which is prohibited in section

7(a). This, according to the applicants, also violate section 12 of the Equality Act which prohibits the dissemination and publication of information that unfairly discriminates.

[55] It is not clear whether Counsel's submission is with reference to the advertisement that was created by Unilever and published on the Clicks Retailers' website or the cropped images that circulated on social media platforms. But Counsel's Heads of Argument (HOA) creates the impression that no distinction was drawn between the two. It would appear, however, from further submissions that reliance was on the cropped images that appeared on social media. In this respect Counsel submitted that an unknown user forwarded the advertisement on twitter with the caption: "*Even after all this black people will go swipe their clicks cards for points*". This, coupled with the submission that CGL acknowledged that the advertisement caused widespread condemnation on social media from the 4 September 2020, it is evident that Counsel was not drawing any distinction between the original advertisement that appeared on the Clicks website and the cropped images that circulated on social media. In fact, Counsel submitted that both were offensive for which the respondents should be held liable.

[56] Conflating the original advertisement by Unilever and the cropped images is problematic. Firstly, the respondents cannot be held liable for the cropped images, if that is what offended the applicants. Secondly, Counsel's submission that both the original and the cropped version were offensive is not supported by the objective facts, as appears *infra*.

[57] It is common cause that the applicants did not attach a copy of the original advertisement or the cropped images to their founding papers. What the applicants attached to the founding affidavit was the statement by the Honourable Minister Ntshavheni, referred to *supra*. According to the applicants, the images complained of are said to comprise of two pictures: One of a Black female and the other of a non-Black

female[19]. The *TRESemmé* advertisement that was published on the Clicks website from 15 May 2019 until it was removed on 4 September 2020, according to the respondents and which is not disputed by the applicants, consisted of six pictures of women illustrating five types of hair. The respondents' version is furthermore corroborated by a copy of the advertisement that is attached to the papers.

[58] Whilst the first applicant stated that she saw an advertisement on the first respondent's website and subsequently on various other media platforms, on these objective facts the images that were the probable cause of the furore were those that appeared on social media and for which the respondents were not responsible. The advertisement that had been on the Clicks website from 15 May 2019 until it was removed on 4 September 2020 did not cause even the slightest discontent, let alone a public outcry on the scale experienced after the publication of the cropped images on social media on the 4 September 2020. On the strength of the *Plascons-Evans*[20] rule, I conclude that it was the images, which appeared on social media platforms, for which the respondents were not responsible, that caused the public outcry. I move to determine whether the original advertisement by Unilever nevertheless contravened the law, as suggested by Counsel for the applicants.

[59] Central to our constitutional democracy is an unwavering commitment to break from, and a ringing rejection of the past which was disgracefully racist, authoritarian, insular and repressive[21]. We do this by declaring in Section 9 of the Constitution that everyone is equal before the law and has the right to equal protection and benefit of the

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[19] The Black female's hair was described, on the advertisement, as dry damaged, frizzy and dull whilst the non-Black female's hair was described as fine, flat and normal, as appears in paragraphs 44 of the founding affidavit.

[20] Is reference to *Plascon – Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). This rule broadly stated, and which was originally formulated in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) provides that in motion proceedings for a final order, where there is a dispute as to the facts, a final interdict should be granted (in motion proceedings) only if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit, justify such an order, or where it is clear that the facts, although not formally admitted cannot be denied and must be regarded as admitted.

[21] Per Mahomed J in *S v Makwanyane* 1994 (3) SA 623 (A) at paragraph 262.

law. Equality, which includes the full and equal enjoyment of all rights and freedoms, is the foundation on which a democratic society is built.

[60] What then is equality? Sachs J described equality in the following term:

> "[60] …*Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting."*[22]

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[22] *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

[61] The complaint by the applicants against the impugned advertisement, stripped of all the adjectival description of its effects, is that it unfairly discriminates on the basis of race. It is the unfair discrimination on the ground of race that Section 7 of the Equality Act prohibits. Unfair discrimination, in my view, is the direct opposite of equality. It principally means treating persons differently in a way which impairs their dignity as human beings who are inherently equal in dignity[23].

[62] The applicants state that the cornerstone of this application for the relief sought rests essentially on whether or not the content of the advertisement constituted unfair discrimination. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human being will be accorded equal dignity and respect regardless of their membership of particular groups[24]. Even under the new democratic order, where all are equal under the law, there are still vestiges of the entrenched racial practices of the past, which were underpinned by apartheid legislative measures, that now and then resurface and manifest in various forms and that may derail the process of transformation to a democratic order. This require a stern determination and a commitment to uproot and eradicate such unsavoury and unfairly discriminatory conduct to protect the vulnerable groups against their effects, which is to rob people of their dignity.

[63] Most of the *jurisprudence* that has developed around the equality provisions of the Constitution involved challenges to state actions, particularly legislation. Private individuals and corporations, however, can commit acts that discriminate unfairly since Section 9(4) of the Constitution extends the prohibition to all persons[25]. The approach in dealing with unfair discrimination, formulated in cases such as *Harksen*[26]*, Prinsloo*[27]

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[23] See in general *Prinsloo v Van der Linde* 1997 (3) SA 1012 particularly para [33].
[24] See *State v Makwanyane and Another* 1995 (3) SA 391 (CC) at paragraph 262.
[25] See Constitutional Law of South Africa 2nd Addition VD.3 page 35-83.
[26] *Harksen v Lane* 1998 (1) SA 300 (CC).
[27] *Prinsloo v Van der Linde* 1997 (3) SA 1012(CC).

*and Hugo*[28] will in my view find application, *mutatis mutandis*, in matters involving allegations of unfair discrimination by individuals and/or corporations.

[64] In *Harksen, a* matter in which the constitutionality of section 21 of the Insolvency Act was challenged on the basis that the vesting provision constituted unequal treatment of solvent spouses and discriminated unfairly against them, and that its effect was to impose severe burdens, obligations and disadvantages on them beyond those applicable to other persons with whom the insolvent spouse had dealings, close relationships or whose possession was found in the possession of the insolvent. The court unequivocally acknowledged that attacks on legislation which are founded on the equality provision of the Interim Constitution raised difficult questions of interpretation and require a careful analysis of the facts of every case and an equally careful application of those facts of each case to the law[29] I am enjoined by precedent to adopt the same approach.

[65] Goldstone J drawing from the *Prinsloo* and the *Hugo* matters, formulated the approach to an enquiry where an attack is made to a statutory provision, relying on the equality provisions of the Constitution, thus:

> *"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessarily an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:*
>
> *(a) Does the provision differentiate between people or categories of people? If so, does the difference bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear rational connection, it might nevertheless amount to discrimination.*
>
> *(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:*
>
> *(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground of discrimination will have been established. If it is not*

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[28] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1.
[29] At paragraph [40].

*on a specified ground, then where not there is discrimination will depend upon whether, objectively, the ground is base attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably manner.*

*(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination, it has been found to have been on a specified ground, then unfairness will be presumed on an unspecified ground, unfairness will have to be established by the complainant. The issue of unfairness focuses primarily on the impact of the discrimination of the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there is no violation of section 8(2).*

*(c) If the discrimination is found to be unfair then a determination will have to be made as to whether provision can be justified under the limitations clause (section 33 of the interim Constitution).*[30]

[66] In order to determine whether the discriminatory provision has impacted on the complainants unfairly, various factors must be considered. These would include:

*"(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;*

*(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In Hugo, for*

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[30] *Harksen* at paragraph [53].

*example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past".*

[67] In the context of this matter, in which we are dealing with allegations of unfair discrimination by corporations against individuals, the enquiry, in respect of paragraph (a) of the three-stage enquiry outlined above, if there is any differentiation, would be whether the differentiation is fair. The question therefore is whether the advertisement differentiated between people or categories of people. If so, is the differentiation fair? If it is not fair, then there is a violation of section 7 of the Equality Act. Even if it is fair, it might nevertheless amount to discrimination. The explanation given by Unilever for the existence of the advertisement is central to this leg of the enquiry.

[68] The applicants complain about the respondents' definition of discrimination. They characterise it as very narrow and failing to consider surrounding sources and circumstances. They argue that consideration must be had to all relevant sources that aims to define when unfair discrimination is present and that such definition must not be interpreted in isolation.[31] Relying on *Brink v Kitshoff*[32] that *prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established, the applicants boldly stated that there is no doubt that discrimination did in fact take place in that the advertisement did not portray black female hair as equal to that of non-black females.

[69] The statement in *Kitshoff*, *supra*, is now reflected in section 13 (2) of the Equality Act which provides that if discrimination did take place (a) on a ground in paragraph (a)

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[31] See paragraph [50] of Heads of Argument.
[32] 1996 (4) SA 197 (CC) at para [42].

of the definition of prohibited 'grounds', then it is unfair unless the respondent proves that the discrimination is fair. Before the respondents can be put to the proof that the discrimination is a fair one it must first be shown that it is unfair discrimination as defined in the Equality Act: it must be proven that the unfair discrimination complained about was an act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposed burdens, obligations or disadvantages on or withheld benefits, opportunities or advantages from the applicants because of their race.

[70] The applicants did not set out facts which proved that the impugned advertisement directly or indirectly imposed any burdens on them or settled them with any obligations or disadvantages. Nor were they able to prove that benefits, opportunities or advantages were withheld from them because they were black. All they could advance was that the advertisement was offensive and hurtful. As the Constitutional Court in *Qwelane v South African Human Rights Commission and Another*[33] found, to prohibit hurtful communication would be an overly extensive and impermissible infringement of freedom of expression. While the *Qwelane,* matter was about hate speech the principle, in my view, is equally applicable to instances where the alleged infringement is against the equality provisions.

[71] Can the impugned advertisement reasonably be construed and/or understood as demonstrating a clear intention to unfairly discriminate against black people? Was it commissioned intentionally with the object of offending black females as submitted by the applicants? Here the subjective views of the applicants are immaterial and an objective test must be applied. The Constitutional Court in *Qwelane, supra,* motivated for an objective test in these terms:

> *"….. an objective standard gives better effect to the spirit, purport and objects of the Bill of Rights. On the one hand, if it were based on the subjective perception of the target group, it would unduly encroach on freedom of expression, since*

[33] 2021 (6) SA 579 (CC) at para 102.

*claims could be based on "a multiplicity of trivial actions by hypersensitive persons".*[34]

[72] Unilever refuted the submission by the applicants that the impugned advertisement was commissioned intentionally with the object to belittle, hurt, or mock black women. In this respect, Unilever explained that *TRESemmé* was originally a brand more focused on Caucasian women's hair but that, from 2017, it took a number of steps to ensure that this product became more diverse and inclusive. To achieve this objective its marketing communications and products were diversified, focusing on hair types rather than race. It consciously embarked on ensuring that 80% of its advertisement campaigns used content that was sourced from South African agencies, using models of different hair types and ethnicities to introduce hair products suitable for South African women with natural hair.

[73] According to Unilever the steps it took were backed by market research. One such market research, called Afro-textured hair in SA conducted in 2017, showed an increase in topical conversations around Afro-hair and showed that maintaining afro-textured hair was a challenge. These findings afforded Unilever an opportunity to position *TRESemmé* as a leading product that care for Afro-textured hair. A survey conducted in April 2019 identified different hair types, with Afro-textured hair in a category referred to as range 3C to C being plagued by dryness and damage. These findings led to the creation of the impugned advertisement.

[74] The applicants' response to the averments relating to the research findings and the introduction by Unilever of products aimed at treating Afro hair, particularly the dry and damaged type, was to state that it was not only black women with dry and damaged hair. According to the applicants, the unfair discrimination lay in depicting non-black women as having a better type or quality of hair against black women with dry and damaged hair, while this was not a phenomenon peculiar to black women.

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[34] At paragraph [99].

[75] An objective, dispassionate and contextual assessment of the impugned advertisement does not support the applicants' contentions. On the original advertisement, the six images appear below a banner that shows a black woman with a beautiful Afro-hair side–by-side with a woman who appears to be a Caucasian sporting beautiful flowing hair. It is below this banner that the 6 images of woman with different types of hair and the dreaded inscription on images of Black women appear to amount to differentiation. But this differentiation does not amount to unfair discrimination when the entire advertisement is viewed in context.

[76] In view of the conclusion I have reached regarding whether there was unfair discrimination or not I deem it unnecessary to deal with the question of the appropriateness or otherwise of the remedies proposed by the applicants. By the same token, it is not necessary to deal with the applicants' reference to other advertisements Clicks have BabyClub and the Dove advertisements, which have been used by the first respondent in the past. These were advanced as proof of its previous conduct of causing offence and finds no relevance in the light of the conclusion that the impugned advertisement did not unfairly discriminate against the applicants and/or black people in general.

[77] Both respondents did not seek costs against the applicants. In my view, this is a sensitive stance and I shall accordingly not make any costs order. The order I grant is therefore the following:

1. *The application is dismissed.*

**M J DOLAMO**
**JUDGE OF THE HIGH COURT**