IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **5633/2020**

In the application of:

CENTRE FOR APPLIED LEGAL STUDIES	*Amicus Curiae* Applicant

In the matter between:

CITY OF CAPE TOWN	Applicant
And	
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	First Respondent
CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Second Respondent
TAURIQ JENKINS	Third Respondent
ANNIE KIRKE	Fourth Respondent
ANNELIZE VANWYK	Fifth Respondent
LYSANDRA FLOWERS	Sixth Respondent
LORENZO DAVIDS	Seventh Respondent
CATHERINE WILLIAMS	Eight Respondent
GILLES VAN CUTSEM	Ninth Respondent
JARED SACKS	Tenth Respondent
ZELDA HOLTZMAN	Eleventh Respondent

CENTRE FOR APPLIED LEGAL STUDIES' HEADS OF ARGUMENT

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"There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency."[1]

INTRODUCTION

1. Accountability is a bedrock of constitutional democracy.

2. Without accountability, human rights violations prevail, the powerful gain impunity and victims lose their voices.

3. At its simplest, this application is an attempt to prevent accountability. The City of Cape Town ("CoCT") brings this application to interdict and restrain human rights monitors who have appointed by the South African Human Rights Commission ("SAHRC")[2]. The interdict seeks to stop the monitors from entering the Strandfontein temporary emergency shelter ("Site") which houses over 700 vulnerable and homeless people,[3] in the midst of a global health crisis and a domestic state of National Disaster.[4] This is not contentious. It is apparent from the CoCT's founding papers.

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1 *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC), para 26.
2 CoCT NOM, p3 to 4, prayers 2 and 3 and FA, p12 to 13, para 10 to 18.
3 CoCT FA, p23, para 67.
4 CoCT FA, p14, para 23.

4. This application is not a mere vindication of the alleged rights claimed by the CoCT however. In bringing this application the CoCT seeks to abrogate its responsibilities as an organ of state, deny the SAHRC its right to comply with its obligations and mandate, and engage in a form of litigation that is intended to, and does in fact have the effect of silencing the homeless residents of the Site and the monitors, preventing their right to raise grievance, participate in process that affect them and to offer feedback through human rights monitors.

5. It is for this reason that Centre for Applied Legal Studies ("CALS") seeks to intervene in this matter as *amicus curiae*. To aid the Court in considering and resolving this dispute, CALS submits that:

   5.1. The CoCT's application falls within the developing definition and understanding of what have been termed 'SLAPP Suits' (i.e. Strategic Litigation Against Public Participation) and should be treated as such; and

   5.2. The CoCT has constitutional, statutory and international obligations to enable constitutional oversight bodies, such as the SAHRC, to perform their functions.

6. Before engaging with this argument, however, in light of the CoCT's refusal to consent to CALS' intervention as *amicus curiae*, CALS argues that it ought to be admitted as such.

CALS SHOULD BE ADMITTED AS *AMICUS CURIAE*

CALS meets the test for intervention as *amicus curiae*

7. On 7 May 2020 CALS addressed a letter to the parties in this application wherein it sought their consent for its intervention in this matter as *amicus curiae*. Its grounds for intervention related to the SAHRC's mandate; the CoCT's obligations and SLAPP Suits.[5]

8. The CoCT refused CALS' request on, in broad terms, the following basis: the request was premature; application to intervene would delay the hearing of the matter and prejudice the CoCT; and the submissions that CALS sought to make were unrelated to the issues before the Court. The CoCT further threatened to seek costs against CALS should it persist with its application for intervention as *amicus curiae*[6]

9. On 8 May 2020 the SAHRC filed its answering affidavit. It then became apparent to CALS that the SAHRC would be making submissions on its nature and constitutional and international obligations. However, it was unclear whether the SAHRC would similarly present argument on the reframing of the element of the balance of convenience in cases concerning organs of state. Particularly in so far as the balance of convenience formed part of the consideration regarding SLAPP Suits.

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5 CALS FA, 30-34, "CALS 1".
6 CALS FA, 35-37, "CALS 2".

10. In light of the contents of the answering affidavit CALS reconsidered its' proposed *amicus* submissions in order to ensure that the submissions are novel and thus useful to the Court. We no longer seek to make submissions on the SAHRC's constitutional and international obligations, but will seek to make submissions on SLAPP Suits, and in particular, how the test on the balance of convenience, in light of the jurisprudence concerning separation of powers, demonstrates that the Applicant has not discharged the requirement. Should CALS written submissions (as contained in these heads of argument) mirror those of the SAHRC, CALS will not make them in oral argument.

11. A letter was subsequently addressed to the CoCT and the SAHRC on 9 May 2020 requesting their consent for CALS' intervention as *amicus curiae* to make submissions on: SLAPP Suits; the CoCT's obligations and the balance of convenience test.[7]

12. The SAHRC consented to CALS' intervention.[8] However, the CoCT once again refused on the basis that:

    12.1. It alleged that its application is not a SLAPP Suit;

    12.2. The balance of convenience argument has been raised by the SAHRC; and

[7] CALS FA, 38-41, "CALS 3".
[8] CALS FA, 42-43, "CALS 4".

12.3. *"The City of Cape Town had no choice but to bring this application in compliance with the duty resting upon it."*[9]

13. The CoCT once again stated that it would seek costs against CALS should the latter persist in bring the application.[10]

14. We demonstrate below that this application falls within the developing definition of SLAPP suits and should indeed properly be characterised as such. We further demonstrate that the CoCT in denying the SAHRC's monitors access to the Site by is abrogating its constitutional and statutory obligations. As previously said, should the SAHRC make submissions on the balance of convenience test, CALS will not do so.

15. On that basis, CALS' submissions are novel. They do not repeat those of the other parties. They will also assist the court in: (a) characterising the case before it; and (b) contextualising the applicant that brought the case to it. These will enable the Court to determine whether to grant the order sought by the CoCT or to dismiss the application.

16. CALS is uniquely placed to bring these submissions before the Court on the basis of a research study conducted by it in 2018 titled "Victimisation Experiences of Activists in South Africa". Although obviously now the context is

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9 CALS FA, 44-45, "CALS 5".
10 CALS FA,45, "CALS 5".

markedly different, we submit that the underlying principles contained in the research study apply.

Condonation should be granted

17. CALS does not bring this *amicus curiae* application within the timeframes set out in rule 16A of the Uniform Rules of Court, it brings them well in advance of those timeframes, due to the urgency of the application launched by the Applicants. The relevant portions of rule 16A read as follows:

> *"(2) Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and these Rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties.*
>
> *. . . .*
>
> *(5) If the interested party contemplated in sub-rule (2) is unable to obtain the written consent as contemplated therein, he or she may, <u>within five days of the expiry of the 20 day period</u> prescribed in that sub-rule, apply to the court to be admitted as an amicus curiae in the proceedings."*

18. These sub-rules read together may be interpreted to mean that an applicant *amicus curiae* who has been refused consent to intervene as *amicus curiae* must wait for the expiry of the 20 days following the filing of the affidavit or pleading which contains the constitutional issue before they approach the court. Once the 20 day period has elapsed they may apply for intervention within the five days following the 20 day period. In other words, they may so apply one day after the expiry of the 20 days (i.e. on day 21) but must have applied within five days of the expiry of the 20 day period (i.e. on day 25).

19. The obvious implication is that if an applicant *amicus curiae* applies 25 days after the filing of the affidavit or pleading containing the constitutional issue they must, in conjunction with the *amicus* application, apply for condonation on the basis of their late filing. However, the provision may also imply that if the applicant *amicus curiae* applies within the 20 days they must apply for condonation on account of their failure to await the expiry of the 20 days.

20. To the extent that this is the case, CALS has applied for condonation in terms of rule 27 which, *inter alia*, empowers the court to condone an abridgment of time limits prescribed in the Uniform Rules.

21. In terms of the rule the applicant for condonation should show good cause for the abridgment which means that merits for success are shown[11] and that

[11] *Madinda v Minister of Safety and Security* [2008] 3 All SA 143 (SCA), para 12.

condonation would serve the interest of justice.[12] Factors relevant to the interest of justice are:

> *"nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."*[13]

22. CALS has not waited 20 days to apply for intervention as *amicus curiae* simply because this is an urgent application.[14] Its failure to comply with the time limits (if such failure exists) is not made on account of CALS' recklessness or carelessness. To the contrary, CALS intervened as speedily as possible so that it would not delay the hearing of the matter and would not cause any prejudice to the parties. To ameliorate any concerns regarding delay CALS sought intervention as *amicus* before the SAHRC had filed its answering affidavit.[15] Its submissions do not depart from those mentioned in its first letter seeking consent to intervene as *amicus*. In fact, CALS elected not to make submissions that it later learned would repeat those of the SAHRC (i.e. in relation to the nature and obligations of the SAHRC).[16] CALS accordingly submits that good cause for condonation has been shown.

23. CALS submits that the submissions it seeks to make will assist the Court in adjudicating this dispute between the parties. As previously stated its

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12 *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC), para 3.
13 Ibid.
14 CALS FA, p11, para [23].
15 CALS FA, p9, para [12].
16 CALS FA, p11, para [19].

submissions contextualise the applicant and characterise the application.[17] The relief sought by CALS — leave to intervene as *amicus* — is by its very nature one directed at the advancement for the cause of justice. No prejudice, has been alleged or will be experienced by the parties.[18] Prejudice will attach to CALS if condonation is not granted as it will be denied the opportunity to make these submissions which protect the interests of human rights monitors, and consequently, the communities which those human rights monitors are reporting on . For these reasons CALS submits that condonation favours the interest of justice.

24. Accordingly, to the extent that condonation is required, CALS submits that a case has been made for the same and thus that it ought to be granted.

SLAPP SUITS

Defining a SLAPP Suit

25. Morumbo and Valentine define SLAPP Suits as *"a meritless case mounted to discourage a party from pursuing or vindicating their rights"*.[19] They state that aim of SLAPP Suits is to intimidate, scare, or "chill" a person who brings a matter of public concern to light.[20]

17 CALS FA, p13, para 26.
18 CALS FA, p11-12, para [23.1-23.2].
19 T Murombo and H Valentine 'SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 *SAJHR* 82, at 84.
20 Ibid.

26. It follows therefore that a SLAPP Suit definition has two elements:

26.1. First, that the case is a meritless case; and

26.2. Secondly, it has the intention or effect of discouraging the vindication or pursuing of rights.

27. CALS submits that the application brought by CoCT falls within this category of cases.

The CoCT's case is meritless

28. The CoCT's case is without merit. In essence, the CoCT seeks an interim interdict against the SAHRC. However, even on its own papers, the requirements for an interim interdict against the SAHRC have not been met.

29. The CoCT does not meet the test for interdicting a functionary like the SAHRC.

30. The CoCT lists the requirements for an interim interdict as: (a) a *prima facie* right; (b) reasonable apprehension of irreparable harm; (c) the balance of convenience; and (d) no alternative remedy.[21] It then goes on to suggest, though this is disputed, that the facts of this case demonstrate that each of these elements have been met.

[21] CoCT FA, p41, para 181.

31. It should be noted that the requirements for an interim interdict as listed by the CoCT are what is applicable in traditional interim interdict applications and have been so applicable for over a century.[22] The test however is different where an interim interdict is intended to constrain the exercise of a public power.

32. Over 50 years ago this Court, the Cape Division of the High Court, stated that, barring bad faith, a court would not readily grant an interim interdict that constrains the exercise of a statutory power, unless there were exceptional circumstances or allegations of *mala fides.*[23] Neither exceptional circumstances nor *mala fides* have been pleaded or alleged by the CoCT in this case.

33. Eight years ago, the Constitutional Court saw fit to refashion the test for an interim interdict which constrains the exercise of Constitutional obligations.[24] Should a court be faced with a request for an interim interdict it must be—

> *"cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."*[25]

34. In *OUTA*, the test for an interim interdict was reformulated as follows:

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22 *Setlogelo v Setlogelo* 1914 AD 221.
23 *Gool v Minister of Justice and Another* 1955 (2) SA 682 (CPD), at 688F.
24 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (hereinafter "*OUTA*"), para 45.
25 Ibid.

"The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called 'separation of powers harm'. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights."[26]

35. The Constitutional Court also held that:

"A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim

[26] *OUTA*, para 47. See also paras 63 to 65.

interdict against an authorised state functionary is competent, but rather whether it is constitutionally appropriate to grant the interdict."[27]

36. It follows therefore, that an additional consideration is embedded in a request for an interim interdict over and above those set out in *Setlogelo*: 'separation of powers harm'.

37. It follows too, from the *OUTA* decision that:

37.1. An interdict should only be granted in the clearest of cases, such as where a right in the Bill of Rights is alleged as the *prima facie* right at issue;

37.2. An analysis of whether the interdict would prevent the exercise of a legislative function is important and must be carefully conducted; and

37.3. An analysis of whether it is constitutionally appropriate to grant the interdict (instead of merely whether the interdict is competent i.e. requirements have been met) is necessary.

38. In this case, the CoCT does not allege that its rights — as set out in the Bill of Rights — have been violated. This, together with the failure to show other elements as discussed below, demonstrates that this is not the clearest of case on which to grant an interim interdict.

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[27] *OUTA*, para 66.

39. The function sought to be constrained is not only a legislated function but more importantly a constitutional function. The CoCT does not engage with this enquiry at all.

40. Neither does it engage with the enquiry about whether the granting of the interdict would be appropriate from a constitutional point of view. In fact, the CoCT only mentions the Constitution in two contexts: first, in its description of the SAHRC[28] and second in its statement that the Regulations in terms of the Disaster Management Act ("National Disaster Regulations")[29] affect human rights.[30]

41. CALS submits that the granting of the interdict would not be appropriate in the Constitutional context. In the first instance this is so because the CoCT actually seeks to constrain the SAHRC from performing a constitutional function. In the second instance because the CoCT seeks to constrain the SAHRC from advancing the cause for human rights and accountability.

42. It does not assist the CoCT to suggest that because it will permit access of the Site to Rev Chris Nissen, it is not interfering with constitutional function.[31] On its own version there are 721 persons resident at the Site. It would be near impossible, if not outright impossible, for one person, Rev Nissen, to monitor the human rights conditions of all those people. Limiting access to only Rev Nissen is tantamount to preventing access completely. It also deprives the SAHRC of the diversity of opinions and expertise provided by the SAHRC which ranges

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28 CoCT FA, p11, para 7.
29 Regulations Issued in terms of Section 27(2) of the Disaster Management Act GNR.480, *Government Gazette* 43258, 29 April 2020.
30 CoCT FA, p16, para 35.
31 CoCT NOM, p2, prayer 2.1.2 and CoCT FA, p50, para 184.

from legal expertise[32] to medical expertise[33] to expertise in the social sciences[34] to cultural expertise.[35]

43. Therefore, the CoCT's interim interdict is lacking as it does not speak to the requirements unique to a respondent such as the SAHRC.

CoCT seeks to discourage vindication of rights

44. CALS makes two submissions on the CoCT attempts at discouraging the vindication of rights. First, CALS argues that the vindication need not be of the SAHRC own rights. Second, CALS argues that on the papers, the CoCT seeks to prevent the vindication of rights. We turn to the first submission first.

45. The SAHRC role as an oversight body has been demonstrated above. However, in addition to being a guard of constitutional rights and values, the SAHRC is also a vindicator of rights and values. It was formed precisely for that purpose.

46. The Constitution provides that the SAHRC may *"take steps to secure appropriate redress where human rights have been violated"*.[36] This phrase is repeated in the preamble to the South African Human Rights Act ("SAHRC Act").[37] Section 13(3)(a) empowers the SAHRC, after the conclusion of an investigation where rights are found to have been violated to *"assist the complainant and other*

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32 SAHRC AA, original pagination p25, para 62.1
33 SAHRC AA, original pagination p25 to 26, paras 62.2 and 62.3.
34 SAHRC AA, original pagination p26, paras 62.4.
35 SAHRC AA, original pagination p26, paras 62.5.
36 Section 182(2)(b) of the Constitution.
37 Act 40 of 2013 ("SAHRC Act").

persons adversely affected thereby, to secure redress". The provision that follows it, section 13(3)(b) empowers the SAHRC to *"bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons"*.

47. In addition thereto, and within the specific context of COVID-19, the SAHRC's role is one of overseeing the state's response to the virus. The SAHRC's importance and fundamental role is confirmed in terms of s26(1) of Annexure D of the 'Disaster Management Act: Regulations: Alert level 4 during Coronavirus COVID-19 lockdown" dated 29 April 2020, where the SAHRC and its' consequential services have been declared as an essential service.

48. The SAHRC's role, particularly within the context of the lockdown, is fundamental considering that most civil society groups are currently prevented from carrying out their ordinary functions of holding the state accountable and protecting the rights of the vulnerable through community engagement due to the quarantine regulations.

49. Contrary to the CoCT's contention in its letter of 11 May 2020 refusing CALS' request for intervention, we submit that SLAPP Suits are not limited to cases where people attempt to vindicate their own rights but apply equally to cases where people seek to vindicate or protect the rights of others. This is especially important where vindicating the rights of others is a constitutional and legislative function or mandate. It is further submitted that this function finds its pinnacle in instances where, due to the lockdown, most civil society groups are prevented

from carrying out their ordinary functions of holding the state accountable or vindicating the rights of vulnerable members of society.

50. That the SAHRC was assisting and providing recourse to people resident at the Site is evidenced by the contents of the SAHRC Report which lists a number of recommendations aimed at improving the state of affairs at the Site:

50.1. *"It is recommended that there should be at least one accommodation/tent where women are given the choice of staying without men (while other women who wish to be with their men, should be allowed to do so)."*[38]

50.2. *"Although I am not experienced or qualified to comment on these regulations, in light of the absence of no on-site ambulance, no after hours medical personnel, and no medical staff monitoring health issues within each tent, I would recommend that an expert be appointed to assess these aspects of the site."*[39]

51. The SAHRC and its monitors seek to vindicate the rights of the most vulnerable members of our society. At a time when all in South Africa are obliged to stay at home to curb the spread of COVID-19, the residents at the Site have no home to confine themselves to. Homeless people are vulnerable at all times; they are especially vulnerable now. They are less enfranchised than most in this scenario. To suggest that this application is not a SLAPP Suit simply because it

38 CoCT FA, "RGB14", p89 and 92.
39 CoCT FA, "RGB15", p108.

is brought against the SAHRC as opposed to community based human rights defenders, or the occupants themselves, is dismissive of and ignorant to the obligations which the SAHRC has to protect the rights of the most vulnerable, in this case, the occupants. That notwithstanding occupants of the Site themselves have said that their rights are being violated. SAHRC monitor Anne Noreen Kirke parlays that some of the occupants said that they "want to go home", "have no human rights", and "have not respect" on the Site.[40] This confirms, at the very least, the extent of severe state of alleged human rights violations on the Site which require the SAHRC's monitors' urgent attention, and confirms the fact that this application ought not have been brought and certainly ought not to succeed.

52. Further evidence that this is a SLAPP Suit is shown by: (a) the relief sought by the CoCT; (b) the effect the litigation is intended to have; and (c) the costs order sought by the CoCT against the Respondents.

53. First, one of the orders the CoCT seeks is to interdict and restrain the monitors of the SAHRC from:

> *"Publishing and/or disseminating reports relating to the site which:*
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> *2.1.7.1. are untrue;*

[40] SAHRC AA, Kirke Affidavit, original pagination p8, para 20.

2.1.7.2. have not been presented to the City for comment before publication and/or dissemination".[41]

54. The CoCT also seeks to silence the SAHRC. It is apparent that the expressed objective of this application is to discourage the monitors of the SAHRC from publishing information about the Site which is unfavourable to the CoCT. This flies in the face of the monitors (and the SAHRC's) right to freedom of expression[42], but it also impedes on the monitors ability to carry out their mandate without fear, favour or prejudice. The monitors cannot be barred from publishing information and their results simply because a party feels embarrassed or has their constitutional shortcomings exposed. Self-evidently, this constitutes an act directed at discouragement.

55. Two of the SAHRC monitors recount that they were denied access to the Site.[43] SAHRC monitor, Lysanda Flowers, also states that the South African Police Services were called when Rev. Nissen recited the legislative framework that permitted them access to the SAHRC.[44] This lends further credence to the underlying discouragement inherent to the application.

56. Second, the CoCT also seeks an order that *"the respondents pay the costs of this application jointly and severally, the one paying the others to be absolved"*.[45]

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41 CoCT NOM, p3, para 2.1.7.
42 Section 16(1) of the Constitution.
43 SAHRC AA, Gilles Affidavit, original pagination, p3 to 4, para 8 and SAHRC AA, Flowers Affidavit, para 11.
44 SAHRC AA, Flowers Affidavit, para 13.
45 CoCT NOM, p3, prayer 2.2.

57. It is trite that an order of liability on joint and several basis means that the judgment creditor may elect to execute the order against any one of the debtors who have been found jointly and severally liable.[46] Should this order be granted in the CoCT's favour, it (the CoCT) may execute the costs order against either the SAHRC, or the SAHRC CEO or any or all of the individual monitors cited as the third to eleventh respondents. This would mean that individuals, acting on behalf of the SAHRC, acting within the course and scope of their accreditation; and who have been appointed by the SAHRC to monitor human rights conditions and ensure a human rights-based environment in the midst of a National Disaster Declaration and Lockdown, would be personally responsible for the CoCT's costs.

58. This is an untenable proposition. It is fundamentally unfair and departs from the trite principle laid out by the Constitutional Court in *Biowatch* that *"if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."*[47] The Constitutional Court said of the rationale for this principle that:

> *"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a*

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46 *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1982 (3) SA 618 (D), at 623B.
47 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), para 22.

concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."[48]

59. CALS accepts that this case, unlike *Biowatch*, is not one brought by aggrieved individuals against the state. However, for precisely that reason, a costs order against the monitors is inappropriate. The monitors have been forced before Court by not only any organ of state (i.e. functionary or institution exercising a public power such as a state owned entity) but a municipality — the local government in the Cape Town. They have been so driven before the Court because they are protecting the rights of individuals who, at the best of times, live in precarious situations, and in the context of a National Disaster Declaration

[48] *Biowatch*, para 23.

and Lockdown, live in extraordinary vulnerability. Monitors protect those vulnerable individual's rights not on their own behalf, but on behalf of the SAHRC who cannot practically perform that function through its commissioners acting alone.

60. The rights violations are claimed against the CoCT. Had an application been unsuccessfully brought by the monitors against the CoCT, the general rule would apply: the CoCT would be responsible for its own costs. Now, however, in a procedurally exploitative fashion where an order is sought against the monitors such order has the effect of departing from the spirit of *Biowatch*.

61. Any party brought to the Court by an organ of state would naturally fear litigation and cease conduct critical of the organ of state. It is for this very reason that the Constitutional Court said that a costs order, could have a *"chilling effect"*.

62. We further submit that the threat of costs alone also serves as a tool of intimidation by litigants, and is a classic SLAPP suit tactic with the purpose of dissuading parties from pursuing litigation and preventing public participation, as is arguably demonstrated by the Applicant's letter to CALS's *Amicus Curiae* request.

63. The costs prayer in itself, and having regard to its chilling effect, further demonstrates that this application falls within the parameters of a SLAPP Suit.

64. When one considers the fact that human rights monitors are among a class of persons known within the social justice sector as human rights defenders, the

consequences of this SLAPP Suit are even more devastating. Other forms of human rights defenders include journalists who expose human rights violations, community activists who use social activism and mobilisation to challenge the human rights violations by repositories of powers, and lawyers who use the law as a means of redress or prevention. While all human rights monitors are human rights defenders, not all human rights defenders are monitors.

65. This case concerns only one category of people who fall within a broader class. In this case the human rights defenders operate under the auspices of the SAHRC, a constitutionally created and legislatively entrusted body. CALS submits that the Court should be mindful of the fact that apart from the human rights monitors currently at issue in this case are other human rights defenders whose rights may be violated in similar ways but who do not fall within the ambit or under the protection of the SAHRC. It should be emphasised that the CoCT brings this application against a constitutionally-created and statutorily-empowered body. This calls to question the attitude of the CoCT against monitors who may not fall within the purview of the SAHRC or indeed human rights defenders whose attempts at vindicating their rights are monitoring related in different contexts.

66. The very real concern is that if this application were to succeed it would set a precedent which would allow other organs of state and powerful non-state actors across the country to use the same tactic to prevent the SAHRC from carrying out its mandate not only during this unprecedented moment when the rights and the welfare of the most vulnerable members of society are at stake/threatened, but also once lockdown is lifted. Furthermore, such an order runs the risk of

creating a situation where human rights monitors and workers in Cape Town and around the country would step down as monitors, or from the Section 11 committee for fear of being saddled with Court orders, costs orders, or even criminal charges in the pursuance of their delegated mandate.

Jurisprudence on SLAPP Suits

67. To date, only one judgment in our law reports mentions SLAPP Suits. In *Waypex*, the court made the following observation:

> *"The defendants also made reference to the belligerent tone of plaintiff's attorney's letters, which were calculated to intimidate and create enmity. There is much justification for this view taken by the defendants.*
>
> *The generally weak merits of the cases became obvious during the trial. The statements complained of were generally made to public officials, mostly in the course of administrative procedures. In some instances the allegations were trivial.*
>
> *Counsel likened the case to what is known in other jurisdictions as 'SLAPP'. The acronym stands for Strategic Litigation Aimed against Public Participation. No instances of cases so described are to be found in local law reports, but the concept of vexatiousness corresponds very closely with the features of a SLAPP suit."*[49]

[49] *Waypex (Pty) Ltd v Barnes and Others* 2011 (3) SA 205 (GNP), at 207B-207C.

68. The court then found that the claims should not have been brought; that the litigation was purposeless and that the defendants were unnecessarily involved in "heavy expenditure" in defending the claims brought against them.[50] It accordingly awarded costs against the plaintiff (against whom the claim of a SLAPP Suit was made) on an attorney-client scale as well as wasted costs on an attorney-client scale.[51]

69. The *Waypex* decision makes it clear that:

69.1. While SLAPP Suits relate to (but have not been found to be identical to) vexatious litigation;

69.2. SLAPP Suits have not been disallowed by our courts;

69.3. The factors considered by the court in that case, which are equally relevant in this case are:

69.3.1. The merit-worthiness of the case brought; and

69.3.2. The intention of intimidating and causing enmity.

69.4. The court has, incensed as it was by the presence of the factors listed above, awarded punitive costs order against the party bringing the application.

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50 Ibid, at 207D.
51 Ibid, at 207F-207G.

70. On that basis, CALS submits that this Court should affirm that this application is a SLAPP Suit based on its demonstration that this application is without merit, and is intended to discourage the vindication of rights. Doing so would not be an extraordinary deviation from the principles of our common law. To the extent that it is, such decision should nonetheless be made so as to develop the common law in the right of the "spirit, purport and object" of the Bill of Rights as commanded by section 39(2) of the Constitution.

COCT'S RESPONSIBILITIES

71. Being a municipality,[52] the CoCT is an organ of state.[53] The CoCT has a number of obligations vis-à-vis the SAHRC which are expressed in international law, the Constitution and the statute books. We hereafter set out what those obligations are and discuss their impact on the CoCT's application.

CoCT's international obligations

72. It is trite that the Constitution provides that international agreements ratified by South Africa bind it.[54] It is also trite that the Constitution provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an act of parliament.[55] The Constitutional Court affirmed, in

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52 CoCT FA, p11, para 6.
53 Section 239 of the Constitution defines an organ of state as "any department of state or administration in the national, provincial or local sphere of government".
54 Section 231(2) of the Constitution.
55 Section 232 of the Constitution.

Glenister 2, that international instruments that had been ratified by Parliament become binding on the Republic.[56]

73. A number of international instruments oblige the state to strengthen national human rights institutions i.e. the SAHRC and others.

74. South Africa has ratified the Charter of the United Nations,[57] the International Covenant on Civil and Political Rights[58] and the International Covenant on Economic, Social and Cultural Rights[59] which obliges states to take steps towards the realisation of human rights. Of particular significance is the Convention on the Rights of People with Disabilities[60] which provides at article 33(2) that:

> *"States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and*

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56 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para 182.

57 Article 55(c) read with article 56 of the Charter of the United Nations which South Africa ratified on 7 November 1945.

58 Article 2(1) of the International Covenant on Civil and Political Rights which South Africa ratified on 10 December 1998.

59 Article 2(1) of the International Covenant on Economic, Social and Cultural Rights which South Africa ratified on 15 January 2015.

60 Ratified by South Africa on 30 November 2007.

functioning of national institutions for protection and promotion of human rights."

75. Because this provision is located in the Convention on the Rights of People with Disabilities what it envisages is a "framework" or "independent mechanism" that promotes the rights of persons living with disabilities. However, it is also clear that such institution may indeed already be in existence and in such a case the responsibility of the state is to strengthen that institution. This is also made apparent by the reference to the "Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights" ("Paris Principles").

76. In its Handbook for Parliamentarians on the Rights of People with Disabilities the UN said that *"given this link, a national human rights institution is the most likely form that an independent "framework" would take in compliance with the national monitoring provisions under the Convention."* It follows that the SAHRC, being a national human rights institution, is the "framework" that must be "strengthened" by the state.

77. The Vienna Declaration and Programme of Action which was adopted by the World Conference on Human Rights and the UN General Assembly is more explicit in its instruction to states. It provides, in relevant part, as follows:

"*The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the*

competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.

The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level."[61]

78. It follows that international law commands that the CoCT, as an organ of state, strengthen (and not weaken) the functioning of the SAHRC.

Constitutional and legislative obligations on the CoCT

79. The SAHRC was first established by the Interim Constitution.[62] It was further established in the final Constitution as a state institution which strengthens constitutional democracy.[63]

80. In relation to such institutions, Section 181(3) of the Constitution imposes the following obligations on organs of state:

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61 Para 36 of the Vienna Declaration and Programme of Action which was adopted by the World Human Rights Conference on 25 June 1993 and endorsed by the UN General Assembly on 14 February 1994 (A/RES/48/121).

62 Section 115 of the Constitution of the Republic of South Africa 200 of 1993.

63 Section 181(1)(b) of the Constitution.

"(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions."

81. This provision has not been judicially considered in respect of the SAHRC. However, speaking of another Chapter Nine institution, the Constitutional Court unanimously made clear in *Economic Freedom Fighters* that:

81.1. Section 181(3) of the Constitution imposed obligations on a wide range of actors i.e. organs of state.[64]

81.2. The impartiality of a Chapter Nine institution would be meaningless if it lacked the possibility and option to perform its functions: strengthen our constitutional democracy.[65]

81.3. *"The obligation to keep alive these essential requirements for functionality and the necessary impact is placed on organs of State. And the Public Protector is one of those deserving of this constitutionally-imposed assistance and protection. It is with this understanding that even the fact that the Public Protector was created, not by national*

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64 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC), para 37.

65 Ibid, para 49.

legislation but by the supreme law, to strengthen our constitutional democracy, that its role and powers must be understood."[66]

82. The Constitutional Court and the Supreme Court of Appeal have also held that the obligations on organs of state in terms of section 181(3) are positive in nature.[67] Positive obligations require the obligator to take positive steps towards the endeavoured objective. The steps that are expected from organs of state are those which assist and protect the SAHRC.

83. The language of section 181(3) is echoed in another part of the Constitution — section 165(4) — which speaks to judicial authority. For reasons which follow we submit that the obligations imposed on organs of state in respect of the judiciary are similar to the obligations imposed on organs of state in respect of Chapter Nine institutions.

84. Section 165(4) provides as follows:

"Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

66 Ibid, para 50.

67 *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC), para 74 and *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA), para 24.

85. The Courts have had the following to say about the obligation imposed by section 165(4):

85.1. *"This duty echoes obligations of organs of state under section 7(2) of the Constitution to respect, protect, promote, and fulfil the rights in the Bill of Rights. . . Failing to fulfil these obligations falls short of the constitutional mandate. Further, government officials have a duty not only to discharge their functions, but also to account for when they have not."*[68] (Footnote omitted; emphasis added.)

85.2. "*In the new era of constitutional supremacy and the rule of law the judiciary is invested with materially enhanced powers, including that of invalidating any law or governmental conduct to the extent that it is found to be inconsistent with the Constitution. Self-evidently the exercise of these powers could involve the judiciary in public contention and it is therefore significant that the Constitution, having reposed such trust in the judiciary, then directs this command to all organs of state. The Constitution thus recognises the importance — and commands reinforcement, if necessary by "legislative and other measures" — of the dignity of the courts. This is the very feature the crime of scandalising aims to protect."*[69]

86. That the aforementioned obligations imposed on organs of state in respect of the judiciary (in terms of section 165(4)), are similar to the obligations imposed on

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68 *Zulu and Others v eThekwini Municipality and Others* 2014 (4) SA 590 (CC), para 71.
69 *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC), para 38.

organs of state in respect of Chapter Nine institutions (in terms of section 181(3)), with some contextual nuances, is by evidenced by the following:

86.1. Obligations in respect of both bodies are placed on "organs of state";

86.2. Organs of state are required to "assist and protect" both bodies;

86.3. The means by which to organs of state are to assist and protect both bodies is "through legislative and other measures"; and

86.4. The assistance and protection by organs of state through legislative and other means is aimed at the "independence, impartiality, dignity . . . and effectiveness".[70]

87. Given that the judiciary and Chapter Nine institutions are not identical bodies, one expects there to be some nuance in the manner in which an organ of state may fail to comply with its constitutional obligations vis-à-vis each of the aforementioned functionaries.

88. The judiciary is the third arm of government constitutionally obligated to adjudicate disputes in impartial, fair, and effective ways.[71] It follows that the assistance which the organs of state are required to provide to the courts is

[70] Section 165(4) includes the additional aim of "accessibility".
[71] Section 165(1) read with section 34 of the Constitution.

compliance with court orders.[72] Failing to do so impacts negatively on the dignity and efficacy of the courts.

89. The context of the SAHRC is ever different. It is not primarily an adjudicator of disputes, but is rather an educator, remediator, investigator and researcher of human rights and human rights violations.[73] The investigation and research done into human rights violation is performed by the SAHRC monitors. What the SAHRC needs in order to perform the function of investigating and researching, is access to the facility in question, information about the facility, and the ability to talk with people accommodated at the facility. These are the obligations imposed on the CoCT as an organ of state by section 181(3).

90. This is precisely what the SAHRC has already been denied by the CoCT.[74] This denial predates the application sought by the CoCT to restrict such access. It is unlawfully self-created and self-enforced by the CoCT. So all-encompassing is the CoCT's denial of access that the SAHRC is unable to account for the measures being taken by the former (the CoCT) to respond to National Disaster Regulations.[75] The CoCT's conduct therefore directly impedes on the SAHRC's effectiveness

91. However, the CoCT's denial of access does more than simply prevent the SAHRC from performing its functions. It denies the SAHRC the dignity it ought to enjoy by constitutional command, and arguably, its constitutionally derived

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72 *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk), 452G-H and 453C-D.
73 Section 184(2) of the Constitution.
74 SAHRC AA, original pagination p29, para 71.
75 SAHRC AA, original pagination p33, para 82.

authority. If the SAHRC is unable to perform its functions because of lack of access, the public's trust in the SAHRC's ability to perform its functions, is eradicated. With the public's trust gone, the SAHRC cannot hold onto its dignity (and authority) as an investigator and researcher of human rights compliance. The CoCT actions accordingly also abrogate its constitutional obligation to "assist and protect" the "dignity" of the SAHRC.

92. These failings constitute a violation of the CoCT's negative obligations towards the SAHRC, to *not* prevent access, and to *not* impede or *impair* the SAHRC's functioning in order for both bodies to be able to comply with their obligations. The CoCT did not do so.

93. However, more is required from the CoCT than simply avoiding actions that interfere with the functions of the SAHRC. The CoCT must also actually perform actions directed at assisting and protecting the SAHRC. The importance of these actions by the CoCT is buttressed by the fact that they are constitutional obligations and not mere "nice to do's". It is apposite at this point to quote what Commissioner Karthy Govender said:

> *"The challenge facing [the Chapter Nine] institutions is to convince those exercising power that they are not simply to be tolerated but should be pro-actively assisted. There will be a necessary tension between them and organs of state, as there sometimes is between courts of law and the government. What is required is an understanding that the exercise of power in South Africa is subject to constraints and that these institutions together with the courts have been given a legitimate overseeing role by*

the drafters. There is an unquestionable acknowledgement that the judgments of the Court must be respected and applied."[76]

94. The Constitutional Court has said that these are essential requirements for the functionality of a Chapter Nine. Without the state's assistance and protection, it would be left without the resources it requires to perform its function. The CoCT has accordingly failed to perform both its positive and negative duties in terms of the Constitution. In doing so, they have acted unconstitutionally. They have also acted in contravention of legislation, as these obligations on organs of state have been cemented in legislation.

95. Section 184(4) of the Constitution provides that the SAHRC is to have additional powers and functions as may be prescribed by national legislation. The SAHRC Act is the national legislation contemplated by section 184(4) of the Constitution and provides for the composition, powers, functions and functioning of the SAHRC.[77]

96. Section 4 of the SAHRC Act echoes the Constitution insofar as the obligations of organ of states go, and provides as follows:

"(2) All organs of state must afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission and in pursuit of its objects.

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76 Quoted in J Klaaren 'South African Human Rights Commission' in S Woolman and M Bishop (eds) *Constitutional Law of South Africa*, at 24C-15.

77 Long Title of the SAHRC Act.

(3) *No organ of state and no member or employee of an organ of state nor any other person may interfere with, hinder or obstruct the Commission, any commissioner, a member of staff or a person appointed under section 11 (1) or 19 (5) in the exercise or performance of its or his or her powers and functions."*

97. The CoCT's failures constitute positive and negative failures in contravention of legislative responsibilities.

Accountability

98. The Constitution commands accountability in three provisions relevant for the determination of this matter.

98.1. Section 1(d) of the Constitution provides:

> *"The Republic of South Africa is one, sovereign, democratic state founded on the following values . . . [u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure <u>accountability</u>, responsiveness and openness."*

98.2. Section 41(1)(c) of provides:

"All spheres of government and all organs of state within each sphere must . . . provide effective, transparent, accountable and coherent government for the Republic as a whole."

98.3. And, section 195(1)(f) provides as follows:

"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles . . . [p]ublic administration must be accountable."

99. Drawing on the justifications clause in the Bill of Rights the Constitutional Court has held that accountability is relevant to the consideration of the "spirit, purport and objects of the Bill of Rights".[78] It has also held that the *"principle that government, and organs of state, are accountable for their conduct is an important principle that bears on the construction of constitutional and statutory obligations"*.[79]

100. The principle of accountability for a municipality is embedded in our constitutional and statutory framework. Section 152(1)(a) states that the objectives of municipalities[80] is to provide accountable governance for local communities.

101. Section 6(1) of the Local Government: Municipal Systems Act[81] incorporates section 195(1) of the Constitution and section 6(2) of the same obliges the

78 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), para 75.
79 Ibid, para 76.
80 Section 151(1) of the Constitution states that local government consists of municipalities.
81 Act 32 of 2000.

administration of a municipality to *"facilitate a culture of public service and accountability amongst staff"*.

102. The Supreme Court of Appeal, in *Hlophe*, summarised a Municipality's responsibilities as follows:

> *"In my view, however, the decisive consideration is the principle of public accountability. It is a founding value of the Constitution and central to our constitutional culture. In terms of section 152(1)(a) of the Constitution the objects of local government include to provide accountable government for local communities. Section 6(1) of the Systems Act provides that the municipality's administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution Section 195(1)(f) of the Constitution specifically states that public administration must be accountable. In terms of section 6(2)(b) of the Systems Act, the administration of a municipality must facilitate a culture of public service and accountability amongst staff. Constitutional accountability may be appropriately secured through the variety of orders that the courts are capable of making, including a mandamus."*[82]

103. When stripped to its core, what the SAHRC and its monitors seek to do, as demonstrated by the SAHRC's terms of reference,[83] is to hold the state accountable for actions in the context of a National Disaster Declaration.

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82 *City of Johannesburg Metropolitan Municipality and others v Hlophe and others* [2015] 2 All SA 251 (SCA), para 25.

83 SAHRC AA, "CN6".

Homeless people within the city of Cape Town, and resident at the site in question are no less deserving of the municipality's accountability.

104. Furthermore, this accountability is not limited to the CoCT. The SAHRC has monitors who assess and report on human rights adherence and violation across the country.[84] The SAHRC is entitled to perform this function at Alert Level 4 of the National Disaster in terms of the National Disaster Regulations which in Annexure D provide that the following constitute an essential service:

> *"26.1 Commissioners of the South African Human Rights Commission, Gender Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Public Protector and Deputy Public Protector and the Independent Electoral Commission; and*
>
> *26.2 Services rendered by the institutions referred to in item 26.1"*

105. This is the first application brought where one of the organs of state obliged to perform in terms of the National Disaster Declaration is seeking to prevent the SAHRC from holding it accountable. Of the CoCT's denial of access to the SAHRC monitors, Dr Gilles van Custem, a senior HIV & TB Adviser for Medecins Sans Frontières' Southern African Medical Unit ("MSF"):

> *"A core value of MSF is the policy of témoignage. This means MSF acts as a witness and will speak out about the plight of vulnerable populations in*

[84] SAHRC AA, "CN6".

danger for whom we work. In doing so, MSF sets out to alleviate human suffering, to protect life and health and to restore respect for human beings and their fundamental human rights. I believe this willingness to bring abuses and intolerable situations to the public's attention, is sometimes necessary to bring about change. It certainly applies to the situation of the shelter for street-based people in Strandfontein."[85]

106. The act of the CoCT in barring the SAHRC monitors from entering the Site, is clearly an attempt to avoid accountability. This runs counter, not only to the CoCT's obligation to "assist and protect" the SAHRC but also to its obligation to remain accountable. In essence, what the CoCT has done already by preventing access, is preventing accountability.

107. At its core, the CoCT is asking the Court to permit it to deviate from its constitutional and statutory mandate. If the CoCT were granted the relief it seeks, it would be doing so (i.e. preventing access) with the Court's might. The SCA said in *Hlophe* that the constitutional accountability could be ensured through the means of a mandatory interdict. CALS submits, in this case, that constitutional accountability can be ensured by merely refusing the CoCT's application. In doing so the SAHRC could continue to access the Site and hold the CoCT accountable and the CoCT would be forced to do, what it should do voluntarily: protect and assist the SAHRC and embrace accountability.

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[85] SAHRC AA, Gilles Affidavit, original pagination, p22, para 93.

108. In the *Mohamed* judgment which concerned the limitation that the lockdown poses on human rights, the High Court, per Neukircher J said:

> *"This pandemic poses a serious threat to every person throughout South Africa and their right to life, dignity, freedom of movement, right to access healthcare and their right to a clean, safe and healthy environment. In a country where we are dominated by so much poverty, where people don't have access to basic amenities such as clean running water, housing, food and healthcare, the potential risk to those households poses a further threat which places an additional burden on the Government to combat – the risk then, in light of those circumstances rises exponentially."*[86]

109. CALS submits finally, that the function of the SAHRC is needed now more than ever given that human rights are limited in an attempt to curb the spread and impact of COVID-19. Where rights are limited and the state's powers expanded, checks and balances for that exercise of that power becomes even more important.

CONCLUSION

110. It follows from the aforegoing that the application brought by the CoCT may be defined as a SLAPP Suit: the application is meritless having failed to demonstrate that the balance of convenience favours the CoCT, and was intended to intimidate and cause enmity. The actions of the CoCT also fly in the

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[86] *Mohamed and Others v President of the Republic of South Africa and Others* [2020] ZAGPPHC 120, para 62.

face of the municipality's international, constitutional, and legislative obligations in respect of the SAHRC and its constitutional and legislative obligations on accountability.

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