IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: **5633/2020**

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 COMISSION	Second Respondent
TAURIQ JENKINS	Third Respondent
ANNIE KIRKE	Fourth Respondent
ANNELIZE VAN WYK	Fifth Respondent
LYSANDRA FLOWERS	Sixth Respondent
LORENZO DAVIDS	Seventh Respondent
CATHERINE WILLIAMS	Eighth Respondent
GILLES VAN CUTSEM	Ninth Respondent
JARED SACKS	Tenth Respondent
ZELDA HOLTZMAN	Eleventh Respondent

RESPONDENTS' HEADS OF ARGUMENT

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I INTRODUCTION

"The City does not need the unwelcome and indeed unnecessary interference by the respondents."[1]

1 The issue at the heart of this case is whether the Court should be party to efforts by the City of Cape Town to shield its activities from scrutiny and accountability by local and international human rights defenders and the body constitutionally established to monitor human rights.

2 By the time that this application is heard, it is likely that the Strandfontein site would have been de-commissioned. This case nonetheless presents an existing and live controversy given the tenor and nature of the City's challenge to the legality of the Commission's conduct and the unfounded allegations of unlawful conduct made by the City against the individual monitors themselves.

3 This application raises constitutional issues of grave importance. The Commission and the individual monitors have a clear interest in the adjudication of the dispute.

4 In such circumstances, the case cannot be said to be moot. As Nkabinde J explained in *Pheko v Ekurheleni Municipality*[2]:

> "It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein. Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based

[1] FA: p 53 para 200

[2] Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC) at para 32.

on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot. It is also live because if we find that the removal of the applicants was unlawful, it would be necessary to consider their claim for restitutionary relief."

5 As we endeavour to show in these submissions, this entire application is without merit and should be dismissed for a series of related reasons.

6 Firstly, the orders sought by the City are overbroad and would impermissibly interfere with and severely impinge upon the constitutional and statutory rights and obligations of the first respondent, the Commission, and the remaining respondents, who represent local and international organisations committed to human rights protection. The City has failed to demonstrate why this is one of the clearest of cases in which such an order should be granted.

7 Secondly, the City purports to seek interim relief, but the relief is final in effect. If granted, the orders would operate past the anticipated remaining length of life of the Strandfontein shelter.

8 The City would effectively have secured for itself limited oversight and accountability by the Commission, and no oversight and accountability whatsoever by the civil society and non-governmental organisations that have a constitutional right to be involved in local government affairs. The "return date" imposed in the notice of motion would be empty – at that stage, the site would be closed and the City's performance of its human rights obligations would not have been independently scrutinised and externally monitored.

9 Thirdly, the City's contention that the individual monitors were unlawfully appointed is without merit. Section 11(1) of the SAHRC Act permits the Commission to appoint the individual monitors as members of a committee established for the purposes of advising the Commission and making recommendations to it. There is in any event no declaratory relief sought by the City to review and set aside the decision of the Commission to either establish a section 11 committee or its decision to appoint the individual monitors. These decisions stand unless set aside. The City is not entitled to ignore the appointment of the individual monitors because it holds a different view regarding the legality of their appointment.

10 Fourthly, there is no basis for the Lockdown Regulations interdict. As a fact, the respondents have not breached the lockdown regulations – available photographic documentary evidence shows the City's allegations to be unwarranted.

11 The suggestion that the respondents do not hold proper and lawfully issued permits is also, with respect, a red-herring. No application has been brought to set aside these permits and they remain valid and binding until set aside. In any event, the permits could be easily re-issued. The City's complaint is purely technical in nature, distracting from the real issue – monitoring the conditions at Strandfontein and holding the City accountable.

12 Fifthly, the Monitoring Interdict sought by the City unconstitutionally intrudes into and hinders the effective exercise of the Commission's statutory and constitutional powers to monitor the observance of human rights. We submit

that no case, let alone one which is the "clearest of cases" has been made out by the City to justify such relief.

13 Sixthly, the City has failed to establish the respondents' complicity in and the factual basis for an interdict restraining the respondents from a range of vaguely described unlawful conduct including "*incitement of rebellion*" intimidation, threats, harassment and "*interference*" with service providers and staff at the site.

14 Finally, and perhaps most gallingly, the City's publication interdict would strike a blow at the heart of freedom of expression. The City lacks standing to bring an interdict to prevent the publication of false or defamatory claims made against it in relation to its management of Strandfontein. Its obligation is to meet those criticisms through publishing its own press releases and reports. Even if, however, the Court is minded to recognise the City's standing, the Court should not be party to a prior restraint, most especially when that prior restraint is of protected political speech intended to hold the government accountable.

15 We elaborate on those submissions below, after giving an overview of the relief sought by the City.

II OVERVIEW OF THE RELIEF SOUGHT

16 The City seeks four-fold interdictory relief:

16.1 Firstly, an order interdicting and restraining the Respondents from "…contravening the lockdown regulations in so far as they apply to the

Strandfontein Temporary Emergency Shelter ("the site")."[3] We will refer to this relief as "the Lockdown Regulations Interdict".

16.2 Secondly, an order interdicting the Respondents (save for Rev. Nissen) from "…acting as monitors in respect of the site, other than in terms of this order; attempting to and/or gaining access to the site and being within a 1km radius of the site." This will be referred to as "the Monitoring Interdict".[4]

16.3 Thirdly, an order interdicting the Respondents from "…inciting violence, riotous behaviour or other acts of rebellion at the site; threatening, members of staff at the site with arrest and prosecution; intimidating, threatening, harassing or in any way interfering with the members of staff at the site and/or operations at the site; intimidating, threatening or in any way interfering with the applicant's officials or persons acting on their behalf or involved with law enforcement at the site." We will describe this as "the Intimidation and Harassment Interdict."[5]

16.4 Fourthly, an order interdicting the Respondents from "…publishing and/or disseminating reports relating to the site which are untrue [and] have not been presented to the City for comment before publication and/or dissemination." We will refer to this as "the Publication Interdict."[6]

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3 Notice of Motion: para 2.1.1
4 Notice of Motion: p 2 para 2.1.2
5 Notice of Motion: p 3 para 2.1.3
6 Notice of Motion: p 4 para 2.1.7

III INTERDICT RESTRAINING THE EXERCISE OF PUBLIC POWERS MAY ONLY BE GRANTED IN EXCEPTIONAL CIRCUMSTANCES AND IN THE CLEAREST OF CASES

17 Each of the parties to this application represents a key role player in the response to the COVID-19 pandemic. We elaborate on their identities, roles and powers in this section, and how this division of functions should inform the Court's approach to the interdicts sought. As we submit below, the Court should show a tremendous reluctance to grant the interdicts sought, the effect of which would be to prevent the exercise of public powers and interfere with the respondents' constitutional and statutory rights and obligations, and should only do so if it holds that this is "the clearest case" for an interdict.

IV THE CITY

18 The applicant, the City, is a municipality. It owes its residents the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights,[7] including the rights to freedom of movement,[8] to enter, to remain and to reside anywhere in the Republic,[9] to access to adequate housing,[10] and to access to health care services, sufficient food and water, and social security.[11]

19 The City has entrenched constitutional authority to govern the affairs of its community.[12] The City's objects include:[13]

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7 Section 7(2) of the Constitution.
8 Section 21(1) of the Constitution.
9 Section 21(3) of the Constitution.
10 Section 26(1) of the Constitution.
11 Section 27 of the Constitution.
12 Section 151(3) of the Constitution.

19.1 providing democratic and accountable government for local communities;

19.2 ensuring the provision of services to communities in a sustainable manner;

19.3 promoting a safe and healthy environment; and

19.4 encouraging the involvement of communities and community organisations in the matters of local government.

V THE COMMISSION

20 The first respondent, the Commission, is one of the state institutions supporting constitutional democracy and established by Chapter 9 of the Constitution.[14] It is independent and subject only to the Constitution and the law, and must be impartial and exercise its powers and perform its functions without fear, favour or prejudice.[15]

21 The Commission's entrenched functions are to:

21.1 Promote respect for human rights and a culture of human rights;

21.2 Promote the protection, development and attainment of human rights; and

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13 Section 152(1) of the Constitution.
14 Section 181(1)(b) of the Constitution.
15 Section 181(2) of the Constitution.

21.3 Monitor and assess the observance of human rights in the Republic.[16]

22 The Commission has all the powers necessary to perform these functions, including the powers to: (a) investigate and report on the observance of human rights; (b) take steps to secure appropriate redress where human rights have been violated; (c) carry out research; and (d) educate.[17]

23 The Commission's constitutionally entrenched powers may be regulated by national legislation,[18] which takes the form of the South African Human Rights Commission Act 40 of 2013 ("the SAHRC Act").

24 Section 13 of the SAHRC Act details additional powers and functions on the Commission, over and above those stipulated in the Constitution. Section 13(1)(b)(iii) of the Act provides that the Commission must liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objects of the Commission.

25 The Commission must also monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission (section 13(1)(b)(vi) of the SAHRC Act).

26 The Constitution and the SAHRC Act provide that other organs of state, including the City, must take measures to assist and protect the Commission to

16 Section 184 of the Constitution.
17 Section 184(2) of the Constitution.
18 Section 184(2) of the Constitution.

ensure its independence, impartiality, dignity and effectiveness.[19] No person or organ of state may interfere with the Commission's functioning.[20]

27 The SAHRC Act provides that all organs of state must afford the Commission such assistance as may reasonably be required for the effective exercising of its powers and performance of its functions.[21] The Commission must also comply with international standards for national human rights institutions. The answering affidavit details those standards, and we do not repeat what is stated there.[22]

28 The second respondent is the Commission's chief executive officer, and has various statutory obligations.

VI THE HUMAN RIGHTS DEFENDERS

29 The third to eighth, tenth and eleventh respondents are all members of the committee established by the Commission pursuant to section 11 of the Act. They were nominated by civil society organisations and non-governmental organisations forming part of the section 11 committee.[23]

30 The ninth respondent is a medical practitioner and epidemiologist employed by Médecins Sans Frontières ("MSF" or "Doctors Without Borders"). He was appointed as a contractor to the Commission. MSF is an international, independent medical humanitarian organisation focused on delivering emergency medical aid quickly, effectively and impartially while also speaking

19 Section 181(3) of the Constitution. See also section 4(2) of the SAHRC Act.
20 Section 181(4) of the Constitution. See also section 4(3) of the SAHRC Act.
21 Section 13(4) of the SAHRC Act.
22 See AA: p 224-227 para 17 to 24.3.
23 The process in this regard is set out at AA: p 233-239 para 39-56.

out about what is witnessed. In order to realise its objectives, MSF's right to speak out to bring attention to neglected crises, challenge inadequacies or abuse of the aid system, and to advocate for improved medical treatments and protocols is paramount.

31 The Commission has a long-standing relationship with MSF and other similar organisations that provide expertise that aid the Commission in the fulfilment of its mandate.

32 Section 19 of the SAHRC Act permits the Commission to enter into contracts of service with persons who have specialist and technical knowledge related to the work of the Commission. It is within this context that the ninth respondent was contracted to assess and provide the Commission with a report on the conditions at the Strandfontein site.[24]

33 The third to eleventh respondents are all termed "human rights defenders". This is the term used by the Office of the High Commission on Human Rights and the UN Special Rapporteur on the Situation of Human Rights Defenders to describe to describe "*people who, individually or with others, act to promote or protect human rights*".

34 The term "*human rights defenders*" has developed since the adoption on 9 December 1998 by the UN General Assembly of its resolution titled "*Declaration on the Right and Responsibility of Individuals, Groups and Organs*

[24] AA: p 239 para 58.

of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms".[25]

35 In the resolution, the General Assembly recognises:

35.1 In article 1 that everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

35.2 In article 2, that:

"Everyone has the right, individually and in association with others:

(a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

(b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

(c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental

[25] General Assembly resolution 53/144 of 9 December 1998.

freedoms and, through these and other appropriate means, to draw public attention to those matters."

35.3 In article 8 that:

"1. Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.

2. This includes, inter alia , the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms."

35.4 In articles 18(2) and (3) that:

"2. I Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.

3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in

> contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realiz

36 The Constitution entrenches the rights and protections afforded by the General Assembly's resolution in a series of provisions. The Constitution gives everyone, which includes the civil society and non-governmental organisations established by natural persons, the rights to: freedom of expression;[26] freedom of assembly, demonstration, picket and petition;[27] freedom of association;[28] and, in the case of citizens, the right to make political choices.[29]

37 Every person, civil society organisation and non-governmental organisation accordingly has entrenched constitutional rights that allow them to act as human rights defenders, to seek to, individually or with others, act to promote or protect human rights.

VII THE INTERPLAY BETWEEN THE RESPONDENTS

38 We have set out this excursus into the identity, rights and responsibilities of each of the parties to this litigation for this reason – each party has a role to play in combatting the COVID-19 pandemic but the interdictory relief sought by the City would ride roughshod over those roles.

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[26] Section 16 of the Constitution.
[27] Section 17 of the Constitution.
[28] Section 18 of the Constitution.
[29] Section 19(1) of the Constitution.

39 The City is constitutionally required to promote a safe and healthy environment,[30] and in so doing it must respect, promote, protect and fulfil the right to access to health care services, sufficient food and water, and social security.[31]

40 The Strandfontein site is one of the measures taken by the City to fulfil these obligations in relation to homeless and street-based persons in Cape Town. The steps taken by the City in fulfilment of this obligation does not however exempt the City from scrutiny and accountability. Quite to the contrary, its constitutional objects include also "providing democratic and accountable government for local communities" and "encouraging the involvement of communities and community organisations in the matters of local government".[32]

41 With the exception of the ninth respondent, the third to eleventh respondents are all members of the Cape Community and representatives of community organisations. They should be actively encouraged by the City to participate in its administration of the Strandfontein site.

42 The Commission plays a similar role. It is constitutionally mandated to investigate and report on the observance of human rights, including by the City. It has extensive powers to do so, and the Constitution both protects it from interference by the City in performing this function, and positively mandates the City to assist the Commission.

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30 Section 152(1) of the Constitution.
31 Section 7(1) read with section 27 of the Constitution.
32 Section 152(1) of the Constitution.

43 The Commission, when performing its functions properly, facilitates the City's performance of its functions. Oversights or areas of neglect should be identified and exposed by the Commission, and its monitors, and reported on. The City can then respond, either to show the concerns to be without foundation, or to improve areas in need of improvement.

44 Why then is the interdictory relief sought by the City so concerning? In some instances, the interdicts would do no more than confirm the legal position – that the respondents should not contravene the lockdown regulations, nor should they incite violence, riotous behaviour or other acts of rebellion.

45 The relief sought by the City is, however, problematic for two interrelated reasons:

45.1 Firstly, it is patently overly broad and disproportionate to the events, even as they are detailed in the founding affidavit. As we return to below, both the monitoring interdicts and the publication interdicts are unlawful, and would interfere with the Commission's statutory obligations and the other respondent's constitutional rights.

45.2 Secondly, the relief, even in relation to the permissible interdicts, would serve to chill accountability of the City. We understand that one of the *amici* intends to address this topic in detail, so we merely emphasise the proposition that, even if any interdict ultimately granted did no more than confirm the law's requirements, it may still be brandished by City officials and employees as a pretext not to provide access to the Strandfontein site, or to refuse to satisfy the City's constitutional and statutory obligations to support the work of the Commission, and to

promote accountable government and the involvement of communities and organisations in local affairs. Other civil society organisations and concerned members of the Cape Town community would be deterred exercising their constitutional rights and obligations to hold the City accountable for fear that they too will be sued by the City as respondents in future interdictory proceedings, and may lack the resources to answer such proceedings.

46 Finally, if the Court finds that the relief sought by the City is interim and not final relief (to which we turn in the next section), we respectfully submit that the constitutional rights and obligations of the Commission and of the human rights defenders weigh heavily in the balance of convenience against granting the City any interim interdict.

47 As explained in National Treasury and Others v Opposition to Urban Tolling Alliance and Others:[33]

> "Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of Government in a manner inconsistent with the doctrine of separation of powers. That would ordinarily be so, if, as in the present case, a state functionary is restrained from exercising statutory or constitutionally authorised power. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases. This is so because in the ordinary course valid law must be given effect to or implemented, except when the resultant harm and balance of convenience warrants otherwise." (emphasis added).

[33] 2012 (6) SA 223 (CC) at para 71.

48 The position was recently re-iterated again by the Constitutional Court in *Economic Freedom Fighters v Gordhan and Others*[34]

> "We were cautioned by this Court in *OUTA* that, where Legislative or Executive power will be transgressed and thwarted by an interim interdict, an interim interdict should only be granted in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle. Essentially, a court must carefully scrutinise whether granting an interdict will disrupt Executive or Legislative functions, thus implicating the separation and distribution of power as envisaged by law. In that instance, an interim interdict would only be granted in exceptional cases in which a strong case for that relief has been made out."(emphasis added).

49 In this matter, we submit that the interdicts sought against the Commission will prevent the Commission from giving effect not only to the SAHRC Act, but to its constitutionally entrenched mandate to monitor and observe human rights. Such an order would breach the principle of separation of powers and be inconsistent with the duties of all organs of state to ensure the Commission's independence, dignity and effectiveness. The preferable approach, with respect, is to dismiss the application *in toto* unless the Court finds that this is "the clearest of cases" for an interdict.

VIII THE CITY SEEKS FINAL RELIEF, NOT INTERIM RELIEF

50 It is trite that whether an interdict is interim or final depends not on how the applicant characterises the interdict, but on its effect.[35]

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[34] Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others (CCT 232/19; CCT 233/19) [2020] ZACC 10 (29 May 2020) at para 48

51 In this matter, the notice of motion purports to seek an interim interdict, pending a return date of 30 June 2020. The interdicts sought would, however, have final effect if granted:

51.1 The applicant makes no provision for (*i*) a review; (*ii*) oral evidence; or (*iii*) the filing of further affidavits. On the return date, the next court charged with hearing this matter would be required to decide this case on the same papers. There is, in this regard, no difference between the present court and the court on the return date.

51.2 The anticipated return date postdates the anticipated closure of Strandfontein, which the City has suggested until recently will be 20 May 2020. If the interdict is granted, it will accordingly operate post the remainder of Strandfontein's expected length of life. The effect of the interdict is accordingly final.

52 Accordingly, the City is required to satisfy the Court that it is entitled to final interdictory relief, not interim relief.

53 The requirements for a final interdict are as follows:[36]

53.1 First: there must be a clear right on the part of the applicant. What this means is that an applicant must prove on a balance of probabilities the right which he or she seeks to protect. Any factual disputes must be resolved in terms of the rule in *Plascon-Evans Paints Ltd v Van*

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35 V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Service (Pty) Ltd 2004 2 All SA 664 (C) paras 9-10. On appeal, the Court accepted that the relief sought was a final interdict. See V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Service (Pty) Ltd 2006 3 All SA 523 (SCA).

36 Setlogelo v Setlogelo 1914 AD 221 at 227; Sanachem (Pty) Ltd v Farmers Agri-Care (Pty) Ltd 1995 2 SA 781 (A) at 789B-C; Hall v Heyns 1991 1 SA 381 (C) at 395E-F.

Riebeeck Paints (Pty) Ltd 1984 3 SA 623 (A) at 634E-G. In other words, final relief may only be granted if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting of such relief.

53.2 Second: there must be an injury actually committed or reasonably apprehended. This means that there must be proof of some act interfering with the applicant's right or a well-grounded apprehension that such an act will occur.

53.3 Third: there must be no other satisfactory remedy available to the applicant. An interdict is an extraordinary remedy, and a court will not grant an interdict if the applicant is able to obtain adequate redress by some other form of ordinary relief.

54 The papers show that there are a slew of disputes of fact. However, this application must be decided in accordance with the respondents' version, in accordance with the principles in *Plascon Evans*.

55 If, however, the Court adopts the position that the applicant is seeking an interim interdict, we would note that an applicant for an interim interdict has to satisfy the following requirements:

55.1 a prima facie right;

55.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

55.3 a balance of convenience in favour of granting the interim interdict; and

55.4 the absence of any other adequate ordinary remedy. [37]

56 These requirements should not be considered separately or in isolation but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of granting the interim relief sought. The courts have consistently applied the "*sliding-scale*" test. The stronger the prospects of success, the less the need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him.[38]

57 In considering the balance of convenience, the court must weigh the prejudice to the applicant if the interim interdict is refused against the prejudice to the respondents should it be granted.[39] Furthermore, the Court has an overriding discretion to refuse an interim interdict even where the requisites have been established.[40]

IX THE LOCKDOWN REGULATIONS INTERDICT

58 The allegations made by the City in this regard are:

58.1 On 18 April 2020 Rev Nissen and "*some of the monitors*" including the Third and Fourth Respondents, arrived at the site.[41] Photographs of this visit to the site on 18 April 2020 "*illustrate that neither the Commissioner nor those who accompanied him adhered to the lockdown regulations.*

Erikson Motors (Welkom) Ltd v Protean Motors, Warrenton 1973 3 SA 685 (A) at 691F-G Hix Networking Technologies v System Publishers (Pty) Ltd 1997 (1) SA 391 (A) at 398I-399B.

38 Erikson Motors (Welkom) Ltd v Protean Motors (Warrenton) *supra*

39 Erikson Motors (Welkom) Ltd v Protean Motors, Warrenton *supra* at 619 F-G

40 See 11 LAWSA 408, p 423.

41 AA: p 32 para 117

They did not even attempt to comply with the social distancing requirements imposed by the regulations and directives."[42]

58.2 On 1 May 2020 "*the respondents*" breached the lockdown regulations and "*the curfew of 8pm to 5am*" by only leaving the property after 9pm.[43]

59 Firstly, it is a notable feature of these allegations that they are entirely bereft of detail regarding precisely which Lockdown Regulations or statutory provision the Respondents are alleged to have contravened. Having alleged that the Respondents acted unlawfully by breaching the Lockdown Regulations and directives, it was incumbent on the City to identify exactly which regulation or directive was breached. The respondents cannot be expected to guess precisely which statutory provisions they are alleged to have contravened.

60 Secondly, and insofar as the alleged breach of the Lockdown Regulations on 18 April 2020 is concerned, the City seeks an interdict against all the respondents. However, the only respondents specifically identified by the City to have been present at the site on 18 April 2020, are the third and fourth respondents.[44]

61 Thirdly, the photographs[45] relied on by the City in support of these allegations simply do not "*illustrate*" that either Rev Nissen or those who accompanied him failed to adhere to social distancing requirements imposed by the Lockdown

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42 FA: p 32: para 119. The photographs referred to appear as annexure RGB5 and RGB6 at p 69 and p 70 of the record.

43 FA: p 42 para 155, p 53 para 197.

44 FA: p 32 para 117

45 Annexures RGB5 and RGB6: p 69 – 70.

Regulations. These photographs merely depict a group of unidentified people clearly standing at distances apart from each other.[46]

62 There is simply no basis for an interdict to be granted on the basis of the scanty evidence depicted in these photographs, which fail to even identify the persons depicted in the photographs.

63 Fourthly, in relation to the alleged breach of "*the curfew of 8pm to 5am*" on 1 May 2020, no attempt is made by the City to identify exactly which of "*the respondents*" contravened the curfew. A number of the respondents were not even present at the site on 1 May 2020. Dr Van Cutsem (the Ninth Respondent) states in his affidavit that he was not present at the site on 1 May 2020.[47] The City does not deny this in its Replying Affidavit.[48]

64 Ms Kirke states in her affidavit that on 1 May 2020 she was monitoring in Mowbray and Observatory where street based people had been removed to Strandfontein.[49] This is not denied let alone dealt with in the City's Replying Affidavit.[50]

65 In any event, the City's reliance on an alleged breach of "the curfew regulations" by the Respondents is misplaced. Regulation 16(3) of the 29 April 2020 Lockdown Regulations stated that "*Every person is confined to his or her place of residence from 20H00 until 05H00 daily, <u>except where a person has been granted a permit to perform an essential or permitted service as listed in</u>*

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46 Record: p 69 – 70.
47 Record: p 546 para 84 - 87
48 RA: p 747
49 Record: p 507 para 25.
50 RA: p 747 para 326

Annexure D, or is attending to a security or medical emergency." (emphasis added).

66 As at 1 May 2020, essential services permits had been issued by Rev Nissen to the Third to Eighth and the Tenth to Eleventh Respondents. These essential service permits are valid and effectual and in terms of the principles established in *Oudekraal*[51], they have legal consequences which cannot be ignored unless set aside in a proper judicial process. As the Constitutional Court explained in *Kirland*:

> "[103] The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in Welkom, "[t]he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process." For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid."[52] (emphasis added)

67 The 29 April 2020 Lockdown Regulations exempted holders of valid essential services permit from the 20h00 to 5am "*curfew*" provided for in Regulation 29(3). These permits have not been set aside in any judicial process nor for

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51 Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

52 MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC) at para 103.

that matter does the City seek to do so in these proceedings. The monitors had all been granted essential services on 1 May 2020. They were lawfully entitled to travel and leave the site after 9pm.

X THE NEW CASE IN REPLY

68 The City, for the first time in its Replying Affidavit, attempts to provide two new grounds to support the Lockdown Regulations Interdict.

69 The first new ground in the Replying Affidavit is the allegation that Rev Nissan unlawfully issued four essential services permits attached to the Founding Affidavit as annexures RGB10 to RGB13 to himself, the Third, Sixth and Seventh Respondents. The City argues that Rev Nissan acted unlawfully in issuing these permits because essential service permits can only be issued by the CEO of the SAHRC and issued only to Commissioners.[53]

70 The second new ground is the allegation in the Replying Affidavit that permits issued to Rev Nissan, Mr Gaum and four SAHRC staff members referred to in the interim order of 8 May 2020 are irregular because they do not comply with the 29 April 2020 lockdown regulations[54]; they were issued by Rev Nissen not the CEO[55] and Rev Nissan issued a permit to himself "*in breach of the lockdown regulations*."[56]

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53 RA: p 684 para 7.9 – 7.12
54 RA: p 692 para 34
55 RA: p 692 para 34
56 RA: p 692 para 34

71 It is impermissible for the City to introduce new and additional grounds to support the Lockdown Contravention Interdict for the first time in its Replying Affidavit.

72 The obligation on a party to make out its case in its founding papers is well established. In *Betlane v Shelly Court CC*,[57] the Constitutional Court stated:

> "It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time."[58]

73 The rationale for this trite principle is set out in *Director of Hospital Services v Mistry*[59] where the Appellate Division stated:

> "When . . . proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:
>
> '. . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, <u>because those are the facts which the respondent is called upon either to affirm or deny</u>'.

74 New issues in a Replying Affidavit will generally only be allowed in circumstances where the Applicant could not have known of such issues at the time of deposing to the founding affidavit. The Court will not permit or will strike out new issues raised in a replying affidavit if the Applicant knew or ought to

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57 2011 (1) SA 388 (CC).
58 Ibid paragraph 29.
59 1979 (1) SA 626 (AD) at 635H-636B.

have known of the existence of such issues but failed for whatever reason to raise them in the founding affidavit.[60]

75 There is no explanation by the City for its belated challenge to the legality of the essential services permits issued by Rev Nissen. Copies of the very permits now challenged for the first time in reply were annexed to the City's Founding Affidavit.[61] The Founding Affidavit however makes no mention of a challenge to the legality of the permits on the grounds advanced for the first time in the City's Replying Affidavit. The Founding Affidavit instead confines itself to the allegation that section 12 of the SAHRC Act makes no provision for the appointment of individual monitors and their appointment as such is irregular and invalid.[62]

76 We submit that the City's challenge to the legality of the essential services permits issued by Rev Nissen to the Third, Sixth and Seventh Respondents is impermissible and cannot be entertained.

77 The City was in possession of these essential services permits and had the opportunity to advance that challenge in its Founding Affidavit. It failed to do so. It cannot seek to do so now and for the first time in its Replying Affidavit.

78 Even more difficult to understand are the relevance of the City's allegations in reply relating to the legality of the permits issued by Rev Nissen to himself, Commissioner Gaum and SAHRC staff and utilised for the purposes of compliance with the order granted on 8 May 2020. These allegations again

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60 Bayat and Others v Hansa and Another 1955 (3) SA 547 (N) and Dawood V Mahomed 1979 (2) SA 361 (D).

61 AA: Annexures RGB10, RGB11, RGB12, RGB13: p 75 – 82.

62 FA: p 35 para 127

constitute new matter raised for the first time in reply and should not be entertained. They are in any event irrelevant because the City seeks no relief whether interim or final against either Rev Nissen or Commissioner Gaum.

79 It would furthermore be irregular to grant an interim interdict restraining the SAHRC and its staff from breaching the lockdown regulations on the basis that the 27 March 2020 permit was irregular because it could not be issued to anyone except a SAHRC Commissioner. This is because it is common cause that the services performed by staff of the SAHRC are now designated as essential services in terms of the 29 April 2019 Lockdown Regulations. Interdicts are prospective in nature, and accordingly cannot be sought for past breaches or wrongdoing, but may relate only to ongoing or future breaches of rights.[63]

80 For these reasons, we submit that there is no factual or legal basis to justify the granting of the Lockdown Regulations Interdict and that prayer 2.1.1 of the notice of motion must therefore fail.

XI THE MONITORING INTERDICT

81 The Monitoring Interdict consists of two parts. First, an order restraining the Respondents from acting as monitors in respect of the site (other than in terms of the order; secondly, an order restraining the respondents from attempting to and/or gaining access to the site and being within a 1km radius of the site. The Monitoring interdict will apply to all the respondents including the Commission itself.

63 NCSPCA v Openshaw [2008] 4 All SA 225 (SCA) para 20.

82 The Monitoring Interdict in both form and effect would have the effect of completely preventing the Commission and the monitors from accessing the Strandfontein site for the purpose of human rights monitoring. In practical terms, neither the Commission staff nor the individual respondents would be permitted to be within a 1km radius of the Strandfontein site, let alone permitted to access the site itself. We submit that it is an interdict which is not only inappropriately broad, but one which restrains the Commission's constitutional and statutory powers in a manner which is entirely inconsistent with the purpose for which the Constitution conferred these powers on the Commission. The Monitoring Interdict breaches the principle of separation of powers and it is accordingly unlawful and unconstitutional.

83 We have earlier emphasized that section 184(c) of the Constitution places an obligation on the Commission to "monitor and assess" the observance of human rights in the Republic. These obligation is mirrored in section 13(1)(b)(vi) of the SAHRC Act which requires the Commission to monitor the implementation of and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission.

84 The Monitoring Interdict seeking to prevent the Commission, its staff and the respondents from accessing the site and restricting them from being within 1km radius of the site plainly restrains the exercise of the Commission's statutory powers to monitor and observe human rights and compliance with international human rights instruments.

85 The Commission explains in its answering affidavit that the interim interdictory relief (which includes the Monitoring Interdict), will force the Commission to deploy its scarce staff resources to monitor the site and practically impede the Commission from performing human rights monitoring. The Commission has explained that it is not feasible to expect the site to be monitored by only one Commissioner given scale of the site and the extent of the problems dealt with in the Independent Experts Report and that the limitations on the human rights monitors will also set a negative precedent for other monitoring by the Commission. This will negatively impact on the independence of the Commission and the performance of its human rights monitoring obligations as required by the Constitution.[64]

86 We submit that this explanation by the Commission regarding the impact of the Monitoring Interdict on its work must be accepted as the City's response to it is no more than a bare denial.[65]

87 The factual basis on which the City seeks the Monitoring Interdict and in particular the order restricting the respondents to a 1km is not entirely clear from the founding affidavit. It appears to be sought on the basis that the purpose of this interdict is "…*to prevent a recurrence of what occurred on 1 May 2020 and the irregular attempts to make contact with the occupiers of tent 2 on 3 and 4 May 2020*."[66] We submit that even this professed factual basis provides no grounds to justify the broad and invasive relief contemplated by the Monitoring Interdict.

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64 AA: p 244 para 67
65 RA: p 706 para 102
66 FA: p 53 para 198

88 Firstly, insofar as the alleged incident on 1 May 2020 is concerned, there is no basis to grant the Monitoring Interdict against the Commission and the second respondent. No Commission staff were present at the site on 1 May 2020 nor is it alleged that the second respondent was in any way involved in this incident. Secondly, the City persists with an interdict against all the respondents but not all the respondents, for example the ninth respondent, were even present on the site on 1, 3 and 4 May 2020. [67]

89 Thirdly, the invasive and broad terms of the Monitoring Interdict restricting any access to the site by the respondents are furthermore disproportionate to the disputed events which took place on 1 May 2020. The City alleges in this regard that the third respondent's motor vehicle was blocking access to the site and that "*they*" (presumably all the respondents) "*…also blocked the entrance and exit to the site making it impossible for service providers or anyone else to gain entry or to leave*."[68]

90 Mr Jenkins, the third respondent, explains that it was the tenth respondent's vehicle that had been stopped by Law Enforcement at the front of the site gate and that he immediately moved the car and parked it in a parking space after being threatened by Law Enforcement that the vehicle would be towed if not moved. Mr Jenkins further explained that it was the Law Enforcement officers that had kept the gate closed and that they created the blockage which

67 See for example the affidavit of the Ninth Respondent: p 546 para 86; RA p 748.
68 FA: p 39 para 145; p 40 para 147

prevented vehicles entering and exiting the site.[69] The City fails to dispute this explanation in any meaningful way in its replying affidavit.[70]

91 A further apparent basis advanced by the City in support of the Monitoring Interdict is what is described as "*irregular attempts to make contact with the occupiers of tent 2 on 3 and 4 May 2020*."[71] We will address this further when dealing with the Intimidation and Harassment Interdict sought by the City.

92 In what follows, we deal with the City's argument that section 12 of the SAHRC Act does not permit for powers to be conferred on individuals and that the individual monitors were therefore irregularly and unlawfully appointed.[72] This appears to be one of the grounds advanced by the City in support of the Monitoring Interdict.

XII THE APPOINTMENT OF THE MONITORS IS LAWFUL

93 The City argues that the establishment of a committee by the Commission does not permit for powers to be conferred on individuals and such powers may only lawfully be conferred on a commissioner, a member of staff or a committee.[73]

94 We submit that these contentions are without merit.

95 Section 11(1) of the SAHRC Act allows the Commission the power to establish committees consisting of one or more commissioners designated by the Commission, and one or more other persons, if any, whom the Commission

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69 Third Respondent's Affidavit: p 478 para 17
70 RA: p 733 para 255
71 FA: p 53 para 198
72 FA: p 35 para 126 - 127
73 FA: p 35 para 126 - 127

may appoint for that purpose and for the period determined by it for the purposes of advising the Commission, or making recommendations to it, in respect of the matter for which the committee has been established.[74] Section 11(4) allows such a committee, subject to the directions of the Commission, to exercise such powers of the Commission as the Commission may confer on it, and provides that the committee must perform such functions of the Commission as the Commission may assign to it, and must follow such procedure during such exercising of powers and performance of functions as the Commission may direct. Upon the completion of the functions assigned to it in terms of section 11(4), the committee must submit a written report thereon, including recommendations, if any, for consideration by the Commission.[75]

96 Section 12 of the SAHRC Act authorises the Commission to in writing confer the exercise of any of its powers or assign the performance of any of its functions to a commissioner, a member of staff or a committee of the Commission. Such a conferment or assignment is subject to such conditions and directions as the Commission may impose and does not divest the Commission of responsibility for the exercise of the power or the performance of the function. The Commission may confirm, vary or revoke any decision taken in consequence of a conferment or assignment in terms of this section, but no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.[76]

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74 Section 11(4) of the SAHRC Act.
75 Section 11(5) of the SAHRC Act.
76 Section 12 of the SAHRC Act

97 On 14 April 2020 the Commission took a decision to establish a committee in terms of section 11 of the SAHRC Act. The decision was taken by the Commissioners by round-robin resolution and passed through email.[77] An email from the Chairperson of the Commission records that the establishment of the section 11 committee and its terms of reference had been approved by the Commissioners on 8 April 2020.[78] The purpose of the section 11 committee as outlined in its terms of reference were to inter-alia '*monitor the observance of human rights during the government-instituted lockdown (and possibly beyond), and report thereon to the SAHRC in terms of the guidelines and rules set by the Committee. The latter of which shall include, but not limited to monitoring training; mitigation of risk; contribution to the SAHRC mandate and the provisions set forth in the SAHRC Act; upholding of human rights in line with the strategic vision of the SAHRC and throughout the operational activities of designated monitors."*[79]

98 The terms of reference for the section 11 committee provided for the committee to be comprised of various civil society organisations, each of which was entitled to have one representative as a permanent member of the committee.[80] Committee members were required to observe a protocol and code of conduct and were provided with human rights monitoring training.[81] Each member of the section 11 committee had to apply for accreditation and accreditation letters were only issued on completion of the mandatory training and signing of the

77 AA: p 232 para 38
78 AA: annexure CN4L p 302
79 AA: p 234 para 40.6
80 AA: p 234 para 41
81 AA: p 236 para 44

code of conduct.[82] There is no dispute that the Third to Twelfth Respondents (except for the Ninth Respondent) were all issued with accreditation letters by the Commission in their capacity as elected representatives of their respective organisations on the section 11 committee.[83]

99 The City's contends in its founding affidavit that section 12 of the SAHRC makes no provision for powers to be conferred on the individual monitors and that their appointment as such is irregular and invalid.[84]

100 There are two problems with the City's arguments in this regard.

101 Firstly, the argument is illogical and runs contrary to the terms of section 12 of the SAHRC Act which makes express provision for the Commission to confer the exercise of any of its powers or assign the performance of any of its functions to a committee of the Commission.[85] As indicated earlier, the City does not dispute that the membership of the section 11 committee comprises of civil society organisations who are represented on the committee by the individual respondents.[86]

102 The City's strained interpretation of section 12 of the SAHRC Act is inconsistent with the purposive approach which the Constitution requires to statutory interpretation.[87] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[88], 16 Ngcobo J stated:

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82 AA: p 236 para 44
83 AA: p 237 – p 239 para 46 – 56; RA: p 698 para 67
84 FA: p 35 para 127
85 Section 12(1)(c) of the SAHRC Act.
86 AA: p 237 – p 239 para 46 – 56; RA: p 698 para 67
87 See for example African Christian Democratic Party v Electoral Commission and Others [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 25, 28 and 31;

"The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights."

103 The underlying purposes of section 11 and section 12 of the SAHRC Act are to ensure and advance the independence and effectiveness of the Commission. This is achieved by permitting the Commission to establish committees in order to advise the Commission or make recommendations to it in respect of the matter for which the committee has been established.

104 Section 12 of the SAHRC Act is also aimed at advancing the effectiveness of a committee established in terms of section 11. It empowers the Commission to confer the exercise of any of its powers or assign the performance of any of its functions to such a committee.

105 If the City's argument were to be correct, it would mean that the Commission would be entitled to establish a committee in terms of section 11 but not entitled to confer powers and assign functions in terms of section 12 of the SAHRC Act to individual members of the Committee. We submit that this would be entirely inconsistent with the purposes of section 11 and 12 of the SAHRC Act and the provisions of section 184(2) of the Constitution, which provides that

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Daniels v Campbell NO and Others [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3.

[88] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para 91.

Commission's powers are regulated by national legislation and are powers which are "…necessary to perform its functions".[89]

106 The power to appoint a section 11 committee and to confer individual members of the committee with powers and functions of the Commission is therefore clearly a power which is necessary for the Commission to perform its human rights monitoring mandate.

107 There is a second and more fundamental problem with the City's argument that section 12 of the Act does not permit the commission to confer its powers and assign its functions to individual members of a section 11 committee.

108 It is this: the decision by the Commission to establish the section 11 committee and its decision to appoint the individual monitors and confer them with powers in terms of section 12, has not been attacked in this application.

109 What the City is effectively attempting to do is to invite this Honourable Court to ignore the decision of the Commission to establish the section 11 committee and to accredit the individual monitors and find that their monitoring of the Strandfontein site was unlawful and warrants an interdict. This argument is wrong. Until the Commission's decisions to appoint the section 11 committee and to appoint and accredit the individual monitors and confer them with powers in terms of section 12 is reviewed and set aside by a court of law, these decisions remain valid and their consequences remain legally effective. This much was made plain by the SCA in *Oudekraal*:

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89 Section 184(2) of the Constitution.

"The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside"

110 The Chief Justice put it as follows in *Economic Freedom Fighters v Speaker of the National Assembly & Others*[90]*:*

"No decision grounded [in] the constitution or law may be disregarded without recourse to a court of law. To do otherwise 'amount to a licence to self-help'...No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained."

111 What this means in simple terms is that the decision of the Commission to appoint the individual monitors remains valid as it has not been set aside. It has not been attacked in this Court. The City's invitation that this Court must willy-nilly disregard the Commission's decision is in direct conflict with the dicta quoted above.

112 In the premises, the City's attack on the process followed by the Commission in appointing the individual monitors must fail.

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90 Economic Freedom Fighters v Speaker of the National Assembly & Others 2016 (3) SA 580 (CC) at para 74

XIII THE INTIMIDATION AND HARRASMENT INTERDICT

113 The Intimidation and Harassment Interdict sought by the City consists of orders interdicting and restraining the respondents from:

113.1 inciting violence, riotous behaviour or other acts of rebellion at the site;

113.2 threatening members of staff at the site with arrest and prosecution;

113.3 intimidating, threatening, harassing or in any way interfering with the members of staff at the site and/or operations at the site;

113.4 intimidating, threatening or harassing or in any way interfering with the applicant's officials or any other persons acting on their behalf or involved with law enforcement at the site.

Incitement of violence, riotous behaviour or other acts of rebellion

114 Insofar as incitement of "violence, riotous behaviour or other acts of rebellion at the site" is concerned, the City alleges that on 1 May 2020 "*…the conduct of the SAHRC monitors resulted in riotous behaviour on the part of the occupiers of the site. They managed to incite them to behave in this manner by making telephone contact with the occupiers of tent 2 (the Haven tent) and instructing them to come to the fence*."[91]", a "*modus operand*i" which was allegedly repeated on 3 and 4 May 2020.

115 It is alleged that photographs taken of the fourth and tenth respondents using their mobile phones on 4 May 2020 make it clear"…*that they were again trying*

[91] FA: p 40 para 147

to make contact with people in tent 2."[92] The City claims that *"…the modus operandi is to call the ring leaders in the tent and get them to come to the access point. Once this occurred, they are incited to violence as appears from the videos of that date*."[93]

116 While these are civil proceedings, given that the City alleges that the respondents have in fact incited the occupiers of the site to violence and riotous i.e. to commit criminal acts, the principles established in the case law relating to the crime of incitement, are instructive.

117 The Full Bench of the Gauteng Division in its recent judgment in *Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another*[94] summarised the prevailing case law as follows:

> "The definition of incitement can be found in S v *Nkosiyana.* An inciter is 'one who reaches and seeks to influence the mind of another to the commission of a crime'. The court in *Nkosiyana* further clarified that ' it is the conduct and intention of the inciter which is vitally in issue . . . the purpose of making incitement a punishable offence is to discourage persons from seeking to influence the minds of others towards the commission of crimes'.
>
> The crime of incitement is the intention, by words or conduct, to influence the mind of another in the furtherance of committing a crime. The question then is what kind of unlawful acts form part of this definition?
>
> It is apparent from this definition that the mere voicing of one's opinion will not be enough for incitement. Snyman provides the example of a person expressing the desire that 'it would be a good thing if x should die' as not

92 FA: p 50 para 184
93 FA: p 53 para 198
94 Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another; Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another [2019] 3 All SA 723 (GP) at paras 19 – 23.

falling under the crime of incitement. Following the position in German law, incitement requires that the inciting words are not too vague or indeterminate. The statement 'take back the land' would likely not constitute incitement as it specifies neither a crime nor an object of which the crime is to be committed against. Support for this can be seen in the case of *Nathie* whereby the Appellate Division, in deciding that the conduct was not incitement, remarked that '[t]he passage in question does not contain any unequivocal direction to the listeners.'

The inciter's conduct need not have an element of persuasion or coercion. It is now settled that the decisive question is not how but if the accused intended to influence the mind of the other person towards the commission of a crime. It is irrelevant whether or not the incite was indeed influenced by the inciter to commit the crime, or acted upon the conduct or communication of the inciter. In fact incitement is limited to those situations in which the crime is not committed. If it were, liability would result from being an accomplice to the crime.

The types of conduct which constitute incitement are fairly narrow. It also is clear that the intention behind the conduct or communication is vital in deciding whether or not incitement took place. Liability for incitement is further restricted by the manner in which our courts have handled the intention requirement."

118 We submit that none of the evidence relied on by the City demonstrates that the monitors intentionally influenced the minds of the site occupiers in furtherance of a crime. The allegation that the monitors "*incited violence*" and "o*ther acts of rebellion*" (whatever that may mean) by making telephone calls to the site occupiers instructing them to come to the fence, is meaningless without any allegation or proof that specific words were uttered by the monitors to influence the occupiers to commit a crime.

119 The allegation that one it is "*clear that that they* [the SAHRC monitors] *were again trying to make contact with people in tent 2*" because photographs[95] of the fourth and tenth respondents depict them "*using their mobile phones constantly*"[96], is with respect, bizarre.

120 All that these photographs depict are the fourth and tenth respondents apparently using their mobile phones. Using a mobile phone without proof of any other form of incitement, is not a criminal offence nor self-evidently, is it sufficient justification for an interdict.

121 The videos of 1 May 2020 relied on by the City do not take the matter any further and are certainly not "*self-explanatory*".[97] Video 1 and video 2 depict the third and eleventh respondents engaging in discussions with law enforcement personnel at the gate of the site. No unlawful conduct by the third and eleventh respondent of any nature is depicted in this video.

122 Video 3 depicts the tenth respondent peacefully recording on his cellphone a group of occupiers demanding to be released from the site. No unlawful conduct by the tenth respondent is depicted in this video.

123 Video 4 is alleged to depict the eleventh respondent "*inciting occupiers*". It does nothing of the sort. A review of the video does not depict the eleventh respondent even engaging or communicating with the occupiers, let alone inciting them to criminal conduct.

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95 FA: p 50 para 184: Annexures RGB28 and RGB29: p 176 and 177

96 Ibid

97 RA: p 731 para 245

124 Video 5 and video 6 are alleged to depict the tenth respondent "*interfering with law enforcement officers*". A review of these videos does not support this allegation at all and merely depicts the tenth respondent recording on his cellphone.

125 Video 7 is alleged to depict the third respondent "*unlawfully briefing the media*". Not only does this video not depict any unlawful conduct by the third respondent, it is entirely unexplained why "*briefing the media*" would be unlawful.

126 Video 8 depicts the third, tenth and eleventh respondent being escorted from the site. No unlawful conduct is depicted in this video.

127 Notably, none of the other respondents are depicted in these videos committing the alleged unlawful conduct in respect of which the City seeks an interdict against all of them.

Alleged threats of arrest and prosecution

128 The City alleges that "….SAHRC affiliated persons have subjected staff at the site to inappropriately aggressive questioning and threats and have even gone so far as to threaten staff with arrest (although the SAHRC has no powers of arrest."[98] In his letter to the Commission dated 2 May 2020, Mayor Plato alleged that the City's concerns "regarding the conduct of the SAHRC" included "…threatening of staff members with arrest and prosecution by SAHRC

[98] FA: p 37 para 137.

appointed monitors. These include front line nurses providing medical treatment to homeless staff during the COVID-19 Pandemic."[99]

129 The City's allegations that the respondents threatened members of staff with arrest and prosecution are vague and generalised and except for the Third Respondent, do not identify which specific respondents allegedly engaged in this conduct.

130 Insofar as the third respondent is concerned, the allegations against him in this regard are made for the first time in the City's Replying Affidavit. The City alleges in this regard that Mr Jenkins attended at the medical tent and threatened the City's medical nursing staff with arrest and prosecution.[100] The City furthermore alleges, again for the first time in its Replying Affidavit, that Mr Jenkins "…unlawfully threatened City staff on numerous occasions with arrest and prosecution and that this occurred in the presence of City staff at the site."[101]

131 Notably, there is not a single affidavit put up by the City from the staff and nurses concerned confirming any of these allegations of threats of arrest and prosecution made by the third respondent or any of the other respondents.

132 It is a well-established a litigant is not entitled to an order against a person in respect of whom no cause of action is made out calling upon that person to desist from some "unlawful" action. There is no justification for making an order

99 Record: p 165
100 RA: 720: para 188
101 RA: 733 para 253

against a person without proof of his complicity and then requiring him to establish his innocence.[102]

133 We submit that the Intimidation and Harassment Interdict sought by the City falls foul of these fundamental principles and that no cause of action has been made out by City for the interdict sought in paragraphs 2.1.3 to 2.1.6 of the notice of motion.

XIV THE REPORT PUBLICATION INTERDICT

134 At the heart of the City's claim is an interdict seeking to gag the Respondents from reporting independently on what has been occurring at Strandfontein. The City seeks broad relief. It would interdict the publication and dissemination of reports relating to Strandfontein which are untrue or have not been presented to the City for comment before publication or dissemination.[103]

135 The City's case for such relief faces a series of insurmountable difficulties. Firstly, the City has no right, whether clear or even *prima facie*, to such interdictory relief.

136 Everyone is entitled to publish or disseminate whatever they wish – including false information – provided that they do not contravene the law or infringe upon constitutional rights. The City's papers do not identify any law or rights that have been contravened by the publication of the reports. Nor could it be the City's "rights" that have been impinged. Municipalities have no claim to

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102 *Ex parte Consolidated Fine Spinners & Weavers Ltd & Another in re Consolidated Fine Spinners & Weavers Ltd & Another v Govender and Others* (1987) 8 ILJ 97 (D)

103 NoM: p 2 – 3; prayer 2.1 read with 2.1.7.

prevent the publication of false or defamatory statements, as our courts refuse to muzzle the criticism of organs of state tasked with providing public services.

137 Secondly, the City has no right to be heard before the publication or dissemination of reports relating to Strandfontein. There is no self-standing right to be heard. Such a prior restraint would only be warranted in the clearest of cases, and in this case the City identifies no protectable interest permitting it a pre-publication hearing.

138 The exception to this is the Commission, who would owe the City an obligation under certain circumstances to hear it before publishing a report. In this instance, however, the published reports were not reports of the Commission, and the Commission has repeatedly sought to consult with the Mayor on the contents of reports prepared by the other Respondents.

139 Thirdly, and assuming that the City's claims for gag orders are cognisable in law, the City has also not shown its rights to have been breached or threatened. Although replete with allegations that the reports were "false", at no stage does the City identify what in the reports were false. Nor could it. The reports were accurate at the time they were published, and the City's own affidavits admit that the concerns raised were "addressed" by the time the City launched proceedings – a tacit admission of the validity of the concerns in the reports. Nor is there any risk the City won't be heard before the Commission publishes its own report; the Commission has repeatedly sought to engage with the City as to the reports it has received in relation to Strandfontein.

140 Fourthly, the balance of convenience is firmly against granting an interdict. There is a strong presumption against ever granting a prior restraint. And in this

case an interdict would also interfere with the Commission's constitutional and statutory obligations.

141 We elaborate on these submissions in the sub-sections below.

XV FREEDOM OF SPEECH AND INTERDICTING POLITICAL SPEECH

142 The Constitutional Court has repeatedly articulated the importance of the right to freedom of expression entrenched in section 16 of the Constitution.[104] As explained by O'Regan J:

> "Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form, and express opinions and views freely on a wide range of matters."[105]

143 Expressing and receiving opinions is, of course, central to holding the State accountable. As the Supreme Court of Appeal has noted:

> "The State, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the State do in discharge of their duties.

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104 *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre As Amicus Curiae)* 2001 (4) SA 491 (CC) at para 31; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at paras 33-7; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC) at para 20; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at para 24. As the Constitutional Court has explained: "[I]ndividuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."

105 *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at para 7.

> And the public is entitled to call on such officials, or members of Government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts, provided of course that it is warranted in the circumstances and not actuated by malice."[106]

144 Freedom of speech is central to holding government accountable. As such, discussion of political affairs is afforded a greater degree of latitude by the courts in order to encourage open and vigorous debate. As the Constitutional Court has noted:

> "Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is no bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible."[107]

145 As such, some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what government does and to hold it accountable. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: that is with the reasonable belief that the statements made are true.[108]

146 An interdict against publication constitutes a "*prior restraint*" on expression. The Constitutional Court and the Supreme Court of Appeal have endorsed the statement of the House of Lords that:

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106 *Mthembi-Mahanyele v Mail & Guardian Limited* 2004 (6) SA 329 (SCA) at para 66.

107 *Democratic Alliance v African National Congress & another* 2015 (2) SA 232 (CC) at para 133. See similarly *National Media Ltd & others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212H.

108 *Mthembi-Mahanyele v Mail & Guardian Limited* 2004 (6) SA 329 (SCA) at para 65.

"[T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice."[109]

147 Prior restraints inevitably amount to a drastic interference with freedom of expression. Consequently, an extremely strong case must be made out for an order restraining in advance a publication. As explained by the Supreme Court of Appeal in *Midi Television (Pty) Ltd t/a E-TV*:

"[19] In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

[20] Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right. And where a temporary interdict is sought, as pointed out by this Court in

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109 *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para 15 citing *Attorney-General v British Broadcasting Corporation* (1981) AC 303 (CA) at 362; confirmed by the Constitutional Court in *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 44.

Hix Networking Technologies, the ordinary rules, applied with those principles in mind, are also capable of ensuring that the freedom of the press is not unduly abridged. Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose. Where there is a risk to rights that are not capable of subsequent vindication a narrow ban might be all that is required if any ban is called for at all. It should not be assumed, in other words, that once an infringement of rights is threatened, a ban should immediately ensue, least of all a ban that goes beyond the minimum that is required to protect the threatened right."[110]

148 In this case, however, the City would have no basis to call upon the principles set out in this quotation. As we detail in the next section, municipalities, like other organs of state, have no standing to seek interdictory relief against the publication of false and defamatory statements. However, if we are incorrect, we address thereafter why the *Midi Television* requirements have not been satisfied by the City.

The city has no standing to interdict the publication of reports

149 Organs of state have no self-standing right to interdict the publication of false and defamatory statements. As such, to have standing to bring an interdict against a publication, a municipality would have to be enforcing a statutory or regulatory prohibition against that speech. The City is no exception to these principles, and must combat false and defamatory statements by contradicting

[110] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at paras 19 and 20. See also: *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at paras 44 – 46.

those statements in the market place for ideas, and not by interdicting reports intended to hold it accountable

150 In *Die Spoorbond & Another v South African Railways*,[111] the Appellate Division had to decide whether a state-owned trading entity could recover damages for defamatory comments. The Court held that it could not. Its reasoning applies with equal measure here:

150.1 Watermeyer CJ writing for the majority held that government's "reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature."

150.2 In a separate concurring judgment, Schreiner JA observed that:

"The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the State's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the State actions for defamation will be at their suit. But subject to the risk of these sanctions and to the possible further risk, to which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects' actions for

111 *Die Spoorbond & Another v South African Railways*; *Van Heerden & Others v. South African Railways* 1946 AD 999 at p 1009.

defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country."[112] (emphasis added).

151 *Die Spoorbond* was applied to municipalities by Traverso DJP in *Bitou Municipality v Booysen*.[113] To do so, the learned Judge assessed case law from a series of foreign jurisdictions on the issue and noted that:

"The underlying ratio in all these decisions (and the authorities cited therein) remains constant, namely that it will be contrary to public policy or public interest for organs of government, whether central or local, to have the right to sue for defamation, as it would impact on a citizen's right to freedom of speech. As pointed out by Lord Keith of Kinkel in the Derbyshire Country Council case at 1017J:

> 'It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism.'" (Our emphasis.)

152 Traverso DJP also endorsed the comments of McNally JA in the Zimbabwean case of *Posts and Telecommunications Corporation v Modus Publications (Pvt) Ltd*.[114] There, McNally JA held that to determine whether an organ of state could sue for defamation it was necessary to ask a series of questions including:

"Whether, if the body concerned is, at least largely or effectively, a monopoly, providing what are generally regarded as essential services traditionally

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112 At p 1012-1013. The reference to "injurious falsehoods" in the quote is a reference to the circumstances in which a state-owned trading entity is competing in a market and one of its competitors makes an injurious falsehood against it, causing it pecuniary loss. The exception would not apply in these circumstances.

113 2011 (5) SA 31 (WCC)

114 1998 (3) SA 1114 (ZS).

provided by government, it would be contrary to public policy to muzzle criticism of it."[115]

153 On this question, McNally JA held that the appellant "provides essential services which no other agency provides. It has a monopoly… Criticism should not be muzzled. It uses the peoples' money."[116]

154 These principles are all stated in the context of defamation cases but would apply with greater force to interdicts sought by municipalities. If the "chilling effect" of damages on the right to freedom of expression is sufficient to deny municipalities standing to bring a defamation claim, then there could be no scope to allow municipalities a prior restraint of false or defamatory publications, more especially when the content of the publications in question are directed at holding the municipality accountable.

155 If, however, municipalities cannot interdict the publication of false and defamatory statements in their own interest, then the City needed to bring its claim for interdictory relief against the publication of the reports on the basis of a statute or regulation which: (*i*) prohibits the speech in question; and (*ii*) affords standing to the City.

156 The City identifies no such statute or regulation in its founding or replying affidavit, or indicated why it would have standing under that statute or regulation, or why the requirements of that statute or regulation have been met. That, with respect, is the end of its claim for interdictory relief prohibiting the publication of the reports.

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115 Ibid at 1123F.

116 Ibid at 1124C.

157 For completeness, we would note that regulation 14(2) of the Alert Level 4 Regulations provides a prohibition in regard to false claims relating to COVID-19. It reads:

> "Any person who publishes any statement, through any medium, including social media, with the intention to deceive any other person about—
>
> (a) COVID-19;
>
> (b) COVID-19 infection status of any person; or
>
> (c) any measure taken by the Government to address COVID-19,
>
> commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment."

158 It is doubtful that the City would have standing to enforce this provision – the responsibility for enforcing this provision would lie with the police and the prosecuting authority.

159 However, the City has not brought itself within the ambit of this regulation. There is no evidence whatsoever on the papers that any of the respondents have "with the intention to deceive" published any of the reports. Quite to the contrary, the reports purport to reflect the respondents' *bona fide* and honest views of what has and is occurring at Strandfontein.

160 The interdictory relief against the publication of the reports should, with respect, be dismissed. The City has no standing for such interdictory relief.

The reports were accurate

161 If, however, it is held that the City does have standing to seek interdictory relief against the publication of reports, there is no factual basis to suggest that any of the respondents have published or intended to publish false reports relating to Strandfontein.

162 Interdictory relief is prospective, and the City's case must be that, in the future, the respondents intend to publish false reports in relation to Strandfontein. It is unclear on what basis the City can show such an intention, especially when regard is had to the fact that none of the previously published reports were false. Whilst much dust is created by the City in relation to media reports and tweets, the respondents have published only two previous reports, being:

162.1 the Independent Experts Report dated 11 April 2020;[117] and

162.2 the Supplementary Report dated 02 May 2020.[118]

163 Neither report contained false statements. We address each in turn.

Independent Experts Report dated 11 April 2020

164 The 11 April 2020 report was authored by a team of independent expert consultants, namely Dr Orly Stern; the Ninth Respondent; Dr Duncan Laurenson; Janice King and the Third Respondent.[119]

[117] Annexure CN17; p 348 – 404.
[118] Annexure CN19; p 405 – 465.
[119] AA: p 241 – 243; para 62 – 62.5; Annexure CN17; p 348 – 404.

165 The City complains that the report contains misinformation as well as false and distorted information pertaining to the site.[120] Curiously, the City does not identify in its affidavit which claims were made in the report that were false or distorted. The respondents and the Court are left to guess as to which allegations are apparently false and distorted.

166 The only detail regarding the alleged falsehoods contained in the report stem from a letter dated 30 April 2020 addressed to Commissioner Nissen from Executive Mayor: Dan Plato, annexed to the City's founding affidavit.[121] In the founding affidavit, the City merely refers to the letter as having being sent in response to the dissemination of the report which contained misinformation as well as false information without more.[122] It does not identify what in the letter is relevant, nor does it forewarn the respondents whether or not it intends to rely on the alleged-inaccuracies identified in that letter.

167 This is lamentable. As explained in Swissbourgh Diamond Mines (Pty) Ltd v Government of the Republic of South Africa:[123]

> "Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."

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120 FA: p 38, para 141; p 42; para 158.
121 FA: p 38; para 141; Annexure RGB18; p 149 – 151.
122 FA: p 38, para 141.
123 1999 (2) SA 279 (T) at 324F-H.

168 On this basis alone, the Court should respectfully conclude that no case was made out in the founding affidavit that the 11 April 2020 report contained false claims.

169 To the extent that the Court is minded to consider the issue, we would note what Mayer Plato's letter placed at issue, namely:

> "the use of rubber bullets amongst other false claims, whereas this equipment is not even carried by Law Enforcement.
>
> claims of the incarceration of individuals at the facility, whereas people have not been held against their will as evidenced by fluctuating numbers on-site for various reasons, including personal choice and the reintegration efforts of the City and NGO partners;
>
> a series of false claims about services at the facility that are, at best outdated and related to early set-up challenges experienced in on metros, and at worst outright deliberate distortions of the true standard of care at the facility.
>
> misrepresentation of the standard of medical care at the facility, whereas over 800 homeless people have benefited from the diagnosis of chronic conditions, such as diabetes or hypertension, that would otherwise have gone unchecked on the streets."124

170 However, an assessment of the 11 April 2020 report shows that it does not make any such false allegations:

170.1 In the report, the authors provide recommendations that the Commission should investigate inter alia the "use of intimidation, threats or force deployed by SAPS, Law enforcement and Private Security in any of the alleged violations in pts. 1-4, including physical man-

124 Annexure RGB18; p 149.

handling, rubber bullets, tear gas, and batons".[125] This is the context in which "the use of rubber bullets" by Law Enforcement appears in the report. There is no statement whatsoever that Law Enforcement is using rubber bullets, but only an indication that this should be investigated when investigating the complaints of identified in paragraphs 1 to 4 above it.

170.2 Similarly, the reference to "claims of incarceration" appears in the report with reference to the recommendation that an investigation should be conducted "into Street-based people's reports of 'incarceration' at Strandfontein and being kept against their will."126 In this regard, the authors stated that they have received reports from those accommodated at the site and have included that feedback into the report. This is evident from the report which provides that "the narrative expressed is that of being in a prison, against people's will and without consent. It's a lock-down in the sense of incarceration not in the sense of medical and health safety".127

170.3 As to the suggestion that the report makes "false claims" about the standard of services – Mayor Plato does not identify what the standard of services actually was, or in what respects the report was inaccurate. We cannot sensibly answer this allegation without such particularity.

170.4 Similarly, Mayor Plato does not identify in what respects the report inaccurately reports on the standard of medical care available at

125 Annexure CN17; p 351 – 353.
126 Annexure CN17; p 351 – 353.
127 Annexure CN17; p 389.

Strandfontein. So too, we cannot answer this allegation without proper particularity.

171 Contradicting, indeed, the suggestion of inaccuracy in the 11 April 2020 report is the admission in the founding affidavit that "most, if not all the issues raised in the report have been addressed and are no longer in issue".128 This statement is a candid acknowledgment of the veracity of the contents of the report, at least on the date when it was authored.

172 It is apparent that the allegations of falsehoods and misinformation in the 11 April 2020 report are misconceived and without merit.

Supplementary Report dated 02 May 2020

173 The City complains in its replying affidavit that the report dated 02 May 2020 contains several inaccuracies.129 Although promising to identify those inaccuracies "below", the replying affidavit never does so expressly, and the reader is left guessing as to what those inaccuracies were.

174 We emphasize the failure to identify the inaccuracies in the 02 May 2020 report for this reason. Both the founding affidavit and the replying affidavit attempt to describe Strandfontein only at its very best – once the City has made commendable efforts to improve conditions at the site. The affidavits do not explain how the conditions in Strandfontein changed over time. As such, claims which were true as at 11 April 2020, or 02 May 2020, might no longer have been true by the date the founding affidavit was deposed to, by the date of the

128 FA: p 36; para 131.

129 RA: p 686; para 7.22. The City incorrectly refers to the report as dated 01 May 2020.

replying affidavit, or by the date of hearing. Regrettably, the City has not taken in the Court into its confidence and explained which allegations in the reports were true as at the date of publication but were no longer true by date of launching this application. Because the affidavits have been deposed to without indicating differences over time, it is impossible to compare the contents of the applicant's affidavits against the 02 May 2020 and 11 April 2020 reports to see which findings in the reports were false when the reports were published, if any.

175 It is, however, clear that the 02 May 2020 report was accurate. The 02 May 2020 report is a Supplementary Report which provides updated information since the 11 April 2020 report. It is authored by the Fifth, Eighth, Tenth and Eleventh Respondents. The findings are based on ethnographic observations and interviews at the Mowbray Terminus on 7 April 2020 as well as at the Strandfontein site on 18, 21, 22, 23rd and 30th April 2020. Of particular importance, the information contained in the report is supported by photographic evidence taken by the authors of the report.130

176 Notwithstanding the City's allegations of inaccuracies in the replying affidavit, it is apparent that the Supplementary Report raises questions regarding the accuracy of the allegations by the City in relation to the necessary health measures it claims to have put in place. The Supplementary Report details the non-compliance with the applicable health standards and protocols regarding social distancing to prevent the spread of COVID-19.131 There is significant disjuncture between the findings of the monitors and independent experts in their reports and the allegations of the City. Notably, the Commission invited

130 Annexure CN19; p 405 – 465.
131 AA: p 249; para 83.

the City to deal with the detailed and serious findings of the Eighth Respondent contained in the Supplementary Report.[132] The City's failure to do so is telling.[133]

Conclusion in respect of the reports

177 There is no evidence to suggest that the Respondents have published any reports that are false, or that they intend to publish false reports in the future. On this basis alone, the City has not established any reasonable apprehension that, in the future, the Respondents will publish false reports. On this ground alone, the interdictory relief stands to be dismissed.

The balance of convenience

178 The balance of convenience is also firmly against granting any interdicts in relation to the publication of reports by the respondents. We have addressed above the strong countervailing interest held by the Respondents in their freedom of speech. The right or interest that the interdict is intended to and will in fact protect would have to be compelling to overcome the Respondents', and the public's interest in publishing reports on Strandfontein.

179 We would stress the importance of the reports produced to date by some of the respondents. Whether true or not, the reports were directed at monitoring and commenting on government's response to the COVID-19 pandemic. Providing the public with independent and external reports of what is occurring at

[132] AA: p 269; para 91;
[133] RA: p 714 & 723; para 152 & 203.

Strandfontein and providing the public with information as to the conditions at the Strandfontein site can neither be gainsaid nor over-emphasised.

180 It is difficult to imagine a more important issue upon which there should be transparent, independent and public discussion than what is occurring in a government-run temporary accommodation and medical facility in the middle of the worst pandemic seen in South Africa since the Spanish flu. This is especially the case given that the camp is intended to serve homeless people and street-based people, a community that is particularly vulnerable to governmental and societal neglect.

181 If the City wishes to contest the contents of those reports, and future reports, it is free to do so by publishing its own reports and media releases. Members of the public can then draw their own conclusions as to the veracity of the City's accounts as against the accounts detailed in the respondents' reports. Transparency, not censorship, is what is required to build faith in the City's measures to combat COVID-19.

182 Perhaps, indeed, some community members or organisations might bring suits against the government to improve conditions at the site. The City laments these suits, and suggests they are without basis – that, however, is to be determined in those proceedings. Litigation by members of the public should be expected in any constitutional democracy, especially when the government and civil society are grappling with an unprecedented health and safety crisis.

183 The evidence in the present case suggests that the publication and dissemination of the reports have encouraged the City "to refine its response in respect of the unique challenges posed by the current situation for homeless

persons on an almost daily basis".134 This is borne out by the City's concession that "most, if not all" the issues raised in the report dated 11 April 2020 have (as of 05 May 2020, being the date on which the founding affidavit was deposed) been addressed and are no longer in issue.135

184 The point however is that the issues identified in the reports existed at some point and were accurately reported on in the public interest. The Commission has explained in this regard that because the vulnerability of dire residents, the changes and constantly evolving response by the City in its operation of the site must be subject to ongoing monitoring and reporting in accordance with the constitutional mandate of the Commission.136

Opportunity for comment before publication and dissemination

185 The City contends that it is entitled to comment on reports concerning the conditions at the site before publication and/or dissemination. It cites no statutory or common law entitlement to such a claim in its founding or replying affidavits. Nor could it. As we discuss in this section, there is no general right to pre-publication comment, nor does the City have such claim against the Commission in the present circumstances.

186 It is, of course, ordinarily good journalistic ethic to allow those adversely reported on to comment on allegations that are to be published. Indeed, a newspaper may battle to claim the reasonable publication (Bogoshi) defence or similar defence in the absence of having afforded the affected person the

134 FA: p 18; para 43.
135 FA: p 36; para 131.
136 AA: p 248; para 80.

opportunity to comment. However, this principle is not immutable. As explained by the Supreme Court of Appeal: “in cases where information is crucial to the public, and is urgent, it may be justifiable to publish without giving an opportunity to comment.”137

187 As explained in in Positioning Corporate Underwriters & Insurance Consultants (Pty) Ltd v Mail & Guardian,138 a person does not per se have a right to obtain prior-publication copy of the material which is to be published about it. This would amount to censorship, which was subversive of the very ethos of the constitutional values of freedom of expression and the public’s right to receive information.

188 The respondents were and remain free to publish and disseminate reports about Strandfontein without giving the City an opportunity to comment on the reports prior to their publication.

189 The position is no different in relation to the Commission. The Commission might, when investigating human rights abuses, owe an obligation to hear those persons in relation to whom it is considering publishing an adverse report before publishing the report. The obligation would arise either from the Promotion of Administrative Justice Act, 3 of 2000 or from the principle of legality, and the requirement that a rational process may in certain circumstances require affording affected persons a hearing. Whether these rights to a prior hearing would apply to an organ of state is unclear given that PAJA does not vest the state with rights.

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137 *Mthembi-Mahanyele v Mail & Guardian Limited* 2004 (6) SA 329 (SCA) at para 67.

138 *Positioning Corporate Underwriters & Insurance Consultants (Pty) Ltd v Mail & Guardian* 2005 (6) SA 394 (T) at 396B-D.

190 We also say that the Commission "might" be required to afford the City a right to be heard before publishing its own report only because the requirement of giving a hearing before making a decision is not immutable in administrative law. Urgent or exigent circumstances (and the conditions in Strandfontein would certainly meet this threshold) may allow decision makers to make decisions before affording the affected person a hearing.139

191 However, in this instance, the debate is moot for a series of reasons:

191.1 Firstly, the reports published to date have not been reports of the Commission but of the respondents or organisations associated with the respondents. The reports giving rise to the City's complaints do not constitute formal investigative reports in terms of sections 13 and 15 of the SAHRC Act.140

191.2 Secondly, the Independent Expert Report was never intended to be an official Commission Report for external circulation141 and was never released under the auspices of the Commission.142

191.3 Thirdly, the Commission has made repeated efforts to consult with the City on the content of the 11 April 2020 report but received no answer.143 The City disputes receiving those requests, although tenders no affidavit by Mayor Plato to whom the reports were sent. Nevertheless, this anomaly needn't be decided – the Commission has

139 See the discussion in Hoexter *Administrative Law in South Africa* Juta p 384-385.
140 AA: p 276; para 113.
141 AA: p 276; para 115.
142 AA: p 277; para 119.
143 AA: p 276 – 277; para 113 & 117; Annexure CN21; p 468 – 469.

made plain its intention to consult the City before publishing its own reports, which may or may not rely upon the contents of the 11 April 2020 and 1 May 2020 reports.

192 As such, the City has no right to be consulted by the respondents prior to the publication of reports. With respect to the Commission, the Commission has attempted to consult with the City and has, to date, not published any reports concerning Strandfontein without consulting the City.

193 In both cases, there is no basis for an interdict directing any of the respondents to consult with the City before publishing a report.

XVI CONCLUSION AND COSTS

194 We submit that the City has failed to establish the requirements for an interdict, whether interim or final, in the terms sought in its notice of motion. The application must accordingly be dismissed.

195 The City has sought interdicts against all the respondents, including the CEO of the Commission, in circumstances where it would have been clear to the City that there was simply no basis in law for the wide-ranging relief sought in the notice of motion to be granted against all the respondents.

196 The City's affidavits furthermore contain unfounded, defamatory and scurrilous allegations against the individual monitors including allegations of criminal conduct. A number of these allegations for example those made against the ninth respondent and the third respondent, are on the City's own version, demonstrably false.

197 For these reasons, and while it is so that the Commission is an organ of state, we submit that it would be appropriate and as a mark of disapproval for the City's conduct, that the City be ordered to pay the Commission's costs.

N ARENDSE SC

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