IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 5809/2020

In the matter between:

SINAZO JORDAN	1st Applicant
BARBARA VUZO	2nd Applicant
COMMUNITY CHEST, WESTERN CAPE	3rd Applicant

and

CITY OF CAPE TOWN	1st Respondent
MINISTER OF POLICE	2nd Respondent

Date of hearing: 27 July 2020 and 17 August 2020

Date of Judgment: 06 October 2020

JUDGMENT

INTRODUCTION

[1] Singabalapha is a small informal settlement which was established during October 2019 in Observatory, Cape Town on a grass area in front of a vacant building which

previously housed an old age home. The members of the Singabalapha community ("the residents") previously occupied the said building until they were evicted on 2 October 2019. The settlement consists largely of tents and other informal structures.

[2] After visits from law enforcement officials from the first respondent, the City of Cape Town ("the City"), over two consecutive days during May 2020, the applicants approached the court on an urgent basis on 20 May 2020, seeking relief as follows:

> "2 That *a Rule nisi be issued calling on the Respondents to show cause on* ***WEDNESDAY 3 JUNE 2020*** *why the following order should not be made final:*
>
> *2.1 the Respondents are interdicted and restrained from –*
>
> *2.1.1 enforcing or further prosecuting the compliance notices and / or fines issued to the First and Second Applicants (and the other residents of Singabalapha Informal Settlement situated at 414 Main Road, Observatory, Cape Town ("the Property"), and other persons who may not be cited herein) pursuant to –*
>
> *2.1.1.1 the By-Law Relating to Streets, Public Places and the Prevention of Noise Nuisances (Provincial Gazette 6469 of 2007); and*
>
> *2.1.1.2 the Integrated Waste Management By-Law 2009 (Provincial Gazette 6651 of 2009);*
>
> ***("the By-Laws")***
>
> *2.1.2 interfering with or confiscating the personal property and belongings of the First and Second Applicants (and the other residents of Singabalapha, and other persons who may not be cited herein) in ostensible reliance on the By-Laws; and*

2.1.3 harassing or abusing the First and Second Applicants (and the other residents of Singabalapha, and other persons who may not be cited herein) in ostensible reliance on the By-Laws;

2.1.4 evicting or removing the First and Second Applicants (and the other residents of Singabalapha, and other persons who may not be cited herein) from the Property in ostensible reliance on the By-Laws, and without an order of court.

2. That paragraph 2.1 above, and the subparagraphs thereto, shall operate as an interim interdict with immediate effect until the final determination of this matter."

[3] Henney J, who was on urgent duty, conducted an on-line hearing and granted the following relief:

"1. That a rule nisi calling on the Respondents to show cause on ***WEDNESDAY, 3 JUNE 2020*** *why the following order should not be made final:*

1.1 the Respondents are interdicted and restrained from –

1.1.1 interfering with or confiscating the personal property and belongings of First and Second Applicants (and the other residents of Singabalapha Informal Settlement situated at 414 Main Road, Observatory, Cape Town ("the Property"), and other persons who may not be cited herein); and

1.1.2 harassing or abusing the First and Second Applicants (and the other residents of Singabalapha, and other persons who may not be cited herein);

1.1.3 evicting or removing the First and Second Applicants (and the other residents of Singabalapha, and other persons who may not be cited herein) from the Property without an order of court.

2. That paragraph 1.1. above, and the subparagraphs thereto, shall operate as an interim interdict with immediate effect until the final determination of this matter."

[4] It is the interim relief granted by Henney J which the applicants now seek to be made final.

[5] The first and second applicants are residents of Singabalapha and brought the application in their own names, and the first applicant also on behalf of the other residents of the informal settlement. The third applicant, the Community Chest, Western Cape is a voluntary association which has been providing support and services to the residents of Singabalapha since October 2019.

[6] Besides the City, the Minister of Police ("the Minister") is also cited, as the second respondent, but I understand that the relief sought is principally against the City. According to the first applicant, she did not observe any police officers involved in any harassment or manhandling of the residents when the City's law enforcement officials attended Singabalapha during May 2020, but she was told there were some police vehicles on the scene during the operations. The Minister is cited as he might have an interest in the matter, but he did not participate in these proceedings.

BACKGROUND

[7] The Singabalapha informal settlement was formed after the occupiers of the Arcadia Old Age Home were evicted. They erected tents and other informal structures on a large grass area in front of the building from which they were evicted and have been living there ever since. The 30 – 35 residents are mostly unemployed with no alternative accommodation (there appear to be some uncertainty about the exact number of residence, as annexure "SJ1", to the founding affidavit which is a list headed "Singabalapha Food Parcel List", lists 60 persons, but this figure may include children whereas other figures mentioned in the papers may not).

[8] On 16 and 19 March 2020, law enforcement officers from the City visited the informal settlement to hand out compliance notices in terms of the By-Law Relating to Streets, Public Places and the Prevention of Noise Nuisances ("the streets by-laws"). The residents were told that they were in contravention of the streets by-law, and they were requested to ensure compliance, failing which the City would return to take further action. On 19 March 2020, evictions were prohibited in terms of the initial "Regulations relating to Covid-19", which were published on 18 March 2020.

[9] On either 7 or 8 April 2020, after a state of disaster was declared by our President in terms of section 23 of the Disaster Management Act 57 of 2002 as a result of the

world-wide Covid-19 pandemic, the City's law enforcement officers visited the informal settlement again.

[10] According to the first applicant, the law enforcement officials visited the settlement to transport the residents to a temporary shelter for homeless people which had been set up in Strandfontein. The residents refused to move to Strandfontein.

[11] Fearing an imminent eviction, the applicants approached the Legal Resources Centre ("the LRC") for legal assistance. On 11 April, the LRC addressed a letter to the City on behalf of the residents of Singabalapha, noting that a court order was not in place for their eviction and requested an undertaking from the City that the residents would not be evicted or forcibly moved during the lockdown period.

[12] The following day, on 12 April 2020, the City responded to the LRC, advising the City's Displaced People Unit ("the DPU") was aware of homeless people in the vicinity of Observatory Main Road, that moving to Strandfontein was voluntary, that the City would never forcefully relocate individuals against their will and that there was no planned operation to that effect. The first applicant avers that she understood this to mean that they were safe from eviction.

[13] However, on 19 May 2020, members of the DPU arrived at the informal settlement in the early hours of the morning whilst people were still sleeping. The City may have been enthused to take the action as it was wrongly under the impression that 91 complaints

were received in respect of the settlement which was recorded on its Epic system a platform on which all complaints are recorded. A spreadsheet annexed to the answering papers listed such complaints, but on a closer inspection, it appears that only one of the listed complaints relates to 414 Main Road, Observatory, which is the address where Singabalapha is situated.

[14] I pause to mention that on 19 and 20 May, our country was on Alert Level 4 in terms of regulations published on 29 April 2020, and in terms of which evictions were allowed by a court order in terms of PIE, provided that any order of eviction was to be stayed and suspended until the last day of Alert Level 4, unless a court decided that it was not just an equitable to stay and suspend the order.

[15] On their arrival at the site on 19 May 2020, the officers woke the residence up and engaged with persons who identified themselves as leaders of the settlement. Senior Inspector Mbane ("Mbane") of the DPU who headed up the operation explained to them that their occupation of the area was in contravention of the streets by-law and that the purpose of the visit was to issue the residence with compliance notices. Other officers also explained the purpose of the compliance notices and that the City would return the following day to issue fines and notices to appear in court.

[16] According to Mr Richard Gavin Bosman ("Bosman") who deposed to the answering affidavit on behalf of the City, the DPU was on site for approximately two hours that day and left after the residents became increasingly agitated.

[17] On 20 May 2020, the DPU conducted a follow-up operation at the site. Bosman first claimed in his answering affidavit that the DPU operation utilised 13 vehicles, including 1 SAPS vehicle and 4 Metro Police sedans, but later, in the same affidavit conceded that the number of vehicles were in fact 24 as recorded by Mr Tauriq Jenkins, a monitor from the South African Human Rights Commission who was on the scene on 20 May 2020.

[18] There is much disagreement on the conduct of the parties who engaged each other on 19 and 20 May 2020. Some of the interaction was captured on video by an officer of the Metro Police video unit. The video recording was made available and both parties relied thereon. On the morning of 19 May 2020, the initial briefing of the law enforcement officers was captured, and thereafter some of the interaction between the officers and members of the residents. It is not clear from the video recording that any compliance notices were issued.

[19] On 20 May 2020, the video recording shows long interaction between members of the community and the law enforcement officers and, who explained their purpose of them being there, namely to issue section 56 notices on the residents. At some stages, these interactions became heated and one of the male residents was detained He initially offered resistance and was handcuffed and placed in one of the law enforcement vehicles.

[20] What is common cause as having transpired on 20 May 2020, is that the DPU issued various residents with notices in terms of section 56 of the Criminal Procedures Act, 1977 ("the CPA"), which constitutes fines and a notice for them to appear in court on a certain

THE APPLICATION TO STRIKE OUT

[23] As already stated, the City brought an extensive application to strike out a number of averments in the applicants' relying affidavits, including an annexure thereto and a number of confirmatory affidavits on the basis that these either constitute new matter or that they are scandalous, vexatious or irrelevant in terms of Rule 6(15) of the Uniform Rules of Court.

[24] As for the application for the striking out of new matter raised in the replying papers, the general rule is that *"applicants must stand or fall by their founding papers"*, a dictum that was endorsed by the Constitutional Court in **Pilane and another v Pilane and another** 2013 (4) BCLR 431 CC. This general rule, however is not absolute and can be moderated or diverted from by the court in the exercise of its discretion. In **Mostert v FirstRand Bank** 2018 (4) SA 443 (SCA), it was held, per Van der Merwe JA at 448 at para [13] as follows:

> *"It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an appellant will not be permitted to make or supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit. See the oft-quoted dictum in* ***Shepard v Tucker Land and Development Corporation (Pty) Ltd (1)*** *1978 (1) SA 173 W at 177G – 178A and the judgment of this court in* ***Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others***

date if they wanted to dispute that they were guilty of contravening the relevant provision of the street by-laws as recorded on the section 56 notice. The male resident who was detained for refusal to provide his name, was later released. The second applicant was also apprehended to be detained, but decided to cooperate, albeit under duress according to her.

THE VARIOUS APPEARANCES

[21] After the interim order was granted by Henney J on 20 May 2020, further papers were filed. The matter was postponed on various occasions for different reasons, and first appeared before me on 27 July 2020. By then, the applicants had filed their replying papers, which consisted of a detailed affidavit by the first applicant as well as several confirmatory affidavits. This prompted the respondent to bring an application to strike out several averments in the replying papers as per a notice dated 12 June 2020.

[22] When the matter appeared before me on 27 July 2020, I considered the application to strike out, which was a substantial opposed application. Of the numerous items which the City sought to be struck out (over 30 in number), I struck out 4 and granted the City leave to respond to those items that were not struck out. The matter was accordingly postponed for the filing of further papers and to be heard on 17 August 2020.

2013 (2) SA 204 (SCA) ([2012] ZASCA 49 para 26. In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in an manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs."

[25] In **Drift Supersand (Pty) Ltd v Mogale City Local Municipality** (1185/2016) [2017] ZACSA 118 (22 September 2017), (2017) 4 All SA 624 (SCA), it was held by Leach J at para [10] that:

"...not only must a court exercise practical, common sense in regard to striking out applications but there is today a tendency to permit greater flexibility that may previously have been the case to admit further evidence in reply. Consequently, as stated in ***Nkengana*** *[**Nkengana & another v Schnetler & another** [2010] ZACSA 64]; [2011] 1 All SA 272 (SCA) para 10], 'if new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding affidavit in order to set out a cause of action, the court will refuse an application to strike out."*

[26] I have considered the items which the City sought to have struck out on the basis that it constitutes new material, in the light of the above development to be flexible and to rather refuse to strike out material that is relevant and would assist this court, at the same time also considering prejudice that the City might suffer if the items were not struck out.

[27] Ms Titus, who appeared on behalf of the applicants correctly pointed out in her argument that much of what the City sought to be struck out from the first applicant's replying affidavit are in response to what she refers to as "sweeping statements" made in the City's answering papers, namely that the City does not engage in the confiscation or removal of personal property of any person, does not engage in the harassment, abuse or threatening of any person and does not evict or remove any person including in reliance of the street by-laws.

[28] Considering the items which the City sought to be removed, it is also clear that they are germane to important issues raised in this matter and which may be vital in the outcome, such as the question whether the City beheld the residents as homeless or as occupiers. From the papers it is clear that the City now regards them as occupiers, but it was not clear that the City did so before this application was launched, an issue which may have had an influence on how the City dealt with the applicants.

[29] Some of the items also relate to the interaction between the members of the DPU and the community and the allegations of aggression or force used. I am of the view that this interaction is very relevant for consideration whether the relief sought should be granted or not.

[30] In exercising my discretion, I refused to strike out the items in the first applicant's replying affidavit, save for paragraph 21.6 and annexure "SJ9", which is referred to in that paragraph, on the basis that it relates to another matter which should not have a bearing on the current one.

[31] As for the items which the City sought to have struck out from the replying affidavit of Khululekile Banzi, I struck out the first sentence in paragraph 6, which seem to imply that the deponent has much experience in dealing with the City's law enforcement officials, without a basis having been laid to give such evidence. As for the rest of the items in Mr Banzi's affidavit, these are not new matters raised at all. It relates to the allegation of how the members of the DPU dealt with the residence when they visited the area during May and the issue relating to the question whether Singabalapha is in fact an informal settlement. The items also relate to, and are in response to, the so-called sweeping statements in the City's answering papers discussed above. The City also sought to have seven confirmatory affidavits to Mr Banzi's affidavit struck out, which, in the exercise of my discretion, I declined to strike out. I now deal with the items which the City sought to have struck out in terms of Rule 6(15), which provides that:

> *"The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate order as to costs, including costs between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted"*

[32] In order for the court to strike any matter out in terms of Rule 6(15), it is clear that two requirements must be satisfied, namely, firstly that the matter sought to be struck out must be scandalous, vexatious or irrelevant, and secondly that the party seeking the matter to be struck out will be prejudiced if the relief is not granted (see **Beinash v Wixley** 1997 (3) SA

721 SCA at 732 I – 733 B). What is clear further is that the court has a discretion, which of course must be judiciously exercised, to grant the relief sought or not.

[33] The City sought to have 7 items struck out from the first applicant's replying affidavit on the basis that they are scandalous, vexatious and in addition irrelevant and consequently prejudicial to it. Besides paragraph 115 of the replying affidavit, which likens the views of the City as "*akin to the views of autocratic despots who do not tolerate dissent from their subjects*", I do not consider any of these items to be either scandalous or vexatious, and they are certainly not irrelevant.

[34] After handing down my order on the striking out application, even though it was not necessary, but in abundance of caution to grant a fair hearing to the City, I postponed the matter for the City to file further papers responding to any of the items which were not struck out. There can therefore be no prejudice to complain of. In any event, the issues in the items complained about was extensively covered on the papers already. These issues were subsequently dealt with in detail during argument. The City was not prejudiced in the refusal to strike out the impugned items.

[35] As already mentioned, the striking out application was substantial and it is apposite to deal with costs on this application separately. Both the applicants as well as the City were partially successful, but the applicants unquestionably and substantially more so. Those items that were struck out would in any event, not have made any difference to the

outcome of this matter, if they had remained. I the result, I am of the view that the City should bear the cost of the application to strike out.

EVALUATION OF THE EVIDENCE

[36] In accordance with the **Plascon-Evans** principle, it is trite that in motion proceedings, where there are disputes of fact, and there are no referral of such disputed issues to oral evidence, a final order can only be granted if the facts averred by the applicants and admitted by the respondents, together with facts averred by the latter, justify such order. This is so unless the respondents' version consists of bald or uncreditworthy denials, raises fictitious dispute of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers - see ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A).

[37] In ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) the rationale for the *Plascon-Evans* principle was explained as follows (at p 290, para 26):

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on affidavit, a final order can be granted only if the facts averred by the applicant's*

> *(Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

[38] Ms Adhikari, who appeared on behalf of the City contends that there are disputes of fact which cannot be resolved on the papers. In my view, however, the disputes of fact are limited to the nature of the interaction between the DPU officials and the residents on especially 19 and 20 May (but also on the other dates when the DPU attended Singabalapha), whether there were direct threats of eviction or confiscation of personal belongings, whether any of the residents were physically manhandled, whether there was any form of physical or verbal aggression by the DPU officers on the residents and the time of arrival of the DPU on the two days in question.

[39] The extent of aggression used to wake up the residents by the DPU officers when they arrived at the site on 19 May 2019 is in dispute. The first applicant says they were shouted at and the officers were banging on their structures. Bosman, however, in his answering affidavit says that the officers did not bang on their structures or harass any person to wake them. Instead, on their arrival at approximately 06h30, *"the DPU officers, the officers walked to the tents and structures in which the occupiers were sleeping and alerted them to their presence both verbally and by tapping on the tents and structures to alert them."* I must add

that the video evidence shows no serious aggression on the part of the law enforcement officers on 19 May 2020.

[40] In terms of the Plascon Evans rule, I have to accept the version of the first applicant on the above, but at the same time must opine that it could have been no pleasant experience for the residence, who were sleeping, to be woken up at that early hour of the morning by the law enforcement officers.

The DPU and the streets by-law

[41] It is clear from the papers before me that during the operations of the DPU at Singabalapha, the DPU officers purported to act in terms of the streets by-law. Throughout the papers filed by the City, it is maintained that they wanted to issue compliance noticed and/or notices in terms of section 56 of the CPA. In doing so, all the indications are that the DPU and by implication, the City, treated the residents not as unlawful occupiers (as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1988 ("PIE")). It is only when the City's answering papers were filed that there emerged an indication that the City regards the residents as occupiers and not as homeless persons.

[42] I say that the City treated the residents as homeless for the following reasons:

42.1 The City engaged the DPU to deal with the residents of Singabalapha. Bosman himself explains that the DPU is specifically trained in the enforcement of the streets by-law. He further states that *"[t]he DPU investigates instances of people living in the streets and ostensibly contravening the Streets By-law within the City's jurisdiction."* This statement accords with the name carried by the DPU, the Displaced Peoples' Unit which was previously called "the Vagrancy Unit".

42.2 On 10 April 2020, the DPU attended the settlement and advised the residents that they could voluntarily relocate to Strandfontein. The Strandfontein temporary site was specifically set up to accommodate homeless people during the period of the state of disaster that was declared as a result of the Covid-19 pandemic and the resultant lockdown.

42.3 The nature of the compliance notices and section 56 notices are redolent of the residents having been treated by the City as homeless as opposed to occupiers. I shall deal with these notices more fully below.

[43] Section 22 of the streets by-laws authorises the City to issue compliance notices to alleged transgressors of such by-laws. In this regard, it provides:

"Notwithstanding any other provisions of this by-law, the City may –

(a)...

(b) where any provision of this By-Law is contravened under circumstances in which the contravention may be terminated by the removal of any structures, object, material or substance, serve a written notice of the owner of the premises or the offender, as the case may be, to terminate such contravention, or to remove the structure, object, material or substance, or to take such other steps as the City may require to rectify such contravention within the period stated in such notice."

[44] In relation to the operation conducted by the DPU during May 2020, Bosman confirms in paragraph 40 of his answering affidavit that compliance notices are issued in terms of section 22 (1) (b) of the street by-laws, and he explains its purpose in paragraph 41 as follows:

"The effect of the compliance notice is: (a) to inform the individual concerned of the specific provisions in the Streets By-law that they are in breach of; (b) to direct the individual to terminate the contravention; (c) to advise the individual that upon failure to terminate the contravention, the City may take certain enforcement measures; and (d) that the individual may, within seven days from the receipt of the compliance notice, make representation in writing to the Assistant Chief: Law Enforcement Services in respect of the compliance notice."

[45] None of the compliance notices which were served on any resident dated 19 May 2020 is attached to the papers. The compliance notice attached is one which was served on the first applicant dated 16 March 2020. This notice is not specific, but rather wide-ranging,

including transgressions relating to the blocking, occupying or reserving a public parking space, begging, sitting or lying in a public space, failing to comply with a lawful instruction from a peace officer, starting or keeping a fire in an area not designated for such purpose, sleeping overnight or erecting a shelter in an area not designated for such purpose, etc.

[46] The first applicant did confirm that a compliance notice was handed to her on 19 May 2020. What is clear, is that the residents were given no opportunity to make representations within seven days from the receipt of the notice in accordance with the purpose of the notice as explained by Bosman. Instead, the DPU attended the site again on the following day of 20 May 2020 to hand out section 56 notices.

[47] The section 56 notices were issued without any regard to the specific facts of each resident or his or her tent or structure. Instead, the section 56 notices are of a generic nature or a "one-size-fits-all" as stated by the first applicant. The residents were also told by Mbane, who headed the operation during May 2020, in the same generic tenor, that their occupation of the area was in contravention of the street by-laws and that the purpose of the operation on 19 May 2020 was to issue them with compliance notices.

[48] It is common cause that a third day of the May 2020 operations was planned. During the briefing session which was held with the City's law enforcement officers on the morning of 19 May 2020, the briefing officer is reported to have advised the other officers as

follows (the quote is verbatim from an informal transcription which was provided by the applicants, and on which both the applicants and the City relied during argument):

> *"Please guys, let's not fight with those people, let come there, do our jobs, professionally, even [if] he doesn't want to cooperate, its fine, we will come back, this is phase one of this notice. Tomorrow it's gonna be 56 and on the third day, we go do what is necessary we gonna do..."* (my underlining).

[49] In paragraph 52 of Bosman's further affidavit dated 4 August 2020, which was filed after leave was granted for the City to respond to those items which were not struck out, he states:

> *"A third day of the operation at Singabalapha would only have been undertaken if the residents or certain of the residents either vacated the property voluntarily or indicated that they wished to be relocated. In that event, the City would have implemented the necessary steps depending on what the residents had indicated to the DPU. This may have included assistance to relocate, removal and cleaning up of abandoned items, referral to social workers, etc."*

[50] Bosman did not give the above explanation of what was to transpire on the third day of the May operation in his initial answering affidavit. Instead, in answer to the first applicant's allegation that they were told on 20 May 2020 that if they did not leave the property, they, ie the DPU, would come back the next day to evict them, Bosman's response was a bare denial.

[51] Bosman's explanation does not assist the cause of the City at all. The explanation only gives credence to the argument that the whole purpose of the operation was to harass the residents to an extent that they would move on their own accord, without a physical eviction. The explanation certainly seem to imply that there was an expectation that at least some of the residents would comply by moving away from the settlement.

[52] It is necessary to deal with the section 56 notices. The one which was served on the first applicant required her to pay an admission of guilt fine of R300.00, failing which she had to appear in court on 30 August 2020. The hand written charge on the notice reads *"STREET MAKESHIFT STRUCTURE IN PUBLIC PLACE"*. There is also a reference to the charge as "GP 6469/sec 2(1)(A)(1) RW se 24 (sic)". It is obvious that the reference "GP6469" is a reference to the Provincial Gazette in which the street by-law was published, and the alleged transgression is in fact in terms of section 2(1)(a)(i), read with section 22 and not 24, the latter section dealing with the repeal of by-laws and the former with the situation including *"where any provision of the bylaw is contravened under circumstances in which the contravention may be terminated by the removal of any such structure, object, material or substance, serve a written notice on the owner of the premises or the offender, as the case may be, to terminate such contravention, or to remove the structure, object, material or substance, or to take such other steps as the City may require to rectify such contravention within the period stated in such notice."*

[53] Section 2 of the streets by-law lists prohibited behaviour and section 2(1)(a)(i), with which the first applicant was charged, provides:

> *"(1) No person, excluding a peace officer or any other official or person acting in terms of the law shall –*
>
> *(a) when in a public place -*
>
> *(i) intentionally block or interfere with the safe or free passage of a pedestrian or motor vehicle..."*

[54] The definition of "public space" in the street by-laws includes;

> *"(b) any parking area, square, park, recreation ground, sports ground, sanitary lane, open space, beach, shopping centre and municipal land, unused or vacant municipal land or cemetery which has –*
>
> *(i) ...*
>
> *(ii) at any time been dedicated to the public."*

[55] The exact nature of the transgression allegedly committed by the residents remain obfuscated, both in what has been explained to them, and what is contained in the compliance notice and section 56 notice which are part of the record.

[56] The charge relating to street makeshift structures in a public place is strange, given that informal settlements are specifically excluded by section 2(3)(m) of the streets by-law – I deal with this below.

[57] In paragraph 55 of his answering affidavit, Bosman explains that during the March 2020 operation at Singabalapha, it was explained to the residents that *"they were in contravention of the Streets By-laws as their structures and daily activities such as washing, cooking etc obstruct the public grass verges and sidewalks. They were requested to ensure that they complied and were issued with compliance notices."* Later, in paragraph 84 of the same affidavit, in dealing with the May operation at the site, Bosman explains that Mbane *"explained to [the residents] the reason that these notices were being issued was because the occupiers were in violation of the provisions of the Street By-laws..."*

[58] Certainly for the residents, it was uncertain exactly what provisions of the street by-laws they were alleged to have transgressed. The one compliance notice attached to the papers are general and vague, and the section 56 notice merely refers to street makeshift structures in a public space, besides the incorrect reference to GP 6469/sec 2(1)(A)(1) RW se 24.

[59] To the extent that the City alleges that the "makeshift structures" block a public space or pedestrian pathway, none of the photographs or the video evidence which forms part of the record indicate that this is indeed so. On the contrary, the photographs and video recording show tents/structures erected on a grass area beyond a pedestrian sidewalk, without blocking the latter.

[60] It is necessary to note that section 2(3)(m), dealing with prohibited behaviour, excludes informal settlements. It provides:

> *"(3) No person shall in a public space-*
>
> > *(m) sleep overnight or camp overnight or erect any shelter, unless in an area designated for this purpose by, or with the written consent of the City, provided that this shall not apply to cultural initiation ceremonies or informal settlements."*

[61] "Informal settlements" is defines as meaning;

> *"an area without formal service and with informal housing; Includes a settlement for residential purposes or a township for which no approval has been granted in terms of any law, or a township other than a formalised township as defined in section 1 of the Upgrading of Land Tenure Rights Act, 1991 (Act number 112 of 1991), and any land which has been designated as land for a less formal settlement in terms of section 3(1) of the Less Formal Township Establishment Act, 1991 (Act 113 of 1991)"*

[62] In acknowledging that Singabalapha is indeed an informal settlement, the City could obviously not rely on a breach of section 2(3)(m) of the streets by-law, therefore the reliance on the provisions relating to the blocking or interference with the safe or free passage of pedestrians, ie section 2(1)(a)(i).

[63] The City, in affidavits filed on its behalf, consistently avers that the officers of the DPU told the residents that they were not there to evict them, but to hand out notices, either

compliance notices or section 56 notices. It is self-explanatory that section 56 notices follows compliance notices, only in the event of non-compliance, but how were the residents to comply? The evidence indicate that the tents or structures erected by the residents do not obstruct the pedestrian pathway. The only way that compliance could occur to the satisfaction of the City, in my view, was for the residents to demolish their structures and it is for this reason that the third day of the May 2020 operation was planned, ie to assist those who would have decided to remove their structures.

Harassment

[64] It is clear that the residents of Singabalapha are occupiers as defined in PIE. The City therefore, cannot evict them without resorting to the procedure as set out in PIE. Instead of following this procedure, the City has attempted to devise an alternative way, through the use of provisions of the street by-laws to ensure the removal of the residents of Singabalapha. I cannot imagine any way for the residents to have complied with the compliance notices issued to them, other than by removing their tents and/or structures. The intention of the City is exposed in the plan to return to Singabalapha on a third day of the May 2020 operation, to clean up the site of those residents who vacated, or to assist those who wished to vacate. The third day would have followed without any grace period to make representation in terms of the

procedure normally followed after the issuance of compliance notices or section 56 notices in terms of the City's own version.

[65] An interdict against harassment is part of the relief claimed by the residents. This application was not brought in terms of the provisions of the Protection from Harassment Act 17 of 2011 ("the Harassment Act"), but its preamble is relatable. It provides:

> *"Since the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;*
>
> *AND IN ORDER TO-*
>
> *(a) Afford victims of harassment an effective remedy against such behaviour; and*
>
> *(b) Introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of the Act..."*

[66] In **Mnyandu v Padayachi** 2017 (1) SA 151 (KZP), the court dealt with the harassment in terms of the Harassment Act, and after discussing what constitutes harassment in a number of foreign jurisdictions and foreign case law, Moodley J concluded (at para 65):

> *"It is apparent from these cases that the offence of harassment is not merely constituted by a course of conduct that is oppressive and unreasonable but that*

the consequences or effect of the conduct ought not to cause a mere degree of alarm; the contemplated harm is serious fear, alarm and distress. The legal test is always an objective one: the conduct is calculated in an objective sense to cause alarm or distress, and is objectively judged to be oppressive and unacceptable."

[67] Harassment by its very nature suggests that there must be a repetitive element or conduct which results in harassment (the definition in the Harassment Act, refers to "engaging in conduct", but it has been held, and I agree, that a single of an overwhelming oppressive nature can constitute harassment (see **Mnyandu v Padayachi** (supra) at para 68). In the present matter, it is clear that the action of the City against the residents of Singabalapha took place over a period of time, and to make matters worse, the action took place during the Covid-19 pandemic during which period our country was under a state of disaster. During this period, for obvious reasons, evictions were initially prohibited, but later, particularly during the May operations, courts were allowed to issue eviction orders, but such orders were stayed and suspended until the last day of Alert Level 4, which was applicable at the time.

[68] Ms Titus for the applicants, correctly argue that the City is using the street by-laws as a quick fix to persistently harass the residents so that they will eventually succumb to the pressure and vacate the settlement. The real intent of using the by-laws, she argues, is to evict the residents without regard to PIE and the provisions thereof. She makes the point that section 2(3)(m) of the street by-laws excludes Singabalapha as an informal settlement. I agree with these contentions.

[69] Section 26 of the Constitution of the Republic of South Africa, 1996, deals with the right to housing, and subsection 3 provides:

> *"No one may be evicted from their homes, or have their homes demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."*

[70] In discussing section 26(3) of the Constitution, the Constitutional Court held in **Motswagae and others v Rustenburg Local Municipality** 2013 (2) SA 613 CC per Yacoob J as follows (at para 12):

> *"The first question to be answered is whether s 26(3) of the Constitution is sufficiently wide to ensure protection of the applicants in their occupation of their homes. In my view, it is. Its provisions would be pointless and afford no protection at all if municipalities and other owners were permitted to disturb occupiers in the peaceful occupation of their homes without a court order. Section 26(3), by necessary implication, guarantees to any occupier peaceful and undisturbed occupation of their homes unless a court order authorises interference. The idea that owners are able to do so without offending the provisions of s 26(3) need simply be stated to be rejected. The underlying point is that an eviction does not have to consist solely in the expulsion of someone from their home. It can also consist in the attenuation or obliteration of the incidents of occupation."* (My underlying)

[71] It is clear, as shown above, that the City employed provisions of the streets by-laws with the expectation that the residents would vacate their homes, which seem to be the only option to comply with the notices issued to them. The City does so without any offer of

alternative accommodation in this regard, I must mention that the proposed relocation to Strandfontein was only temporary, as that site was not intended to provide permanent accommodation. In fact, its purpose was to provide temporary accommodation for homeless people and not people such as the residents of Singabalapha, who are occupiers.

Requirements for final relief

[72] In order for an applicant to prove entitlement to final interdictory relief, it has long been established, in **Setlogelo v Setlogelo** 1914 AD 221 at 227 that it must demonstrate a clear right, an injury actually committed or reasonable apprehended, and the lack of an adequate alternative remedy.

[73] It is common cause that the residents of Singabalapha are occupiers and are therefore excluded from section 2(3)(m) of the street by laws excludes informal settlements. The residents of Singabalapha also have rights in terms of PIE. They are entitled to be treated with dignity and privacy. These are clear rights which cannot be denied. They may not be denied these rights, nor can they be lawfully evicted without a court order in terms of PIE.

[74] It was not the first time during May 2020 that the city's law enforcement officers attended Singabalapha. The residents were also issued compliance notices during March 2020

to issue compliance notices. The general nature of these compliance notices were such that the only compliance possible were for the residents to vacate the settlement.

[75] City officials also visited the settlement during April. The May operation included a plan to visit the settlement for a third day in a row on 21 May 2020, in order for the DPU, in the words of the briefing officer, to "*do what is necessary we gonna do*". The third day of the operation was interdicted in terms of the provisional order which was granted on 20 May 2020.

[76] To argue, as Ms Adhikari does, that the residents are not entitled to final relief as they have an alternative, remedy, namely to challenge the section 56 notice in the Municipal court is of no assistance to the City. Given the history of attempts to have the residents move, even a successful challenge as suggested is no guarantee and provides no comfort to the residence that the City will not discontinue its efforts to induce the residents to move without going through the processes as provided for in PIE.

[77] I need to make it clear that the order I am making should not be seen as precluding the City from enforcing provisions of the streets by-law. The streets by-law is not subject to challenge in this application and the City may legally enforce its provisions as long as it does so within the confines of the law.

ORDER

[78] In the result, the applicants are entitled to the relief sought, and I make the following order:

1. The first respondents is interdicted and restrained from;

    1.1 confiscating the personal property and belongings of first and second applicants and the other residents of Singabalapha informal settlement situated at 414 Main Road, Observatory, Cape Town ("the Property");

    2.2 harassing or abusing the first and second applicants and the other residents of Singabalapha; and

    3.2 evicting the first and second applicants and the other residents of Singabalapha from the Property without an order of court.

2. The respondent to pay the costs of the applicants.

HOCKEY AJ

For Applicants:	Adv. Z Titus
Instructed by:	Dingley Marshall Inc.
For Respondents:	Adv. M Adhikari
Instructed by:	Riley Inc.