

**IN THE HIGH COURT OF SOUTH AFRICAN
(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 COMMISSION**

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

APPLICANT'S HEAD OF ARGUMENT

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INTRODUCTION AND RELIEF SOUGHT

1. As more fully described below, the applicant, the City of Cape Town (*“the City”*) established a temporary emergency shelter at the Strandfontein site (*“the site”*) to accommodate homeless persons during the lockdown period implemented in terms of regulations in terms of s 27(2) of the Disaster Management Act 57 of 2002 (*“the DMA”*) published in Government Gazette No. 43148 (*“the lockdown regulations”*).

2. This is an urgent application in which the City the following relief -¹
 - 2.1. Interdicting and restraining the respondents from:
 - 2.1.1. contravening the lockdown regulations in so far as they apply to the site;

 - 2.1.2. inciting violence, riotous behaviour or other acts of rebellion at the site;

 - 2.1.3. threatening City staff at the site with arrest and prosecution;

 - 2.1.4. intimidating, threatening, harassing or in any way interfering with:
 - 2.1.4.1. the operations at the site; and/or

¹ NoM rec. pp. 2-3.

2.1.4.2. City staff, City officials or any persons acting on the City's behalf or involved with law enforcement and/or service provision at the site;

2.1.5. publishing and/or disseminating reports relating to the site which are untrue and/or have not been presented to the City for comment before publication and/or dissemination;

2.2. Directing that the respondents, save for the Rev. Chris Nissen ("*Rev. Nissen*" or "*the Commissioner*"), are interdicted and restrained from:

2.2.1.1. Acting as monitors in respect of the site, other than in terms of the order granted by this court;

2.2.1.2. Attempting to and/or gaining access to the site;
and

2.2.1.3. Being within a 1km radius of the site.

3. The notice of motion seeks an interim order pending the granting of final relief, however, given that the matter has been fully ventilated on the papers before this court, the City seeks a final order.²

4. Before dealing further with the relief sought, it is apposite to mention that the site has been decommissioned and is no longer in existence.

² RA para 330, rec. p.748.

5. What started as a proper case for relief against the respondents has ended up being overtaken by new developments before it was heard.
6. The City is of the view that this renders the relief sought in the application moot and that there is no reason for the matter to be argued. However, the respondents are insistent that the matter must be heard.
7. The ordinary rule is that a case which is moot is not justiciable in that it no longer presents an existing or live controversy, however, a Court has a discretion to hear a matter even where it is moot in circumstances where any order which the court may make will have some practical effect either on the parties or on others.³
8. It is submitted that the order sought in this matter does not fall within the discretionary category described above, in that the order will have no practical effect (or indeed any effect whatsoever) on the parties or others.
9. This is so because the City expressly sought to interdict the respondents from engaging in certain specified conduct **at the site**. The relief sought did not relate to the conduct of the respondents in any context, other than at the site.
10. Given that the site is no longer in existence, self-evidently the relief sought is moot and will have no practical effect on any party at all.
11. It is a manifest waste of judicial resources for this matter to be heard in these circumstances.

³ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para [11].

12. We submit that in light of the obdurate stance adopted by the respondents (and indeed the only reason that this Court is burdened with this application is the respondents' stance), if the application is dismissed on the basis of mootness, the City is entitled to recover its costs from the respondents.
13. In the alternative, and in the event that this Court is not minded to grant the City its costs, it is submitted that the stance adopted by the respondents does not warrant protection under the *Biowatch*⁴ principle and the respondents consequently are not entitled to recover their costs from the City.
14. We now turn to the relief sought in this application.
15. The City recognises the authority of the first respondent, the South African Human Rights Commission (*“the SAHRC”*) as a Chapter 9 Institution and respects its roles and functions in the constitutional scheme.
16. The City recognises the right of the duly appointed Commissioners of the SAHRC to conduct monitoring, assessments and observations at the site in line with the relevant regulatory regime governing the lockdown period.
17. The City has never disputed the right of Rev. Nissen, as a duly appointed Commissioner of the SAHRC, and any other lawfully appointed persons, to conduct activities at the site as authorised by South African Human Rights Commission Act, No. 40 of 2013 (*“the SAHRC Act”*) read with the relevant regulations governing the lockdown period.

⁴ *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

18. In summary the City contends that:
 - 18.1. there is no basis in law for the third to eleventh respondents (collectively referred to hereinafter as "*the monitors*") to conduct any activities at the site in terms of the SAHRC Act read with the relevant regulations governing the lockdown period;
 - 18.2. the monitors have failed to conduct themselves in accordance with the applicable legislative framework and the lockdown regulations;
 - 18.3. the SAHRC and the second respondent, the Chief Executive Officer of the SAHRC ("*the CEO*") have done nothing to restrain the unlawful conduct and, in some instances, have condoned their behaviour;
 - 18.4. the SAHRC, the Commissioners and the CEO have not done anything to distance themselves from the unlawful conduct of the monitors; and
 - 18.5. this has left the City with no choice but to seek interdictory relief after it had unsuccessfully sought an undertaking from the SAHRC that the monitors' unlawful conduct would cease.
19. These heads of argument deal with the following:
 - 19.1. First, the parties to the proceedings are described;
 - 19.2. Second, the relevant factual background, including the current facilities at the site, is summarised;
 - 19.3. Third, the relevant legislative and regulatory provisions are set out;

19.4. Fourth, the unlawful conduct of the respondents is described;

19.5. Fifth the requirements for interdictory relief are examined.

THE PARTIES

20. The first respondent, the SAHRC is an independent state institution established in terms of s 181 of the Constitution of the Republic of South Africa, 1996, (*“the Constitution”*) as one of the institutions which support constitutional democracy. The functions of the SAHRC as set forth in s 184 include, *inter alia*, the promotion, the protection, the development and the attainment of rights enshrined in Chapter 2 of the Constitution (the Bill of Rights).
21. The second respondent is the CEO of the SAHRC appointed in terms of s 19 of the SAHRC Act. He has been cited principally as the appointment of monitors who have demanded and indeed forced access onto the site, was at his behest and purportedly done under his signature. This was impermissible and not in accordance with the legislated mandate, powers and functions of the SAHRC.

22. The third to eleventh respondents,⁵ (the monitors) are persons purportedly appointed in terms of s 11 by Rev. Nissen, alternatively the SAHRC as human rights monitors.
23. They have consistently held themselves out to be representative of the SAHRC and held themselves out to be monitors duly appointed by the SAHRC, although this is now disputed in respect of certain of the respondents as set out below. The third to eleventh respondents have all attended at the site at various times ostensibly as monitors appointed by Rev. Nissen. The CEO's name appears on the appointment letters of the third to eighth respondents and tenth and eleventh respondents.
24. There is no written record of the appointment of the ninth respondent ("Mr van Cutsem"). It is contended by the respondents that he was appointed verbally. The SAHRC is a constitutional institution listed in schedule 1 to the Public Finance Management Act, No. 1 of 1999 (*the PFMA*). The respondents make no attempt to explain how its accounting officer (the CEO) is able to discharge his duties enumerated in Chapter 5 of the PFMA where oral agreements are allegedly concluded. This is not in line with the responsibilities of accounting officers.

⁵ The third respondent is Tauriq Jenkins (*Mr Jenkins*).
 The fourth respondent is Annie Kirke (*Ms Kirke*).
 The fifth respondent is Annelize van Wyk (*Ms Van Wyk*).
 The sixth respondent is Lysandra Flowers (*Ms Flowers*).
 Ms Flowers is also the Chairperson of the Strandfontein Community Policing Forum. See confirmatory affidavit, rec. p. 577.
 The seventh respondent is Lorenzo Davids (*Mr Davis*). He is also the CEO of the Community Chest. See FA para 14, rec. p. 12 and AA para 70, rec. p. 245.
 The eighth respondent is Catherine Williams (*Ms Williams*).
 The ninth respondent is Gilles Van Cutsem (*Mr van Cutsem*).
 The tenth respondent is Jared Sacks (*Mr Sacks*).
 The eleventh respondent is Zelda Holtzman (*Ms Holtzman*).

RELEVANT FACTUAL BACKGROUND

25. On 15 March 2020 the National Minister of Cooperative Governance and Traditional Affairs, Minister Nkosazana Dlamini-Zuma (*“the Minister”*) acting in terms of the DMA declared a national state of disaster in terms of s 27(1) which was published in Government Gazette No. 43096.⁶
26. The declaration was made considering the magnitude and severity of the COVID-19 outbreak which had been declared a global pandemic by the World Health Organisation and classified as a national disaster by the Head of the National Disaster Management Centre, and taking into account the need to augment the existing measures undertaken by organs of State to deal with the pandemic.⁷
27. On the same day, the President of South Africa (*“the President”*) addressed the country and said, ... *“We have decided to take urgent and drastic measures to manage the disease, protect the people of our country and reduce the impact of the virus on our society and on our economy. We have now declared a National State of Disaster in terms of the Disaster Management Act.”*⁸
28. The President further explained that this would enable the government to have an integrated and coordinated disaster management mechanism aimed at preventing and reducing the outbreak of COVID-19.⁹

⁶ FA para 22, rec. p. 14. AA para 76 rec. p. 247.

⁷ FA para 23, rec. p. 14. AA para 76 rec. p. 247.

⁸ FA para 24, rec. p. 14. AA para 76 rec. p. 247.

⁹ FA para 25, rec. p. 15. AA para 76 rec. p. 247.

29. Following upon the declaration of a national state of disaster the Minister on 18 March 2020 issued regulations in terms of s 27(2) of the Disaster Management Act which were published in Government Gazette No. 43107 (*“the 18 March 2020 regulations”*).¹⁰
30. The 18 March 2020 regulations also imposed certain limitations aimed at limiting the spread of COVID-19 by encouraging social distancing measures including, *inter alia*, prohibiting gatherings of more than 100 persons, restrictions on the right to refuse medical treatment in suspected cases of COVID-19, the imposition of mandatory isolation and/or quarantine measures in certain circumstances, the closure of schools, and limitations on access by members of the public to detention facilities.¹¹
31. Following on consultation with the National Coronavirus Command Council the President took a decision to implement a national lockdown period with the express purpose of imposing further measures aimed at curbing the spread of COVID-19.¹²
32. On 25 March 2020 the Minister, after consultation with the National Minister of Health, issued further regulations in terms of s 27(2) of the DMA, i.e. the lockdown regulations.¹³
33. The lockdown regulations imposed much stricter limitations on the movement of goods and persons as well as the provision of services and in effect implemented a complete restriction on the movement of all persons and

¹⁰ FA para 25, rec. p. 15. AA para 76 rec. p. 247.

¹¹ FA para 27, rec. p. 15. AA para 76 rec. p. 247.

¹² FA para 28, rec. p. 15. AA para 76 rec. p. 247.

¹³ FA para 29, rec. p. 15. AA para 76 rec. p. 247.

goods and the provision of all services save for those deemed to be essential in terms of the lockdown regulations. Further regulations were also issued by the Minister.¹⁴

34. On 9 April 2020 the lockdown period was extended to 30 April 2020.¹⁵
35. We remain in lockdown although now at what is known as Alert Level 4. This necessitated further regulations which were issued by the Minister on 29 April 2020 in Government Gazette 43258 (*“the 29 April 2020 regulations”*).¹⁶
36. Acting on the declaration by the Minister and the lockdown regulations published on 25 March 2020, the City made provision for a temporary emergency shelter at the site to accommodate homeless persons during the lockdown period.¹⁷
37. The City, as an organ of State, was and remains compelled in terms of the regulations and directions published in terms of the DMA to implement measures that would mitigate against the spread of the virus.¹⁸
38. The City consulted with its various departments and external organisations and NGO’s on how best to deliver services and care for the homeless prior to the establishment of the site.¹⁹

¹⁴ FA para 30, rec. p. 16. AA para 76 rec. p. 247.

¹⁵ FA para 31, rec. p. 16. AA para 76 rec. p. 247.

¹⁶ FA para 32, rec. p. 16. AA para 76 rec. p. 247.

¹⁷ FA para 33, rec. p. 16. AA para 76 rec. p. 247.

¹⁸ FA para 34, rec. p. 16. AA para 76 rec. p. 247.

¹⁹ FA para 36, rec. p. 17. AA para 78 rec. p. 247.

39. The City identified, as part of this process, the Strandfontein Sports Complex as the site at which it would accommodate homeless persons within the City. On 1 April 2020 the City took the decision to establish the site.²⁰
40. The City contracted expert NGO partners to manage the care for the homeless at the site, including *Haven Night Shelter*, *Ubuntu Circle of Courage* and *Oasis*. These NGO partners have decades of experience in caring for homeless persons.²¹
41. The site was established by the City during the period 3 April 2020 to 5 April 2020. It was operational and able to receive homeless persons from all over the City as from the afternoon of 5 April 2020.²²
42. Based on expert advice, and taking the City's limited resources into consideration, the City was of the view at the time that a centralised facility offered a number of important advantages, *inter alia*:²³
- 42.1. the coordinated ability to screen, test and isolate for in particular COVID-19 and tuberculosis;
- 42.2. the concentration of limited medical services and professionals offering daily clinic services, medication, psycho-social support and referrals to specialist care facilities;
- 42.3. the ability to monitor services and standard of care to the homeless in one place, including the provision of a minimum of 3 meals per day

²⁰ FA para 37, rec. p. 17. AA para 78 rec. p. 247.

²¹ FA para 38, rec. p. 17. AA para 78 rec. p. 247.

²² FA para 39, rec. p. 17. AA para 78 rec. p. 247.

²³ FA para 40-40.4, rec. pp. 17-18. AA para 78 rec. p. 247.

plus snacks between meals, hot shower and ablution facilities, laundry services, and shelter from the elements in large weather-proof marquees with blankets and mattresses; and

- 42.4. enhanced safety and security services in one location rather than spread thinly across dozens of sites.
43. It bears emphasis that the COVID-19 pandemic arose without much prior warning. It is unprecedented, spreads rapidly, and has posed unique challenges to the City, the country and indeed the world.²⁴
44. The City has never before had to contend with a global pandemic in its disaster management responses. Consequently, as has been seen with the national and international response to the pandemic, State institutions are implementing measures to the best of their abilities and limited resources and adjusting their responses as further information and data becomes available.²⁵
45. The challenges posed by the lockdown regulations in relation to the care of homeless persons are complex and multifaceted. Consequently, the City has been required to refine its response in respect of the unique challenges posed by the current situation for homeless persons on an almost daily basis.²⁶
46. The site was always intended to be a temporary measure. It was established as a humanitarian measure in response to the national lockdown imposed. The City intended to decommission the site by 20 May 2020. This had now

²⁴ FA para 41, rec. p. 18. AA para 78 rec. p. 247.

²⁵ FA para 42, rec. p. 18. AA para 78 rec. p. 247.

²⁶ FA para 43, rec. p. 18. AA para 78 rec. p. 247.

been extended following the positive COVID-19 result of a former resident.²⁷ For so long as the site remains extant, the residents' needs will have to be met. Different challenges arose during this process (and will no doubt continue to arise) which required the City to take steps to address them. The City will continue to do so until the closure of the site.²⁸

47. The City has developed a plan for the phased closure of the site with specific emphasis on the reintegration of the homeless persons currently accommodated at the site. Reintegration includes, *inter alia*, accommodation at appropriate shelters, reunification with families where possible and appropriate accommodation at safe spaces.²⁹
48. The respondents incorrectly state that the City has failed to provide information on the closure of the site.³⁰ Such information was never requested from the City by the monitors and the City has provided details in its founding affidavit as to the decommissioning of the site. In addition the City is liaising with the legal representatives of certain of the residents at the site (those in Tent 2) regarding the decommissioning of the site.³¹
49. Despite the fact that the monitors and the Commissioner Nissen have freely communicated with those residents, they appear not to be aware of these interactions.

²⁷ Supplementary RA para 9. The supplementary replying affidavit will be served on the Court and the respondents on 5 June 2020.

²⁸ FA para 44, rec. pp. 18-19.

²⁹ FA para 48, rec. p. 19.

³⁰ AA para 79, rec. p. 248. RA para 118-120, rec. p. 708-709.

³¹ RA para 118-120, rec. p. 708-709. See also the supplementary RA para 7-12.

50. The City, based on past experience is also cognisant of the fact that a number of homeless persons will choose to return to living on the streets and for those persons appropriate social assistance measures need to be put in place, bearing in mind the lockdown regulations and the new phased risk adjusted approach announced by the President which has been implemented from 1 May 2020. The City will be guided in this process by the latest regulations which were recently gazetted. Any directions issued by the relevant Cabinet members and which are relevant to the site will also be adhered to.³²
51. The City has readily acknowledged that its initial response in establishing the site needed refinement and further changes have been made within its available resources to the best of its ability. By way of example, once the site was established the City formed the view that smaller, decentralised sites would better serve the needs of the City's homeless population.³³
52. The City initially accommodated the homeless persons in 3 large marquee tents. This too has changed, as the understanding of the nature of the pandemic and the necessary health measures has evolved as described below. The social distancing requirements were addressed to the best of the City's ability and is compliant with the legislation and the disaster regulations. The City has put in place measures which exceed the National Department of Health ("*NDOH*") guidelines for minimum social distancing.³⁴
53. Initially challenges were experienced in the provision of quarantining and isolation, and again these issues have been addressed. Further, the City's

³² FA para 49-50, rec. p. 20.

³³ FA para 45, rec. p. 19.

³⁴ FA para 51, rec. p. 20.

approach to the screening and testing complies with the guidelines and protocols established by the NDOH and the National Institute of Communicable Diseases (“*NICD*”) as amended from time to time.³⁵

54. When the site was set up the City sought to engage with the South African Police Service (“*the SAPS*”) and the Provincial Joint Operations Command Centre (“*Prov JOC*”) which includes officials from the national and provincial departments of Health and Social Development, the SAPS, the South African National Defence Force (“*SANDF*”) and the Department of Home Affairs (“*the DHA*”). The City participates in regular Prov JOC meetings where it provides feedback on the site and reports any incidents of concern. The other stakeholders do likewise.³⁶

Current facilities and services available at the site

55. The City’s averments in paragraphs 62 to 104 below as regards the current facilities at the site are undisputed and must be accepted as correct for the purposes of this application.³⁷
56. The respondents on the one hand contended that the monitors were prevented from accessing the site but at the same time seek to place reliance on the reports prepared by these monitors during visits to the site. In any event on the respondents’ version as set out in the answering affidavit the

³⁵ FA para 51-52, rec. p. 20.

³⁶ FA para 53-54, rec. pp. 20-21.

³⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635D.

monitors were on site on several occasions from 5 April 2020 when the site opened to 2 May 2020.³⁸

57. On the one hand Rev. Nissen correctly admits that he has no knowledge of the current situation at the site, yet he also seeks to place reliance on the content of the report dated 2 May 2020 regarding the purported concerns noted at the site by the authors of the report.³⁹
58. He then goes on to state that he does not put up the report to demonstrate the truth of its contents and findings but merely to “*emphasise*” the purported “*significant disputes*” as regards the standards at the site.⁴⁰
59. These positions are mutually exclusive and contradictory.
60. One cannot on the one hand state that you have no knowledge of certain facts and that you do not rely on the truth of a report dealing with those purported facts and at the same time try to use the purported facts in the same report as a basis for a claim that those facts support your actions in circumstances where the veracity of your concerns and the motives behind your conduct are called into question.
61. Rev. Nissen’s personal knowledge is limited as his visits to the site have been infrequent and of short duration. He does not perform any monitoring duties. Consequently, his purported observations are of limited if any value. As demonstrated below the reports put up by Mr Sacks, Ms Williams and Mr van

³⁸ See for example AA para 37, rec. p. 232; para 59, rec. 240; para 64, rec. p. 243; para 85 rec. 250; para 89, rec. p. 255; para 98, rec. 272.

³⁹ AA para 84 rec. 250.

⁴⁰ *Id.*

Cutsem (whose observations are relied on by Rev. Nissen) are speculative and uncorroborated and demonstrate their bias.

62. The site complies with all relevant regulations and health standards imposed in terms of the DMA.
63. There are currently 24 tents on the site, divided into 10 camps.
64. The total floor space for the tents is 8775m².
65. When the founding affidavit was deposed to there were 721 persons accommodated at the site. When the site was opened 1600 people were accommodated.
66. By 29 April 2020 this figure had reduced to 1167 persons. The reduction in numbers is in line with the City's plan that the site was intended to be temporary and would be decommissioned by 20 May 2020. Some of the residents have been moved into other shelters, some have been placed into safe care and others have been reintegrated with their families. When the replying affidavit was deposed to there were approximately 500 persons accommodated at the site.⁴¹
67. Although the City initially planned to house a maximum of 2 000 persons at the site, given the need for social distancing the City took a decision that no more than 1 600 persons may be accommodated at the site. This figure has been complied with and there has never been more than that number of persons accommodated at the site.

⁴¹ RA para 75, rec. p. 700.

68. People are entitled to leave the site should they so wish, the only condition being that they cannot return once they leave. This is for health reasons and aimed at curbing/slowing the spread of COVID-19. This is the same reason that outside persons are not allowed to access the site, other than in a controlled fashion and in a manner, which complies with the regulations.
69. Each person is provided with an area of 5x5m² which is demarcated using red tape as a social distancing measure.⁴²
70. There is a 24-hour operation centre on site which is supported by 24-hour Law Enforcement presence. There is access control to the site in order to ensure the safety of the occupants. The site together with the tents are patrolled on foot by security and Law Enforcement officers. Residents can report any criminal offence to the security and/or Law Enforcement who will assist the complainant and if required either take them to the nearest SAPS station or inform SAPS of the complaint.
71. The site thus has three layers of security to enhance the safety of those inside and outside the property, approximately 100 security officials including 40-50 Law Enforcement officers and approximately 60 private security guards in total to assist with the security on site.
72. The City Health department is coordinating all health services at the site.
73. City Health provides most of the health services from 08:30 to 16:30 and EMS is contacted for after-hour emergency services. The contact details of EMS

⁴² See the layout plan of the site setting out the locations of each of the camps within the site RGB1, rec. p. 56 and Aerial photographs of the site as well as photographs of some of the tents at the site, RGB 2.1 to RGB2.5, rec. pp. 57-61.

are available on site, should an after-hours emergency occur. The situation is monitored constantly and is adapted should circumstances change.

74. Challenges have been experienced with the availability of ambulances and the City has sought to address this with the Provincial Health authorities which have responsibility for EMS ambulance services, however, these engagements have had mixed success due to limited resources available to EMS.
75. Consequently, where an ambulance is not available in an emergency situation Law Enforcement takes responsibility for conveying the person in need to the nearest medical facility which is a hospital in Mitchells Plain and from there arrangements are made by the medical staff to transfer patients in need of further medical care to other appropriate facilities as the case may be.
76. Law Enforcement further takes responsibility for collecting patients that have been treated at outside medical facilities and returning them to the site when they have been discharged.
77. Every person who is accommodated at the site was subjected to screening for tuberculosis and COVID-19 on arrival in line with the guidelines implemented by the NDOH. Where the NDOH guidelines indicate that testing for tuberculosis and COVID-19 is warranted this is done, again in accordance with the relevant guidelines.
78. Persons who have been tested are accommodated in isolation tents while awaiting their test results and are then moved to appropriate accommodation

determined by amongst other things where they were previously residing, any social or family connections that they may have with other residents at the site and their individual health needs including mental health and substance abuse history.

79. Individuals who have tested positive for tuberculosis are isolated from the other residents in dedicated isolation facilities. They are provided with treatment where diligent administration of medication is ensured. Patients needing to be admitted to dedicated facilities are also referred as needed.
80. HIV counselling and testing was added to the intake protocol.
81. Individuals are appropriately assessed to ascertain whether they require referral to outside medical facilities for care of psychiatric conditions and where no referral is necessary, facilities are in place to manage the care of persons with psychiatric conditions.
82. Persons who require chronic medication are provided with such medication.
83. An on-site medical facility is staffed by at least 15 nurses, doctors, pharmacists and volunteers. A daily clinic service offers general health checks, including access to medication for pain relief, blood pressure, and anti-depressants and other chronic medication.
84. As a result, 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. These individuals are now enrolled for chronic medication and are provided with health care at the site. These

underlying conditions are acknowledged by the World Health Organisation as contributory factors to increased mortality.

85. Social workers assess mental and substance abuse concerns. Addicts have access to psychosocial support and referral pathways.
86. Every individual has access to a hot shower, at least 3 meals a day and a snack between meals, the necessary ablution facilities as well as facilities to wash clothes. Toilets and showers for peoples with disabilities are also provided at the site.
87. The City has recently begun to incorporate some entertainment on site to address boredom brought about by the restrictions currently imposed on all citizens.
88. At all times social distancing and hygiene protocols in line with the relevant NDOH guidelines are sought to be maintained at the site.
89. Social distancing is enforced during mealtimes when queuing occurs. A minimum distance of 1.5m between people is maintained.
90. When residents arrived at the site, they were given information regarding social distancing and hygiene protocols. However, as with any other sector of society, social distancing depends on compliance by individuals. All residents accommodated at the site are adults and it would be inappropriate for the City to use force to implement social distancing, hence the City together with the NGO partners continues to educate residents to reinforce the importance of social distancing and hygiene protocols and take active measures to

encourage social distancing at all times. Correct coughing and hand washing practises are encouraged.

91. In addition to the initial screening and testing that took place, during the course of the week commencing 20 April 2020 all residents were again screened and those that met the NDOH guidelines for testing, were tested. Most have tested negative for COVID-19. The results of 7 residents were outstanding when the replying affidavit was deposed to.⁴³ A former resident who left the site on 11 May 2020 has since tested positive for COVID-19. This is addressed in the supplementary replying affidavit of Mr Bosman.
92. Provision is made at the site for women to be accommodated in a separate tent. However, most of the women do not want to be accommodated in a separate tent and elected to be accommodated with the rest of the individual community which they formed part of prior to their relocation to the site. The offer to women to be accommodated in a separate tent remains open and will be made available if requested by any woman wanting to accept this offer.
93. The City has ensured that the availability of a separate tent for women is addressed during the daily meeting between the City and the site management consisting of NGOs, and the offer has been relayed to the women on site.
94. The Transgender/LGBTI community has been separately accommodated. The same applies for senior citizens, who are accommodated in a separate tent.

⁴³ RA para 75, rec. p. 700.

95. The City has contracted a cleaning and sanitation service to ensure that the necessary level of cleanliness and hygiene is achieved and maintained on a daily basis. Toilets, showers and basins are cleaned and sanitised on a daily basis. Soap, toilet paper and sanitiser are available at all times. Hygiene packs (including sanitary pads and adult nappies) are provided. Sanitary bins in the toilets are removed on a regular basis.
96. COVID-19 information pamphlets and posters have been supplied and have been placed within each accommodation site.
97. The inside of the tents is cleaned and sanitised daily and all frequently touched surfaces are regularly disinfected. The NGO partners have taken responsibility for cleaning the inside of the tents managed by them and have been provided with the necessary cleaning materials by the City. The outside of the tents and rest of the area is cleaned by the City's cleansing service at least twice daily.
98. All access flaps to tents have been replaced with doors and windows have been installed in the tents. Windows and doors have been installed at the tents to ensure proper cross ventilation of air through the tents. At least 5% of the floor area of tents is capable of being opened.
99. Any issues which may arise are addressed as soon as reasonably possible. The latest issue at the site related to the ventilation. This was attended to by the City.⁴⁴

⁴⁴ See report addressed to Mr Gavin Heugh of the City on the 29 April 2020, RGB3, rec. p.62.

100. All food preparation takes place off site.
101. The entire site is fully and securely fenced and Law Enforcement and security conduct regular patrols to ensure that the site is secure and that no residents who are not authorised to do so, are able to leave the site. The City cannot have a situation arising whereby people come and go onto the site without measures in place to safeguard others who do not do so. The free movement of people poses a risk to them, other residents at the site and well as staff and support services.
102. A SANDF representative on the Provincial Joint Operational and Intelligence Service, in his capacity as a co-chair, conducted an oversight visit at the site on 18 April 2020 and has prepared a report which indicates that the site is well managed and provides appropriate, integrated services to residents. The report is marked confidential, but the City has been granted permission to place it before the court.⁴⁵
103. The City has complied with the relevant regulatory framework in regard to COVID-19.
104. The residents at the site are free to leave should they wish to do so, bearing in mind relevant health protocols.

⁴⁵ See report annexed as RBG4, rec. pp. 63-68.

THE RELEVANT REGULATORY PROVISIONS AND THE UNLAWFULNESS OF THE APPOINTMENT OF THE MONITORS

The Lockdown Regulations

105. As set out above, following upon the declaration of a national state of disaster the Minister on 25 March 2020 issued the lockdown regulations.

106. The lockdown regulations introduced “*essential services*”.

107. The following definitions in the lockdown regulations are of particular relevance:

107.1. “*essential services*” means the services as defined in s 213 of the Labour Relations Act 66 of 1995 (“*the LRA*”), and designated in terms of s 71(8) of the LRA and which designation remains valid as at the date of publication of this regulation, and as listed in paragraph B of Annexure B, as may be amended from time to time;

107.2. “*head of an institution*” means the accounting officer of a public institution and the chief executive officer or the equivalent of a chief executive officer of a private institution;

107.3. “*institution*” means any public or private institution that is engaged in the supply or distribution of an essential good or service.

108. Regulation 11B(1)(a)(i) provides that for the period of lockdown every person is confined to his or her place of residence, unless strictly for the purpose of

performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving, or chronic medical attention.

109. Regulation 11B(2) and (3) provide that:

“(2) The head of an institution must determine essential services to be performed by his or her institution, and must determine the essential staff who will perform those services: Provided that the head of an institution may delegate this function, as may be required in line with the complexity and size of the business operation.

(3) Persons performing essential services as determined in subregulation (2), must be duly designated in writing by the head of an institution, on a form that corresponds substantially with Form 1 in Annexure C.”

110. Annexure B to the lockdown regulations sets out the categorisation of essential goods and services during the lockdown period.

111. Part B of Annexure B provides that “[c]ategories of essential services shall be confined to the following services:

...

27. *Commissioners of the South African Human Rights Commission ...”.*

112. In accordance with the restrictions imposed by the lockdown regulations, the Minister saw fit to designate **only** the Commissioners of the SAHRC, as an essential service.

113. Consequently, it was not open to the CEO or a Commissioner of the SAHRC to seek to designate any other person affiliated with or employed by the SAHRC as an essential service.
114. The respondents may seek to argue that the lockdown regulations must be given a wider meaning but this is simply not consistent with the express words of the regulation or with its intent and indeed goes directly against the intent of the regulations which is to limit movement as far as possible.
115. The approach to be followed in the interpretive process is the same for all legal documents, be they statutes, wills, contracts and patents.⁴⁶
116. Words and phrases in a statute must be given their ordinary meaning in light of the context in which they occur.⁴⁷ Interpretation of documents (including statutes) is a unitary exercise where the words of the document are considered in the light of all relevant and admissible context. Further, the Constitution requires a purposive approach to statutory interpretation.⁴⁸ The purpose of a statute or regulation plays an important role in establishing a context that clarifies the scope and intended effect of a law.⁴⁹
117. The clear and unambiguous wording of the lockdown regulations limited the provision of essential services by the SAHRC during the lockdown period to Commissioners of the SAHRC.

⁴⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]. See also *KPMG Chartered Accountants v Securefin and Another* 2009 (4) SA 399 (SCA) at para [39].

⁴⁷ *Endumeni* at paras [18]-[26].

⁴⁸ *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at paras [21], [25], [28] and [31]; *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at paras [22]-[23].

⁴⁹ *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3 quoted with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para [89].

118. This accords with the express purpose of the lockdown regulations which was to limit the movement of goods and persons during the lockdown period to the minimum required for the provision of essential services and supply of essential goods in order to limit as far as possible the spread of COVID-19.
119. The scheme and wording of the lockdown regulations makes it clear that the intention of the legislature was to prescribe which services are regarded as essential ,as opposed to prescribing what was not essential and leaving the scope of essential services open to interpretation.
120. There is no challenge to the lockdown regulations which remained in force until their withdrawal on 29 April 2020 by the regulations published on that date by the Minister in Government Gazette No. 43258 (*“the 29 April 2020 regulations”*).
121. Consequently, the City and the SAHRC are bound by the lockdown regulations and the courts are obliged to uphold them.
122. Thus from 23h59 on Thursday, 26 March 2020, until 23h59 on Thursday 16 April 2020 (and later extended to 30 April 2020), no person other than a duly appointed Commissioner of the SAHRC was entitled under the lockdown regulations to perform essential services.
123. The SAHRC could not lawfully appoint a committee in terms of s 11 of the SAHRC Act, and in so doing seek to empower that committee or members thereof to perform acts which would in effect amount to a breach of the lockdown regulations.

124. Neither the CEO nor Rev. Nissen could lawfully empower the monitors to perform essential services during the lockdown period, irrespective of what those services were.

The 29 April 2020 Regulations

125. The lockdown regulations were repealed by the 29 April 2020 regulations.
126. Regulation 3(2) provides that the Minister shall, upon the recommendation of the Cabinet member responsible for health and in consultation with Cabinet, declare which of the alert levels in sub-section (a) to (e) apply, and the extent to which they apply at a national, provincial, metropolitan or district.
127. In terms of regulation 15(1), the Minister declared, that Alert Level 4 would be applicable from 1 May 2020 in the Republic and will remain in force up to the declaration of different Alert Levels for the duration of the national state of disaster.
128. Regulation 16(1) provides that every person is confined to his or her place of residence.
129. Regulation 16(2)(a) provides that a person may only leave their place of residence to perform an essential or permitted service, as allowed in Alert Level 4.
130. Regulation 1 defines “*essential services*” as the services listed in Annexure D.

131. Table 1 of the 29 April 2020 regulations provides that persons in the industries and activities listed in that table will be permitted to perform work outside the home, and to travel to and from work, under Alert Level 4, subject to -
- 131.1. strict health protocols, and social distancing rules;
 - 131.2. return to work to be phased in to enable measures to make the workplace COVID ready; and
 - 131.3. return to work to be done in a manner that avoids and reduces risks of infection.
132. Part O (item 9) of Table 1 is headed Public Administration, Government Services and other Arms of the State and provides that only essential government and administration services may operate, including Commissioners of the South African Human Rights Commission, Gender Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Public Protector and Deputy Public Protector and the Independent Electoral Commission.
133. Part B of Annexure D of the 29 April 2020 regulations provides that essential services means *“the services as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995), and designated in terms of section 71 (8) of the Labour Relations Act, 1995 (and which designation remains valid as at the date of publication of this regulation), and as listed below”*.
134. Item 26.1 of Part B of Annexure D of the 29 April 2020 regulations provides amongst other things that commissioners of the SAHRC are essential

services. Item 26.2 of Part B of Annexure D provides that services rendered by the institutions referred to in item 26.1 are essential services.

135. It is apparent that the essential and permitted services under Alert Level 4 may only be performed in such a manner as to limit the spread of COVID-19 and to avoid and reduce the risk of infection.
136. In essence, the lockdown period implemented on 25 March 2020 was extended indefinitely on 29 April 2020 and the Minister declared that the country had entered a further lockdown period governed by the regulations relating to essential and permitted services under Alert Level 4.
137. All movement of persons is restricted unless such persons are performing essential or permitted services.
138. The Commissioners of the SAHRC are regarded as essential government and administration services under Alert Level 4 and the services rendered by the SAHRC are similarly so regarded.
139. However, these provisions must once again be read purposively.
140. The 29 April 2020 regulations do not and indeed, could not on any reasonable and purposive interpretation be read as effectively exempting the SAHRC from compliance with the extended lockdown provisions.
141. Indeed, the 29 April 2020 regulations again proscribe the ambit of the operations of the SAHRC during Alert Level 4. Only Commissioners of the

SAHRC and “*services rendered by [the SAHRC]*” are regarded as essential services.

142. This does not include services performed by *ad hoc* committees established in terms of s 11 of the SAHRC Act. This interpretation is consonant with both the 29 April 2020 regulations and the SAHRC Act.
143. Section 11 of the SAHRC Act grants the SAHRC wide powers to appoint persons and to assign powers of the Commission to persons on an *ad hoc* basis for purposes of advising the Commission or make recommendations on specific issues.
144. It appears that the Commission has sought to utilise that power to establish a committee in terms of s 11 consisting of representatives of some 27 organisations (“*the s 11 Committee*”).⁵⁰
145. Notably, Mr Jenkins, Mr Davids and Ms Flowers identify as members of organisations which are not on the list of 27 organisations listed in the terms of reference of the s 11 Committee annexed to the answering affidavit.⁵¹
146. Rev. Nissen indicates in the answering affidavit that they are members of the s 11 Committee by virtue of the organisations to which Mr Davis and Ms Flowers belong having been admitted to the committee at a later stage.⁵² Notably, no explanation is provided in the affidavit for how this is alleged to have taken place.

⁵⁰ Annexure CN6, rec. pp. 308-315.

⁵¹ Annexure CN6, rec. pp. 309-310.

⁵² AA para 51, rec. p. 237-238; para 52, rec. p. 238.

147. There are documents annexed to the answering affidavit which are not dealt with in the affidavit itself which appear to be applications or requests for “*accreditation*” for *inter alia*, Mr Jenkins, Ms Flowers and Mr Davids respectively.
148. Mr Jenkins’ organisation also does not appear on the list of 27 organisations nor does the answering affidavit contend that his organisation was admitted as a member of the s 11 Committee at a later stage. Although, again documents are annexed to the answering affidavits which appear to relate to some sort of “*accreditation*” procedure in relation to the organisation to which Mr Jenkins is alleged to belong.
149. Although the answering affidavit states that Ms Flowers is a member of the s 11 committee by virtue of her membership of the Strandfontein Social and Economic Development Forum (“*the SSEDf*”), Ms Flowers states that she is not a member of the SSEDf but the Chairperson of the Strandfontein Community Policing Forum.⁵³
150. There is no indication in the answering affidavit as to the affiliation of the Strandfontein Community Policing Forum with the s 11 Committee, although documents referring to “*accreditation*” in respect of members of the Strandfontein Community Policing Forum are annexed to the answering affidavit without being dealt with therein.
151. In the absence of an explanation in the answering affidavit as to how these documents relate to the appointment process in terms of s 11, the City is left

⁵³ Confirmatory affidavit of Flowers, para 3, rec. p. 577.

to speculate as to the lawfulness or otherwise of these “*accreditation*” procedures.

152. It is settled law that it is not open to the respondents to merely annex documentation to their affidavits and ask to the Court to have regard to it. In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* Joffe J stated:⁵⁴

‘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.’

153. What is, however, apparent from the documentation annexed to the answering affidavit in respect of the “*accreditation*” process is that despite the fact that clause 5 of the terms of reference of the s 11 Committee clearly stating that “*the appointed Section 11 Committee members will comprise of one representative from*”⁵⁵ the organisations listed in paragraphs 5.1 to 5.27 of the terms of reference, more than one representative of certain organisations has received “*accreditation*”.

⁵⁴ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-G. See also *Lipschitz and Schwartz NNO* 1976 (3) SA 772 (W) at 775H-776.

⁵⁵ Annexure CN6, rec. p. 309.

154. I refer in this regard specifically to -

154.1. Mr Jenkins' organisation which appears to have submitted a request for 10 persons to receive accreditation;⁵⁶

154.2. Ms Kirke's organisation which submitted a request for 5 persons to be accredited;⁵⁷

154.3. Ms Flowers' organisation which submitted a request for at least 2 persons to be accredited, although the email correspondence refers to "*other persons*" in addition to the 2 persons referred to in the email;⁵⁸

154.4. Ms Williams' organisation which submitted a request for 4 persons to be accredited;⁵⁹

154.5. Mr Sacks' organisation which submitted a request for 2 persons to be accredited; and⁶⁰

154.6. Ms Holtzman's organisation which submitted a request for 30 persons to be accredited.⁶¹

155. Further, the accreditation letters of the third to eighth and tenth and eleventh respondents annexed to the answering affidavit make no reference to s 11 of the SAHRC Act.

⁵⁶ Annexure CN9, rec. pp. 319-320.

⁵⁷ Annexure CN10, rec. pp. 324-325.

⁵⁸ Annexure CN12, rec. p. 331.

⁵⁹ Annexure CN14, rec. p. 337.

⁶⁰ Annexure CN15, rec. p. 340.

⁶¹ Annexure CN16, rec. p. 343-347.

156. Curiously the accreditation letters state that the respondents in question have “*been appointed in terms of sections 12(1)(c) – (3), 13(1)(b)(iii) and 19(5) of the [SAHRC Act].*”⁶² Of the sections of the SAHRC Act referred to in the accreditation letters, only s 12(1)(c) relates to s 11 committees. Indeed, it does not appear from a reading of ss 11 and 19(5) that appointments in terms of those two sections could coincide.
157. Section 19 of the SAHRC Act regulates the appointment of staff by the SAHRC.
158. Section 19(5) provides that the Commission may in the exercise of its powers or the performance of its functions by or under the Constitution, the SAHRC Act or any other law, for specific projects, enter into contracts for the services of persons having technical or specialised knowledge of any matter relating to the work of the Commission, and determine the remuneration, including reimbursement for travelling, subsistence and other expenses, of such persons.
159. This section allows the SAHRC to appoint staff on an *ad hoc* basis for specific purposes. These appointments are subject to clear legislative requirements aimed at ensuring compliance with public sector accountability and are distinct from s 11 committee appointments.

⁶² See CN9, rec. p. 317; CN10, rec. p. 321; CN11, rec. p. 327; CN12, rec. p. 329; CN13, rec. p. 332; CN14, rec. p. 335; CN15, rec. p. 338; CN16, rec. p. 341.

160. It is not consonant with the requirements of s 19(5) for verbal contracts to be entered into with purported experts with no recordal of the duration of such contracts or the terms of such appointments.⁶³
161. Further, the permits issued to the monitors were all issued by Rev. Nissen purportedly in terms of regulation 11B(3) of the lockdown regulations.
162. Rev. Nissen is not the head of the SAHRC for purposes of the lockdown regulations and could thus not lawfully issue essential services permits to any person. In terms of s 20 of the *SAHRC Act*, the CEO is the accounting officer of the SAHRC and thus the head of institution as defined in the lockdown regulations.
163. In any event the lockdown regulations provide that only Commissioners of the SAHRC were entitled to be issued with essential services permits, and not other persons irrespective of their affiliation to the SAHRC.
164. Consequently, the permits issued to the monitors purportedly in terms of the lockdown regulations were irregular and unlawful.
165. Similarly, the permits purportedly issued to Rev. Nissen, Mr Gaum, and the four SAHRC staff members referred to in the interim order regulating the further conduct of this matter, dated 8 May 2020 are irregular and do not comply with the 29 April 2020 regulations.⁶⁴

⁶³ See reply to Rule 35(12) and (14) Notice where it is stated the “*experts*” were engaged in terms of verbal contracts, para 1, rec. p. 595.

⁶⁴ See rec. p. 750; rec. p. 753; rec. p. 755; rec. p. 757; rec. p. 759; rec. p. 760.

166. These permits have been issued by Rev. Nissen and not the CEO. This is irregular. Signally, Rev. Nissen has issued a permit to himself, in contravention of the 29 April 2020 regulations and has also signed his own permit on behalf of the CEO.
167. All of the aforementioned issues are illustrative of the fact that the SAHRC has used s 11 and s 19(5) to seemingly appoint a large number of persons without any measure of control or oversight or indeed accountability, and clearly in contravention of the relevant regulations.
168. The establishment of the s 11 committee does not permit for powers to be conferred on individuals. In terms of s 12 of the SAHRC Act, powers may be conferred upon and functions assigned to a commissioner (section 12(1)(a)), a member of staff (section 12(1)(b)) or a committee (12(1)(c)). No provision is made for individual monitors to be appointed and their appointment as such is irregular and invalid.
169. An interpretation of the 29 April 2020 regulations that admits of appointments in terms of s 11 and s 19(5) of the SAHRC Act as falling within the definition of “*services rendered by*” the SAHRC would effectively render the purpose of the lockdown and the 29 April 2020 regulations nugatory.
170. Indeed, such an interpretation would allow the SAHRC to circumvent the 29 April 2020 regulations by appointing unlimited numbers of persons for a variety of purposes and to issue them with essential services permits thus effectively granting them freedom of movement not contemplated in the

regulations and indeed in direct contradiction to the express terms of the 29 April 2020 regulations which are aimed at restricting movement.

171. Such an interpretation is not consonant with the express wording of the 29 April 2020 regulations or the clear purpose thereof.
172. For these reasons it is submitted that the appointment of the monitors was unlawful and in direct contravention of the lockdown regulations and their continued operation is in contravention of the 29 April 2020 regulations.
173. Quite aside from the lawfulness issue the conduct of the monitors entitles the City to the relief sought.

THE CONDUCT OF THE RESPONDENTS

174. The City has had constant requests from persons seeking entry onto the site, stating in the first week after people moved onto the site. Indeed, it is evident from the media reports annexed to the founding papers and the reports of the “*experts*” and monitors that the City has faced a barrage of unwarranted criticism regarding the operation of the site. Indeed, the City’s critics including the respondents have gone so far as to publicise in the media false information regarding alleged COVID-19 positive cases at the site.
175. At the outset it must be emphasised that Rev. Nissen was always allowed to access the site.
176. The monitors were denied access after they took to unlawfully threatening staff with arrest and prosecution (powers which they do not have), intimidating

staff and demanding access to confidential medical information. The monitors refused to produce the required permits and identification at the time. The permits that were subsequently produced are irregular.

The 11 April 2020 visit

177. On 11 April 2020 Rev. Nissen arrived at the site with six persons and informed Mr Henry that he had appointed them as monitors. He introduced the monitors, including Mr Jenkins and Ms Kirke. Mr Henry was not given an opportunity to record the names of the six persons who were with Rev. Nissen.
178. Despite both Mr Jenkins and Mr van Cutsem, having at all relevant times and in particular on 11 April 2020, held themselves out to be monitors appointed by Rev. Nissen, it is now claimed that they were appointed on 10 April 2020 as “*experts*” in terms of s 19 of the SAHRC Act one day prior to the visit which they conducted at the site on 11 April 2020.⁶⁵
179. There is no record of their appointment as “*experts*”.
180. Similarly, Ms Kirke despite having held herself out to be a monitor at all relevant times, including on 11 April 2020, now claims that she was first appointed to act as some sort of facilitator whose role was confirmed to “*coordinating*” and “*assisting with logistical arrangements*”.⁶⁶

⁶⁵ AA para 59-60, rec. p. 240.

⁶⁶ AA para 61, rec. 240.

181. Indeed Rev. Nissen represented to the City on 11 April 2020 that Mr Jenkins, Ms Kirke and the other persons with him were duly appointed monitors when he arrived at the site on that day.⁶⁷
182. The City now knows that Mr van Cutsem was one of the six persons who accompanied him to the site on 11 April 2020 and whom Rev. Nissen advised that he had appointed as monitors.
183. Although Rev. Nissen in the answering affidavit seeks to distance himself from these statements as to the status of Mr Jenkins, Mr van Cutsem and Ms Kirke on 11 April 2020, it is submitted that on the facts the court is entitled to reject his version on the papers.⁶⁸
184. When the City requested the contracts for the “*experts*” it was advised that there are no written contracts and that all such agreements have been concluded orally.⁶⁹
185. There is no explanation in the answering affidavit for a “*multi-disciplinary team of experts*”⁷⁰ that was engaged on one days’ notice and without any written terms of reference or indeed any record of their appointment despite being purportedly engaged to “*prepare an expert report on compliance with international human rights and health standards*” at the site.⁷¹

⁶⁷ FA para 115, rec. p. 31.

⁶⁸ *National Director of Public Prosecution v Zuma* 2009 (2) SA 277 (SCA) at para [26].

⁶⁹ Reply to Rule 35(12) and (14) Notice, para 1, rec. p. 595.

⁷⁰ AA para 96, rec. p. 271.

⁷¹ *Id.*

186. No explanation is provided in the answering affidavit for why Mr Jenkin's status changed from "*expert*" to "*monitor*" or why Ms Kirke's status changed from "*facilitator*" to "*monitor*".
187. It is submitted that the only plausible explanation for these discrepancies is that the s 11 Committee was only established on 14 April 2020 but that Rev. Nissen and/or the SAHRC incorrectly and unlawfully held the third to eleventh respondents out to be monitors before they were appointed in any capacity by the SAHRC.
188. The position was clearly misrepresented to the City when Rev. Nissen and the monitors gained access to the site on 11 April 2020.

The 11 April 2020 report

189. On the same date of the 11 April 2020 visit it appears that the "*experts*" prepared a report on their observations at the site. The respondents seek to place reliance on this report for the contention that the site is not fit for purpose.
190. When the founding affidavit was deposed to it was not clear to the City what the status of this report was. In particular it was not clear whether the report purported to be a formal report from the SAHRC prepared in terms of an investigation as contemplated by the provisions of the SAHRC Act. Nor

indeed was it clear in terms of which powers or provisions of the SAHRC Act, if any, the report was prepared.⁷²

191. The first time that the City had sight of this report was when it was annexed as an annexure to the founding affidavit in the urgent application brought on 24 April 2020 by the Strandfontein Social and Economic Development Forum and the Strandfontein Rate Payers Association (*“the Strandfontein application”*).⁷³
192. Most, if not all of the issues raised in the report have been addressed and are no longer in issue.
193. Rev. Nissen persists with the contention that the report was emailed to the Mayor on 24 April 2020 and adds that he *“requested an urgent meeting to discuss the contents of the report”*.⁷⁴
194. It is however clear that the email relied upon by Rev. Nissen is dated 23 April 2020 and not 24 April 2020. The email which is annexed to the answering affidavit does not contain any request for *“an urgent meeting to discuss the contents of the report”* as alleged in the answering affidavit.
195. The email was purportedly re-sent to the Mayor on 29 April 2020. Despite being alerted to the City’s concerns in regard to why it was necessary to resend the email on 29 April 2020 if it had indeed been sent on 23 April 2020 or 24 April 2020 (as now alleged but contradicted by the email) no explanation

⁷² FA para 133-134, rec. p. 36.

⁷³ FA para 132, rec. p. 36.

⁷⁴ AA para 117, rec. p. 277 and CN21, rec. pp. 468-469.

is provided in the answering affidavit. No delivery receipts are annexed presumably because the document was not delivered to the Mayor.

196. On the one hand the respondents contend that the report was sent to the City for comment on 24 April 2020, but it also states that the SAHRC was still discussing the report on 1 May 2020. It is unlikely that the SAHRC would send a report to the City for comment while that report was still under discussion internally. Plainly both versions cannot be correct. This strikes one as an *ex post facto* attempt to somehow address the improper manner in which the report was used.
197. On the evidence it is clear that the report of 11 April 2020 was not sent to the City. The inescapable conclusion is that the only action that the SAHRC and/or one or more of the so-called independent experts and/or monitors took in regard to the report was to release it to the media and other civil society organisations for the purposes of bad faith litigation against the City.
198. The conduct of the respondents in not raising the contents of the reports with the City is entirely inconsistent with the function of promoting respect for and the protection of human rights by monitoring and assessing the observance thereof.
199. The report purportedly documents serious human rights concerns/abuses, yet it has not been raised with the party allegedly responsible for these concerns/abuses (or indeed any other party for that matter) in order to seek urgent redress of the alleged abuses. The withholding of such information

and/or the failure to take steps to redress them is an abdication of the SAHRC's responsibilities.

200. We point out that to date neither the SAHRC nor the monitors have ever sought to engage with the City regarding the purported concerns/abuse documented in the report. Even if SAHRC and/or the monitors were for some reason disinclined to raise the purported concerns/abuse documented in the report, there can be no reason why those concerns were not raised with some other oversight body such as the NDOH.
201. Moreover, no explanation is provided in the answering affidavit for how the 11 April 2020 report came to serve before the court in the Strandfontein application.
202. The contention that the report was first leaked to the media on 1 May 2020 does not explain how the applicants in the Strandfontein application came to possess the report on or before 26 April 2020, being the date on which the affidavit to which that report was annexed in that application was deposed to.
203. The failure to furnish the report to the City (or any other appropriate party) for appropriate remedial action, if necessary, is unacceptable and self-defeating. It is certainly not in keeping with the duties imposed in terms of the SAHRC Act.
204. It is contended the report which was annexed to the Strandfontein application and dated 11 April 2020 was initially "*incorrectly titled*" as a SAHRC report and

that it in fact was a report of the independent “*expert*” team which was not meant for distribution.⁷⁵

205. It is further contended that the initial report was submitted to the SAHRC on 14 April 2020 for consideration and that the final report is now annexed to the answering affidavit. The reports annexed to the answering affidavit and to the Strandfontein application are almost identical save for a few minor changes.
206. Further, although the report is dated 11 April 2020 it contains transcriptions of interviews done on 12 April 2020 as well as other references to interviews on 12 April 2020. This discrepancy is not explained.
207. In addition, the report attached the answering affidavit refers to a report of interviews conducted by Mr Jenkins in his capacity as a monitor which took place on 7 April 2020 at Mowbray and Observatory.
208. It is of interest that aside from Mr van Cutsem whose credibility is in question as detailed below, none of the other medical “*experts*” who formed part of the team that visited the site on 11 April 2020 have deposed to affidavits in this matter.
209. It remains unknown how other persons gained access to this report, yet it was withheld from the City.
210. The City was not given the opportunity to respond to the contentions contained in the report. The principles of administrative justice require that the

⁷⁵ AA para 115, rec. p. 276.

City be given a fair opportunity to consider the report and to respond to the allegations therein.

211. The release of the report ostensibly under the auspices of the SAHRC is troubling and warrants the grant of an interdict. It has also been used to harass and intimidate staff at the site.

The 18 April 2020 visit

212. On 18 April 2020 Rev. Nissen and some of the monitors, including Mr Jenkins and Ms Kirke arrived at the site unannounced and demanded access to the site. Those persons who could not produce permits were denied access.⁷⁶
213. All persons who seek to access the site are required to have the relevant permits in place and identification available as required by the regulations. If the respondents take issue with this requirement, they must challenge the regulations. People cannot access the site freely due to the lockdown restrictions currently in place and the health concerns in ensuring that the site remains free of COVID-19.
214. The demand to enter the site by monitors without the necessary permits was unlawful in terms of the lockdown regulations.
215. As the photographs annexed to the founding affidavit illustrate, neither Rev. Nissen nor those who accompanied him adhered to the lockdown

⁷⁶ FA para 117-118, rec. p. 32. AA para 98-99, rec. p. 272.

regulations. They did not comply with the social distancing requirements imposed by the regulations.⁷⁷

Mr Jenkins' interview on the Fix on 19 April 2020

216. The visit on 18 April 2020 was followed by Mr Jenkins giving an interview on the Fix, which is broadcast on eNCA, on 19 April 2020.

217. Mr Jenkins gave an unwarranted, and inaccurate report on the conditions at the site during this interview.

218. Notably the Protocol on the Code of Conduct for COVID-19 Monitors annexed to the answering affidavit (*“the Code of Conduct”*) requires that only the Chairperson of the s 11 Committee shall be authorised to communicate with the media.

219. Mr Jenkins in his answering affidavit states that Rev. Nissen gave him permission to give this interview.⁷⁸ Neither he nor the SAHRC at any stage sought to engage the City about the alleged concerns raised by Mr Jenkins in this media interview.

220. It is clear from the answering affidavit that the SAHRC does not regard Mr Jenkins' utterances as inappropriate. Nor does it state that his statements fell outside his mandate as a monitor.

⁷⁷ RGB5 and RGB6, rec. pp. 69-70.

⁷⁸ Affidavit of Jenkins para 9, rec. p. 475.

The 23 April 2020 visit

221. On 23 April 2020 Mr Davids addressed correspondence to the City requesting a visit to the site. Rev. Nissen arrived at the site on 23 April 2020 unannounced and without any prior arrangements. He was accompanied by a delegation of persons including a staff member of the SAHRC, Mr Jenkins, Ms Kirke, Ms Van Wyk, Ms Flowers Mr Davids, Ms Williams, Ms van Cutsem, Mr Sacks, Ms Holtzman, a representative of a parliamentary portfolio committee and the respondents' attorney of record, Ms Dass.
222. The City's officials were informed that the attendees were all monitors from the SAHCR with the exception of Rev. Nissen and Khaya Dlulane. The latter is a member of staff at the SAHRC. Although Ms Holtzman was introduced as a monitor of the SAHRC, she listed the organisation which she was representing as "*C-19 Peoples Coalition*" in the attendance register.
223. The attendees were asked for their letters of appointment on 23 April 2020. None were presented except for Ms Flowers. As set out above the appointment letters and the permits relied upon by the respondents are irregular.
224. During this visit Mr Jenkins attended at the medical tent and threatened and harassed the City's medical nurse staff who were also threatened with arrest and prosecution.⁷⁹

⁷⁹ RA para 188, rec. p. 720.

225. The visit on 23 April 2020 was used as a basis to bring the ill-fated Strandfontein application which served before this court on 30 April 2020. That matter came before Papier J.

The 1 May 2020 visit

226. On 1 May 2020 Mr Jenkins and Mr Sacks attended at the site during the lunch hour and demanded access. This was refused by Mr Henry when he returned to the site at 14h00. Mr Jenkins' motor vehicle was blocking the access. They refused to leave the site and the crowd soon grew. The media also came to the site during the course of the afternoon.⁸⁰

227. At just after 6 pm further persons claiming to be SAHRC monitors arrived at the site without prior notice or arrangement. They were accompanied by members of the Strandfontein Ratepayers Association, as well as other unknown people. They demanded to be given access to the site. This was not in accordance with the agreed protocol relating to access to the site. Ms Holtzman forced her way in and took up a position at the gate post making it impossible to close the gate.⁸¹

228. They also blocked the entrance and exit to the site making it impossible for service providers or anyone else to gain entry or to leave. This was hugely problematic since all food is prepared off site and delivered to the property so that the residents can be served. One cannot have a situation where the entrance and exit to the site is effectively blocked as occurred on 1 May 2020. Staff need to enter and leave the site. A number of support vehicles have to

⁸⁰ FA para 145, rec. p. 39.

⁸¹ FA para 146, rec. p. 39

come onto the site. Emergency vehicles may be required. The conduct exhibited by the SAHRC monitors on 1 May 2020 was wholly at odds with ensuring people's human rights.⁸²

229. This unlawful conduct exhibited by the SAHRC monitors resulted in riotous behaviour on the part of the occupiers at the site.⁸³

230. This resulted in two female and one male Law Enforcement officer sustaining bodily injuries.⁸⁴ The City is already constrained with its resources and cannot afford to lose Law Enforcement staff in this manner.

231. The incident which occurred on 1 May 2020 was incited by the respondents.

232. After the SAHRC monitors attended at the property on 1 May 2020, an article appeared in the Weekend Argus on 2 May 2020, which is false in a number of material respects. Its publication was reckless and unjustified and required correction by way of a media release issued by the City.⁸⁵

Mr Sacks' false social media posts regarding positive cases at the site

233. On Sunday, 3 May 2020 Mr Sacks tweeted that there were 9 law enforcement officers at the site who had tested positive for COVID-19 and that the City had exposed "*over a thousand people to Covid-19*". This was patently false. This was later retweeted by another Twitter user.⁸⁶

⁸² FA para 147, rec. p. 40.

⁸³ FA para 148, rec. p. 40.

⁸⁴ FA para 150, rec. p. 41. RGB21-RGB22, rec. pp. 162-163.

⁸⁵ FA para 157, rec. p. 42.

⁸⁶ FA para 159-160, rec. p. 43.

234. Neither Rev. Nissen nor the SAHRC have made any attempt to distance themselves from Mr Sacks' publication despite the fact that it is patently false regarding COVID-19 infections at the site. The silence on this issue is astounding. The publication of false information is a criminal offence in terms of the lockdown regulations and one would have expected the SAHRC to distance itself from unlawful and criminal conduct. Seemingly, this is not construed as being problematic.

The report dated 2 May 2020

235. The respondents in the answering affidavit rely largely on the observations of Mr Sacks and Ms Williams as set out in the report dated 2 May 2020 in support of their contentions that there are "*significant disputes*" as regards the standards at the site.⁸⁷

236. Significantly Rev. Nissen states in terms that the report is not put up to demonstrate the truth of its contents,⁸⁸ yet significant portions of the report are reproduced in the affidavit in a clear attempt to demonstrate that the conditions at the site are not satisfactory.

237. As regards Ms Williams who is allegedly a psychiatric nurse, it is unclear why she has not taken the necessary steps to report the violations that she purportedly observed immediately to the City, the NDOH or the medical staff on duty so that they could be addressed immediately.

⁸⁷ AA para 84 rec. 250.

⁸⁸ AA para 84, rec. p. 250.

238. It is curious that instead she chose to do nothing from 23 April 2020 and simply chose to record her supposed observations in a report which is disclosed to the City for the first time in the answering affidavit. This is incompatible with her ethical duties as a medical professional and calls into question her integrity.
239. Either she observed violations and chose to do nothing, or she did not observe violations and prepared a false report.
240. Mr Sacks' credibility is most certainly in question.
241. The respondents do not deal with the fact that he disseminated false information on social media regarding alleged COVID-19 infections at the site which resulted in false media reports and which had to be corrected by the City. Mr Sacks falsely stated on social media that there were 9 law enforcement officers at the site who had tested positive for COVID-19 and that the City had exposed *"over a thousand people to Covid-19"*.
242. Mr Sacks refused to allow anyone to accompany him when he visited the site. Thus, his purported observations are uncorroborated and rely entirely on his own credibility which is in question. He is not a medical doctor, has no medical expertise and is not qualified to provide an opinion on medical issues.
243. His report states in terms that the views expressed therein are entirely his own and not representative of any organisation. Yet this report is now placed before the court under the rubric of it being a SAHRC report.

244. It is submitted that no reliance can be placed on any information arising from his report.
245. Mr Sacks incorrectly refers to the residents at the site as “*detainees*”. This is simply not correct and is inflammatory. It is also not appropriate for a monitor to use such misleading terms.

The conduct of the seventh respondent

246. Mr Davids has also been addressing correspondence to the City in his capacity as the CEO of the Community Chest. His letter of appointment is dated 16 April 2020. Four days later and on 20 April 2020 he published an report in the Cape Argus in which he castigates City without any factual basis. His conduct in this regard is improper, biased and conflicted. His function is to report to the SAHRC, not to the media.⁸⁹

The incorrect accounts circulated by the ninth respondent

247. Mr van Cutsem deposed to an affidavit in these proceedings. Mr van Cutsem provided an almost identical affidavit to the Community Chest and the applicants in the Strandfontein application.
248. It is apparent from his affidavit that Mr van Cutsem sought and was denied access to private medical information of residents at the site. As a medical professional Mr van Cutsem should be aware that such information cannot be

⁸⁹ FA para 172, rec. p. 46

shared. Yet Mr van Cutsem seeks to criticise the City for failing to disclose such information to him.⁹⁰

249. Despite Mr van Cutsem having been part of the site visit which took place on 23 April 2020 where he would have observed the current status of the facilities and services at the site, he has chosen to depose to an affidavit based on his observations during a visit which took place on 11 April 2020 and 16 April 2020.⁹¹

250. He has been deliberately misleading in this regard. Mr van Cutsem has failed to disclose to the court that the conditions at the site on 23 April 2020 differ markedly to those which he purports to have noted during his visit on 11 April 2020. Indeed, despite visiting the site on 23 April 2020, Mr van Cutsem makes no reference to the conditions at the site on the latter date save for one instance which is dealt with below. It is noteworthy that Mr van Cutsem does not state that the conditions that he observed on 23 April 2020 are the same as those that he purports to have observed on 11 April 2020.

251. Indeed, he could not make such an allegation under oath, given what is set out above as regards the current status of the facilities and services available at the site.

252. Mr van Cutsem provides outdated information regarding ventilation of the tents. It is unclear why Mr van Cutsem appears to be unaware that tuberculosis patients are accommodated separately from the other residents

⁹⁰ Affidavit of Van Cutsem para 8, rec. p. 529-530.

⁹¹ Affidavit of Van Cutsem para 10-11, rec. p. 530.

and are provided with specific treatment in conditions which comply with the guidelines of the NDOH.⁹²

253. Mr van Cutsem's criticisms of the COVID-19 screening and testing protocols are unwarranted given that the City implements the protocols and guidelines of the NDOH of which Mr van Cutsem as a medical doctor should be aware.⁹³
254. Mr van Cutsem incorrectly appears to contend that residents at the site are receiving inadequate or no medical care.⁹⁴ Indeed even a cursory examination of the medical services at the site would have revealed to him that residents have been tested for tuberculosis as well as two additional rounds of COVID-19 screening and testing. In addition, residents have been provided with HIV counselling and testing and have benefited by having previously undiagnosed chronic conditions identified and treatment regimens put in place.
255. Mr van Cutsem also provides inaccurate information regarding the physical social distancing measures implemented at the site.⁹⁵
256. Mr van Cutsem provides incorrect information regarding the care available to substance abusers at the sites.⁹⁶
257. The City provides specialised care for substance abusers. They are identified and provided with psycho-social care. Most such patients should adequately detox without medication. Some were issued with Valium where necessary.

⁹² Affidavit of Van Cutsem para 19, rec. p. 532.

⁹³ Affidavit of Van Cutsem para 21, 24-27 rec. p. 533.

⁹⁴ Affidavit of Van Cutsem para 22-23 rec. p. 533.

⁹⁵ Affidavit of Van Cutsem para 32-35 rec. pp. 534-535.

⁹⁶ Affidavit of Van Cutsem para 54 rec. pp. 538.

Some patients who required further care are directed to specialised care facilities.

258. It is clear from the above that Mr van Cutsem's observations are of no value and singularly unhelpful. His conduct is misleading and unfortunate. It should not be countenanced by this court and is worthy of censure.

THE REQUIREMENTS FOR AN INTERDICT

259. It is trite that an applicant seeking a final interdict must establish, first a clear right to the relief sought; second, an injury actually committed or reasonably apprehended and third, the absence of any other satisfactory remedy available to the applicant.⁹⁷
260. *Setlogelo* refers to "*injury actually committed or reasonably apprehended.*" A final interdict is a remedy not only for a past infringement and harm but also for a future violation of rights and consequent harm.⁹⁸ In *Pilane* the injury is described as "*the violation of the right*".
261. On the facts of this matter it is submitted that the City has a clear right as is evidenced by the following:
262. First, it established the site and has put measures in place to ensure the care and well-being of the occupiers.
263. Second, the City was not obliged to give the monitors access to the site. This notwithstanding, the City did so until the unlawful conduct became an

⁹⁷ *Setlogelo v Setlogelo* 1914 AD 221. See also *Pilane v Pilane and Another* (4) BCLR 431 (CC) at para 39.

⁹⁸ LAWSA Vol 11 para 390.

intractable problem. Rev. Nissen has at all times been afforded access by the City. There are also no difficulties with Commissioner Gaum accessing the site.

264. The City has a clear right to prevent persons from unlawfully accessing the site. The respondents forced their way onto the site on 1 May 2020. They have not desisted from this conduct. There were further unlawful attempts to gain entry on 3 and 4 May 2020.
265. On the latter date, Ms Kirke and Mr Sacks were observed standing outside the site. They were using their mobile phones constantly and it was clear that they were again trying to make contact with people in tent 2. This was the same *modus operandi* followed on 1 May 2020.
266. Third, The City has an entitlement to protect its rights through the courts. It also has a duty to protect the fundamental rights of those persons residing at the site.
267. Fourth, the respondents unlawful conduct, if allowed to continue unabated and in the absence of a court order, will render the site completely ungovernable, unsafe and a health risk. It will lead to an inability on the part of the City to comply with the disaster regulations. This situation is untenable, unlawful and self-defeating. The object of establishing the site was to give persons safe abode during the lockdown.
268. The unlawful entry onto the site is set out in detail above.
269. The City has at no stage refused the Rev. Nissen access to the site.

270. The monitors were refused access but have at various times forced their way onto the property. This occurred on 18 April 2020, 23 April 2020 and 1 May 2020. Attempts to access the site unlawfully have clearly escalated. This is also evidenced by the conduct on 3 and 4 May 2020. The undertaking sought from the SAHRC has not yet been forthcoming and may not be given. It must be emphasised that this situation will in all probability persist unless this court grants the relief sought in the notice of motion.
271. The situation has become progressively worse since 23 April 2020.
272. As things stand, the City's officials, Law Enforcement officers and security guards are patrolling and monitoring the site, but they cannot continue to so 24 hours a day lest the respondents decide to attempt to access the site unlawfully or again succeed in inciting occupiers to violence as occurred on 1 May 2020.
273. The only manner in which the City may avert irreparable harm occurring to people (and perhaps also property) at the site is by obtaining this interdict.
274. It is inconceivable that an organisation such as the SAHRC would fail to provide the undertaking sought that its monitors would not act unlawfully. The SAHRC is the custodial of human rights.
275. It is apparent that the SAHRC is aware of the unlawful conduct of its monitors and has declined to distance itself from such conduct. This is indicative that such conduct will continue unless the relief sought is granted.

276. The interdict will assist and prevent the unlawful access to the site. It will also ensure that the respondents do not force their way onto the property. This will in turn ensure that the current regulations in respect of the lockdown are complied with and that the City can fulfil its function to safely accommodate the residents within its available means and resources.
277. The City cannot have a situation where the entrance and exit to the site is blocked. This is manned 24 hours per day so that the site can be accessed and egressed as required by those lawfully entitled to do so.
278. Service providers have been denied access to the property by the respondents. On 1 May 2020 service providers could not gain access to the site and no-one could leave. The respondents were not concerned about this and remained present until after 9 pm.
279. They were also unconcerned about breaching the curfew regulations. Their attempts to enter the site by force show scant regard for law and order and the necessity of complying with the regulations. It is precisely this attitude which will result in COVID-19 spreading. The City's primary concern is to ensure the care and well-being of the residents at the site. It cannot do so given the respondents' conduct.
280. They are not entitled to access the site. The City has also sought an order restricting them to a 1km radius from the site. This 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. As stated, the *modus operandi* is to call the ring leaders in the tent and to get them to come to the

access point. Once this occurs, they are incited to violence as appears from the videos of that date.

281. The City has done everything in its power to assist the residents and to ensure that their needs are accommodated. Special arrangements were made for them to access their SASSA grants on 5 May 2020. The City provided transportation and masks. More people were taken to collect their grants on 6 May 2020. All SASSA grant recipients were screened when they returned by the medical staff and social distancing was impressed upon them while they were collecting their grants.
282. In the circumstances, I submit that unless the relief sought in this application is granted, the City has no other remedy at its disposal.

THE ADMISSION OF THE WLC AS AN *AMICUS CURIAE*

283. The City submits that this is not a matter where the submissions of an *amicus curiae* will assist the court.
284. Mr Bosman has addressed the rape in his supplementary affidavit. The report of 11 April 2020 makes reference to a gang rape. While there was no gang rape, the fact that a rape occurred appears not to have been of any concern to the respondents or if it was, this did not galvanise them into action. Not a single respondent considered it necessary to report the matter to the City to ensure that there was not a recurrence.
285. The submissions which the WLC seek to advance do not assist in the determination of the matter. The City is seeking an interdict for the reasons

explained in its papers. The submissions made by the WLC are unhelpful in the determination of the matter and, in particular, whether or not the City is entitled to an interdict. They have also not demonstrated why the respondents cannot make these submissions.

286. Fundamental to the role of an *amicus* is that it assists a court by offering information, expertise or insight that has a bearing on the issues in the case.⁹⁹ The contribution of the WLC fails to do so. In short, it has no bearing on the issues.

THE ADMISSION OF CALS AS AN *AMICUS CURIAE*

287. The submissions made above in respect of the WLC apply equally to CALS. It makes a fundamental error when it asserts that this is a strategic lawsuit against public participation (“*SLAPP*”). Suits such as this are regulated by statute in foreign jurisdictions usually referred to as anti-*SLAPP* laws. *SLAPP* suits are brought to silence or intimidate the opposition. This matter is the polar opposite of a *SLAPP* suit.

288. The complaint made by the City is the respondents’ failure to have brought issues to the attention of the City’s. This is manifest from the letter addressed to Rev. Nissen by the Mayor on 30 April 2020.¹⁰⁰

289. The letter was addressed to Rev. Nissen out of concern:

⁹⁹ *Phillips v South African Reserve Bank and Others* 2013 (6) SA 450 (SCA) at para [37].

¹⁰⁰ Annexure RGB18, pp 149-151.

- 289.1. *“about the spreading of misinformation by certain accredited members of the SAHRC’s Advisory Committee on lockdown measures.”*
- 289.2. The Mayor expressed concern about the reckless circulation of reports containing faults and distorted information about the site.
- 289.3. He outlines the known and disproven falsehood contained in the report.
- 289.4. He emphasised the duty which the National State of Disaster placed on everyone and the need to publish accurate and non-misleading information.
- 289.5. He highlighted that Dr Van Cutsem and Mr Jenkins *“have been releasing misinformation for several weeks now.”*
- 289.6. He drew to the attention of Rev. Nissen that Dr Van Cutsem and Mr Jenkins were assisting Ndifuna Ukwazi with a potential court application to have the shelter closed.
- 289.7. The Mayor emphasised the President’s call for national unity and solidarity in combating the spread of the pandemic and expressed his appreciation for Rev. Nissen’s ongoing support for the City’s efforts to care for the homeless.
- 289.8. He also thanked Rev. Nissen for his recent comments to the media in which he condemned the “fake news” surrounding the site. He

also pointed out that Rev. Nissen had previously expressed his disappointment at the premature release of reports by individuals on the Advisory Committee.

289.9. The Mayor appealed that they *“now redouble our efforts to ensure collegiality and solidarity while the City conducts the decommissioning process of the emergency shelter at Strandfontein”*.

289.10. The Mayor also looked forward to further engagements with Rev. Nissen and expressed his appreciation for the support to date, notwithstanding the concerns raised.

290. The above letter was clearly written in a spirit of cooperation and to remediate issues which Rev. Nissen himself had taken issue with.

291. There was no response to the Mayor’s letter.

292. On 2 May 2020 Mr Bosman addressed correspondence to SARC.¹⁰¹ His concerns include amongst other things the failure by the monitors to adhere to the lockdown regulation, their incitement of riotous behaviour, their failure to comply with section 41 of the SARC Act. Mr Bosman proceeds to enumerate a number of concerns, some of which overlapped with those raised by the Mayor.

293. He also explained that in terms of section 26(1) of the Regulations published on 29 April 2020, the Commissioners of the SARC had been appointed as an

¹⁰¹ Annexure “RGB23” at pp164-165.

essential service provider. This function had not been extended to staff of the Commissioner. He pointed out that section 25(f) of the Regulations allowed for controlled access to the shelter. He also pointed out the unlawful conduct at the site, in breach of the Regulations.

294. The City sought an undertaking outlined in paragraph 2¹⁰² of the letter. This letter was clearly not an attempt to silence anyone, but to secure compliance with the law. This removes it from the realm of a slapp suit.

295. In *Waypex (Pty) Ltd v Barnes & Others*¹⁰³ Sapire AJ noted that the concept of vexatiousness corresponds very closely with the features of a slapp suit.¹⁰⁴

296. Vexatious proceedings are regulated in our courts by the Vexatious Proceedings Act, No. 3 of 1956 and in terms of the common law.

297. It is well established that our courts have the power to regulate its own process and to stop frivolous and vexatious proceedings. See in this regard *Member of the Executive Council for the Department of Co-Operative Governance and Traditional Affairs v Maphanga*¹⁰⁵ where the Court held as follows at paragraph 25:

“It was firmly established in the South African common law, long before the advent of the Constitution, that the Supreme Court had the inherent power to regulate its own process and stop frivolous and vexatious proceedings before it. This power related solely to proceedings in the Supreme Court and not to

¹⁰² At p160.

¹⁰³ *Waypex (Pty) Ltd v Barnes & Others* 2011 (3) SA 205 (GNP).

¹⁰⁴ At p207.

¹⁰⁵ *Member of the Executive Council for the Department of Co-Operative Governance and Traditional Affairs v Maphanga* 2020 (1) All SA 52 (SCA).

proceedings in the inferior courts or other courts or tribunals. The following principles crystallised over the ages. It had to be shown that the respondent had ‘habitually and persistently instituted vexatious legal proceedings without reasonable grounds. Legal proceedings were vexatious and an abuse of the process of court if they were obviously unsustainable as a certainty and not merely on a preponderance of probability. I must point out at this juncture that this definition applied to all litigation that amounted to an abuse of court process. The attempt by the MEC’s counsel to distinguish the cases from which the principle derives on their facts was, therefore, mistaken.’

298. On the facts of this matter, the litigation clearly has merit and the breaches of the Regulations and the SARC Act have been established. The City has also shown that the monitors have been irregularly appointed, in contravention of the Regulations. Moreover, all the requisites for an interdict have been met. These proceedings cannot be categorised as a slap suit, particularly in circumstances where the City has sought to engage with the SARC.

URGENCY

299. The conduct exhibited at the site by the respondents and the harm and injuries inflicted are all matters which render the matter extremely urgent. The City will not be afforded substantial redress at a hearing in due course.
300. It is incumbent that the regulations be complied with to combat or at least curb the spread of COVID-19. This will not be achieved should the respondents’ unlawful conduct persist. I respectfully aver that the attempted unlawful access to the site constitutes a threat to the safety of all residents as well as

the City's officials, staff and service providers. These, as well as the other factors delineated above, render this matter extremely urgent.

CONCLUSION

301. For the above reasons, a proper case has been made out for the relief sought in the notice of motion which should be granted as prayed.

APPLICANT'S AUTHORITIES

1. *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC)
2. *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).
3. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)
4. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)
5. *KPMG Chartered Accountants v Securefin and Another* 2009 (4) SA 399 (SCA)
6. *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC)
7. *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC)
8. *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A)
9. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)
10. *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-G. See also *Lipschitz and Schwartz NNO* 1976 (3) SA 772 (W)
11. *National Director of Public Prosecution v Zuma* 2009 (2) SA 277 (SCA)
12. *Setlogelo v Setlogelo* 1914 AD 221
13. *Pilane v Pilane and Another* (4) BCLR 431 (CC)
14. *Phillips v South African Reserve Bank and Others* 2013 (6) SA 450 (SCA)
15. *Waypex (Pty) Ltd v Barnes & Others* 2011 (3) SA 205 (GNP)

16. *Member of the Executive Council for the Department of Co-Operative Governance and Traditional Affairs v Maphanga* 2020 (1) All SA 52 (SCA)