OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

CASE NO: **21616/19**

In the matter between

THE CITY OF CAPE TOWN	Applicant
And	
JP BALUS	First Respondent
PAPY SUKAMI	Second Respondent
SYLVIA NAHMANA	Third Respondent
THE PROTESTORS OCCUPYING THE SECTIONS OF LONGMARKET STREET, BURG STREET, INCLUDING THE SIDEWALKS, AND GREENMARKET SQUARE, AS SHOWN ON ANNEXURE "A" HERETO ("THE AFFECTED AREA")	Fourth Respondent
THOSE PERSONS WHO ASSOCIATED THEMSELVES WITH THE AIMS AND CONDUC T OF THE FOURTH RESPONDENT AS WELL AS THE FIRST TO THIRD RESPONDENTS	Fifth Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES, WESTERN CAPE	Sixth Respondent
THE PROVINCIAL COMMISSIONE OF THE SOUTH AFRICAN POLICE SERVICES, WESTERN CAPE	Seventh Respondent
THE MINISTER OF HOME AFFAIRS	Eighth Respondent

JUDGMENT DELIVERED: 17 FEBRUARY 2020

THULARE AJ

INTRODUCTION

[1] This is an urgent application for a *rule nisi* returnable on a later date to be determined by the court in terms of which the respondents and any other interested parties are called upon to give reasons why a final order should not be granted in the following terms:

> 1. That the first to fifth respondents be ordered to refrain from the following conduct in Longmarket and Burg Streets, including sidewalks, and Greenmarket Square, Cape Town, (the affected area) and anywhere else in the City of Cape Town;
>
> 1.1. intimidating, threatening, harassing or assaulting or in any way interfering with the applicant's officials, or any persons acting on their behalf or involved with the law enforcement at the affected area; and/or
>
> 1.2. damaging any of the applicant's assets or facilities or properties; and/or

1.3. preventing persons from entering or leaving the property; and/or

1.4 contravening the applicant's By-Law relating to streets, public places and the prevention of noise nuisance, 2007 published in the Province of Western Cape: Provincial Gazette No 6469, on 28 September 2007 and in particular, without derogating from the generality of the aforegoing:

1.4.1 staying overnight and sleeping at any time;

1.4.2 making fires;

1.4.3 cooking and eating food;

1.4.4 doing clothes washing;

1.4.5 conducting personal hygiene regimes, including ablutions;

1.4.6 urinating and/or defecating.

2. That the relief sought as set out in paragraph 1, operate as an interim interdict pending the final determination of this application.

3. In the amended notice, the applicants also sought:

3.1 That the sheriff of the court, assisted by the SAPS if necessary, be authorised to take such steps as are necessary in the circumstances to enforce any interim order granted by this court;

3.2 That the SAPS be authorised to arrest such persons who refuse to comply with any such order.

3.3 That any interim order granted by this Court be served on the first to fifth respondents by the Sheriff of the Court in the following manner:

3.3.1 affixing at least ten (10) copies thereof to lampposts or other suitable structures in and around the affected area;

3.3.2 handing out at least fifty (50) copies thereof to protesters found within the affected area, and in the event of persons refusing to accept same, leaving such copies in a box or suitable container at a prominent place in the affected area;

3.3.3 by reading, through a loud hailer, the terms of any interim order granted, at a prominent place in the affected area.

4. Costs against any party that opposes the application, jointly and severally, as the case may be.

[2] The applicant did not pursue the relief sought against the National Commissioner as well as the Provincial Commissioner of the South African Police Services. The two were cited in the papers as the sixth and seventh respondents respectively. The applicant and the Minister of Home Affairs, who was cited as the eighth respondent in the papers, reached an agreement in respect of the relief that the applicant had sought in the papers.

[3] The only issue is whether the applicant should be granted the relief sought against first to fifth respondents (the respondents).

THE BACKGROUND

[4] There are two narratives that underpinned the developments around some foreign nationals living in South Africa in late 2019. The first was that some foreign nationals were behind the unlawful underworld of drug trade, child trafficking, forced prostitution, building hijackings and general unlawfulness in the country and these criminals were taking over authority in the streets and some settlement areas of the Republic.

[5] The second narrative was that businesses run by some foreign nationals sold illegal and counterfeit as well as expired goods in the open market. In terms of this narrative, the upsurge of unlawful trade in counterfeit goods destroyed the economy and led to the increase in unemployment and the decrease in employment opportunities. The trade in illegal and counterfeit goods affected the economy in that custom duties, value added tax and normal tax were not being paid but benefits were derived from the conduct of business. Government was denied revenue, which collection contributed to its socio-economic programmes.

[6] Intellectual property rights' holders invested in their brands but could not have any returns on investments. The illegal and counterfeit trade was riding on the brands' successes. The brands had unfair competition and some were forced to consider closing business, which increased unemployment. Furthermore, the illegal and counterfeit goods as well as expired goods included pharmaceutical and medicinal products, as well as food sold generally to the poor. This was seen as a contributory

factor to the state of health and even death for some of the poor people. The poor were sold not only unhealthy but in some instances also toxic consumables.

[7] These narratives received extensive media coverage, both audio-visual and print. The narratives alleged collusion between the alleged foreign national drug dealers and illegal and counterfeit as well as expired food traders on one hand, and some members of the police on the other hand. This alleged collusion, founded on corruption, was provided as the reason why those foreign nationals were brazen in their unlawful activities.

[8] On 1 August 2019 the South African Police Service (SAPS) undertook a law enforcement operation in the City of Johannesburg targeting illegal and counterfeit goods. The police confiscated illegal and counterfeit goods from the traders and vendors involved. The vendors and traders gathered and confronted the police. The vendors and traders refused to follow the instructions of the police. The confrontation with the police escalated into a violent attack on the law enforcement officers. The police and their armoured vehicles were pelted with bottles, bricks and petrol bombs by the crowd. The situation became volatile. The police withdrew from the operation allegedly to avoid bloodshed and death. The lawlessness displayed and the open attack on the police, which also received both audio-visual and print media coverage, was seen as a challenge to the sovereignty and authority of the Republic. It fed into a perception that foreign national criminals have become ungovernable and did not respect the laws of this country.

[9] On 27 August 2019, Jabu Baloyi, a taxi driver, allegedly witnessed a foreign national who sold drugs to school- going children at one of Pretoria's busiest taxi ranks in Bloed street in the City Centre. He allegedly acted on his observations and was shot dead by persons related to the drug underworld. A public riot followed Jabu Baloyi's killing, which included attacks on businesses of some foreign nationals alleged to be behind the underworld drug trade. The developments around this killing received extensive media coverage. Confidence in the capacity or willingness of the State to deal with the underlying criminality embedded in these narratives declined.

[10] Mass protests where people came together and laid the basis for the solidarity that would challenge the criminality represented in the two narratives followed. There was a building ferment within the country. The two narratives and amongst others the two incidents undergirded the outbreak of mob attacks on some foreign nationals, some vendors and some businesses owned by foreign nationals, largely in and around Johannesburg and Pretoria in the days that followed, around September. Some homes were burnt, shops were looted and others experienced personal violence. This caused a major national and international outcry.

[11] The situation veered to the verges of profound moral, ethical and political crisis. The Executive leadership of the country condemned the inhumane and degrading treatment of foreign nationals. Unity, shared values and a more inclusive society were called for and a commitment was made to hold those responsible to account. Active grassroots interventions were mobilized, social movements organized around the developments on stability and the attacks were subsequently contained. Some foreign

nationals were voluntarily reintegrated into communities that they originally fled from. Others relocated whilst others opted to return to their countries of origin, some with a repatriation drive sponsored by their respective governments and their fellow nationals.

[12] That history and background was, in my view, essential for a just determination of this matter. It was necessary to refer to that history and background, as the issue in this matter should be seen against that history and background in order to properly contextualize it. Under the circumstances, I was unable to disregard that history and background as it was familiar information known and that related to the community at large. It is in the context of that history and background that the respondents started their sit-in protest. In my view, that history and background not only met the criteria for common knowledge, but is also a relevant factor. The history and background is not knowledge by my personal observation, but are facts commonly known as a result of notoriety [*R v Tager* 1944 AD 339 at 343]. It is general information.

THE SIT-IN PROTEST

[13] Over the ensuing weeks, especially from 1 October 2019, the respondents, who are allegedly all foreign nationals, began a sit-in protest in the Waldorf Arcade Building, 80 St George's Mall, Cape Town. This is the building which amongst others, also house the United Nations High Commissioner for Refugees (the UNHCR). Their demand was that the UNHCR relocate them as a group to Canada, other countries in Europe or any country that would receive them outside South Africa, and not to their countries of origin. They alleged fear for what they referred to as xenophobic violence. They also

alleged that they are all refugees or qualify for that status and are asylum seekers. Around 15 October 2019 the number of protesters had reached around 1200. The first to third respondents openly led the protest. The UNHCR advised the respondents that resettlement was highly unlikely.

[14] The owners of the building were granted an interim interdictory relief on 16 October 2019 directing the respondents to immediately vacate the building, interdicting them and restraining them from entering any part of the building unless such respondent had obtained express written and signed consent from either the owners or tenants and further interdicting and restraining the respondents from committing any acts that impeded and or prevented the owners from accessing, using, rendering of services at or administering the building or complying with any of their obligations to the various tenants.

[15] The Sheriff of the Court, the South African Police Service, the Department of Social Development, the Department of Health Emergency Services, the Department of Home Affairs, the UNHCR and the Department of Community Safety as well as the Operational Co-ordination for Central Business District of the City of Cape Town planned a joint law enforcement operation which was carried out on 30 October 2019. In excess of 100 people were arrested for contravening the court order. Images of the apprehension of women and children, which enjoyed media coverage, created another national outcry.

[16] It was during that joint law enforcement operation that the Central Methodist Church (the Church) offered to provide temporary shelter for the respondents at Greenmarket Square. The respondents were too large a group to all fit in the church. Mostly women and children were accommodated inside the church. The men moved their sit-in protest to the streets, sidewalks and sections of the Greenmarket Square in the area around the Church. This is the affected area. No order is sought against the respondents inside the church.

[17] The respondents in the affected area slept in the open, cooked meals on open fires, bathed or washed themselves, did their washing and hung clothes to dry and also attended on their personal ablution and toilet requirements which includes urinating and defecating in the streets and sidewalks of the City Centre, which are public spaces to which the public had a right of access and use. They have intentionally blocked, occupied and reserved for themselves a public space and interfered with the safe and/or free passage of pedestrians and vehicles. They have not immediately ceased to do so when directed by peace officers. They have fought, acted in a riotous manner and physically threatened others, the law enforcement officers and officials of the City of Cape Town.

[18] The respondents sat on front stoeps of hotels in the area and refused to leave when requested by the business owners, claiming that the stoep is on the pavement and therefore public space where they can sit if they wanted to. As a result, guests felt threatened and refused to get off the taxis and enter the hotels. Hotel managers who tried to engage the respondents on their conduct were threatened with physical harm.

The Business Forum informed the City and sought its intervention. A number of European travel advisories issued warnings to European tourists against visiting Cape Town as a direct result of the situation developing with the respondents in the City. Hotels in the affected area suffered cancellations of bookings already made by tourists. The space leased to taxis was occupied and led to conflict between the respondents and the taxi operators.

[19] The Greenmarket Traders Association is made up of traders who lease space from the City at Greenmarket Square. The Square is one of the most frequented places in the City particularly in the peak tourism season. Many of the Association's members are refugees and the asylum-seeking community in Cape Town. The respondents have occupied parts of their business area. Unhealthy odours from the use of the streets and sidewalks as toilet, by the respondents, affect the traders' work and their businesses adversely. Around a third had to close down whilst others are facing collapse in trade. The open fires are a health hazard.

[20] The affected area reportedly had the air thick with the stench of urine, with a series of makeshift tents. The smell was unbearable. The noise, fights and sexual acts in public by the respondents raised concern. The refuse that lies around posed a health threat. The value of the properties in the area was affected. Properties were losing tenants and businesses run from the commercial units lost viability. Property management companies and other interested parties asked the City to intervene and enforce its by-laws. Most organized business formations threatened the City with legal action and some firms of attorneys started correspondence with the City in that regard.

[21] The respondents did not avail themselves of the various available legal resource institutions, to which their attention was drawn, and did not utilize their right to legal representation. Instead, they elected to be represented by their leadership. They did not file opposing papers and the necessary affidavits in terms of the rules, opting to make statements which were not under oath or affirmation.

[22] The respondents were aware that their demand for resettlement to another country other than repatriation to their country of origin, if they opted to leave the country, would not be met. Anyone who expressed themselves on the respondent's unrealistic demand and sought to influence a realistic solution was declared an enemy and was either threatened or attacked by the respondents. This included the leadership of faith-based organizations, various non-governmental organisations, the UNHCR, the Department of Home Affairs and the South African Human Rights Commission. The City indicated that it did not have alternative accommodation to provide to the respondents, whether temporary until resettlement as demanded, or permanently. It sought to engage the respondents on steps to terminate contravention of its By-Law. Its officials were attacked. The bare denials of the respondents are simply not enough to gainsay and stand in contradistinction.

[23] The respondents have for all intents and purposes established a self-governing territory within the City of Cape Town. No single individual, or a group of persons, should be allowed to be a law unto themselves. An attack on law enforcement officers is an attack on the authority of the State. The respondents have shown no respect for

authority. I am not convinced that the vulnerability of a foreign national, especially one who has or may qualify for a status as a refugee or asylum seeker, is in itself a weapon sufficient to intimidate officials of a country into submission to a flagrant disregard of the country's laws and processes. The City is well within its rights to defend the rule of law, and enforce its By-Law.

THE ANALYSIS

[24] The applicant abandoned its prayer for the respondents to be ordered to refrain from conducting any form of sit-in protest as it appeared in its notice of motion. Intimidation, threats, harassment, assault, malicious damage to property and preventing persons from entering or leaving the property, which are conduct referred to in 1.1 to 1.3 above, are common law and statutory offences in terms of our law. Nothing turns around them being offences and I deem it not necessary to restate the elements of those offences.

[25] The relevant provisions of the City of Cape Town By-Law relating to Streets, Public Places and the Prevention of Noise Nuisances, 2007, published in the Provincial Gazette No 6469 dated 28 September 2007 (the City By-Law), read as follows:

Clause 2 (1) (a) (i):

"2. (1) No person, excluding a peace officer or any other official or person acting in terms of the law, shall-

(a) When in a public place-

(i) Intentionally block or interfere with the safe or free passage of a pedestrian or motor vehicle;"...

Clause 2 (2):

"2 (2) Any person who blocks, occupies or reserves a public parking space, or begs, stands, sits or lies in a public place shall immediately cease to do so when directed by a peace officer or member of the Cape Town Metropolitan Police Department."

Clause 2 (3):

"2(3): No person shall in a public place-

(a) Use abusive or threatening language;

(b) Fight or act in a riotous or physically threatening manner;

(c) Urinate or defecate, except in a toilet;

(d) Bath or wash himself or herself, except –

(i) In a bath or shower; or

(ii) As part of a cultural initiation ceremony in an area where such a ceremony is taking place;

(e) Spit

(f) Perform any sexual act;

(g) Appear in the nude or expose his or her genitalia, except where designated by the City as area where nudity is permitted, provided that this shall not apply to children below the age of seven;

(h) ...

(i) ...

(j) ...

(k) ...

(l) Start or keep a fire, except an official or person duly authorised to do so or acting in terms of the law or in an area designated by the City to do so; or

(m) Sleep overnight or camp overnight or erect any shelter, unless in an area designated for this purpose by, or with the written consent of the City, provided that this shall not apply to cultural initiation ceremonies or informal settlements."

Clause 3 reads:

"3. No person shall in a public space-

(a) Cause or permit to be caused a disturbance by shouting, screaming or making any other loud or persistent noise or sound, including amplified noise or sound;"

Clause 7 reads:

"7. No person, other than a peace officer or other official or person acting in terms of the law shall-

(a) Deposit, pack, unpack or leave any goods or articles in a public space, or cause any goods or articles to be deposited, packed, unpacked or left in a public space, other than for a reasonable period during the course of the loading or off-loading or removal of such goods or articles, or

(b) In any way obstruct the pedestrian traffic on a sidewalk by bringing or allowing to be brought thereon any object or motor vehicle."

Clause 13(a) and 14 reads:

"13. No person shall in a public space-

(a) Including on a balcony or verandah erected beyond the boundary line of a public road, wash, clean or dry any object, including any clothing, except in an area designated by the City for that purpose;" ...

14. No person shall dry or spread washing, bedding or other items in a public place or on a fence or the boundary of a public road except where conditions in an informal settlement are such that it is not possible to do otherwise."

Clause 19 reads:

"19. No person shall, in a public space-

(a) sleep in a stationary motor vehicle except in dire emergency (or where such a person is the driver of a public transportation motor vehicle or is guarding the motor vehicle) or in a designated rest area; or

(b) reside in a motor vehicle for longer than twenty-four hours."

[26] The City had recourse to contraventions of its By-Laws, as set out in clauses 22 and 23. The two clauses read as follows:

"THE CITY MAY ACT TO RECOVER COSTS

22. (1) Notwithstanding any other provision of this By-Law, the City may-

(a) Where the permission of the City is required before a person may perform a certain action or erect anything, and such permission has not been obtained; and

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

(2) Any person who fails to comply with a notice in terms of subsection (1) shall be guilty of an offence, and the City may, without prejudice to its powers to take action against the

offender, take the necessary steps to implement such notice at the expense of the owner of the premises or the offender, as the case may be.

OFFENCES AND PENALTIES

23. (1) Any person who contravenes or fails to comply with any provision of this By-Law or disobeys any instruction by a peace officer or a member of the Cape Town Metropolitan Police Department, enforcing this By-Law, shall be guilty of an offence and with the exception of a contravention of section 2(3)(g),(h),(i),(j) and (k), where there is a maximum penalty as provided for in analogous national legislation, be liable to a fine or imprisonment for a period not exceeding six months, or to both a fine and such imprisonment.

(2) Any person whop contravenes sections 2(2)(g),(h),(i),(j)) or (k) shall be liable to a fine as the court may deem fit to impose or to imprisonment as the court may deem fit to impose or to both a fine and imprisonment, not exceeding the maximum penalty as provided for in analogous national legislation. Where there is no maximum penalty as provided for in analogous legislation the maximum penalty provided for in subsection (1) applies.

(3) A court convicting a person of an offence under this By-Law may impose alternative sentencing in place of a fine or imprisonment."

[27] The evidence showed that the City attempted at a stage to issue a notice as envisaged in clause 22 of the By-Law. The City withdrew its law enforcement agencies when the respondents acted aggressively towards its officials. The City abandoned its law enforcement exercise as a result of a threat posed by the respondents. The consequence was that the City did not issue notices to the respondents, for instance in pursuance of contravention of clause 2 (1) (a) (i), 2 (2) or 7, as regards the erection of

structures or tents erected on the streets and sidewalks and other objects. The City elected not to use available civil remedies provided by the By-Law against the respondents. The civil remedy provided for in clause 22 in my view included provision, in the notice, for an amount reflecting an administrative charge reasonably associated with the rendering of any duty by the City as a necessary step to implement the notice. This would include amongst others the costs of the notice as well as the tariffs reflecting the costs reasonably associated with implementation of the notice on action taken by the City should the respondents fail to comply with the notice to remove any structure, object, material or substance. The tariffs would have a rational connection between the amount it cost and the extent of the action of the City in execution of its function.

[28] The mindset of the City turned to criminal prosecution, but not at its instance. There is nothing in the papers that indicate that the City had taken necessary steps to implement the terms of any notice given. I can therefore safely accept that no notice was issued to the respondents to terminate their contravention, as offenders of the By-Law. Clause 22 read with clause 23 also provides for a fine or imprisonment or both but only on conviction of an offence pursuant a judicial process. The City clearly did not elect a path that gave it the authority to levy fees, charges and tariffs as well as the authority to recover fines for transgressions, over and above the removal of the respondents.

[29] The City in its founding papers referred to its various law enforcement entities. Amongst these is the municipal police service established in terms of section 64 A of

the SAPS Act No. 68 of 1995 (the SAPS Act). The functions of a municipal police service are set out in section 64E of the SAPS Act as follows:

"64E. Functions of municipal police service. – The functions of a municipal police service are-

(a) Traffic policing, subject to any legislation relating to road traffic;

(b) The policing of municipal by-laws and regulations which are the responsibility of the municipality in question; and

(c) The prevention of crime."

Section 64 F(3) provides:

"64F. Powers of member of municipal police service.-

(3) Every member of a municipal police service is a peace officer and may exercise the powers conferred upon a peace officer by law within the area of jurisdiction of the municipality in question: ..."

Section 64H provides:

"64H. Procedure after arrest by member of municipal police service.- A person arrested with or without warrant by a member of a municipal police service shall as soon as possible be brought to a police station under the control of the Service or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant, to be dealt with in terms of section 50 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)".

One should also have regard to section 64 F (2) which reads:

"(2) The Minister may from time to time prescribe that any power conferred upon a member of the Service by this Act or any other law, may be exercised by a member of a municipal police service: Provided that where the power includes the power to seize an

article, the member of the municipal police service shall forthwith deliver the article to a member."

[30] There is a deafening silence from the City in its papers, which silence is too loud to be disregarded, on the full role which was played by the City of Cape Town Metropolitan Police Department, in furtherance of its function to police the By-Law which are the responsibility of the City. The City enjoyed the benefit of legal advice and representation in dealing with the contravention of its By-Law in this matter. It cannot be said that its election not to avail itself of the full powers of its resource, the municipal police, available within its machinery, was an oversight.

[31] It is not far-fetched, in my view, to conclude that full utilization of its municipal police would have led to two possible paths that the City did not desire to walk. Firstly, arrest is the most drastic infringement of the rights of an individual and the law requires of peace officers to regard it as a last resort as a method of securing the attendance of an alleged offender to court. The less invasive method in this matter would have been issuing the respondents with a written notice as envisaged in section 56 of the Criminal Procedure Act, (the CPA). The admissions of guilt amounts determined for the prohibited behavior per clause are amounts of not more than R5000-00 per clause. The non-appearance of contravention of its By-Law in Schedule 1 of the CPA meant that the City deemed it not advisable for the municipal police to arrest the respondents without a warrant. One can conclude from the affidavit deposed to on behalf of the City and its interaction with the SAPS and DHA that the City's primary goal was the arrest of the

respondents. The issue of a notice as a means to bring the respondents before the court did not advance the City's goal.

[32] Secondly, the municipal police would have been well within their functions to arrest the respondents in order to end an offence as envisaged in Clause 23 (1) of the By-Law, on the circumstances of this case. This is a justifiable exception to the general rule that the object of an arrest was to secure the attendance of the offender at his or her trial [*Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) at para 19]. It is not for this court to speculate on the reasons that informed the City's desire to have the respondents arrested, but that such arrest should not be executed by members of its municipal police. The City wanted to eat, but not from the sweat of the brows of its own officials.

[33] Suffice it to say that had the municipal police arrested the respondents, as it was within their functions to have done so, and brought the respondents as soon as possible to a police station under the control of the SAPS, I doubt that the application against the SAPS would have been necessary The arrest would have started a knock-on effect, whose next move would have meant that the respondents would have been dealt with in terms of section 50 of the CPA, which included detention, being granted to bail or appearing before a magistrate's court as soon as reasonably possible, but not later than 48 hours after the arrest.

[34] Any person who contravenes or fails to comply with any provision of the By-Law or disobeys any instruction by a peace officer or a member of the Cape Town

Metropolitan Police Department, enforcing this By-Law, is guilty of a punishable offence. This means that if and when a complaint is lodged with the SAPS, which relates to the contravention or failure to comply with the By-Law or disobeying a member of the municipal police, the SAPS has a duty to act in accordance with its mandate. The SAPS has a residual duty in the enforcement of the By-Law. According to its papers, the City attempted to co-ordinate an appropriate intervention to deal with the issue of the respondents. In perusing the papers, I have been unable to find any evidence that the City or any of its officials at any stage attended to a member of the SAPS to file a complainant in respect of an offence as envisaged in clause 23 of the By-Law. Had the City done that, in my view, the seventh respondent, the Provincial Commissioner of the SAPS, may have chaired a meeting of the local policing coordinating committee as envisaged in section 64K of the SAPS Act, in order to determine its own procedure on how to deal with the complaint. I doubt that an application against the National Commissioner and the Provincial Commissioner would have been necessary, had the City simply lodged such a complaint.

[35] My approach to this matter is better summed up by what Yacoob J said in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) at para 20:

> "[20] The provisions challenged in the High Court are of immense public importance, being concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings who may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of the people concerned but also their dignity as human beings. The very fabric

> of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity."

[36] The Immigration Act, 2002 (Act No. 13 of 2002), administered by DHA, provides for the admission, entering, sojourning and departure of foreign nationals in the country. All permits, consents and authorisations for a foreign national must be issued in writing by DHA. A foreign national's entering and sojourning in the country when not documented, is illegal. It cannot be said that there are adequate reasons for the City to determine that the foreign nationals at the affected area are undocumented and their sojourn illegal, unless there are sufficient factors for the City to suspect that. I have perused the affidavit deposed to on behalf of the City, and except reference to the countries of origin of the respondents set out as Rwanda, Burundi, the Democratic Republic of Congo, Somalia, Bangladesh and Pakistan, I have been unable to trace factors relied upon which are sufficient to sustain a reasonable suspicion by the City's officials that any of the respondents are undocumented and their sojourn illegal.

[37] The City is aware that the respondents claim to be refugees and asylum seekers. The City understood the concerns of the respondents to be related to the service provided to them by DHA. I say this because in paragraph 9 of the founding affidavit, Mr Petrus Ignatius Robberts (Robberts) said:

> "9. It has not been possible to establish the names and other particulars of the fourth and fifth respondents. The group comprises of between 200 and 600 persons. They are foreign nationals who have embarked on protest action against alleged poor treatment by the eighth respondent, of which their current conduct is an extension. They are

however clearly identifiable by their current location, as well as their conduct, as described herein."

At paragraph 18 Robberts continued:

"18. The protest action and conduct described herein, is a sequel to a recent spate of protest actions by the first to fifth respondents, including occupation of the offices of the eighth respondent, against alleged poor treatment by the eighth respondent. ..."

The City, on its own version, knew that the respondents amongst others complained about the quality of the services rendered by DHA.

[38] The City cut to the chase in the first paragraph of what they stated as relevant facts, to wit, paragraph 27:

"RELEVANT FACTS

27. During October 2019 a group of approximately 300 refugees and asylum seekers began a sit-in protest in the Waldorf Arcade building, 80 St Geroge's Mall, CapeTown, which inter alia houses the offices of the United Nations High Commissioner for Refugees ("the UNHCR"). Their protest was stated to be against recent alleged xenophobic violence against foreigners in South Africa and they demanded that the UNHCR relocate them out of South Africa, as a group, to either Canada or Europe. Over the ensuing weeks, the numbers of the group fluctuated, reaching a peak of approximately 1200 protestors on 15 October 2019."

The inescapable conclusion is that on 2 December 2019 when Robberts deposed to this affidavit, the City knew that not only the Immigration Act, but also the Refugees Act, 1998 (Act No. 130 of 1998) (the Refugees Act) was applicable to the respondents. The logical flow from what the City said in paragraphs 9, 18 and 27 is that a group of refuges

and asylum seekers were unhappy with the service from DHA, which can only relate to their documentation related to admission, entry sojourning and departure in the Republic, as well as alleged xenophobic attacks.

[39] In my view, the City places a question mark with a red pen over its own application's *bona fides* when it proceeds as follows at paragraph 33:

> "33. ... The written operational plan involved that the DHA would process any persons arrested and deal with such foreign nationals who do not have the requisite permission to be in the country, in accordance with its procedures and in terms of the Immigration Act, 13 of 2002 ("the Immigration Act"). My understanding of the procedures is that persons suspected of being illegal foreigners may be arrested, in which case they are detained in cells at the various police stations, which in this case would be at Cape Town Central Police Station. The Immigration Act contains specific procedures in terms of which such persons found not to have permission to be in the country can then ultimately be deported."

Only the City knows why it would deliberately exclude and disregard the provisions of the Refugees Act, which is the legislation which regulates matters related to refugees and asylum seekers in the Republic, in its case against DHA.

[40] The general provisions of refusal of entry, expulsion, extradition or return to other country where the person may be subjected to persecution on the listed grounds or where his or her life, physical safety or freedom would be threatened on the applicable listed grounds in section 2 of the Refugees Act demand not only an interview but some research of the person and country of origin by a Refugee Reception Officer and a Refugee Status Determination Officer. This also relates to the qualifications for the

status provided for in section 3, the Exclusion provisions in section 4, the grounds for cessation of refugee status as provided for in section 5 as well as some research, understanding, interpretation and administration of the Convention Relating to the Status of Refugees (UN, 1951), the Protocol Relating to the Status of Refugees (UN, 1967), the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969), the Universal Declaration of Human Rights (UN, 1948) and any other relevant convention or international agreement to which the Republic is or becomes a party. This is required by section 6 of the Refugees Act. This is over and above functional literacy of the Refugees Act, the Constitution and other relevant prescripts. Where necessary, the Refugee Status Determination Officer may need to consult with the UNHCR representative to exchange information. From the City's own description of the conditions and circumstances, as well as inconsistent conduct of the respondents towards DHA, it was not conducive for DHA to carry out its mandate either at the church or the affected area.

[41] Being a foreign national on its own, within the borders of the Republic, does not translate into illegality. Being an immigrant is not illegal either. It is being undocumented that is illegal in South Africa, as regards foreign nationals. The City itself, in paragraph 45 of its founding affidavit set out how its own law enforcement officers had to withdraw a legitimate government exercise because of the aggression of the respondents. Law enforcement officers of the City include the municipal police. It is striking to note that the City expected DHA unarmed civilian personnel to walk in where the City's security and armed forces feared to tread.

[42] On the other hand, it appears to me that the way that the respondents interpreted the position was different from what the true position really was. I have reason to believe, from reading the papers in this matter, that JP Balus (Balus) and Papy Sukami (Sukami) tended to deceive the majority of the other respondents. The two leaders are aware and have been told repeatedly by various persons and institutions, where the two represented the respondents, that the demand to be resettled was unlikely to happen, yet they encouraged its indefinite sustenance.

[43] The two are aware that the continued sit-in protest would also not miraculously translate into them being granted access to housing in the City of Cape Town. The City had consistently told them that it had no housing for them, when they demanded it. The City indicated that those who sought housing with it apply for it and that most of those within its jurisdiction are on a waiting list and further that the respondents cannot seek to jump that queue simply because they have engaged in protest action. It is not for this court to determine whether the respondents had prospects of success to be provided with housing under any programme of government or any other institution. The power and duty to determine whether a person should be provided with housing, as an owner or on rental, a subsidy therefor or a loan thereto lay outside the jurisdiction of this court. At best all I can say is that an applicant has to lodge an application with the relevant authority and is entitled to enjoy the benefit of the application process.

[44] JP Balus's ability to engage proficiently in English, a privilege from which others did not ordinarily benefit, provided an opportunity for him to distort perception due to the others' vulnerability. The two leaders created a deceptive and misleading image, after

gathering information and processing it by creating a perception that in reality did not match what the sit-in may achieve. The majority of the other respondents were vulnerable firstly on their competency to intelligibly engage in the issues because of the language barrier, and secondly because they were alleged refugees and asylum seekers who had suffered considerable trauma. Most had been displaced from their countries of origin and the experiences of some foreign nationals in the Republic especially in the months of August and September 2019 was simply inhuman. In my view Balus and Sukami misused the other respondents' vulnerability, inability and humility.

[45] Sad as it may sound, the attacks on some foreign nationals in the country around August and September 2019 appear to me to have been an opportunistic bread from which Balus, Sukami and some of their hangers-on determined to feed. The reaction of the majority of South Africans was to contain those attacks and because of the passage of time as well, that opportunistic bread had become stale and mouldy. It is simply unfortunate that Balus, Sukami and their hangers-on use the sit-in protest and their demands to try and restore the stale and mouldy bread to a fresh loaf. Their sit-in protest and its demands sounds to me like a broken microwave oven available to them. However hard and at whatever frequency the buttons are pressed, it will not work.

[46] It appears to me that the illusionary self-governing territory of a make-shift slum settlement established by Balus, with a shadow opposition party led by Sukami, within the Cape Town Metropolitan Municipality in Greenmarket Square, Longmarket and Burg Streets, is not sustainable. The protest is ungovernable. It is used to pursue

unachievable goals and in my view amounts to abuse of the right to protest, which is a sacrosanct method to raise and to pursue legitimate concerns. In essence, the City prays that the government of the affected area should move from the pretenders and their followers and return to the competent authority, to wit, the City of Cape Town Metropolitan Municipality.

[47] In my view, under the circumstances, those respondents who are in distress have an obligation to attend in person to the relevant applicable unit of the City or a municipality that has jurisdiction over their habitual residence within the Republic to seek assistance, and to provide to the City or that other municipality all the necessary information to enable the City or that other municipality to decide on their position. The information may include but is not limited to the provision of fingerprints and photographs as regards their true identity. The information may also include sufficient particularity of facts, factors and circumstances from which a well-founded fear of persecution or a threat to their life, physical safety or freedom is based should they return to their former habitual residence in the Republic.

[48] In my view, this should be a natural flow into our national law, drawn from our approach on the international stage. Section 2 of the Refugees Act provides as follows:

> "Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return or remain in a country where-

(a) He or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) His or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."

[49] Cameron J, writing for the Constitutional Court said the following about this section in *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) at para 24 and 25:

"[24] This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself- but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of *non-refoulement,* the concept that one fleeing persecution or threats to 'his or her life, physical safety or freedom' should not be made to return to the country inflicting it".

"[25] It is a noble principle- one our country, for deep-going reasons springing from persecution of its own people, has emphatically embraced. The provenance of s 2 of the Refugees Act lies in the Universal Declaration of Human Rights (Universal Declaration), which guarantees 'the right to seek and to enjoy in other countries asylum from persecution'. The year in which the Universal Declaration was adopted is of anguished significance to our country, for in 1948 the apartheid government came to power. Its mission was to formalize and systematize, with often vindictive cruelty, existing racial subordination, humiliation and exclusion. From then, as apartheid became more vicious and obdurate, our

country began to produce a rich flood of its own refugees from persecution, impelled to take shelter in all parts of the world, but especially in other parts of Africa. That history looms tellingly over any understanding we seek to reach of the Refugees Act."

[50] In my view, a respondent has to show that factors exist that compel them not to return to their habitual residence. The City or that other Municipality may request clarification where such is necessary. The City or that other municipality has an obligation to assist such respondent in that regard, within its means. The City or that other municipality may conduct such enquiry as it deems necessary to verify the information furnished by such respondent in order to process and deal with such respondent's request and its provision for aid in distress.

THE LAW

[51] The dust between the SAPS and DHA on one hand and the City on the other, which largely contributed to the length of this judgment, including the basis for the order, related mainly to the powers and functions of each of them. After that dust was settled, what remained to be seen was that the City prayed for a restraint order to address the problem which the respondents had created on the streets of the City of Cape Town. Against that background, the main question that the court had to consider was whether the City had passed the threshold and made up a case for an interim order to be granted.

[52] In *National Treasury v Opposition to Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene)* 2012 (11) BCLR 1148 (CC) at para 41 Moseneke DCJ said:

> "The test
>
> [41] The High Court relied on the well-known requirements for the grant of an interim interdict set out in *Setlogelo* and refined, 34 years later, in *Webster*. The test requires that an applicant that claims an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy."

[53] The City had a duty and a right to enforce compliance with its By-Law not only in its own interests, but also in the interests of the community. The respondents are engaged in contraventions of the law in public spaces, which the City is custodian of. The affected area has been rendered ungovernable and a no-go area, which cannot be countenanced. The City cannot sanction deliberate illegality where it has a duty to its inhabitants and visitors.

[54] The respondents caused and continue to cause substantial and irreparable harm, for instance the financial as well as reputational damage to others in the affected area especially the hospitality industry and allied businesses of the City, the Province and the country. The demands of the respondents are unreasonable. The court cannot advance conduct which makes it impossible for the City to govern its territory. The City

had shown a *prima facie* right which if not protected by an interdict, irreparable harm would ensue

[55] When comparing the harm that the City would endure if the interim order is not granted against the harm that the respondents would suffer if it is granted, in my view, the balance of convenience favours the granting of the order. It is not my duty to restrain the City, a tier of government, to exercise its power and function, unless it does so outside the bounds of the Constitution and the law or infringing the rights enshrined in the Constitution. The doctrine of separation of powers of the State enjoins me to exercise caution, respect and restraint.

[56] The respondents threatened the law enforcement officers of the City when the City attempted to obtain their personal information in an attempt to issue notices. It is unclear whether these were notices in terms of clause 22 of the By-Law or in terms of clause 23 of the By-Law read with section 56 of the CPA. The City abandoned that course. The papers suggest that it was abandoned as a result of the respondent making it impossible, at that time, for the City to obtain their particulars. The remedy sought in this matter is urgent and effective protection. I have my doubts as to whether the two notices, which are available remedies, can be said to provide similar protection [*Setlogelo v Setlogelo* 1914 AD 221 at 227], on urgency alone, at this time. To send the city back to consider the arrest of the respondents would be technical and unjust. It is not a given that in lieu or together with a sentence, the magistrate may order the civil remedies, which in my view are necessary under the circumstances.

[57] What is clear to me is that unless the court intervenes, the conduct of the respondents, which has no regard for authority, the rights of others and the law will continue indefinitely. The City has satisfied me of the facts necessary for its right to be protected in this application. After having considered the attitude and response of the City in respect of its obligations towards the rights of the respondents, as human beings, in my opinion, there is a need to set out terms which safeguard the respondents. The court needs to protect the City, but also to uphold the rights of the respondents [*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1193]. The Bill of Rights in our Constitution enshrined the rights of all people in our country, which includes foreign nationals [section 7(1) of the Constitution]. The City, as a tier of government in our State, must respect, protect, promote and fulfill the rights in the Bill of Rights [section 7(2) of the Constitution]. A just and equitable order is called for.

THE ORDER

[58] For these reasons I would make the following order:

1. A rule *nisi* is issued returnable on 17 March 2020 on the semi-urgent roll of the Court, in terms of which the first to fifth respondents and any other interested parties are called upon to give reasons why a final order should not be granted in the following terms:

    1.1 That the first to fifth respondents be ordered to refrain from the following conduct in the sections of Longmarket and Burg Streets,

including the sidewalks, and Greenmarket Square, Cape Town, as shown on Annexure "A" hereto ("the Affected Area"), and anywhere else in the City of Cape Town:

1.1.1 Intimidating, threatening, harassing or assaulting or in any way interfering with the applicant's officials, or any persons acting on their behalf or involved with the law enforcement at the Affected Area; and/or

1.1.2 Damaging any of the applicant's assets or facilities or properties; and/or

1.1.3.1 Preventing persons from entering or leaving the Affected Area; and/or

1.1.4 Contravening the applicant's By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances, 2007 published in the Province of Western Cape: Provincial Gazette No 6469, on 28 September 2007 and in particular, without derogating from the generality of the aforegoing:

1.1.4.1 Staying overnight and sleeping at any time;

1.1.4.2 Making fires;

1.1.4.3 Doing clothes washing;

1.1.4.4 Conducting personal hygiene regimes, including ablutions;

1.1.4.5 Urinating and defecating.

1.2 Occupy any structure, object, material or substance erected, deposited, packed or left on the streets, sidewalks and any public spaces of the affected area.

1.3 Further and/or alternative relief.

1.4 Costs against any respondent or other person who opposes this relief.

2. That the relief sought in paragraph 1.1 above operates as an interim interdict pending the final determination of this application, and only comes into operation on the day after the seven day period referred to in paragraph 4 below.

3. That the Sheriff of the Court, assisted by the SAPS if necessary, be authorised to take such steps as are necessary in the circumstances to enforce any order granted by this Court.

4. For a period of seven (7) court days after the date of this order:

4.1 the applicant shall make available a suitable venue at which the Department of Home Affairs (DHA) shall conduct and undertake such verification and other administrative processes that are required in relation to the first to fifth respondents in terms of Immigration Act 13 of 2002 and/or the Refugees Act 130 of 1998

4.2 the DHA shall for such purposes deploy officials to undertake such process;

4.3 the applicant shall provide transport to the first to fifth respondents from the Affected Area to the aforementioned venue, of as many persons per day as indicated by the DHA;

4.4 The applicant shall make available a suitable venue at which it shall process Respondents who are in distress and who attend in person to the Applicant to seek assistance and provide to the applicant all the necessary information to enable the applicant to decide on their position. The information may include but is not limited to:

4.4.1 personal particulars;

4.4.2 fingerprints and photographs;

4.4.3 sufficient particularity of facts, factors and circumstances from which a well-founded fear of persecution or a threat to their life, physical safety or freedom is based should they try return to their former habitual residents in the Republic.

4.5 the applicant shall provide transport to the first to fifth respondents from the Affected Area to the aforementioned venue, of as many persons per day as indicated by the applicant.

5. That this order be served on the first to fifth respondents by the Sheriff of the Court in the following manner:

5.1 Affixing at least ten (10) copies thereof to lampposts or other suitable structures in and around the Affected Area; such copies to also be provided in the languages of Lingala, Swahili and French;

5.2 Handing out at least fifty (50) copies thereof also in the languages referred to 5.1 to protestors found within the Affected Area, and in the event of persons refusing to accept same, leaving such copies in a box or suitable container at a prominent place in the Affected Area;

5.3 By reading, through a loud hailer, the terms of any interim order granted, at a prominent place in the Affected Area, such interim order to also be read in the languages of Lingala, Swahili and French.

6. That in the event of non-compliance with any provision(s) of this order, the applicant is granted leave to approach this Court on the same papers, duly supplemented, for an order of civil contempt and/or any further and appropriate relief that may be necessary.

7. No order is made against sixth and seventh respondent.

8. No costs order is made in respect of First, Second, Third, Fourth, and Fifth Respondents. The Applicant is ordered to pay the costs of the Sixth, Seventh and Eighth Respondents, such costs in respect of the Eighth Respondent to include the costs of two (2) Counsel.

D. THULARE
Acting Judge of the High Court