

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

CASE NO: 16372/2021

In the matter between:

RUWAYDA DAVIDS

1st Applicant

FURTHER OCCUPIERS OF 6 SYDNEY STREET,

DISTRICT SIX, CAPE TOWN AS APPEARS IN

ANNEXURE “RD1”

2nd – 44th Applicants

and

CITY OF CAPE TOWN

Respondent

JUDGMENT ELECTRONICALLY DELIVERED ON 7 OCTOBER 2021

ALLIE, J:

1. Applicants bring this application as an urgent one seeking the following relief:
 1. Declaring that the dispossession of the Applicants’ tents, habitable structures and possessions and their eviction by the Respondent on or about 19 September 2021 at or around Sydney Street Parking Area, District Six, Cape Town, without a valid order of court, in terms of the by-law relating to Streets, Public Places and the Prevention of Noise Nuisances (Provincial Gazette 6469 of 2007) is unlawful in terms of section 26(3) of the Constitution, read together with section 8 (1) of the

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE);

2. Directing the Respondent to:

1.2.1. Return the tents and habitable structures confiscated from the respective Applicants, alternatively construct for the Applicants temporary habitable structures that afford shelter, privacy and amenities at least equivalent to those that were destroyed and/or removed, and which are capable of being dismantled, at 6 Sydney Street Parking Area, District Six, Cape Town at which their previous shelter structures were demolished, with immediate effect; and

1.2.2. Return the Applicants' possessions, including tents, habitable structures and building materials, wood. Clothing, shoes, food, mobile phones and waster for recycling, and any other items which were removed, to 6 Sydney Street Parking Area, District 6, Cape Town, with immediate effect; and

3. Directing that Respondent is:

1.3.1. Interdicted and restrained from evicting the Applicants from their tents and habitable structures at 6 Sydney Street Parking Area, District 6, Cape Town, without a valid order of court granted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; and

1.3.2. Interdicted and restrained from demolishing damaging, confiscating or otherwise destroying and disposing of the Applicants' tents and habitable structures and personal property;

4. ALTERNATIVELY, the Respondent is liable for the cost of restoring the Applicants' structures damaged, destroyed or disposed of by themselves on the 19 September 2021, and are directed to:

1.4.1 provide each Applicant whose tents and habitable structures were damaged or destroyed with the equivalent, alternative tents or materials, alternatively, provide the Applicants with a compensatory amount of R1700 (one thousand seven hundred rand: and

1.4.2. provide each Applicant whose personal property was damaged or destroyed with a compensatory amount of R1500 (one thousand five hundred rand);

1.5. Costs on an attorney and client scale.

2. The Applicants allege that on 19 September 2021 the Respondent unlawfully dispossessed them of their personal belongings and unlawfully evicted them from 6 Sydney Street Parking Area, District Six, Cape Town ("the property"), without a valid order of court.

Factual Matrix

Applicants' Allegations

3. The Founding Affidavit deposed to by Ms Ruwayda Davids, contains the following allegations concerning what transpired on Sunday 19 September 2021.
4. On Sunday 19 September 2021, at or around 09h00, about ten vehicles from the City's Law Enforcement arrived at the property. They were accompanied by a Law Enforcement vehicle with a large trailer, bearing the City's Law Enforcement emblem. A further two trucks arrived at the property, one with a crane affixed to the back, apparently used for waste removal, and the other appeared to be a loading truck.
5. Soon after the arrival of Law Enforcement, the City's Law Enforcement officers ("City's officers") approached the Applicants' and ordered that they vacate their respective homes, remove their personal effects, and dismantle their homes or else the Law Enforcement officers would take it away themselves.
6. Although the Applicants tried to engage the City's officers to enquire on what basis the confiscation of their personal belongings and homes were being carried out, the City's officers refused to engage the Applicants' save to demand that they dismantle their homes.

7. The City's officers failed to provide any documentation that authorised their actions, despite the request of the Applicants that they provide same. At this point, the City's officers and certain individuals wearing blue overalls with reflective tape, who seemed to be in the employ of Law Enforcement, began forcefully and unlawfully dismantling the Applicants' tents and habitable structures in instances where the Applicants had failed or refused to do so.
8. The City's officers and the individuals in their employ also unlawfully dismantled and confiscated the tents and habitable structures of the Applicants who were not present at the time, without first enquiring who the owner was or whether they were present. The City's officers indiscriminately confiscated the tents and habitable structures along with personal effects that were inside, in a manner that made it impossible for the Applicants to salvage their personal belongings first, regardless of the Applicants' presence at the property at the time. Some of the personal belongings seized by Law Enforcement include identity documents and other personal documentation like family members' death certificates, driver's licenses, clothes, blankets, toiletries and even food.
9. The confiscated tents, habitable structures and belongings were then loaded onto the trucks. Where this was the case, the Law Enforcement official issued a notice for the impounded property to some of the Applicants, but only to those that were present. They did not issue notices to every Applicant who is a party to this application and who had their belongings impounded. These notices

requested the Applicants 'to appear before the Municipal Court on a charge of 'contravening ... Section 2(1)(a) read with Section 23 of the By-Law relating to Streets, Public Places and the Prevention of Noise Nuisance 2007...' The notices further indicate that the fine payable for the alleged contravention, is R300.00. Section 2(1)(a) of the Streets, Public Places and Prevention of Noise Nuisance By-law, 2007 ("Streets By-law") states that:

*'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 [...]*

10. Some Applicants' were charged with contravening section 18(1) read with Section 28 of the Coastal By-law PG8301/2020 (Government Gazette No. 8301) ("Coastal By-law") on the charge which reads to '[b]lock or impede coastal access land or damage or deface infrastructure relating to coastal access land.' Such a notice states that the relevant Applicant is fined in the amount of R 2000.00.
11. Some of the Applicants were also given a notice issued either in terms of the Streets By-law or Informal Trading By-law P/N 6677/2009, with such notice detailing the property that was confiscated as well as the tag number affixed thereto. The notice does not state in terms of which section and which By-law it was issued. Due to the Applicants having all their belongings outside and exposed to the various adverse elements, many of the issued notices have been

damaged or destroyed. According to the notices, the confiscated property is stored at Ndabeni.

12. At no point were any of the Applicants given a copy of a court order, which sanctioned the conduct of the City's officers, either in terms of the common law or a statute. Instead, they were given notices and receipts as described above for their confiscated tents and property.
13. It is common cause that on 19 September 2021 the City's officers in the employ of the Respondent ("the City") removed tents and makeshift structures (houses erected using plastic, wood and any other material) which constituted the homes of the Applicants'.
14. According to the Applicants, such removal constituted an eviction which could only have been authorised through a Court Order under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), while it is the Respondents' case that the tents were impounded under a 'By-Law Relating to Streets, Public Places and the Prevention of Nuisances approved by Council: 30 May 2007 C24/05/07' promulgated 28 September 2007 PG 6469; LA 44559 ("Streets By-Law").

15. Consequently, the pertinent issue for consideration in this application is the question under which laws the Law Enforcement officers were permitted to remove the tents and make shift structures.
16. A monitor from the South African Human Rights Commission (SAHRC) assisted the first applicant to lodge a complaint of contravention of the Disaster Management Act 57 of 2002 (DMA) , with the SAPS against the Respondent.
17. Some occupiers left the site in Sydney Street's Parking area due to the cold weather but first applicant and others remained on the site. First Applicant is currently sleeping under one plastic sail and was drenched and cold on the morning of 20 September 2021.
18. The mayor stated in an open letter dated 11 March 2021, to the City's residents that occupiers could not be removed without a court order under PIE for the duration of the DMA regulations.
19. The Respondent's Principal Inspector of Law Enforcement, the Displaced People Unit (DPU) and the Problem Building Unit, one Mr Aldridge stated in a memorandum that tents, whether occupied or unoccupied, will not be removed during the lockdown imposed in terms of the National State of Disaster.
20. Approximately a month before 19 September 2021, the Respondents Social Development Department's officials approached some of the Applicants and

offered them accommodation at the City's Safe Space but first applicant advised the officials that she had used those facilities previously but it doesn't provide an opportunity for her to live with her household members privately. She also informed the officials that she had been on the City's housing waiting list since 1991.

21. Respondent's attorney responded to Applicant's attorney's letter of demand by, *inter alia*, stating that the land occupied by Applicants is the subject of a land claim in terms of the Restitution of Land Rights Act 22 of 1997 and that Applicants' occupation, undermines the restitution of land.
22. Applicants allege that in the absence of signage erected in the vicinity, they were unaware that the land is subject to land restitution claims.
23. Applicants do not deny the importance of the land restitution process, but allege that the Respondent should obtain a court order to evict them and should prior to such order, engage meaningfully with them with regard to suitable alternative accommodation.
24. Applicants allege that the Respondent uses the Streets By-law to circumvent PIE much in the same way that the colonial and apartheid governments disregarded the rule of law and the application of the Streets By-laws to the Applicants serve to criminalize the poor.

25. Applicants refer to three other instances where the Respondent had used the Streets By-law to illegally evict people living in tents in the past month, namely:

25.1. On 23 August 2021, tents, dwelling materials and personal possessions of 21 people living adjacent to Green Point Tennis Club were confiscated. The court proceedings are known as Valencia Lewis and Others v City of Cape Town and judgement has been reserved in that matter;

25.2. People living in Hope Street, Cape Town have been subjected to repeated law enforcement raids and confiscation of their tents, materials and personal belongings, as late as late as 22 August 2021, under the implementation of the Streets By-law. Sections 22, 22(2) and 23. The Applicants in that case seek to declare the Street By-laws unconstitutional and invalid for violating sections 9,10,12(1)(a) and (e); 14, 21(1) ,25(1) ,26(1) and (3) of the Constitution. That case is known as Gelderbloem & 10 Others v City of Cape Town;

25.3. People living in Bothasig in tents had their tents and other personal belongings confiscated by the City's Law Enforcement officers on 17 September 2021.

26. Applicants allege that the Coastal By-law being applied to some of them is not applicable to the land in Sydney Street, District Six as it is not land that can properly be described as coastal access land.

27. Applicants deny the Respondent's notices' assertion that they have contravened sections 2 (1) (a) and 23 of the Streets By-law, in that they deny that they prohibit or block or interfere with safe passage of pedestrians or vehicles by living in tents in the parking area of the land in question.
28. Applicants aver that only some of them received confiscation notices and those notices were damaged while in their possession as they were exposed to inclement weather.
29. Applicants allege that those occupiers who were absent from their tents or informal structures when the Respondent's officers commenced effectively evicting them, were out searching for a means of income or food and were therefore not notified of the confiscation.
30. Applicants allege that by issuing notices in terms of section 56 of the Criminal Procedures Act 51 of 1977, the Respondents acted as judge, jury and executioner in their own cause.
31. Applicants allege that Respondent has misused and distorted the intention of the Streets By-Law to, effectively evict them from their homes.
32. Applicants seek a *mandament van spolie* in that they were in peaceful and undisturbed possession of their tents and informal structures as well as of their personal belongings and they were unlawfully deprived thereof.

33. Applicants also allege that they fulfil the requirement for the grant of an interdict in that they have a *prima facie* right, actual harm suffered, no adequate alternative remedy.
34. Although applicant sought interim relief in their founding papers, during argument, Mr Jaga, SC, for the Applicants submitted that applicants seek final relief as the issues were fully ventilated on the papers and during argument.
35. Applicants annex to their founding papers, colour photographs showing that the Respondent's Law Enforcement vehicles had removed tents and building materials as well as mattresses and cupboards.
36. Applicants annexed confirmatory affidavits of 29 applicants to their founding papers.

Respondent's Allegations

37. In its answering affidavit, the Respondent alleges the following.
38. The Applicants bring the application at a time when they know that there is litigation pending before the courts concerning the Respondent's implementation of the Street By-laws and hence the application is frivolous and vexatious.

39. The Applicants' legal representatives are waging a campaign against the City and frustrating the fulfilment of its Constitutional obligations.
40. The Respondent had tendered to return the confiscated items to the Applicants at a different place to the place from which it was confiscated.
41. Since 26 September 2021, tents and structures have once again been erected on the Parking Lot at Sydney Street, District Six, Cape Town.
42. Respondent alleges that Applicants should have joined the Commissioner for Land Restitution and a failure to do so, calls for the dismissal of the application.
43. Respondent takes the point that the Applicants have not properly cited the 2nd to 45th applicants in that their full names, gender, occupation or unemployment status and addresses are not described in the founding affidavit. Therefore, it is alleged, that they lack the necessary *locus standi* to bring this application.
44. Respondent alleged that it is inhumane and unsafe for applicants to live on the streets because they are subject to violence, sexual abuse, lack protection against the elements and have no access to basic services such as, ablution facilities, water and electricity.
45. Respondent alleges that the Applicants may cause the demise of the area by making illegal fires; littering, dumping of hazardous waste; increasing criminal

activity; abuse of drugs and alcohol in public spaces; create a nuisance and noise when fighting with one another; create health hazards by urinating and defecating in public; accumulating items intended for recycling which is dumped in public open spaces, parks, buildings, roadways and sidewalks; blocking drain systems and damage fire hydrants and other infrastructure and by storing clothing in fire hydrants which corrodes its metal.

46. No specific allegations are made as to which applicants committed which of the abovementioned anticipated contraventions of law.
47. Respondent relies on section 2(1) (a) of the Streets By-law dealing with the prohibition on intentionally blocking or impeding pedestrians and vehicles in a public space. Once again, no specific facts demonstrating a contravention of the section are alleged.
48. Respondent also relies on section 2(2) of the Streets By-law, which prohibits blocking, occupation, begging, standing, sitting or lying in a public space including a public parking space. No facts are alleged in support of a contravention of that sub section.
49. Respondent relies on section 2(3)(c), (d) and (m) of the Streets By-law that prohibits urination or defecation in a public place, save for a toilet, bathing in a public place and sleeping overnight or camping or erecting shelter in a public

place without consent of the City No facts are averred in support of a contravention of that sub section.

50. Respondents rely on section 7 of the Streets By-law that prohibits objects, goods or articles not used, from obstructing public places. No facts are alleged concerning the applicants' alleged contravention of that section.
51. Respondent relies on section 10(a) (i) of the Streets By-law that prohibits goods, building materials, motor vehicle wrecks or dangerous objects without prior consent, being left, stored or packed in a public place. No facts supporting an alleged contravention of the section are provided.
52. Respondent relies on section 22(1)(a) and (b) for its authority to remove structures, objects, material or substances.
53. Respondent relies on the criminal sanctions imposed in section 23 of the Streets By-law.
54. Respondent alleges that the land in District Six has been targeted for unlawful use since 2020 and that *"it presents a major obstacle for the building of house(s) to (sic) the District Six beneficiaries."*
55. Since the land in issue in these proceedings concern a Parking area, Respondent does not explain whether the Parking Lot is intended to be built

upon for housing and whether that fact was communicated to Applicants in form of due notice, prior to the removal of their structures and tents.

56. Respondent relies on 18 compliance notices issued to people on 28 August 2021, but only 3 of those notices refer to occupiers living on the Sydney Street Parking Area.
57. Respondent alleges that Applicants refused to accept the alternative accommodation offered to them.
58. In amplification of the suitable accommodation alleged by Respondent, it is alleged that the people at Safe Space in Culemborg wake up at 6am, have breakfast and leave by 8am and return at 17h00. That is clearly not a home in which household members can remain together during the day and it is clearly in the nature of a shelter for homeless persons. What applicants sought to create for themselves, was a home, albeit in a temporary structure.
59. Respondent relies on the judgement in Case No.7349/2021 and allege that first applicant is in contempt of that court order. No contempt of court proceedings have been brought concerning that case.

Applicants' Replying Affidavit

60. In reply, applicants seek copies of the confiscation notices issued to them so that they can verify which of their belongings were confiscated and so that they can have those belongings returned to them.
61. Applicants deny that its failure to join the Commissioner for Land Restitution is fatal to their case as they say no relief is sought against the Commissioner for Land Restitution and that he would not have a direct and substantial interest in this application.
62. Applicants seek that Respondent follow due process in evicting them and they do not claim a permanent right to remain on the land.
63. Applicants filed a further 15 confirmatory affidavits with their replying affidavit.
64. Applicants allege that the City failed to follow their own policy of its Social Services Department holding six engagements with people, would the matter be referred to the Law Enforcement Department but the Respondent did not allege instances of six engagement processes with applicants.
65. Applicants further allege that Law Enforcement failed to implement its policy of i Phases 1 and 2 and seem to have gone straight over into phase 3.

Principles of Law

Joinder

66. Applicants' counsel made the following submissions concerning the applicable law.

67. In **Bowring NO v Vrededorp Properties CC and Another**¹ the court held:

*"Though the Trust may well be right in its analysis of the effect of Vrededorp's claim, the enquiry relating to non-joinder remains one of substance rather than the form of the claim. (See eg Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657.) The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned (see eg Aquatur (Pty) Ltd v Sacks and Others 1989 (1) SA 56 (A) at 62A - F; Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others 2005 (4) SA 212 (SCA) paras [64] - [66])."*²

68. The legal position in **Bowring** had been confirmed in **Judicial Service Commission v Cape Bar Council**³, where the court held that:

"It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings I concerned (own emphasis added)" (see eg Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg Burger v Rand Water Board and Another J 2007 (1) SA 30 (SCA) para 7; and Andries Charl Cilliers, Cheryl Loots and 2013 (1) SA p177 Brand JA (Cloete JA, Snyders JA, Mhlantla JA and Petse JA concurring) Hendrik

¹ 2007 (5) SA 391 (SCA). Hereafter referred to as *Bowring*.

² See *Bowring* at para 21.

³ 2013 (1) SA 170 (SCA). Hereafter referred to as *Judicial Service Commission*.

Christoffel Nel Herbstein & Van Winsen The Civil Practice of the A High Courts of South Africa 5 ed vol 1 at 239 and the cases there cited)."⁴

Constitution of the Republic of South Africa, 1996 ("the Constitution")

69. According to section 2 of the Constitution; the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
70. In terms of section 9(1) -(3) of the Constitution:
- "Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- a. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed Chapter 2: Bill of Rights 6 to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- b. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."*

Section 25 (1) of the Constitution

71. Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. A deprivation is defined as the restriction of the owner's use and enjoyment, exploitation and disposal of the property. There are two requirements

⁴ See *Judicial Service Commission* at para 12.

for an arbitrary deprivation in section 25(1). Firstly, the deprivation must take place in terms of a law of general application. Secondly, no law may permit arbitrary deprivation.

72. Furthermore, to decide whether there is a sufficient reason for the deprivation, “a complexity of relations” has to be considered.

Section 26(3) of the Constitution

73. Section 26(3) of the Constitution provides that:

“no one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

74. In support of the interpretation and application of this constitutional provision, reference is made to two cases namely, **Pheko v Ekurhuleni Metropolitan Municipality**⁵ and **Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality**.⁶

75. In **Pheko**, the Constitutional Court held, in view of the section 55 of the Disaster Management Act 57 of 2002, “that The Municipality's understanding of s 26(3) as set out above is incorrect. The Municipality's proposition simply turns s 26(3) on its head. Section 26(3) must be read as a whole. It does not permit legislation authorising eviction without a court order.”⁸

⁵ 2012 (2) SA 598 (CC), hereafter referred to as *Pheko*.

⁶ 2013 (1) SA 323 (CC), hereafter referred to as *Schubart Park*. ⁸ *Pheko* para 35.

76. In **Schubart Park**, the City of Tshwane sought to rely on various statutory bases for the removal of the residents and the Court held that neither the conditional tender made by the City nor the High Court order amounted to justification for an eviction in terms of section 26(3).⁷
77. This was due to the fact that the conditional tender only provided for occupation of the property to the residents who could prove their rights to occupancy and accept the conditions of the municipal tender. Those who could not prove a right to occupy or refused to accept the tender were left without a remedy. However, the Court found that the removal of the occupiers did not amount to a permanent dispossession of their homes as the dispossession was foreseen to be temporary in nature.⁸
78. As the City provided that it would restore the complex for reoccupation by the occupiers once the buildings were safe, the removal did not amount to an eviction. The Court recognised that this finding may leave room for abuse in eviction proceedings. It thus stated that in instances where urgency dictates that restoration or re-occupation should not be ordered in circumstances such as these, the relevant court should make clear that such order would not lay the foundation for a lawful eviction under section 26(3).⁹ The order before the High Court thus fell short of the protection afforded by section 26(3).

⁷ *Schubart Park* para. 30.

⁸ *Schubart Park* paras 36–37.

⁹ *Schubart Park* para. 38.

Prevention of Illegal Eviction From and Unlawful Occupation of Land

Act 19 of 1998 (PIE)

79. Provisions in PIE were enacted to give effect to section 26(3) of the Constitution. Van der Walt explains that “once legislation has been enacted to give effect to a right in the Constitution, litigants must rely on the legislation – and may not rely directly on the constitutional provision – when bringing action to protect that right against infringement”.¹⁰ He goes further, stating that this is the subsidiarity rule which excludes the direct application of the “infringed” constitutional provision once legislation has been enacted to give effect to that right.
80. In terms of s 1 of PIE, “*unless the context indicates otherwise . . . 'building or structure' includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter*”. According to the Oxford English Dictionary, a “building or structure” is a “construction, edifice, erection or other object constructed from several parts or material put together . . . that has a roof and walls”. To ‘build’ envisages an act of ‘putting up, setting together, assembly, creating or manufacture’.¹¹
81. The Preamble of PIE emphasizes that no person may be evicted from their home or have their home demolished in the absence of a court order.

¹⁰ Van der Walt AJ „Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 *Constitutional Law Review* 77-128 100.

¹¹ See *Ngomane and Others v Johannesburg (City) and Another* 2020 (1) SA 52 (SCA). Hereafter *Ngomane*. See para 16.

82. PIE clearly delineates the set procedure to have unlawful occupiers evicted. Unlawful occupiers are to be given adequate notice of prospective eviction proceedings, be given the opportunity to make representations and that to have their personal circumstances placed before the court. Once a competent court of law had regard to all relevant circumstances, it must decide whether it is just and equitable to grant the eviction order and, if so, it must determine a just and equitable date on which the occupiers must vacate the land.
83. It is imperative, that neither an organ of state nor a private landowner may circumvent the requirements of the PIE Act or purport to take the law in their own hands to evict any unlawful occupiers. Section 8(1) of the PIE Act stipulates that *"No person may evict an unlawful occupier except on the authority of an order of a competent court."*
84. Section 4(10) of PIE provides that a court that makes an order for eviction of occupiers may also make an order for the demolition or removal of buildings or structures that were occupied by the such person.
85. The PIE Act defines the term *"building or structure"* broadly to include *"any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter"*.

86. In the absence of judicial oversight and a fair process, the eviction of a person from their home and the demolition of that home (whether it is an established building or a temporary shelter) violates that person's constitutional rights to dignity, housing, safety and security of the person, health and (in the context of the Covid-19 pandemic) even the right to life.
87. Properly interpreted, the provisions of PIE (including section 8(1) and 4(10)) require that if there is any doubt about whether a structure is occupied for residential purposes; or whether a structure is complete or fully built, an organ of state or private person must obtain a court order before it may evict a person from, or demolish, that structure or building. This applies to all structures that resemble a *"hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter"*.
88. This interpretation best promotes the rights in the Bill of Rights including the right to have evictions and demolitions of homes subject to judicial oversight in terms of section 26(3) of the Constitution. It ensures that the occupiers' constitutional rights to dignity, housing, safety and security of the person and life are protected. It is also an interpretation which is entirely consistent with the purpose of the PIE Act, which is to subject buildings and structures that *".... perform the function of a form of dwelling or shelter for humans.."* to the protection of the PIE Act.¹²

¹² See *Ndlovu v Bekker* 2002 (4) All SA 384 (SCA) at para 12. Hereafter referred to as Ndlovu.

89. On 15 July 2020 Salie-Hlophe J handed down judgment in *Community of Hangberg and Another v City of Cape Town*¹³ this Honourable Court declared the City's conduct to be unlawful and unconstitutional and stated the following:

"The PIE Act governs the eviction process in the event of a land invasion. Municipalities like the respondent in this case are bound by it. The process set out in the applicable legislation sets out the proper notice and processes of law that need be followed to allow a Court of law to decide on the just and equitability of the eviction that is sought. A number of fundamental constitutional rights such as the right to housing, dignity, the right against arbitrary deprivation of property and values enshrined in our Constitution recognises our unequal past. It further acknowledges the need to be conscious of past injustices which is so deeply rooted it continues to marginalise sectors of our society. These constitutional values and ethos in our constitution form part of the cornerstone of our democracy. The PIE Act regulates eviction of unlawful occupation which is exactly the position relevant in this matter.

The actions of the respondents in repeatedly demolishing the home of Mr. Phillips is a sore and painful reflection of a failure to appreciate the plight of our poor communities, the hardships suffered and what can probably be described as objectifying the indigent as having no individual rights worthy of recognition. Mr. Phillips construction of his home together with being in peaceful and undisturbed possession thereof established his constitutional rights which have been zealously grabbed from him without care of his dignity and other enshrined values of our constitution, his rights in terms of our law and with his humanity simply having been commoditised. This demolition was indeed also inhumane, heartless and done with scant regard to his safety, security and health particularly in light of the Covid19 health pandemic. It bears mentioning that the challenges to government, municipalities, businesses and individuals alike in the face of the country and global pandemic of this consuming virus are overwhelming. The City as a municipality is strained and under pressure to service in accordance with its constitutional obligations, amongst others, to provide housing. However, they need to go about their affairs and utilise the manpower and infrastructure in a constitutional and lawful manner to achieve their goals. Trampling the bill of rights in its efforts to do so is not permitted. (own emphasis added) It follows that, in the absence of an eviction order and with that an order expressly stating that it is just and

¹³ (7837/2020) [2020] ZAWCHC 66 (15 July 2020). Hereafter referred to as *Hangberg*.

equitable to do so, demolitions of homes cannot be carried out lawfully and at present, during Alert Levels 3 and 4.”¹⁴

90. In *Port Elizabeth Municipality v Various Occupiers*¹⁵, with reference to the broad constitutional matrix for the interpretation of PIE, Justice Albie Sachs held that:

“The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of overcoming the above abuses and ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.

PIE not only repealed PISA but, in a sense, inverted it: Squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus, the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common-law remedies, while reducing common-law protections, was reversed so as to temper common-law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgment of the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect.”¹⁶

The Disaster Management Act 57 of 2002 (“DMA”)

91. Section 27(2) of the DMA confirms the operation of the provisions of PIE. Specifically, the regulations issued in Gazette 45156 on 12 September 2021 as amended, state that:

¹⁴ *Hangberg* paras 9-10.

¹⁵ 2005 (1) SA 217 (CC). Hereafter referred to as *PE Municipality*.

¹⁶ See *PE Municipality* at paras 11-12.

“Eviction and demolition of places of residence”

54 (1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted an order authorising the eviction or demolition.

(2) A competent court may suspend or stay an order for eviction or demolition contemplated in subregulation (1) until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just or equitable to suspend or stay the order having regard, in addition, to any other relevant consideration to -

(a) the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;

(b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these Regulations;

(c) the impact of the disaster on the parties;

(d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the persons who will be subject to the order;

(e) whether any affected person has been prejudiced in their ability to access legal services as a result of the disaster;

(f) whether affected persons will have immediate access to an alternative place of residence and basic services;

(g) whether adequate measures are in place to protect the health of any person in the process of a relocation;

(h) whether any occupier is causing harm to others or there is a threat to life; and

(i) whether the party applying for such an order has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including but not limited to payment arrangements that would preclude the need for any relocation during the national state of disaster.

(3) A court hearing an application to authorise an eviction or demolition may, where appropriate and in addition to any other report that is required by law, request a report from the responsible member of the executive regarding the availability of emergency accommodation or quarantine or isolation facilities pursuant to these Regulations.”

92. The above prohibition on evictions under alert level 3 was confirmed in *South African Human Rights Commission v Cape Town City*,¹⁷ being the First Respondent in this matter, where the applicants approached this Court, on an urgent basis, to interdict the City of Cape Town from executing evictions from informal dwellings. The Honourable Justices Meer and Allie held that:

- I. *The City, its land-invasion unit, and any private contractors the City employed were interdicted from evicting persons from and demolishing informal dwellings whether occupied or unoccupied, throughout the Metropole, while the state of disaster endured, except in terms of an order of court;*
- II. *Where the City, the land-invasion unit or contractors conducted evictions and demolitions of occupied or unoccupied informal dwellings under order of court, such demolitions and evictions were to be performed in a manner respectful of the dignity of the evictees, without excessive force, and without destroying or confiscating materials of the evictees; and*
- III. *Any police present at such demolitions and evictions were to ensure they were conducted lawfully, and that evictees' dignity was protected.*

Streets By-Law and nuisance based evictions

93. Section 2(1)(a)(i), with which the Applicants were charged, provides:

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

94. With reference to **Sinazo Jordan and Others v City of Cape Town**,¹⁸ similarly the occupiers, as the Applicants' erected makeshift structures, in this matter also

¹⁷ 2021 (2) SA 565 (WCC), hereafter referred to as *SAHRC* case.

¹⁸ Case number: 5809/2020 WCC (6 October 2020), hereafter referred to as *Jordan*.

tents, on property which the City of Cape Town held blocked a space or pedestrian way and, in so doing, contravened the Street By-Law.

95. According to AJ van der Walt, in his journal article entitled: *"Living with new neighbours - Landownership, land reform and the property clause"*:¹⁹

*"..eviction orders based on the formal or technical unlawfulness of occupation are uncomfortable reminders of similar cases stretching all the way back into the pre-constitutional apartheid era.²² Most urban evictions during the apartheid era were often simply based on contraventions of the Group Areas Act 36 of 1966 or similar legislation, but non-compliance with formal planning and land-use legislation was also used to bring occupation of shacks and shelters in informal settlements under the provisions of the Prevention of Illegal Squatting Act 52 of 1951, even in cases where the settlement was established by a state authority in the first place - there are many examples from the apartheid years of cases where occupiers were also evicted from land (even when they occupied it with the landowner's consent) because they erected and occupied structures that did not comply with planning laws."*²⁰

Interpretation of legislation

96. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*²¹ the court held that:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it

¹⁹ (2002) 112 SALJ 816-840, hereafter referred to as *Living with new neighbours*. ²² See *Living with new neighbours* at 826.

²⁰ See *Living with new neighbours* at 826.

²¹ 2012 (4) SA 593 (SCA). Hereafter referred to as *Endumeni*.

*is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*²²

97. In addition, the court in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No and Others*²³ held that:

"The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."

98. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*²⁴, the court held that:

"By the same token, where two conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which better reflects those structural provisions should be adopted. Whether the interpretation of

²² See *Endumeni* at para 18.

²³ 2001 (1) SA 545 (CC). Hereafter referred to as *Hyundai*. ²⁷ *Hyundai* at para 22.

²⁴ 2009 (1) SA 337 (CC). Hereafter referred to as *Wary Holdings*.

the proviso contended for by the applicant meets that requirement is a constitutional matter.”²⁵

99. In **Affordable Medicines Trust and Others v Minister of Health and Others**²⁶

the court held that:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.”³¹

*...
The exercise of such power must be rationally related to the purpose for which the power was given.”²⁷*

*...
As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate.”²⁸*

100. The courts have recognised the impact of the coronavirus pandemic in a number of recent judgments. The courts heard and granted extensive relief on an urgent basis in **Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others (21512/2020) [2020] ZAGPPHC 147 (15 May 2020)**(“**Khosa**”) (which dealt with the obligations of the SAPS, the SANDF and municipal police departments during the lockdown and national disaster).

²⁵ See *Wary Holdings* at para 47.

²⁶ 2006 (3) SA 247 (CC). Hereafter referred to as *Affordable Medicines*.³¹
Medicines at para 49.

²⁷ See *Affordable Medicines* at Para 75.

²⁸ See *Affordable Medicines* at para 77.

Fabricious J emphasised the urgency of the matter in the context of the national disaster caused by the covid-19 pandemic.

101. Respondent's counsel made the following submissions.

102. The preamble and purpose of the Restitution Act makes it clear that the Commissioner has a direct and substantial interest in proceedings such as these and ought to have been joined as a necessary party.

103. The similarity between the Valencia Lewis case and the present case means that it was frivolous and vexatious for the applicants not to await the outcome of that case before launching this application.

104. Section 10 of the Constitution of the Republic of South Africa, Act No 108 of 1996 ('the Constitution') provides that:

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

1. Chapter 7, sections 151 to 156 of the Constitution deals with local government. Section 151 stipulates the status of municipalities while section 152 spells out their objects:

'Status of municipalities

(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

105. Objects of local government

(1) The objects of local government are-

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

106. Section 156 provides municipalities with the following powers and functions:

'(1) A municipality has executive authority in respect of, and has the right to administer-

- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
- (b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

.....

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

107. Part B of Schedule 4 to the Constitution provides the following sphere of powers and jurisdiction of municipalities:

'The following local government matters to the extent set out in section 155 (6) (a) and (7):

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Firefighting services

Local tourism

Municipal airports

Municipal planning

Municipal health services

Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law

Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

Stormwater management systems in built-up areas

Trading regulations

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems'

By-law relating to streets, public places and the prevention of nuisances approved by council: 30 May 2007

108. The preamble of the Streets By-Law reads as follows:

'Preamble

WHEREAS the City of Cape Town ("the City") may make and administer by-laws for the effective administration of such matters as the control of public nuisances, municipal roads, public places, traffic and parking;

AND WHEREAS aggressive, threatening, abusive or obstructive behaviour of persons in public is unacceptable to the City;

AND NOW THEREFORE, BE IT ENACTED by the Council of the City Of Cape Town, as follows'

109. The definition section includes the defines the following words:

"public place" means—

(a) a public road;

(b) any parking area, square, park, recreation ground, sports ground, sanitary lane, open space, beach, shopping centre on municipal land, unused or vacant municipal land or cemetery which has—

(i) in connection with any subdivision or layout of land into erven, lots or plots, been provided, reserved or set apart for use by the public or the owners or occupiers of such erven, lots or plots, whether or not it is shown on a general plan, plan of subdivision or diagram;

(ii) at any time been dedicated to the public;

(iii) been used without interruption by the public for a period of at least thirty years expiring after 31 December 1959; or

(iv) at any time been declared or rendered as such by the City or other competent authority; or

- (c) a public transportation motor vehicle,
- (d) but will not include public land that has been leased or otherwise alienated by the City;

....

"shelter" means any structure that provides privacy or cover, that has one or more sides enclosed;

"shoulder" means that portion of a road, street or thoroughfare between the edge of the roadway and the kerb line;

"sidewalk" means that portion of a verge intended for the exclusive use of pedestrians;

"verge" means that portion of a road, street or thoroughfare, including the sidewalk, which is not the roadway or the shoulder.

110. Section 2 of the Streets By-Law prohibits the following behaviour:

2. Prohibited behaviour

(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; or

(ii) intentionally touch or cause physical contact with another person, or his or her property, without that person's consent;

(b) approach or follow a person individually or as part of a group of two or more persons, in a manner or with conduct, words or gestures intended to or likely to influence or to cause a person to fear imminent bodily harm or damage to or loss of

property or otherwise to be intimidated into giving money or other things of value; or

- (c) continue to beg from a person or closely follow a person after the person has given a negative response to such begging.
- (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.
- (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 areas where nudity is permitted, provided that this shall not apply to children below the age of seven;
 - (h) consume any liquor or drugs;
 - (i) be drunk or be under the influence of drugs;

- (j) solicit or importune any person for the purpose of prostitution or immorality;
- (k) engage in gambling;
- (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. (Own emphasis)

111. Section 23 prescribes the following offences and penalties:

‘23. Offences and penalties

- (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 sections 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 who contravenes sections 2 (3) (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 national 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.'

Prevention of Illegal Evictions from and Unlawful Occupation of Land Act No. 19 of 1998 ("PIE")

112. The purpose of PIE is:

'To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto'

113. In its preamble the following aims and objects are prescribed:

'WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;

AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances;

AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;

AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows'

114. Section 6 regulates eviction at the instance of organs of state:

- (1) *An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction,*

except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if-

- (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or*
 - (b) it is in the public interest to grant such an order.*
- (2) For the purposes of this section, 'public interest' includes the interest of the health and safety of those occupying the land and the public in general.*
- (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to-*
- (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;*
 - (b) the period the unlawful occupier and his or her family have resided on the land in question; and*
 - (c) the availability to the unlawful occupier of suitable alternative accommodation or land.*
- (4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.*
- (5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).*

- (6) *The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1).'*

115. It is the Respondents' contention that the Applicants had contravened sections 2(2), section 2(3)(m) and section 7(a) of the Streets By-Laws and the tents were removed as a result of:

- 115.1. intentionally blocking or interfering with the safe and free passage of a person or vehicle in a public place
- 115.2. sleep overnight or camp overnight or erect any shelter
- 115.3. Section 7(a) – deposit, pack, unpack or leave goods or articles in a public place, or cause any goods or articles to be deposited, packed, unpacked or left in a public place, other than for a reasonable period during the course of the loading, off-loading or removal of such goods or articles.
- 115.4. Subsection 2(2) – Failing to comply to a lawful instruction from a Peace Officer.

116. Under section 151(2) of the Constitution, a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

117. Under section 151(2) of the Constitution, the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

118. Under section 152 the Streets By-Law falls within the objects of the City:

- (a) to provide democratic and accountable government for local communities,
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

119. In terms of section 156(5) of the Constitution the Streets By-Law is not only reasonably necessary for, or incidental to, the effective performance of its powers and functions but also to preserve the health safety and security of street people.

120. In **NCSPCA v Openshaw 2008 (5) SA 339 (SCA) at para 20**, the SCA reiterated that an interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. According to the SCA, an interdict is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.

Application of the Law to the Facts

121. The application was launched 3 days after the applicants' structures and belongings were removed by the Respondent.

122. Applicants are destitute people who have lost what constitutes a home for them, albeit in a temporary structure.
123. Applicants are entitled in those circumstances to turn to the Court as a matter of urgency. One can conceptualize of no greater urgency than the need to have the material with which to re-erect one's home returned.
124. This is not a matter of self-created urgency.
125. I accordingly find that since the issues were fully ventilated in a full set of papers and written and oral argument was capable of being advanced, hence the matter is ripe for hearing and is also clearly capable of being determined on the basis of final interdictory relief as opposed to interim interdictory relief.
126. The failure to join the Commissioner for Land Restitution is not in my view, fatal to applicant's case because the relief sought is that the Respondent should follow due process in its efforts to remove applicants from the land. It is not relief in which applicants claim a right to remain on the land in a manner that would impede the land restitution process.
127. Respondent who was the applicant in case no 7349/2021, in which the City of Cape Town obtained an interdict against persons intending to occupy land in District Six, did not join the Commissioner for Land Restitution in that case

because similarly, the relief it sought did not impact upon the land restitution process.

128. I am not persuaded that the Commissioner for Land Restitution has a direct and substantial interest in an application to compel the City to follow due process.
129. It has often been said that the Rules are there for the Court not the other way around. The rule that parties be cited by gender, occupation or lack thereof and address is there to ensure certainty with regard to; in favour of who and against who any judgement is enforceable.
130. The annexure to the Notice of Motion clearly identifies who the 2nd to 44th applicants are, as do the confirmatory affidavits.
131. I do not agree with Respondent's argument that the failure to cite each applicant in the manner suggested earlier, is fatal to the application, for to do so would be to elevate form over substance.
132. The plight of the applicants is similar to the plight that millions of people all over South Africa suffer. It is one where due to parlous financial circumstances, they are unable to afford a bricks and mortar or prefabricated structure as a permanent home and are driven by desperate poverty to set up home on land unlawfully. The informal structures that the applicants inhabit are by and large furnished with very basic furniture and household goods due

to their poor financial position and consequent inability to equip the structures with goods that people in more formal structures would otherwise have. That does not however lead to the conclusion that those informal structures do not constitute a home or residence.

133. Applicants' allegation that the occupiers of some of the unattended structures were not present when Respondent's Law Enforcement arrived to remove the structures, but were out in search of income and/or food, cannot be reasonably gainsaid. In those instances, the absent occupiers clearly would not have received any confiscation notice nor any Section 56 notice. Their belongings were summarily removed without notice to them.
134. Occupiers who did receive notice, both verbally and in writing, of Respondent's intention to remove their structures and belongings, received those notices on the day of removal. That does not, on any interpretation of placing people *on notice*, constitute due and proper notice within a reasonable period of time nor does it grant the occupiers a reasonable opportunity to dismantle their shelters.
135. In addition, the letter of the law, as it were, be it a By-law or a statute or the Constitution of the Republic of South Africa, must all be read in its context with due regard to its purpose and objects.²⁹

²⁹ Endumeni's case

136. The context to which the Streets By-law applies is clearly one in which it is envisaged that the category of people who do so live on the streets and public places at which the By-law is directed, must in fact be people who are willfully disobeying the By-law, Hence the reference in section 2(1) (a) to:

“intentionally block or interfere with the safe or free passage of...”(emphasis added).

137. There is no doubt that applicants do not choose to live in public parking area on Sydney Street out of malice or willfulness, but out of desperation and need so that they can live for the whole day and night with members of their household in one structure and not merely overnight as they would in a shelter or Safe Space.
138. Applicants brave the inclement weather, run the risk of being attacked by criminal elements and endure the general hardship of living in a tent or other informal structure because the housing list, at least in the case of first applicant, has not advanced sufficiently since 1991, in order to provide her with a house.
139. The housing crisis in the Respondent’s jurisdiction shows no signs of sufficient improvement to avert the human catastrophe of people living in the manner in which the applicants do.

140. It does not behove the respondent to compel the applicants to live in places far away from the City in circumstances where they clearly do not have the financial means to travel into the City and other financial hubs in search of employment or food.
141. The Coastal By-law clearly does not apply to the land in question because it is not land for which access is required to the coast.
142. The Streets By-law must be applied with due regard to its purpose and context. If there is prevailing operative legislation and a Constitutional provision that prohibits the effective consequence of implementing the Street By-laws in the manner in which the Respondent has in this application, then clearly that legislation and Constitutional provision must prevail over the manner of implementation of the Streets By-law. Section 156 (3) of the Constitution says as much.
143. It matters not that the City's Law Enforcement intended to implement the Street By-law and not to evict occupiers of informal structures, the effect of its actions was to effectively evict occupiers of informal structures without a court order authorizing them to do so.
144. To that extent, applicants' complaint that the City cannot be judge, jury and executioner in its own cause, is correct.

145. In this Constitutional democracy, no one may sit in judgement in its own cause. Hence, the courts exist to determine disputes of the nature before this Court.
146. The Respondent as an organ of state is duty bound to follow due process and not to take the law into its own hands.
147. Respondent's counsel acknowledged during argument that the photographs attached to applicants' founding affidavit show that mattresses and furniture were removed by Respondent in addition to tents and building materials.
148. I can find no justifiable reason in the papers for why Respondent refused to return items confiscated other than tents and building material when clearly it confiscated personal belongings and household items. Respondent's tender to return the tents and building materials should have included a tender to return all items confiscated. There is also no plausible explanation for not returning the belongings to the applicants at the place from which it was confiscated and failing that, to compensate the applicants financially for the loss of their belongings.
149. It is common cause that the Respondent's officers had free access to the land on which the applicants were living.
150. Respondent has not made a single allegation in the papers of how and in which manner each applicant contravened the By-law nor is there any

allegation about how the *"intentional obstruction of access to public places"* occurred.

151. Applicants have however demonstrated in its papers and it is now common cause, that Respondent's officers have forcibly removed their structures and taken away the materials with which the structures were erected as well as mattresses and furniture and possibly other personal possessions.
152. That Respondent relies on the authority vested in it by the By-law to confiscate items that are kept in a public place unlawfully, does not detract from the fact that Respondent caused the Applicants' belongings to be removed without due process. A notice on the day on which the removal occurred does not amount to adequate notice nor to due process.
153. If the applicants are being charged in terms of section 56 of the Criminal Procedure Act, they are entitled to know the facts in support of the charge being preferred against them with sufficient particularity to enable them to mount a defence thereto. The respondent's papers are silent on those facts.
154. Respondent makes the broad and sweeping generalization that some or all of the applicants could be guilty of contravening the Streets By-law in a manner which would implicate them in criminal activities, yet they do so without setting out which criminal activities which applicants were engaged in and in what manner their conduct would constitute a crime.

155. It is precisely allegations of that nature together with section 56 notices devoid of facts spelling out the details of the alleged offending conduct, which lead applicants to allege that they are being criminalized for being poor and homeless.
156. The effect of the confiscation of the shelters of applicants is that it gives rise to eviction of people from occupied structures without a court order authorizing eviction during a National State of Disaster.
157. It is the Respondent's manner of interpretation and implementation of the Street-by laws that are unsustainable.
158. In the result, I am persuaded, on the facts alleged by the applicants, which the respondent could not reasonably gainsay, that in substance, the applicants were evicted from informal structures that constituted their homes, without a court order.
159. Accordingly applicants have demonstrated that they have:
- 159.1. a clear right worthy of protection, namely a right not to be evicted without due process;
 - 159.2. that they have suffered actual harm and continue to hold a reasonable apprehension that Respondent will repeat its conduct of removing any new structures that they now sleep in; and
 - 159.3. that there is no other satisfactory and adequate remedy.

IT IS ORDERED THAT:

1. The dispossession of the Applicants' tents, habitable structures and possessions and their eviction by the Respondent on or about 19 September 2021 at or around Sydney Street Parking Area, District Six, Cape Town, without a valid order of court, in terms of the by-law relating to Streets, Public Places and the Prevention of Noise Nuisances (Provincial Gazette 6469 of 2007) is unlawful in terms of section 26(3) of the Constitution, read together with section 8 (1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE);
2. The Respondent shall return the tents, habitable structures, building materials and personal possessions which were removed, to 6 Sydney Street Parking Area, District 6, Cape Town confiscated from the respective Applicants, within 5 days hereof; and
3. Respondent is:
 - 3.1. Interdicted and restrained from evicting the Applicants from their tents and habitable structures at 6 Sydney Street Parking Area, District Six, Cape Town, without a valid order of court granted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 or any other applicable legislation; and

- 3.2. Interdicted and restrained from demolishing damaging, confiscating or otherwise destroying and disposing of the Applicants' tents and habitable structures and personal property without a court order authorizing them to do so;
4. In the event that the Respondent is unable to return the tents, building materials, goods and possessions of the Applicants as aforesaid, the Respondent is liable for a compensatory amount of R1700 (one thousand seven hundred rand) per household: and
5. Respondent shall bear Applicants' costs on an attorney and client scale.



JUDGE R. ALLIE