Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(Cape of Good Hope Provincial Division)

Case No: 4543/03

In the matter between

Victoria & Alfred Waterfront (Pty) Ltd **First Applicant**

V & A Waterfront Properties Ltd **Second Applicant**

and

The Police Commissioner of the Western Cape **First Respondent**

Patrick Smith **Second Respondent**

Ganief Benjamin **Third Respondent**

(Legal Resources Centre *as amicus curiae*)

JUDGMENT DELIVERED on 23 December 2003

DESAI, J:

This is the extended return day of a rule *nisi* and interim interdict. The applicants are the managers and owners, respectively, of the Victoria and Alfred Waterfront ("the

Waterfront"). The Police Commissioner of the Western Cape is cited on the papers as the first respondent. No relief is sought against him because of certain negotiations between the parties which are currently in progress. The applicants refer to the second and third respondents as "homeless persons". That designation is not entirely correct as third respondent seems to have a permanent address in Mitchells Plain. In any event, on 8 July 2003, the applicants sought and obtained against the latter two respondents an *ex parte* order from Davis J in the following terms:

> ***"1. A rule nisi is hereby issued calling upon Second and Third Respondents to show cause (if any) on Monday 11 August 2003 at 10h00 or so soon thereafter as Counsel may be heard, why and Order should not be made in the following terms:***
>
> ***1.1 That Second and Third Respondents be interdicted and restrained from entering the premises of the Victoria & Alfred Waterfront, Cape Town ("the Waterfront");***
>
> ***1.2 That Second and Third Respondents be interdicted and restrained from interfering, harassing and causing harm to visitors and businesses situate at the Waterfront;***
>
> ***1.3 That Second and Third Respondents be interdicted and restrained from assaulting, harassing, intimidating or threatening any employee and/or official of the First Applicant;***
>
> ***1.4 That the Applicants be granted leave, in the event of the Second and/or Third Respondents, as the case may be, failing to comply with the provisions of sub-paragraphs 1.1, 1.2 and/or 1.3 of this Order to apply on the same papers, duly supplemented for an Order convicting the Second and/or Third Respondents, as the case may be, of contempt***

of court and imposing such sentence, of imprisonment or otherwise, as this Honourable Court may deem meet.

2. That the relief contained in sub-paragraphs 1.1 to 1.4 hereof, operate as an interim interdict pending the return day;

3. A copy of this Order shall be served personally upon the Second and Third Respondents by the Sheriff of this Honourable Court."

When the matter initially came before me on 30 October 2003, Mr **B David** appeared on behalf of the applicants. The second respondent appeared in person. There was no appearance on behalf of the third respondent. As this matter involves an evaluation of fundamental liberties and constitutional rights, I suggested the appointment of an *amicus curiae* to assist the Court. The parties did not object to that procedure being followed. The hearing was accordingly adjourned, and the rule extended, until 27 November 2003.

Before the court adjourned the second respondent complained that the extension of the rule meant that he could not go on legitimate business to the police charge office located at the Waterfront. After consulting with his clients, **David** agreed that the rule should be relaxed to enable him to do so. I amended the rule accordingly.

On 27 November 2003 Mr **H J De Waal** appeared on behalf of the applicants. The second respondent was present in person and there was again no appearance on behalf of the third respondent. Mr **G M Budlender** of the Legal Resources Centre appeared as *amicus curiae.* The Court is indebted to **Budlender** for his role in these proceedings.

At the outset of the hearing **De Waal** sought to amend paragraph 1.2 of the order

granted by **Davis J** by inserting at the end thereof a specific clause prohibiting the respondents from begging at the Waterfront. I indicated to **De Waal** that the suggested amendment raised enormous social and legal issues which had not been canvassed or raised directly on applicants' papers. **Budlender** argued that if **De Waal** persisted with the proposed application to amend, he would have to seek an adjournment to file affidavits from experts, *inter alia*, with regard to the socio-economic situation in the Western Cape. **De Waal** thereafter abandoned the said application.

In fairness to **De Waal** I should, perhaps, set out his concession in some detail. He submitted that the applicants were not conceding that they were not entitled to prohibit begging at the Waterfront. The concession was being made as there was insufficient evidence to support such an order and because it raised complex issues such as possible indirect discrimination. **De Waal** in express terms stated that the second and third respondents would not be acting in contempt of court by begging at the Waterfront if para 1.2 of the order issued by **Davis J** was made final. This Court is accordingly not asked to prohibit second and third respondents from begging at the Waterfront and the order which I propose to make should not be construed as containing such a prohibition.

I have, in any event, grave reservations about the constitutional validity of such a prohibition. The issue of begging frequently raises a direct tension between the right to life and property rights. In that event, the property rights must give way to some extent. The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights we are required to value those rights above all others. (See: ***S v Makwanyane* and another 1995(3)SA 391(CC) at [144]).** Furthermore, the right to life encompasses more than "mere animal existence". It includes the right to livelihood. (See: ***Olga Tellis v***

Bombay Municipal Corporation* AIR 1986 SC 180 para 32;** reprinted in **Davis, Cheadle & Haysom *Fundamental Rights in the Constitution: Commentary and Cases (1997) 520 at 520, 521. There is also the possibility of indirect discrimination on the grounds of race. The modern history of this country is characterised by over

three hundred years of rule by a racial oligarchy. The result is that poverty remains racially distributed. In the circumstances, discrimination on the grounds of poverty would inevitably lead to indirect discrimination on the grounds of race, which is prohibited by The Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution").

The respondents have not filed any answering affidavits and I must in general accept the factual correctness of the allegations made under oath on behalf of the applicants. It is apparent, however, that certain of the allegations are to some extent overstated and a degree of caution in assessing the evidence is merited.

The Waterfront is somewhat different from other shopping malls and appears to be private property of a particular kind. It is 123 hectares in extent and consists of a vast array of shops, restaurants, offices and places of public entertainment. It also includes public roads, hotels and access to the sea. People wishing to visit Robben Island are obliged to board the boat or ferry transferring them to the island at the Waterfront. Moreover, a post office and a police charge office are located on the property.

It has the distinctive character of private property to which members of the public have routine access and which the public are invited to visit whether or not they intend to conduct any business on the property. It is for all practical purposes a suburb of Cape Town.

The applicants seek to permanently preclude second and third respondents from entering the Waterfront because of their prior conduct. The complaints against the said respondents are not without merit. Over the past two years the second respondent addressed young visitors to the Waterfront in a vulgar and intimidating manner; he made rude sexual comments to a female security guard and grabbed her breasts; on several occasions disturbed clients eating at restaurants and became violent and abusive

when asked to leave; and he has threatened other security officers. The complaint of alleged shoplifting at Pick & Pay is hearsay and not confirmed by any direct evidence. With regard to the third respondent the principal complaint was that he attacked a patron with a broomstick. He was, however, acquitted on this charge. The other

allegations against him relate largely to him interfering with clients at restaurants while he is in a drunken state. The conduct of the respondents falls short of civilised behaviour and is quite clearly unacceptable. It invades the rights of the applicants and warrants prohibition.

The fact that second applicant is the owner of all developed and undeveloped buildings and property, except for certain residential units, at the Waterfront, is not in dispute. In the circumstances, **De Waal** contended, the applicants have a clear right to preclude individuals such as the second and third respondents from entering the Waterfront. He argued that the power to exclude others and exercise control over property lies at the core of the bundle of rights which accrues to a property owner under the common law (See: ***Van de Merwe:*** **Sakereg 2ed (1989) at p171)** Furthermore, he submitted, under section 25(1) of the Constitution, a property owner is protected against the deprivation of property rights, including the rights to exclude and control property, other than by a law of general application, which law may not permit arbitrary deprivation of property rights.

De Waal also argued that the nature of the property can have no bearing on the bundle of rights which accrues to the owner of the property. In support of this proposition he referred the Court to a decision of the United States Supreme Court: ***Pruneyard Shopping Centre v Robins*** **447 US 74, 64 L Ed 2d 741 at 752.** This decision does not quite support the proposition made by counsel. It says, in this regard, that a property does not lose its private character merely because the public is generally invited to use it for designated purposes.

The next argument vigorously advanced by counsel relates to the power of this Court to amend the common law. **De Waal** contended that any ruling by this Court to the effect that the applicants do not have the right to exclude second and third respondents from the Waterfront will fall foul of the judgment of the Supreme Court of Appeal in ***Afrox Healthcare v Strydom*** **2002(6)SA 21 (SCA).** He argued that as the owner's right to exclude others from his property is not directly inconsistent with the

Constitution, it must be upheld by this Court. As I understand the **Afrox** case, *supra,* if I am convinced that any common law rule is in conflict with the Constitution, I am obliged to differ from it (see paragraph 27 thereof). The obligation to differ from the common law is for obvious reasons more compelling where it is in conflict with the fundamental liberties entrenched in the Bill of Rights contained in the Constitution.

As stated earlier, the Waterfront is an unique property. If I am to exclude the respondents from the Waterfront I shall in effect exclude them from a charge office, a post office, hotels, places of residence, shops, parts of the coast and, of course, visiting Robben Island. With regard to the latter **De Waal** suggested that if second or third respondents really wished to go to Robben Island, they could do so with a rubber dinghy from Mouille Point. Though, I suppose, one could traverse the oceans on a rubber dinghy, few South Africans would have the expertise, or sufficient knowledge of the sea, to cross Table Bay in a rubber dinghy. I do not think that second or third respondents are in any position to do so.

In support of the argument that such exclusions are not without legal precedent, the Court was referred to a recent decision of the European Court of Human Rights: ***Landvreugd v Netherlands* 36 E.H.R.R. 56.** In that case, the Mayor of Amsterdam prohibited a person from entering a particular area of Amsterdam for 14 days because he had a history of drug abuse in the area. The Court held that the limitation of the right to freedom of movement did not violate article 2 of Protocol 4 of the European Convention on Human Rights.

The **Landvreugd** case, *supra,* establishes that a prohibition of this kind does constitute a limitation of the right of freedom of movement. The case, however, must be approached with some caution because the European Court of Human Rights is an international court. When it applies the convention to a concrete case in order to decide whether there has been a violation, it allows a "margin of appreciation" to national authorities. What this amounts to is giving a certain amount of deference or

leeway to the decision of the domestic body. (See ***Handyside v United Kingdom* 1 EHRR 737 (1996)** In deciding whether the restriction of freedom of movement was "justified in the public interest in a democratic society", the Court in the **Landvreugd** case held that:

> ***"It cannot be said that the national authorities over-stepped their margin of appreciation when, in order to put an end to this situation, the Burgomaster issued a prohibition order to the applicant."***

There are, in any event, striking differences between the **Landvreugd** case and the present matter. In that case the exclusion was for 14 days. This Court is being asked to permanently exclude second and third respondents from the Waterfront. In the **Landvreugd** case the exclusion was from a small area. Here the Court is being asked to exclude certain people from 123 hectares which in effect constitute a suburb of Cape Town. Furthermore, unlike the **Landvreugd** case, alternative remedies have been suggested.

I may add that in the light of the unfortunate recent history of this country where millions of people were denied access to towns, cities and other public places, the practice of excluding people from parts of a city, albeit for limited periods, may appear repugnant and not pass constitutional muster.

It is not wholly clear from **De Waal's** submissions whether he accepts that the applicants do not have an unqualified right to exclude anyone from the property. He focuses on the common law position which is set out by **SchreinerJA** as follows:

> "Ownership, unless limited by law, entitles the owner to exclude all others from the property"

(See ***Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA* 1958(4)SA 572 (A) at 636C).**

If the applicants' property rights, save for statutory limitations, are absolute, the fact of

ownership is sufficient basis for the exclusion and interdict. The conduct of the respondents would be irrelevant. They can be excluded from the Waterfront for an arbitrary reason or for no reason at all.

Though arguing that the refusal of access to private property will seldom constitute a significant restriction on the right of freedom of movement, **De Waal** accepts that the right of freedom of movement may bind a private person in appropriate circumstances. He also concedes that the private property involved in these proceedings is an important area within the City of Cape Town and, as he puts it, "the issues are less clear cut."

It seems from the above that the applicants, perhaps reluctantly, accept that they do not have an unqualified right to exclude anyone from the property. They acknowledge that the nature of the property and the circumstances are relevant factors to take into consideration in determining whether the law and, in particular, the Constitution place limits on the right to exclude. That concession is correctly made. The applicants' right to exclude people from the Waterfront is qualified in several respects. It is a property to which members of the public are invited to visit whether or not they intend to conduct any business at the Waterfront. This fact distinguishes it from, for instance, a restaurant. As a consequence of its location, size and composition, it is for all practical purposes a suburb of Cape Town. It is fundamentally different from an ordinary shop or restaurant, or for that matter a shopping mall. These factors limit or qualify the owner's right to exclude.

The right to exclude is further limited by the fact that exclusions will be a limitation of the constitutional right of freedom of movement of the second and third respondents.

It is not suggested that the invasion of the owner's rights is unrestricted or that the right of freedom of movement is itself unlimited. If the area is overcrowded and as a result unsafe to allow further access, a temporary closure would clearly be within the powers of the access. To restrict a person's freedom of movement by excluding him from the area on a permanent basis, however, is an entirely different matter. It should only be done where there is no other way of achieving a lawfully justifiable goal.

With regard to freedom of movement (section 21 of the Bill of Rights) **De Waal** submitted that the core of the right is to prevent the re-introduction of the pass laws which prevented people from moving freely from one place to another during the

apartheid era. It may be that the effect of the section is to prohibit such legislation. However, the section is not limited to those circumstances. It is broadly stated. There is no reason to limit it so as to bring it in line with the common law; rather, the converse applies.

In the circumstances there is a tension between the property rights of the applicants and second and third respondents freedom of movement. It is a tension which should be resolved in a manner which permits the rights of both parties to be vindicated to the greatest extent possible.

Though applicants assert that the interdict sought represents the least restrictive means of vindicating their property rights, that is in fact not so. The permanent exclusion of the second or third respondents from the property is the most extensive restriction which is possible. The suggestion that there is no other remedy available to them, is also open to considerable doubt. On the undisputed facts, the second respondent has acted in an aggressive manner towards certain of the visitors and applicants' staff on the property.

That conduct could be prohibited without excluding him from the property. It is common cause that the third respondent has not assaulted, intimidated or threatened applicants' staff. The applicants, however, persist in seeking an order for his exclusion from the property because he has *"committed an act of violence and acts of harassment against visitors and second applicant's employees".* The only allegation of an act of violence is a hearsay allegation of assault for which the third respondent was arrested, tried and acquitted.

On the other hand the applicants have a clear right to protect their custom and business interests at the Waterfront from unlawful interference by second and third respondents (See: ***Fourways Mall (Pty) Ltd v S A Commercial Catering & Allied Workers Union* 1999 (3) SA 752 (W) at 756 and 759**). They also have a sufficient interest in having the physical integrity and security of their employees protected against the unlawful actions of the second respondent.

It appears that the principal interest of the applicants is in preventing unlawful

activities by the respondents on its property. This is a legitimate interest and the applicants are entitled to an order which protects their legitimate rights and interests as owner. These rights may be effectively protected by an order which does not exclude second or third respondents permanently from the whole of the Waterfront, but which prohibits the specific conduct which invades the rights of the applicants. That order is to be preferred.

Budlender submitted that the prohibition must be in a form which is reasonably precise, in that the respondents can know what they are prohibited from doing under threat of criminal sanction. An order which is vague would result in a criminal prohibition which is vague and indeterminate and, moreover, lead to further conflict with regard to its interpretation.

In the result I issue the following order which I trust will not lead to any misunderstanding:

1. The second and third respondents are interdicted and restrained from unlawfully causing harm to visitors and businesses situate at the Victoria & Alfred Waterfront, Cape Town ("the Waterfront"), in particular by remaining on the premises of a restaurant after having been instructed by the person in charge to leave those premises.

2. The second respondent is interdicted and restrained from unlawfully assaulting, intimidating or threatening any employee and/or official of the first applicant.

3. The applicants are granted leave, in the event of second and/or third respondent, as the case may be, failing to comply with the provisions of this order, to apply on the same papers, duly supplemented, for an order convicting the second and/or third respondent of contempt of court and imposing such sentence of imprisonment or otherwise, as this Court may deem meet.

4. A copy of this order shall be served personally upon the second and third respondents by the Sheriff of this Court.

5. The rule issued by **DavisJ** on 8 July 2003 is discharged.

DESAIJ