IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: 5008/2013

In the matter between:

THE WESTERN CAPE GOVERNMENT Applicant

and

ZWELOHLANGA NDIKI First Respondent

and Six Others

Hearing: 23 May 2013

JUDGMENT DELIVERED THIS 30th DAY OF MAY 2013

WRAGGE, AJ:

[1] The applicant in this matter is the Western Cape Government. The respondents are community leaders from Delft. The first respondent is the secretary of the African National Congress, Dullah Omar region in Delft. The third and second respondents are the chairperson and

deputy chairperson of the South African National Civic Organisation ("SANCO"), Mongezi Danster branch, Delft. The fourth and fifth respondents are the secretary and chairman, respectively, of the Tsunami Informal Dwellers in Delft. The sixth and seventh respondents are the chairman and secretary respectively of TRA5, a temporary relocation area located in Delft.

[2] The applicant seeks an order interdicting and restraining the respondents from committing certain acts relating to the construction of houses that is currently in progress at a site in Delft Symphony Precinct 3 and 5. More particularly the applicant seeks to interdict and restrain the respondents from:

(a) Disrupting any work related activity at the site;

(b) Instructing any persons to disrupt the work or to damage any property or to prevent any person lawfully on the site from continuing with their work;

(c) Intimidating or attacking the applicant's officials and the contractor's personnel;

(d) Preventing any persons who are lawfully entitled to gain entry to the site from gaining such entry;

(e) Damaging or causing damage to any property belonging to the applicant and the contractor, including motor vehicles, machinery, equipment and buildings;

(f) Preventing any of the applicant's and the contractor's employees and sub-contractors from performing their duties;

(g) Gathering or "causing a gathering" within a perimeter of 300 metres of the site for the duration of the construction work;

(h) Entering and occupying the site and from interfering with any duties of any employee or official of the applicant and the contractor for the duration of the construction work; and

(i) Compelling the respondents forthwith to take all necessary steps "to inform and communicate with its members and those other people acting under them and/or in concert with them to refrain from doing and/or causing any of the actions referred to above".

[3] The background to this application, to a large extent is common cause. A housing project in Delft, known as the Delft Symphony 3 and 5 Housing Project, is under construction according to criteria and guidelines determined by the N2 Gateway Allocations Committee. The committee functions under the broad auspices of the Member of the

Executive Council (MEC) for Human Settlements in the province, representatives of the Department of Human Settlements, the City of Cape Town, the National Department of Human Settlements and the Housing Development Agency (HDA). The housing project entails the building and construction of 1,951 housing units to be allocated members of the community in need of permanent housing in the Cape Province.

[4] The housing units were to be (and are being) constructed using alternative building technology (ABT) as opposed to brick and mortar. Tenders were invited for the first phase of the project and the successful tenderer was Group 5 Motlekar Cape Joint Venture ("the contractor"). The award of the tender, however, is the subject of review proceedings that are currently pending in this court. More of this later.

[5] It would appear that work on the project commenced shortly after the contract was signed during February 2013. On 11 March 2013, however, unrest broke out at the project site. A description of what occurred (and on which description the applicant relies for the relief that it seeks) is set out in the founding affidavit deposed to by Mr Rayan Rughubar, Chief Director, Human Settlement Operations, Department of Human Settlements. As will become evident from what I say below, it is important to have careful regard to this description.

[6] It is stated that the problems started on or about 11 March 2013 at approximately 09h00 in the morning. A group of approximately 100 people marched into the site yard and demanded from everybody on the site that they stop working immediately under threat of physical violence against those who would not adhere to their demands. According to a report made by the site manager, Mr Albert Lategan, the crowd first gathered in front of the gate of the yard and prevented any access. An attempt was then made to break down the gate to get access to the yard. It is not evident from the report whether this attempt was successful. The crowd, however, did gain access to the site at approximately 11h30. Certain damage was done and the work was disrupted. Mr Lategan ordered the workers to withdraw from the site to prevent damage to equipment and bodily harm. At around 14h00 the crowd left the site and made its way to the City Council's office. The workers, however, stayed away from the site for the rest of the working day. It is stated in the affidavit that the actions of the crowd "were under leadership and influence of the Respondents". There is no mention of the respondents in Mr Lategan's report. There is reference only to unnamed "representatives from this crowd".

[7] According to a report furnished by Mr Ludik Burger, a contracts manager, no work was possible on 12 March due to "continued strike action". Labour and plant operators were threatened by the strikers. During the evening a security official allegedly reportedly saw a group

of people moving towards the site where only one security official was on duty. This group then threw stones and destroyed equipment and work on the site. The police had to intervene.

[8] On 13 March 2013, when Mr Burger arrived at the site, he found that several windows had been broken and the gates were mangled. According to Mr Burger's report, no work was possible because of continued strike action. In a further report filed by Mr Lategan on the following day it is stated that a crowd of approximately 100 protestors gathered at the site at 9.30 p.m. They broke windows, set a forklift truck alight, burnt one air-conditioning unit as well as some panels. Several shots were apparently fired at the security guards on duty and a petrol bomb was thrown through the window of one of the offices which, fortunately, did not burn.

[9] There was then a period of respite until 18 March 2013. According to a report made by Mr Burger, on that day Mr Lategan had a meeting with representatives of SANCO and the outcome of the meeting was that the community would not allow any further work on the site until such time as their issues had been resolved. It is also stated in the report that the SANCO representatives warned Mr Lategan that violent action would be used if this arrangement was not adhered to by the contractor and sub-contractors. The contractor decided that it should

withdraw all of its resources from the site for safety reasons, which it did, and no work was possible as from 10h45 on that day.

[10] On 20 March 2013 there was more unrest. According to a report filed by Mr Lategan approximately 200 to 250 protestors marched to the site yard and closed off the entrance. An attempt was made by the protestors to start burning tyres. Stun grenades and gun shots were fired in order to keep the crowd in order.

[11] On 22 March 2013 Mr Lategan reported that community representatives came to the site yard and demanded that everybody vacate the premises. So as to avoid any injury Mr Lategan withdrew the labourers from the site.

[12] There are two aspects of the founding affidavit that are significant:

(a) Apart from general remarks to the effect that the crowd was acting "under the leadership and influence of the Respondents", there is not a single factual allegation linking the respondents to the actions of the crowd.

(b) No incidents of unrest at the site are described after 22 March 2013.

[13] In the answering affidavit deposed to by the sixth respondent (confirmed by the fourth and fifth respondents) the involvement of the respondents in the unrest at the site during the period 11 to 22 March 2013 is described.

[14] The fifth respondent was nominated by the communities from TR5 and Tsunami as a community liaison officer (CLO). One of the tasks of the CLO's was to facilitate co-operation between the contractor and the local community. The fourth, sixth and seventh respondents were nominated by their communities to be their representatives on a project steering committee (PSC) set up to assist with the development of the site.

[15] On 11 March 2013 members of the community gathered at the site. The approximate time of the gathering referred to by the sixth respondent is not specified. The second, fourth, fifth and sixth respondents were present. They spoke to Mr Alberts, a representative of the contractor about the materials to be used to construct the houses. Mr Alberts was unable to assist and suggested that, if the respondent had any concerns, they should approach their local councillor. The respondents reported this to the gathering and told them to go home. The respondents then went to see the councillor at his office but he was not there.

[16] On 12 March 2013 members of the community gathered at the site again. The fourth, sixth and seventh respondents were present. The gathering was singing but not violent. The respondents told the community to go home and that they would go and speak to the councillor. The respondents then met with councillor Makeleni at his office. He was unable to assist but promised to organise a meeting with the MEC and the HDA to discuss the matter and to meet with the respondents again on the following day. The respondents were satisfied and left.

[17] On 13 March 2013 a crowd once again gathered at the site. The gates were locked and the crowd was not permitted to enter. There were certain leaders from SANCO present who said that they would write a letter, which they did. The letter was handed to a CLO. (In his affidavit the sixth respondent assumes that this must be the letter, a copy of which is annexed to the founding affidavit. This letter, however, is dated 19 March 2013.) The fourth, sixth and seventh respondents then returned to the councillor's office for the meeting that had been promised the day before. The councillor, however, refused to meet with them. The respondents then advised the community members who were present that there would no longer be a meeting and that they should go home. The fourth, sixth and seventh respondents also went home.

[18] The sixth respondent was arrested at his home at 03h00 on the morning of 14 March 2013. He was advised by the police that he had been arrested for having vandalised the councillor's house that night. The sixth respondent remained in custody until about noon on 14 March. He subsequently discovered that, despite the respondents' pleas that the crowd return home, the crowd had in fact made plans to protest on the night of 13 March. They did not inform their community leaders of these plans because they knew that the respondents would try to stop them.

[19] On Friday, 15 March 2013, the sixth respondent appeared in the Magistrate's Court. The other respondents were present to support him. The sixth respondent was not required to appear before a Magistrate and went home.

[20] Nothing happened over the weekend of 16 and 17 March 2013.

[21] On 18 March 2013 the respondents held a community meeting at TRA5 to discuss their grievances and to tell the community what had happened at court. There is no reference to a meeting with Mr Lategan of the contractor on that day as described in the founding affidavit.

[22] On 19 March 2013 a crowd once again gathered at the site. On this occasion all of the respondents were present. This was the first time that the first respondent was involved in such a gathering. The first respondent attempted to talk to the people on the site but was not permitted to do so by the contractor. The first respondent advised that he would report to the ANC executive.

[23] On 20 March 2013 members of the community once again gathered at the site. The fourth, sixth and seventh respondents were present. A representative handed a copy of the ANC's letter to Mr Alberts. The first and sixth respondents then went with representatives of SANCO and the ANC to the MEC's office where a meeting was held.

[24] When the first and sixth respondents returned to the site they were advised that members of the crowd had been shot by the police with rubber bullets. The first and sixth respondents told the crowd to go home, which they did. There was no suggestion that any of the other respondents were present or played a part in the disturbance that evidently occurred and which is described in Mr Lategan's report of the events that occurred.

[25] On the afternoon of 21 March 2013 the MEC attended a meeting with the community at the Delft library. The meeting appears to have been hostile and the MEC told the crowd that he intended to organise

security for the site to prevent the community from disrupting the work. He did however also undertake to consult with others and to report back to the community in three days. The respondents were satisfied with this. In the event the MEC never reported back to the respondents.

[26] A security company then came and secured the site. On 22 March to 4 April, when this application was brought, there were no further protests and the contractor began building operations again.

[27] In the answering affidavit reference is made to review proceedings pending between Asla Construction (Pty) Ltd, on the one hand, and the applicant and the contractor on the other. A copy of an affidavit deposed to by Mr Rieger Van Rooyen, a director of Motlekar Cape (one of the members of the contractor joint venture) is annexed to the answering affidavit. In this affidavit Mr Van Rooyen describes the unrest as having been over a period of three weeks from 11 March 2013 to the end of March 2013. He goes on to state that private security companies had been hired in order to assist the police and to secure the site against future damage and delay-causing riots by protestors.

[28] A copy of the review proceedings commenced by Asla Construction (Pty) Limited were also made available to me. The annexures referred to in Mr Van Rooyen's further answering affidavit form part of this

record. One of these annexures is a letter from the contractor to Lukhozi Consulting Engineers (Pty) Limited dated 15 April 2013 which indicates that the contractor suffered a delay during the period 11 to 25 March 2013. A second letter, also dated 15 April 2013 also identifies the period of unrest as being 11 to 25 March 2013.

[29] In the replying affidavit it is repeatedly stated that the respondents were present at various times when there was unrest at the site and that the respondents are "self professed and proclaimed leaders" of the community. The sixth respondent's description of his and the other respondents' movements on the days that the unrest occurred is not disputed to any material degree.

[30] The front page of this application shows that it was issued by the Registrar of this Court on 4 April 2013 and set down for hearing on the following day, 5 April 2013 at 10h00. It appears from an affidavit deposed to by Mokgetheng David Moshigo, an assistant State Attorney, that service of the application was effected on the first respondent by telephoning him on his cellular telephone number and advising him of the application. He also sent a copy of the papers to the first respondent by telefax. He first made contact with the first respondent at 19h43 on 4 April 2013. Mr Moshigo also made contact with the third respondent on his cellphone and sent a copy of the papers to him by email. The third respondent promised that he would

inform the other respondents who serve with him on SANCO of the application. It appears that the application came to the knowledge of the fifth respondent who telephoned Mr Moshigo. The seventh respondent was also advised by telephone.

[31] The sixth respondent was notified of the application on the morning of 5 April 2013.

[32] The respondents (save for the third respondent) attended at court on the morning of 5 April 2013. The State Attorney afforded the respondents a period of 1½ hours within which to arrange legal representation which the respondents were unable to do.

[33] The respondents then returned to court where the matter came before Mr Justice Dlodlo. The applicant's counsel prevailed upon the respondents to agree to an order being granted against them but they advised the applicant's counsel that they did not wish to deal with the matter until such time as they had legal representation. An order was then made postponing the matter for hearing on 22 May 2013. No interim relief was granted and the respondents refused to give any undertaking that they would not engage in any violent protest action regarding the project. The fourth to seventh respondents were then able to instruct their attorneys of record.

[34] The applicant's replying affidavits were delivered on 16 May 2013, thirteen days after the date of 3 May 2013, being the date stipulated for their delivery in the order made by Mr Justice Dlodlo on 5 April 2013. The respondents had delivered their answering affidavits on 26 April 2013, being the date stipulated in the order. The applicant's seek condonation for the late filing of their replying affidavits. Averments made in support of this application are made in the main answering affidavit itself.

[35] On 21 May 2013, one day before the hearing, the applicant filed a "supplementary replying affidavit" deposed to by Mr Albert Lategan. No application was made for leave to file this affidavit. Reliance was placed on an indication evidently given by Dlodlo J at the hearing on 5 April 2013 that the applicant is entitled to file supplementary papers at any time should further violent protest take place in and around the site prior to the hearing of the matter. In the affidavit reference is made to a further incident at the site on 16 May 2013. A crowd of 100 to 150 protesters gathered at the site, threatened the contractor's employees and damaged property. It is alleged that the second respondent was present and addressed the crowd in Xhosa.

The condonation applications

[36] At the hearing the fourth, fifth, sixth and seventh respondents were represented by the Legal Resources Centre. The first, second and third respondents attended the hearing but were not represented. They advised the court that they opposed the application. They, however, did not have the means to obtain legal representation. As they did not foresee that this would change they advised the court that they did not intend to play a part in the proceedings. They were, however, given an opportunity to address the court, which all three of the unrepresented respondents did.

[37] At the commencement of the hearing Mr Bishop, who appeared on behalf of the fourth, fifth, sixth and seventh respondents, pointed out that the applicant required condonation for the late delivery of its replying affidavits and for the delivery of the supplementary affidavit.

[38] Mr Bishop was unable to point to any prejudice that the respondents had suffered arising from the late delivery of the applicant's replying affidavits and condonation for the late filing of the applicant's replying affidavits was granted.

[39] With regard to the supplementary replying affidavit, Mr Bishop submitted that this affidavit constituted, in essence, a fourth set of affidavits, and that the applicant should not be permitted simply to file the affidavit without a substantive application for leave to do so. In this

regard Mr Bishop referred me to **Standard Bank of SA Ltd v Sewpersadh**[1] in which it was held that a litigant who wishes to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the court file.

[40] So as not to delay the hearing of the application any further, with the agreement of both counsel, I provisionally condoned the filing of the applicant's further affidavit, whilst reserving the respondents' rights to argue that I should not have regard to the contents of the affidavit in determining the application.

[41] Having regard to the risk that the applicant's further affidavit might be admitted, the respondents applied in terms of Uniform Rule 6(5)(e) for leave to file a further affidavit dealing with the averments made in the applicant's further affidavit.

[42] The unusual aspect of this matter is the applicant's averment that leave was given to it by Dlodlo J when the application came before him on 5 April 2013 to file supplementary affidavits should further violent protest action take place in and around the site prior to the hearing of the matter. No provision of this nature appears in the order made by Dlodlo J on the day but I accept the applicant's averment, confirmed by Mr Moses, that Mr Justice Dlodlo did give such leave.

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[1] **2005 (4) SA 14 (C)** at paras. [12] and [13]

[43] On the assumption that Dlodlo J did indicate that the applicant was entitled to file further affidavits the question that arises is whether this relieved the applicant of the obligation in any event to make a substantive application to file the affidavit.

[44] In my view, given the uncertainty surrounding the applicant's right to file further affidavits, an appropriate exercise of my discretion is to admit the applicant's further affidavit and grant the respondents application for leave to file its further affidavit dealing with the matter contained in the applicant's affidavit. It is so ordered.

[45] The result is that an explanation for the respondents' involvement in the unrest that occurred on 16 May 2013 is explained. Far from inciting the crowd, the second, sixth and sevenths respondents (it is not suggested that any of the other respondents were present) tried to calm the crowd down and to dissuade them from further violent or disruptive action.

The relief sought by the applicant

[46] When the matter first came before Mr Justice Dlodlo the relief sought by the applicant was in the form of a rule *nisi* with interim effect. The result of the postponement of the application is that a full exchange of affidavits has occurred. Mr Moses who appeared on behalf of the

applicant agreed, subject to one proviso, that the application should be regarded as one for a final interdict. The proviso was that, should I find that section 11 of the Regulation of Gatherings Act No. 205 of 1993 has application and that section 11(2), in particular, imposes some type of reverse onus on the respondents. It would be appropriate to grant interim relief so as to afford the respondents an opportunity to deliver further affidavits raising their defences referred to in the above sub-section. For reasons with which I deal below I do not believe that the provisions of the Regulation of Gatherings Act No. 205 of 1993 apply and have relevance to this application. It accordingly is incumbent upon the applicant to satisfy the well-established requirements for the granting of a final interdict, i.e. the applicant must establish:

(a) a clear right on its part;

(b) an injury actually committed or reasonably apprehended; and

(c) the absence of any other satisfactory remedy available to it.

The points *in limine*

[47] The fourth to seventh respondents have raised two points *in limine*:

(a) it is contended that the application was not, and is not, urgent and therefore should be dismissed on this ground alone; and

(b) the respondents allege that a memorandum of agreement had been concluded between the applicant and "all parties" that would include the representatives of the various communities who stand to benefit from the project. Clause 7 of the memorandum of agreement establishes a dispute resolution process which provides for the resolution of disputes between the parties, firstly through dialogue and negotiation. Second, if that fails, by way of mediation and, as a last resort, by arbitration. It is contended on behalf of the respondents that the applicant should have followed the dispute resolution process and that its failure to do so should result in the application being struck from the roll.

Urgency

[48] On the applicant's own papers the last incident that occurred prior to 4 April 2013 when the application was brought, and upon which it relies for its allegation that it apprehended that it would suffer harm, occurred on 22 March 2013, nearly two weeks before. It is not disputed by the applicant that after 22 March 2013 additional security was employed at the site and building recommenced. There was no event

subsequent to 22 March 2013 relied upon by the applicant that may have precipitated the application.

[49] The courts in this division and others have consistently held that mere lip service to the requirements of Uniform Rule 6(12) will not do. It is for the applicant to make out a case in its founding affidavit to justify the particular extent of the departure from the Uniform Rules that ordinarily apply to applications.[2]

[50] The major considerations that play a part in determining whether or not a court should exercise a judicial discretion to accelerate the hearing of a matter are the prejudice that the applicant might suffer by having to wait for a hearing in the ordinary course; the prejudice that other litigants might suffer if the applications are given preference and the prejudice that the respondents might suffer by being forced into participating in an early hearing[3].

[51] I agree with Mr Bishop that there was no justification for the applicant to have brought its application with the degree of urgency that it did. There is no evidence to suggest that there was an actual threat of imminent harm. The fact that the applicant was prepared to agree to

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[2] Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F; Salt and Another v Smith 1991 (2) SA 186 (NHC) at 187F-H; Sikwe v SA Mutual Fire and General Insurance 1977 (3) SA 438 (W) at 440H; Eniram (Pty) Limited v New Woodholme Hotel (Pty) Limited 1967 (2) SA 491 (E) at 493A-G

[3] IL & B Marcows Caterers (Pty) Ltd v Greatermans SA Ltd and Another 1981(4) SA 108 (C) at 112H -113A

a postponement of the hearing of the application for a period of six weeks without interim relief and without an undertaking from the respondents that they would not commit any of the acts that the applicant complained of suggests that the applicant itself did not consider that there was an immediate threat of harm.

[52] The respondents were clearly prejudiced by the manner in which the application was brought. They were forced to hurry to court on 5 April 2013. Some of the respondents were only notified of the application on that day. None of the respondents had sufficient time within which to obtain legal representation.

[53] The manner in which the application was brought meant that it must have come before the duty Judge hearing urgent applications on that day. This may have impacted on the Judge's ability to dispose of other applications that were genuinely urgent. Litigants should not be permitted to seek preferential treatment by the Court unless the circumstances genuinely warrant the matter being given preference.

[54] The applicant, therefore, has not satisfied me that it was entitled to invoke Uniform Rule 6(12) to have its application determined as a matter of urgency. In particular, no grounds existed for bringing the application as a matter of extreme urgency with minimal notice to the respondents.

[55] Having decided that the applicant has failed to demonstrate that there were grounds which justified the extent to which it departed from the Uniform Rules ordinarily applicable to the hearing of applications, the question arises as to what relief is appropriate.

[56] In **Commissioner, South African Revenue Services v Hawker Air Services (Pty) Limited**[4] Cameron JA, in considering appeal against a dismissal of an application by the court *a quo* on the grounds that it lacked urgency held as follows[5]:

> "Urgency is a reason that may justify deviation from times and forms the Rules prescribe. It relates to form, not substance, and is not a pre-requisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of Court permit a Court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it "as to it seems meet" (Rule 6(12)(a)). This, in effect, permits an urgent applicant, subject to the Court's control, to forge its own Rules (which must "as far as practicable be in accordance with" the Rules). Where the application lacks the requisite element or degree of urgency, the court can, for that reason, decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance."[6]

[57] In **Vena v Vena**,[7] however, Jones J had dismissed an application for a mandatory interdict with interim relief on two bases. First, he held that the applicant had failed to prove grounds of urgency which justified a

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[4] **2006 (4) SA 292 (SCA)**
[5] **at para. [9]**
[6] In **IL & B Marcow v Greatermans SA (supra)** an order was made refusing the application that he matter be heard as one of urgency and setting the matter down as one of semi-urgency.
[7] **2010 (2) SA 248 (ECP)**

departure from the normal rules of court and, secondly, he dismissed the claim on the merits. In considering an application for leave to appeal against his judgment the learned Judge referred to Cameron JA's dictum in **Commissioner SARS v Hawker Air Services (Pty) Limited** and commented as follows[8]:

> "First, I do not understand this judgment to place any restriction on the discretion of a trial court to dismiss a claim as a mark of its displeasure as an abuse of the process of the court, whether it is an abuse of the procedure of urgency or any other procedure. The issue of abuse of the process of the court was not raised or considered by the Supreme Court of Appeal. The judgment may, therefore, not be applicable in this case."

[58] I respectfully agree with Jones J's comments.

[59] In this matter I regard the manner in which the applicant's launched the application and forced the respondents to attend at court with minimal notice in circumstances where no case was made out that the applicant was at risk of suffering immediate harm constitutes an abuse of this court's process which justifies the dismissal of the application without further ado.

[60] Lest this view be wrong, however, I am of the view that in any event the application falls to be dismissed on its merits.

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[8] **at para. [7]**

[61] In the light of the view that I take regarding the urgency of the application and its merits, it is not necessary for me to deal with the second point *in limine* raised by the fourth to seventh respondents.

The merits

[62] In considering whether the applicant has made out a case for the granting of a final interdict, it is necessary for me to apply the principles set out by Corbett J (as he then was) in **Plascon-Evans Paints Limited Van Riebeeck Paints (Pty) Limited.**[9] The applicant will only be entitled to a final interdict if the facts averred in its affidavits which have been admitted by the respondents, together with the facts alleged by the respondents justify such an order. The only exception to this rule is where a denial by a respondent does not raise a genuine dispute of fact because the denial is so far-fetched or clearly untenable so as to permit the court to reject the denial merely on the papers.[10]

[63] It is not in dispute that the site is owned by, and under the authority of the applicant. The site has been earmarked and demarcated for housing development purposes. In developing the site the applicant is seeking to fulfil its obligations under section 26 of the Constitution to take reasonable steps to provide homes for those seeking to realise their right of access to adequate housing. There can be little doubt

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[9] **1984 (3) SA 623 (A) at 634H-I**

[10] cf **Wightman t/a JW Construction v Headfour (Pty) Limited 2008 (3) SA 371 (SCA) at 375F-376B, H J Erasmus op. cit. at B1-49**

that the applicant has a clear (i.e. "definite") right that is capable of protection.[11]

[64] Mr Moses submitted that the applicant has a right arising from section 11 of the Regulation of Gatherings Act 205 of 1983 which imposes liability on organisations and persons who unlawfully cause or contribute to riot damage for such damage. Mr Moses submitted that section 11(2) of the Act imposes an onus on a person or organisation resisting such a claim to bring him, her or itself within the ambit of the defences described in the sub-section. I have doubt as to whether the effect of section 11(2) is as Mr Moses suggests. In my view, in any event, section 11 of the Regulation of Gatherings Act has no application or relevance to this matter. The applicant's right that is entitled to protection is its right as owner and possessor of the site to undisturbed possession and its right to proceed with the fulfilment of its constitutional obligations without unlawful interference.

[65] The applicant, however, is required to demonstrate that the respondents have committed acts that interfere with its rights or that it had a well-grounded apprehension that the respondents would commit such acts. Unless the applicant demonstrates that, at the time that it brought the application, it was suffering or reasonably believed

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[11] **Nienaber v Stuckley 1946 AD 1049 at 1053; Mosii v Motseoakhuma 1954 (3) SA 919 (A) at 930A; Edrie Investments v Dis-Chem Pharmacies 2012 (2) SA 553 (ECP) at 556B-D**

that it would suffer some injury or an invasion of a right it will not be entitled to interdictory relief.[12]

[66] The harm must be caused by the respondents, alternatively the prevention of the harm must be within the respondents' power. The respondents must be the infringers of the rights that the applicant is seeking to protect. There must be no doubt as to who, precisely, is responsible. If there is such doubt an interdict will be refused.[13]

[67] It is also necessary that the injury must be a continuing one or that there must be a reasonable apprehension that it will be repeated. An applicant is not entitled to an interdict restraining an act already committed.[14]

[68] Mr Bishop submits that there is no evidence that the respondents committed any violent or destructive acts or that they encouraged or ordered such acts. I agree. Applying the approach in **Plascon-Evans** which enjoins me to have regard to the facts alleged by the respondents, I am driven to the conclusion that, far from inciting the crowd, the respondents who were present at various times during the

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[12] Von Molkte v Costa Roesa (Pty) Limited 1975 (3) SA 255 (C) at 258D-E; V&A Waterfront Properties (Pty) Limited and Another v Helicopter & Marine Services (Pty) Limited 2006 (1) SA 252 (SCA) at para. [21]. See generally H J Erasmus et al Superior Court Practice at E8-6D

[13] Herbstein & van Winsen The Civil Practice of the High Courts of South Africa (5th edition) 2008 at 1446, H J Erasmus et al op. cit. at E8-6; W A Joubert et al Law of South Africa Vol. 11 (2nd edition) 2008 at para. 393.

[14] Philip Morris Inc v Malboro Shirt Co SA Limited 1991 (2) SA 720 (A) at 735B; Payen Components SA Limited v Bovic CC 1995 (4) SA 441 (SCA) at 451F-G; Herbstein & van Winsen op. cit. at 1465

period 11 to 22 March 2013 took steps to pacify and to disperse the crowd. The applicant has not alleged any facts that suggest that the respondents themselves either took or threatened to take any of the steps listed in paragraph 2 of the notice of motion.

[69] By the time that the applicant approached the court on 4 April 2013 there was no continuing harm. There had been no incidents at the site since 22 March 2013 and building had resumed. There was also no reason for the applicant to apprehend that there would be more unrest and that the respondents would be involved. In my view the fact that there were incidents on 16 May 2013 is not relevant. It is the state of mind of the applicant's representatives at the time that the application was launched that is material. No facts have been alleged by the applicant which might suggest that its representatives had grounds for a reasonable apprehension that the respondents would be involved in further incidents of unrest at the site that would infringe the applicant's rights.

[70] In my view, therefore, the applicant has failed to demonstrate that the respondents were the cause of the harm that it alleges that it apprehended. The applicant has also failed to demonstrate that its apprehension was based on reasonable grounds.

[71] The application accordingly falls to be dismissed.

Costs

[72] In the answering affidavit filed on behalf of the fourth, fifth, sixth and seventh respondents it is prayed that the application be dismissed with costs on the scale as between attorney and client. Detailed submissions in support of the prayer for a punitive costs order were also set out in Mr Bishop's heads of argument.

[73] The principles that are relevant to a consideration of whether an award of costs on the scale as between attorney and client are well established:

(a) Where costs are awarded the court exercises a discretion. This discretion is to be exercised judicially upon a consideration of the facts of each case. It is a matter of fairness to both sides.[15]

(b) As a general rule the successful party is entitled to his costs.[16]

(c) As regards an award of costs on the scale as between attorney and client:

> "(T)he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing

[15] Fripp v Gibbon 1913 AD 354; Intercontinental Exports (Pty) Limited v Fowles 1999 (2) SA 1045 (SCA) at 1055F-G; MacDonald v Huey Club 2008 (4) SA 20 (C) at 22A-B
[16] Treatment Action Campaign v Minister of Health 2005 (6) SA 363 (C) at 371C-E

> party, the court in a particular case considers it just by means of such an order to ensure more effectively than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation.[17]

[74] Mr Bishop submitted that there are special considerations arising from the circumstances in which the application was brought and from the conduct of the applicant's representatives that render it just that the fourth, fifth, sixth and seventh respondents be awarded their costs on the scale as between attorney and client. These special considerations include the following:

(a) At the time that the application was launched there was no threat of immediate harm to the applicant. I refer to what I have said above in this regard.

(b) The applicant was either unable, or did not, put any factual evidence before the court that indicated that the respondents themselves were responsible for the harm that the applicant alleged that it had suffered and reasonably apprehended that it would suffer in the future.

(c) In its founding affidavit the applicant represented that by reason of the respondents unlawful actions "no work could, and can, be

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[17] per Tindall JA in **Nel v Waterberg Landbouers Ko-Operatiewe Vereniging 1946 AD 597 at 607**; see also **Ward v Sulzer 1973 (3) SA 701 (A) at 706G-707A; Swartbooi and Others v Brink and Others 2006 (1) SA 203 (CC) at para. [27]**

done on the site". It is also alleged that, by reason of the respondents' unlawful actions the applicant had suffered "and will continue to suffer" serious financial damages conservatively estimated at R300 000,00 per day. Both of these statements were untrue. By the time that the application was launched on 4 April 2013 (the same day as Mr Rughubar deposed to his founding affidavit) work on the site had recommenced and any financial losses that the applicant may have suffered as a result of work stoppages during the period 11 to 22 April 2013 had come to an end.

(d) Notwithstanding the aforegoing the application was brought as a matter of extreme urgency with some of the respondents only receiving some hours notice. Having compelled the respondents to rush to court to oppose the drastic relief sought against them (including an order that they not gather within the perimeter of 300 metres from the site for the duration of the building activities) the applicant was content to agree to a postponement of the application for a period of approximately six weeks without any interim relief and without any undertaking from the respondents that they not engage in the conduct described in paragraph 2 of the notice of motion.

[75] Mr Moses submits, on the other hand, that it should be borne in mind that the applicant brought this application so as to create or restore an environment in which it could fulfil its obligation, and promise, to the Delft community to provide housing. One can certainly comprehend and understand the applicant's need, during the period of unrest that occurred between 11 and 22 March 2013, to protect the people and equipment on the site from damage and to restore a safe working environment so that construction of the houses could continue. This, however, provides no reason or justification for bringing an urgent application, some weeks after the unrest had come to an end, of the nature and in the circumstances described above. There is no doubt that there is friction between sections of the Delft community, on the one hand, and the applicant and the contractor, on the other, relating to the houses being constructed on the site and the materials being used for their construction. This friction, however, will not be eased by arbitrarily hauling leaders of the community before the court and seeking to impose some type of legal obligation on them to prevent unrest.

[76] In **Matatiele Municipality and Others v President of the Republic of South Africa and Others**[18] Sachs J emphasised that the Constitution requires candour on the part of the Government:

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[18] **2006 (5) SA 47 (CC)**

> "What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore it is consistent with ensuring that the courts can function effectively, as s 165(4) of the Constitution requires.[19]

[77] In my view the above dictum has relevance to this matter. The applicant owed a constitutional obligation to the respondents, their community and to the court to be candid and to put a full and fair account of all of the circumstances surrounding the application before the court. It failed to do this.

[78] Lastly Mr Moses submitted that the fact that the fourth, fifth, sixth and seventh respondents were represented by the Legal Resources Centre, being a public interest body, should play some part in the exercise of my discretion as regards the scale of costs to be applied. I see no reason for drawing a distinction between the Legal Resources Centre and any other firm of attorneys. It is so that the Legal Resources Centre is publicly funded. I see no reason why this should have any effect on an award of costs. There in any event have been numerous instances where litigants represented by the Legal Resources Centre have been awarded their costs.

[79] Having regard to the aforegoing, in my view fairness dictates that the applicant be ordered to pay the costs of the fourth, fifth, sixth and seventh respondents on the scale as between attorney and client.

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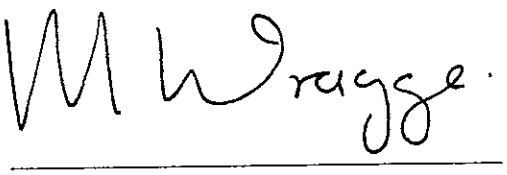
[19] **at para. [107]**

[80] I accordingly make the following order:

(1) The application is dismissed.

(2) The applicant is ordered to pay the costs of the fourth, fifth, sixth and seventh respondents on the scale as between attorney and client.



WRAGGE, AJ