IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 22326/2018

GROWTHPOINT PROPERTIES LTD	Applicant
v	
ALL PERSONS INTENDING TO OCCUPY ERF 165639, CAPE TOWN	Respondents
RECLAIM THE CITY	First Interested Party
#UNITEBEHIND	Second Interested Party
SOCIAL JUSTICE COALITION	Third Interested Party

Coram: Justice J I Cloete

Heard: 3 June 2019

Delivered: 28 June 2019

JUDGMENT

CLOETE J:

Introduction

[1] This is the extended return day of a rule *nisi* granted *ex parte* by Savage J in chambers on 4 December 2018, interdicting the respondents from entering or remaining on the applicant's immovable property, being erf 165639 Cape Town, which is a portion of vacant land currently utilised as a parking lot and situated at 5 Lower Loop Street, Cape Town ("the property"). The respondents were also interdicted from erecting or attempting to erect any form of structure on the property, be it of a temporary, permanent or semi-permanent nature.

[2] On the return day, 15 January 2019, the applicant consented to the first to third interested parties being granted leave to intervene and oppose, and the rule *nisi* was extended to 3 June 2019 by Masuku AJ, together with an agreed timetable for the filing of further affidavits. By the time the matter came before me on 3 June 2019 the only parties who opposed the granting of a final interdict were the first and second interested parties. It is common cause that on the evening of 4 December 2018 the respondents vacated the property after the *ex parte* order was served upon them by the sheriff and have not returned. They have also formally undertaken not to return to the property.

[3] The first interested party, Reclaim the City, is a voluntary social movement comprised of Cape Town working class residents (including domestic workers, waitrons, call-centre workers, carers and security guards), learners, university students and professionals. It was formed to *'advocate for just and*

equal access to land and housing for all, undo the legacy of a segregated and unequal apartheid city… advocate for an accountable government on issues of land, housing and spatial justice… resist and prevent unjust practices by government and all sources of private property power'.

[4] In order to realise its objectives and vision, Reclaim the City *'protests in a variety of non-violent forms'*. The early form of the social movement was launched at a public community meeting held in Cape Town on 13 February 2016 as a direct response to the sale, by the Western Cape Government, of state land in Cape Town to private sector investors. The applicant is one of those investors.

[5] The second interested party, #UniteBehind, is a civil society coalition which was formed in April 2017 by over 20 organisations and movements. It *'…strives to advance the rights enshrined in our Constitution and in particular the right to human dignity, land reform and housing, health education, safety and security, basic service delivery'* and *'foster genuine political participation of all people in our society to achieve openness, transparency and direct accountability… done through organising, protest action, citizen assemblies and political education'.*

[6] For convenience, I refer to the first and second interested parties as "the interested parties". They oppose the granting of a final interdict in their capacity as civic society organisations acting in the public interest and in their own interest, in order to uphold and protect the constitutional right to protest contained in s 17 of the Constitution, which provides that:

> *'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'*

[7] The crux of the interested parties' opposition lies in their contention that the applicant breached the duty of utmost good faith in the *ex parte* application and how this impacted what they describe as the respondents' constitutional right to protest. They say that their opposition is procedural in nature to vindicate their constitutional rights as well as to ensure that the applicant's conduct does not set an unsavoury precedent for future cases.

[8] In particular, they contend that the duty of utmost good faith is more stringent when it concerns and affects constitutional rights as is the case, so they argue, in the present matter. They submit that confirmation of the rule *nisi* would set a weighty precedent to sanction the manner in which the applicant initially approached court in what they consider to be an attempt to obtain a tactical advantage over the respondents.

[9] It is necessary to place the interested parties' opposition in proper context. This court is <u>not</u> called upon to determine whether or not the constitutional right to protest enshrined in s 17 of the Constitution extends to the right to do so on privately owned property. The interested parties accepted, in their answering affidavit, that the applicant, as owner of the property, is entitled to prevent access thereto by third parties.

[10] However, at the same time, the interested parties maintained that their interest in this application *'is to uphold the right to protest as enshrined in*

section 17 of the Constitution'; that the respondents' presence on the property *'was pursuant to an exercise of the right to protest'*; and that *'there is no settled case law on whether the right to property automatically outweighs the right to protest, and thus a Court might have refused the* ex parte *order had the Applicant not withheld all the facts'.*

[11] This apparent contradiction, which gave rise to some confusion, was taken up with *Ms Matsala*, who appeared for the interested parties. She rightly accepted that in order for them to have advanced a case on the issue of whether s 17 extends to privately owned property, the interested parties were obliged to follow the procedure laid down in rule 16A of the uniform rules of court. Given their failure to do so *Ms Matsala* conceded that it was not an issue that was properly before me.

[12] The interested parties' opposition thus boiled down to the following, namely that the applicant breached the duty of utmost good faith in not disclosing all material facts when it brought the *ex parte* application. Had it done so, it was submitted, then Savage J would have been made aware of the facts relating to the nature and context of the protest and the sequence of events, and might have refused the interim order, alternatively granted an order in different terms. I will thus approach the determination of this matter on that basis, and it is therefore also not necessary for me to make a finding on whether or not, where constitutional rights are at risk, a more stringent duty is placed upon an applicant in *ex parte* proceedings.

[13] Before turning to the allegations in the papers, it is convenient to refer to the established legal principles pertaining to the duty of utmost good faith in *ex parte* applications.

Applicable legal principles

[14] These were recently re-stated by the Supreme Court of Appeal in *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at paras [45] to [52]:

> '***Disclosure – legal principles***
>
> *[45] The principle of disclosure in* ex parte *proceedings is clear. In* NDPP v Basson *this court said:*
>
> *"Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide (Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E–349B)."*
>
> *[46] The duty of the utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely,* audi alteram partem*. The law sometimes allows a departure from this principle in the interests of justice but in those exceptional circumstances the* ex parte *applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.*
>
> *[47] The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all*

relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte *relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the* ex parte *applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.*

[48] As Waller J said in Arab Business Consortium*, points in favour of the absent party should not only be drawn to the Judge's attention, but must be done clearly:*

"There should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough."

[49] The ex parte *litigant should not be guided by any notion of doing the bare minimum. She should not make disclosure in a way calculated to deflect the Judge's attention from the force and substance of the absent respondent's known or likely stance on the matters in issue. Generally this will require disclosure in the body of the affidavit. The Judge, who hears an* ex parte *application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.*

[50] In regard to the court's discretion as to whether to set aside an ex parte *order because of non-disclosure, Le Roux J said in* Schlesinger v Schlesinger

". . . [U]nless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte *on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant."*

[51] This is consistent with the approach in English law, that if material non-disclosure is established a court will be "astute to ensure that a plaintiff who obtains [an ex parte *order] without full disclosure, is deprived of any advantage he may have derived by that breach of duty".*

[52] As to the factors that are relevant in the court's exercise of its discretion whether or not to set aside an ex parte *order on grounds of non-disclosure, in*

> NDPP v Phillips *this court said that regard must be had to the extent of the non-disclosure, the question whether the Judge hearing the* ex parte *application might have been influenced by proper disclosure, the reasons for non-disclosure and the consequences of setting the provisional order aside.'*

The allegations on the papers

[15] The deponent to the applicant's founding and replying affidavits was Mr Timothy Irvine ("Irvine"), who is employed as its asset manager. The founding affidavit was not supported by any confirmatory affidavit(s) when the *ex parte* application came before Savage J. In the founding affidavit Irvine however stated that he deposed to it *'by virtue of my personal knowledge of the facts thereof and in my capacity as a representative of the registered owner of the relevant property'.*

[16] The case made out in the founding affidavit may be summarised as follows. An unlawful invasion of the property had commenced that day, i.e. 4 December 2018. A large group of persons had arrived at the property claiming an entitlement to occupy it. Irvine believed that they had either been encouraged by *'third parties'* or duped by these third parties into believing that the property was public land which they were entitled to occupy.

[17] He alleged that at the time of deposing to the founding affidavit (the time was not disclosed) no persons were resident on the property and nor had any residential structures been erected. However there was a group of several dozen people, to the applicant unknown, who were in the process of

beginning to erect rudimentary structures. Irvine annexed a photograph *'showing circumstances as they are as at approximately 08h00 this morning'.*

[18] The photograph in question depicts a group of about 30 people milling about on the property, some of whom were brandishing flags bearing the inscription "RTC". Irvine stated that the property is encircled by a fence and that the only way to gain entry is through the boom at the gate of the property. According to him, it appeared that during the course of the morning these people (i.e. the respondents) simply forced their way through this boom and onto the property.

[19] He alleged that the respondents were persons wholly unknown to the applicant and that *'for obvious reasons the respondents have no inclination to disclose their identities to the applicant'.* Irvine went further, alleging that *'where the respondents might at present be resident is a matter… unknown and accordingly it is impossible for the applicant to ascertain their identities or to serve papers on them in the ordinary course'.*

[20] According to him, given that some of the individuals were in the process of erecting structures on the property with the intent to occupy, if the hearing of the application was to be delayed in order to effect service on these individuals, the very object of the interim interdict sought would be frustrated. He maintained that:

> *'10.6 Further, there is the very real concern, as I am informed has happened in many previous cases of this nature, that service of these*

papers will precipitate exactly the sort of conduct that the applicant fears, namely an orchestrated and large scale invasion of the land with the intent of occupying same before an order concretizes the rights of the applicant.'

[21] Irvine stated that he had personally attended at the property and estimated that there were approximately 12 structures in the process of being erected, all along the boundary, evidently with the intention to create the impression of occupation. He had been informed that the manner in which the land invasion was taking place is an example of what is commonly referred to as "plot farming", alternatively was being driven with a political motive. What "plot farming" entails is a consortium of persons, frequently with fake proprietary credentials or fake credentials, indicating that they are officials of an organ of state, who let it be known that they are entitled to make either private or public land, as the case may be, available to persons in need, almost uniformly in exchange for payment of an "administrative fee" or some form of simulated purchase or lease agreement. Person acting under these misrepresentations then pay for the "right" to build a structure.

[22] He further stated that:

'14.6 I suppose that it is technically possible that a large group of persons all independently and spontaneously decided to take steps to occupy the land of the applicant on the same day, but would submit that this is extraordinarily unlikely. The fact that such a large group of persons at the same time are attempting to occupy the land is indicative of the fact that this is indeed such a case of plot farming or a politically motivated land invasion.'

[23] Irvine maintained that a further indicator of the fact that the respondents had been misled as to the nature of the land in question was evidenced by a photograph taken during the course of the morning in which a banner is evident displaying the words "RECLAIM ALL PUBLIC LAND". While the City was previously the owner of the land in question, it was purchased by the applicant for development purposes in 2016.

[24] Irvine went on to state that:

> *'18. I should point out that the applicant's attorney of record, Mr Andre Pepler has been in telephonic communication with one Mr Jonty Cogger, who purports to act on behalf of an organisation known as* Ndifuna Ukhwazi*.*
>
> *18.1 It is unsure whether this organisation is the organisation which is in fact orchestrating the land invasion or not but Mr Cogger apparently takes the view that the occupation of land is "symbolic" and in so doing they simply wish to create an opportunity to engage with the applicant and the City of Cape Town.*
>
> *18.2 I attach hereto in this regard email correspondence received from Mr Cogger by applicant's attorneys of record during the course of this morning.*
>
> *18.3 While Mr Cogger might represent some of the people seeking to occupy the property there is no way of knowing whether this is indeed the case.*
>
> *18.4 Further, in the event structures are erected on the property it could very well encourage other third parties to similarly erect structures.*
>
> *18.5 Further, while Mr Cogger might refer to this as "symbolic" we have only his word in this regard, and I should point out that this is the undertaking of a person who has already clearly*

seen fit to act in breach of the law by making himself a party to the unlawful occupation of land. In any event, whether it is "symbolic" or not is with respect of no moment, the occupation of the land remains unlawful.

18.6 The applicant has no certainty to the effect that the persons currently on the property will vacate same during the course of this afternoon, although it sincerely hopes that this is indeed the case.

18.7 The applicant will happily liaise with this gentleman and engage with him and whatsoever organisation he represents in due course, but will do so once the applicant's rights have been protected. In the event that the occupation of the land in question is indeed "symbolic", then there can be no prejudice occasioned by this.

18.8 Further, the applicant has no knowledge as to whether or not all the persons seeking to occupy the property are in fact represented by Mr Cogger and in the circumstances applicant elects to err in favour of a more generous interpretation of the rights of the respondents and to afford any person who feels that he or she has the right to occupy the land to approach this honourable court and give reasons why this should be the case…'

[25] The email to which Irvine referred was sent to Pepler at 11h21 that day and reads as follows:

'Dear Mr Pepler

Our telephone conversation earlier today refers.

We note that Growthpoint Property Limited has instructed you to obtain an urgent interdict against a protest occurring at Site B today [i.e. the property].

You indicated that you require more information on the nature of protest. Kindly find attached a joint statement from the social movements participating in the protest, which include Reclaim the City, Social Justice Coalition and

#UniteBehind. This statement explains the reasons and the intention for the protest.
https://www.facebook.com/751429941654979/posts/1379555322175768/

My instructions are that the erection of structures at Site B symbolise the struggle that the majority of Capetonians, and South Africans, face in the struggle for access to adequate housing. As such the structures have been erected to demonstrate the plight of homelessness and inequality in access to land and property as well as a system where well-located land is sold to private entities without the concomitant redress. As indicated in the public statement, the participants have engaged in various protests in the last few months without producing adequate or sufficient answers as to the circumstances of the disposal of Site B to Growthpoint.

At the heart of today's protest is a desire for public accountability for the sale of valuable well-located public land to private entities. With this in mind, my instructions are to request an audience with your client and the relevant officials at the City of Cape Town to explain the disposal of Site B at a convenient time. This, they believe, is the most practical solution without engaging in protracted legal processes.

We wait for your response.

Regards,

Jonty Cogger

Attorney 1 Ndifuna Ukhwazi Law Centre

+27 72 456 1185 +27 21 012 5094 nu.org'

[26] The contents of the statement posted on Facebook, referred to in Cogger's email, did not form part of the founding papers. It was only on 20 December 2018 (16 days after the *ex parte* order was granted) that Pepler deposed to a "supplementary affidavit". After confirming the correctness of Irvine's founding affidavit to the extent that it related to him, Pepler added:

'4. I wish in addition to confirm that I did speak to Mr Cogger early on the morning of 4 December 2018. I confirm that Mr Cogger sent me a WhatsApp message at 8:57 requesting permission to go onto the property to take legal instructions and that I responded immediately thereafter confirming that he may go onto the property to take such instructions.

5. Although it was not expressly stated I believe it is common cause between Mr Cogger and I that he would be on the property for the purpose of taking instructions as the attorney for the persons then occupying or seeking to occupy the property.

6. Mr Cogger called me back at 9:23 to relay his client's instructions to me. I requested that he put same in writing – which eventuated in the email being annexure "FA6" to the founding affidavit deposed to by Timothy William Irvine.

7. I thereafter called Mr Cogger on his mobile phone at around 19:00 that evening when I arrived at the property together with the sheriff in order to execute the order handed down earlier in the day under the above case number. The purpose was to attempt to arrange for a peaceful vacation of the property. Mr Cogger was still at the property that evening, and he and I had an initial discussion on the vacation of the property by those persons occupying same.

8. The evening ended when the persons occupying the property voluntarily vacated same and, at the same time, dismantled and removed the structures that they had erected along with black plastic chairs, mattresses, portable generators and portable toilets…'

[27] It will immediately be apparent that what Pepler disclosed about Cogger's involvement in his supplementary affidavit of 20 December 2018 paints a very different picture to that "disclosed" by Irvine in the founding affidavit. It is abundantly clear that, by the time the *ex parte* application served before Savage J, Pepler was aware that: (a) Cogger was acting in his capacity as the attorney for the persons then occupying or seeking to occupy the property;

(b) despite this knowledge, Cogger was not given any notice of the *ex parte* application; and (c) the first time Cogger, in his capacity as attorney for the respondents, had any notice of the application was after the *ex parte* order was granted in chambers.

[28] In the answering affidavit filed on behalf of the interested parties the deponent, Ms Karen Hendricks ("Hendricks") who is a member of both, submitted that the applicant failed to disclose and/or suppressed material facts in its *ex parte* application:

28.1 First, the applicant failed to disclose that it knew and had prior engagement with the first interested party whose members were present on the property on 4 December 2018. Throughout his affidavit, Irvine claimed that the respondents were wholly unknown to him. These claims were patently false;

28.2 Secondly, the applicant failed to disclose, and as a result misled Savage J, as to the reason for the respondents' presence at the property. The applicant (via Pepler) was informed by Cogger both telephonically and in writing on the day of the protest that people had gathered on the property to protest against its disposal by the City to the applicant, in circumstances where it was believed by the protesters that some corruption, collusion or negligence was at play in the disposal and related processes. The applicant knew that the protesters were not on the property for the purpose of a large scale orchestrated

land invasion as Irvine claimed, but were rather voicing and protesting a legitimate grievance of significant public interest and concern; and

28.3 Thirdly, the applicant failed to disclose that its attorney had approached the interested parties' attorney early on the morning of 4 December 2018 to inform him of the applicant's instructions to apply for an urgent interdict. Clear lines of communication had been established between Pepler and Cogger. Despite knowing that the interested parties (in addition to the respondents) were legally represented, Irvine misrepresented the nature of Cogger's presence on the property.

[29] Hendricks set out in some detail why the interested parties believe that corruption, collusion or negligence was involved in the disposal of the property and subsequent processes. It is not necessary to set out these details in this judgment, nor to make any finding on whether or not the interested parties' grievances are well-founded. The point is rather that the applicant well knew of the existence of these grievances, but did not disclose them in the *ex parte* application.

[30] Hendricks pointed out *inter alia* that on 4 October 2018, a peaceful protest was held outside the applicant's offices in Claremont. At this protest, a list of questions was handed over to Irvine himself as well as the applicant's head of marketing, Ms Nadine Kuzmanich. This protest ended when Ms Kuzmanich addressed the protesters and undertook to respond to the questions within two weeks. This is borne out by an email addressed by Kuzmanich to the first interested party dated 25 October 2018 which reads as follows:

> *'As promised, attached please find our statement regarding Growthpoint's position on Site B* [i.e. the property]*, which we will also be issuing to the media.*
>
> *We are confident that our statement will give answers to all your questions and provide the context that is so important.*
>
> *We would like to emphasise that we are significantly committed to the City of Cape Town and its people, but we believe that the provision of social housing is the responsibility of the City. We cannot prescribe how the City directs its proceeds from the sale or the significant administered costs that we pay them.*
>
> *Regards*
>
> *Nadine'*

[31] Hendricks also pointed out that on 10 October 2018 a further peaceful protest was held outside the offices of the applicant's town planner, Nigel Burles & Associates. In subsequent email correspondence, Burles agreed to meet on 16 October 2018 to answer any questions relating to the disposal of the property. Annexed to the answering affidavit is an email dated 11 October 2018 addressed to Burles by a member of the first interested party's co-ordinating committee, thanking Burles for agreeing to meet with them and setting out a short list of questions. It concluded with the following sentiments, namely *'…we would really appreciate it if you can answer the questions. We think it is important so that we and other residents in Cape Town can better understand how this happened'.*

[32] It was also pointed out that on 24 October 2018 a further peaceful protest was held outside the private residence of the consultant contracted by the

applicant to submit the land use application, namely Mr Jappie Hugo. It ended at about midday as Mr Hugo refused to address the protesters.

[33] On 8 November 2018 a further protest was held at the Civic Centre, which resulted in a meeting with certain City officials. They were however unable to provide any further information on the City's forensic investigation into the interested parties' grievances.

[34] On 27 November 2018 a penultimate peaceful protest was held at Alderman Ian Nielson's private residence in Cape Town. He is currently the Deputy Mayor, but at the time of disposal of the property he was the Executive Director of Asset Management at the City. The protest ended when Mr Nielson left the premises with a police escort.

[35] According to Hendricks, the final protest occurred on 4 December 2018. Its purpose was two-fold: first, to raise awareness of the sale of well-located public land to private entities; and secondly, erecting empty structures on the property to showcase the inequalities of living conditions in Cape Town between the affluent inner city and the poor marginalised periphery of the city. The intention was to gain an audience with both the applicant and the City to account to the protesters for the disposal of the property. This is borne out by Cogger's email to Pepler. Instead of this occurring, the protest ended peacefully after Pepler arrived at the property with the *ex parte* order.

Discussion

[36] While it is so that Cogger's email was referred to in the founding affidavit, and was undoubtedly read by Savage J, what cannot seriously be disputed is that the real purpose of the occupation, not only in light of the history between the parties, but also the communications between Pepler and Cogger, must have been known to Irvine. He did not disclose this in the founding affidavit. Instead he portrayed a picture of entirely unknown persons who appeared intent on orchestrating a large scale land invasion of indefinite duration. Not only that, but the case advanced by the applicant was such as to deflect Savage J's attention from the known or likely stance on the matters in issue on the part of the absent respondents, who any reasonable person in the applicant's position would have realised were on the property as members of at least the first interested party.

[37] Irvine painted a picture of grave and imminent prejudice to the applicant if the order was not granted on an *ex parte* basis. He did not pertinently draw to Savage J's attention in his affidavit that the logo on the flags brandished by some of the protesters were clearly those of the first interested party; he did not disclose the fact that prior protests had occurred in a peaceful and orderly fashion and had ended when either engagement had taken place, was promised or refused; and he misled Savage J as to Cogger's actual purpose for being on the property.

[38] I agree with the interested parties that, in so doing, the applicant breached its duty of utmost good faith. Had the respondents (and thus the interested

parties) been afforded the opportunity to be heard in circumstances which were clearly not of dire urgency as claimed, it may well have become apparent to Savage J that the protest action did not pose a real threat to the applicant's property rights. The court hearing the application for interim relief would also have been in a position to make a determination, favourable to the applicant or not, or indeed somewhere in between, after having had the benefit of all relevant and material facts.

[39] Irvine's allegations regarding Cogger are particularly concerning. On Pepler's own subsequent admission Cogger did not, as Irvine alleged, see fit to act in breach of the law by making himself a party to the unlawful occupation of land. Pepler knew and understood why Cogger was entering onto the property, and he also knew that Cogger was doing so with the applicant's permission.

[40] If Pepler knew that Cogger had the applicant's permission then it is highly unlikely that Irvine, who was furnishing instructions to Pepler, was oblivious to this. Pepler, as the applicant's attorney, should also have ensured that all relevant and material facts were disclosed in the founding papers. There is no apparent reason why he could not have deposed to an affidavit setting out the full extent of his communications with Cogger, and what he understood Cogger's role to be, before the matter came before Savage J.

[41] As set out in the Supreme Court of Appeal authority to which I have referred, in an *ex parte* application the applicant has a duty of utmost good faith to bring all material facts before the court which might affect the granting or

otherwise of the *ex parte* order. The failure to do so can lead to the order being set aside if it is shown that the court might have come to a different conclusion had it been fully appraised of all the facts. In the instant matter, not only was the application brought on the basis of utmost urgency, reliance was placed on uncorroborated hearsay evidence, and to the applicant's knowledge an attorney was both local and available to accept service.

[42] In the replying affidavit Irvine took the opportunity to set out *'…in a little bit more detail the events that took place on 4 December 2018, as since established by applicant'.* Essentially this amounted to information that Irvine obtained from Mr Mzwanele Ndlovu of Interpark, which manages the parking lot on the applicant's behalf, and who was present at the property on the day in question. According to Ndlovu, the persons who entered the property did so by ignoring his instruction to the contrary and proceeding to open the boom and move onto the property both on foot and in minibus taxis, motor cars, a truck and a bakkie. Ndlovu immediately contacted his controller and informed him that the property had been taken over by persons unknown to him. After they took control of the property these individuals closed the boom and the gate and did not let any of the persons entitled to park on the property to enter it. They sealed the gate to the property with a chain and a padlock.

[43] Two issues arise therefrom. The first is that Irvine does not explain why he was not able to obtain this information from Ndlovu and incorporate it in his founding affidavit along with a confirmatory affidavit by Ndlovu when the *ex parte* application came before Savage J. The second is that these allegations

were raised for the first time in reply and the interested parties were therefore unable to deal with them. In any event, none of this detracts from Irvine's duty to have taken the court into his confidence about the real purpose of the occupation and the events which preceded it.

[44] Irvine also persisted in his allegation that he had no knowledge of the identity of the actual persons on the property on 4 December 2018. To my mind, this is a contrived allegation. It may well be that he did not know the identity of each individual but it is clear from photographs attached, not only to the founding affidavit but also to the answering affidavit, who these individuals purported to represent, namely the interested parties.

[45] Significantly, Irvine was constrained to concede in the replying affidavit that he was aware of the protests that took place on at least 4 October, 10 October and 24 October 2018. He sought however to place reliance on the fact that none of the prior protests had taken place on private property. That of course did not relieve him of the obligation to disclose, in the founding affidavit, the fact of the prior protests and the context in which they took place.

[46] Irvine also went to some lengths to justify the *ex parte* application by referring to the contents of the Facebook post referred to in Cogger's email of 4 December 2018. While some of the contents of that post, which was disclosed by the interested parties, might be considered irresponsible, the fact of the matter is that it was not drawn to Savage J's attention because it did not find its way into the founding papers. Not only that, but it did not form the

basis of the case made out by the applicant, because it makes clear reference to *'peaceful protest'.*

[47] It is against this background that I am unable to agree with the submission made by *Mr Rosenberg SC* who, together with *Mr Wilkin*, appeared on behalf of the applicant on the extended return date that, given that Savage J exercised her discretion judicially, there is no basis to discharge the interim order in circumstances where the interested parties concede that the applicant has the right to refuse third parties access to the property. For all of the reasons already given, that is not the test. I am instead persuaded that the applicant omitted to place all relevant facts before Savage J and that these omissions were material. The extent of the non-disclosure was also material. Savage J might have been influenced by proper disclosure to grant a different order. The reasons given for non-disclosure, to the extent that they were advanced in reply, are flimsy and unpersuasive. In addition the respondents have given a formal undertaking not to return to the applicant's property and I accept that this undertaking includes the interested parties on whose behalf the respondents were there in the first place.

[48] Insofar as costs are concerned, there is every likelihood that the entire application could have been avoided had the applicant simply taken the trouble to serve upon the respondents and interested parties via Mr Cogger. The fact of the matter is that the protesters voluntarily vacated the property upon service of the order and have not returned. In all the circumstances I see no reason why costs should not follow the result.

[49] **The following order is made:**

1. **The rule *nisi* granted *ex parte* on 4 December 2018, and extended on 15 January 2019 and 3 June 2019 (pending judgment) is discharged.**

2. **The applicant shall pay the costs of the first and second interested parties on the scale as between party and party, including any reserved costs orders.**

J I CLOETE