IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No. : A558/13

Magistrate's Court Case No. : 9/1227/13

In the matter between:

JANINA SAMUELS Appellant

vs

THE STATE Respondent

JUDGMENT DELIVERED ON THURSDAY 31 MARCH 2016

DLODLO, J

[1] This is an appeal against the Appellant's conviction on a charge of Contempt of Court and the sentence subsequently imposed by the Magistrate – Wynberg district on 7 June 2013 *("the trial Court"*). The matter is before this Court after Leave to Appeal in terms of Section 309B of the Criminal Procedure Act 51 of 1977 ("the

Criminal Procedure Act") was granted by the trial Court on 2 August 2014.

A BRIEF FACTUAL MATRIX

[2] It is common cause that at the time of her conviction, the Appellant who was then a forty-four (44) year old single mother of four (4) children had been living in an informal structure in the area known as Hangberg together with her sixteen (16) year old son. She had constructed the informal dwelling herself on 12 October 2012 and was then employed as a contract worker who then earned R180.00 per day. As we gather, the Appellant had been on the housing waiting list for fifteen (15) years. This we gather from Exhibit A which is an extract from the housing data base. On 31 May 2013 the Appellant appeared before the Court on a charge of Contempt of Court as mentioned in the introductory portion of this judgment. Having been advised of her rights as to legal representation, the Appellant made an election to act in person and/or to represent herself. On that date she was released from custody after having been granted bail in the sum of one thousand rands. The granting of bail was of course subject to certain usual conditions. On that particular day the proceedings were adjourned and the case postponed until 7 June 2013. The

records specifically mention that the proceedings were postponed to the latter date for "*the accused's plea*".

[3] According to the charge sheet, the charge against the Appellant related to her failure to comply with an interim interdict granted by this Court on 30 September 2010 and which was made final on 10 November 2011. In the charge sheet the State alleged that the interdict applied to the area known as Hangberg, Hout Bay in the magisterial district of Wynberg and the said interdict made the following provisions:

"*1. Preventing the building, extension or completion and/or fresh occupation of current or new informal structures (or the re-erection of those that have been dismantled) on or above the area commonly known as The Sloot;*

2. Restraining and interdicting the unlawful occupants of erven 33-2844, 33-1510, 33-1860 and any other person from unlawfully occupying or invading the vacant properties which have been acquired by the City of Cape Town;

3. Restraining and interdicting anyone from building, completing, extending and taking occupation of any further informal structures:

(i) Anywhere in the area known as Hangberg; and

(ii) On or above and under the Sloot in Hangberg."

It needs to be mentioned that the Second Respondent cited in both the interim and Final Orders granted by this Court on 30 September 2010 and 10 November 2011 respectively was described as follows:

"The unlawful occupants of erven 33-2844, 33-1510, 33-1860 and State land west of Hout Bay unmeasured and unregistered commonly referred to as 33-0000/5 Hout Bay whose identities are not known to the Applicants and those intending to occupy erven 33-8176, 33-8474, 33-2844, 33-1510, 33-1860 and State land west of Hout Bay unmeasured and unregistered commonly referred to as 33-0000/5 Houtbay."

[4] The State alleged in the charge sheet that on 18 January 2013, the Deputy Sheriff had served a notice on the Appellant notifying her of the existence of the High Court Orders and also informing her that she was in contravention of the Order and giving her seven (7)

days *"to vacate the informal structure and demolish it."* The State alleged that the Appellant failed to comply with the aforementioned notice.

[5] According to the record of proceedings on 7 June 2013 the Appellant appeared before the Court as scheduled. She confirmed her earlier election, namely, to represent herself. The Prosecution put a charge to her and when asked what her plea was, she pleaded guilty to the charge preferred against her by the State. The record of proceedings, however, does make it appear that before the charge was put to the Appellant, the charge sheet was amended in terms of Section 86 of the Criminal Procedure Act to include, in reference to the area known as the Sloot, the words "*onder en and/or under."*

[6] Upon pleading guilty the trial Court thereafter proceeded to question the Appellant in terms of Section 112(1) (b) of the Criminal Procedure Act. Importantly, in answer to the question "*waar presies is u woning?*" (*by the trial Court*) the Appellant answered "*dis langs die Sloot, maar aan die onderkant van die*

sloot. Dis nie op of bo die Sloot nie." Strangely the trial Court then questioned the Appellant as to whether she received a notice from the Sheriff on 18 January 2013 which stated that she must "*afbreek en ontruim."* The response by the Appellant to this question was somewhat curious. She answered "*ek het verstaan dis `n hooggeregshof bevel en dat ek moes geuit het, maar ek het nêrens gehad om heen te gaan nie. Daarom het ek nie gegaan nie."* In answer to the question as to whether the Appellant knew that she was committing an offence and that she could be punished for doing so, the Appellant answered "*Ja."*

[7] Even though the trial court did not expressly say it accepted and was satisfied that the Appellant correctly pleaded guilty to the charge preferred against her, it does appear to have accepted the Appellant's plea of guilty. One is obliged to deduce so because the trial court thereafter permitted the prosecution (ostensibly in terms of Section 112 (3) of the Criminal Procedure Act) to present evidence on the charge. The State then led the evidence of one Jan Gerber, an advocate employed by the Western Cape Department of Community Safety. Mr Gerber whose evidence was subsequently reconstructed, testified *inter-alia* that he was

overseeing the investigation and prosecution of persons who had breached the High Court Order. At the conclusion of his evidence, Mr Gerber proposed that the Appellant be given a suspended sentence on condition that she breaks down her unlawful structure and that should she fail to do so, the suspended sentence should then be put into operation. Strangely, the trial court obliged and proceeded to sentence the Appellant to undergo imprisonment for the period of three (3) months the whole of which was suspended on two conditions. The first condition was that the Appellant not be found guilty of Contempt of Court within the three year period of suspension. The second condition was that the Appellant "verwyder and ontruim" her structure on or before 20 June 2013.

[8] On 22 July 2013 the Appellant (by that stage represented by the Legal Resources Centre) filed a simultaneous application for condonation and an application for Leave to Appeal in terms of Section 309B of the Criminal Procedure Act. The Appellant advanced a number of grounds of appeal in the application for Leave to Appeal. These included but were not limited to the following as paraphrased by Mr Magardie:

"(a) The court a quo had erred in finding as a matter of fact in finding that the Appellant was guilty of Contempt of Court;

(b) The court a quo had erred by permitting the amendment of the charge sheet which prejudiced the Appellant in her defence contrary to the provisions of Section 86 of the Act;

(c) The court a quo had erred in that having elicited the answers given by the Appellant pursuant to the questioning in terms of Section 112 (1) (b) of the Act, the Court ought to have been in doubt as to the Appellant's guilt. In these circumstances the Court ought to have invoked the provisions of Section 113 of the Act, recorded a plea of not guilty and required the prosecutor to proceed with the prosecution;

(d) The condition imposed by the court a quo as part of the suspended sentence, requiring the Appellant to "verwyder en ontruim" her home, was not legally competent. The condition amounted in form and effect to an Order evicting the Appellant from her home, in circumstances where there had been no enquiry as the relevant circumstances which Section 26(3) of the Constitution and Section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation

of Land Act 19 of 1998 ("PIE") requires to be considered before an Order is granted evicting a person from their home."

APPLICABILITY OF CERTAIN PROVISIONS OF THE CRIMINAL PROCEDURE ACT AND THE RELEVANT LEGAL PRINCIPLES

[9] In order to address the concerns that an amendment to the charge sheet prejudiced the Appellant, it is necessary to set out *infra* the provisions of Section 86 (1) of the Criminal Procedure Act. It reads as follows:

"86(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part

thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend."

[10] It is important to mention that the amendment can be effected "*at any time before judgment."* However, the probability that the accused person will be prejudiced is, of course, greater as the trial proceeds to its end because the defence would not have borne the amendment in mind. In the interest of completeness one perhaps needs to mention that in an extensive and complex trial involving several charges the central and decisive particulars have far-reaching and important consequences and accordingly the Court will be slow to allow an amendment at the late stage clearly because such an amendment can prejudice the accused person. See for instance **S v Heller** 1971 (2) SA 29 (A); **S v Mpambanso** 2013 (2) SACR 186 (ECB). Fortunately, *in casu* this has no application.

[11] The test for prejudice is whether the accused will, (as far as the presentation of his case is concerned) be in a weaker position than

that in which he or she would have been had the charge been in the amended form when the plea was tendered. This does not talk to being deprived of a handy technical point. There will be prejudice if the accused person could reasonably have presented or sought other evidence or would have cross-examined differently had the charge sheet read differently and an adjournment or other indulgence cannot remove the prejudice. In the words of Innes CJ in **R v Herschel** 1920 AD 575 at 580 *"the cases where such prejudice cannot be avoided by a suitable adjournment must be few indeed."* In the instant case, in my view, prejudice does not even arise. There is no defence put forth by the Appellant on which the latter would conceivably be prejudiced by the amendment. Moreover, this I prefer to call, cosmetic amendment to the charge sheet, hardly raised issues of the moment. The Appellant had not even pleaded when this amendment was made to the charge sheet. To say that it prejudiced her in her defence is untenable.

[12] In any event after the amendment had been effected the charge was then put to the Appellant and she proceeded to plead guilty thereto. Where is prejudice? The latter is of course a rhetoric

question. There is none at all. Prejudice is prejudice to an accused person if the amendment sought and granted affects the merits of the defence put forth by the accused person. Indeed Section 86 (1) places no onus on the prosecution to establish the absence of prejudice before the Court may for instance, order and/or sanction the changes in the indictment to be amended. See **S v Maqubela and Another** 2014 (1) SACR 378 (WCC). Ordinarily where the Court intends amending the charge sheet, it always must afford the accused person (legally represented or acting in person) an opportunity to adduce evidence or make submissions in order to show prejudice and postpone the proceedings. I need to conclude this aspect by stating that the Court can amend a charge sheet *mero motu* or on the application of either the State or the accused. I hasten to add though that in each case the Court should inform the accused that it is considering an amendment in order to afford him an opportunity to indicate prejudice. See **S v Gelderbloem** 1962 (3) SA 631 (C).

[13] There is merit in the contention that the Court ought to have resorted to invoking the provisions of Section 113 of the Criminal Procedure Act. The answer given to the question by the Court

"*waar presies is u woning?"* was as mentioned *supra "dis langs die Sloot, maar aan die onderkant van die Sloot – dis nie op of bo die Sloot nie."* It is rather unfortunate that the trial court stopped the Section 112(1) (b) questioning halfway. But from the answer given it became abundantly clear that the Appellant may very well not be resident in the area covered by the widely worded interdict order alleged to have been breached.

[14] Clearly, I would be surprised to gather that the trial magistrate became satisfied that the Appellant correctly pleaded guilty to the charge preferred against her. Her answer to the question of whether she received a notice from the Sheriff was in fact more telling that she never understood nor intended to commit Contempt of Court. I repeat the answer *infra* to facilitate this discussion:

"Ek het verstaan dis `n hooggeregshof bevel en dat ek moesge uit het, maar ek het nêrens gehad om heen te gaan nie. Daarom het ek nie gegaan nie."

[15] If the last answer can be described as not having amounted to a defence then I would never comprehend how otherwise an

undefended, uneducated and unsophisticated accused person must communicate with the Court in disclosing her defence on a charge of Contempt of Court. There was undoubtedly inadequate questioning by the trial court. But what was solicited by the totally inadequate questioning was enough to show that this accused person actually means to plead not guilty to the charge preferred against her. The provisions of Section 113 were put by the Legislature in the Criminal Procedure Act in their clear wisdom to cater for instances such as the present one.

[16] Section 113 of the Criminal Procedure Act provides as follows:

"(1) If the court at any stage of the proceedings under section 112(1) (a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided

that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

(2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise."

[17] It must be mentioned that criterion for a change of plea envisaged in Section 113 quoted above is reasonable doubt. If the Court has a reasonable doubt whether the accused person admits, admitted or still admits an allegation in the charge sheet or whether such admission was correctly made regarding either guilt or the possible existence of a defence, a plea of not guilty must be noted. As held in **Attorney-General, Transvaal v Botha** 1993 (2) SACR 587 (A), the doubt can arise from replies during the initial questioning or during argument, from information regarding sentence or from questions there or from other material which is furnished. The section indeed applies to the entire process from the initial questioning until just before the sentence is imposed on the

already found guilty accused person. We now live in a Constitutional era. The Constitution of the Republic of South Africa ensures in Section 35 (3) that the accused's right to a fair trial is borne in mind particularly the accused person's right to the presumption of innocence, the right to remain silent and the right to be protected against self-incrimination.

[18] When the presiding officer engages in the questioning of an accused person who has tendered a plea of guilty to the charge, he in the first place seeks to confirm the guilty plea. In fact the presiding officer under Section 112 (1) and (2) acts as an inquisitor and not as umpire, the purpose being to make a determination whether a trial is at all necessary. The accused's guilt must appear prominently from his or her answers to the questioning. Thus the presiding officer determines whether the accused person's guilt appears from his or her answers to the questioning. I fully associate myself with the sentiments expressed in **Hiemstra's Criminal Procedure** as updated by Albert Kruger to the effect that the inquisitorial and purely preliminary nature of Section 112 also manifests itself in the fact that it is not concerned with evidence but with unattested statements and that the process

is not a trial but an investigation. Indeed before an admission by an accused person during the Section 112 (1) (b) proceedings can stand as proof under Section 113 (1) the content and ambit of the admission must be clear. The State loses nothing when the plea of guilty is altered to the one of not guilty in terms of Section 113 of the Criminal Procedure Act. I say so because all admissions which have not been withdrawn remain proof of the particular allegation.

[19] Contempt of Court has essential elements which must be proved, just like any other crime. Contempt of Court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body. See Milton, **South African Criminal Law and Procedure**, Volume ll, 3rd edition 1996 page 164. In **S v Beyers** 1968 (3) SA 70 (A) it was correctly held that a person who unlawfully and intentionally disobeys a Court Order commits an offence. The State has an obligation (as in any other criminal prosecution) to prove beyond a reasonable doubt that the offence was committed intentionally and with the necessary *mens rea*. The Appellant faced a particular species of Contempt of Court in the instant matter. This is Contempt of Court *ad factum*

praestandum – non-compliance with a Court Order requiring a respondent to do or not do something.

[20] The Supreme Court of Appeal has stated that the test for when disobedience of a civil order constitutes Contempt is whether the breach was committed "*deliberately and mala fide*". See **Frankel Max Pollak Vinderine Inc. v Menell Jack Hyman Rosenberg & Co Inc** 1996 (3) SA 355 (A) at 367 H-I; **Jayiya v Member of the Executive Council for Welfare, Eastern Cape** 2004 (2) SA 602 (SCA) paras 18 and 19. Mr Magardie referred us to **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA). The latter case is truly a leading case on the correct characterisation of Contempt of Court in the form of disobedience of a civil Court Order. Cameron JA (as he then was) writing for the full bench of the Supreme Court of Appeal stated the following elucidating formulation:

"Deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him-or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is

objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

[21] Perhaps it is of paramount importance to mention as well that the purpose of questioning in terms of Section 112 of the Criminal Procedure Act is to protect an accused person, who, as in the instant case, is not only undefended but is clearly uneducated and exhibits no sophistication, from the adverse consequences of an ill-considered plea of guilty. At the risk of repeating what I have stated already earlier in this judgment I reiterate that the questioning and answers must cover all the essential elements of the offence which the State in the absence of a plea of guilty would

be required to prove. See in this regard **S v Doud** 1978 (2) SA 403 (O). Botha JA in **S v Naidoo** 1989 (2) SA 114 (A) at 121F stated the following:

"It is well settled that the section was designed to protect an accused from the consequences of an unjustified plea of guilty, and that in conformity with the object of the Legislature our courts have correctly applied the section with care and circumspection, and on the basis that where an accused's responses to the questioning suggest a possible defence or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence."

It remains abundantly clear from the answers given by the Appellant pursuant to the trial court's questioning of the Appellant in terms of Section 112 (1) (b) of the Criminal Procedure Act that the Appellant's non-compliance with the Order was not deliberate, *mala fide* or unreasonable.

[22] In the first place the Appellant believed that she was not in breach of the Court Order. This is evident from her statement that her home was not on or above the Sloot. Importantly, the Appellant

told the magistrate that she did not demolish and vacate her home as required by the Order because she had nowhere else to go. The fact is that there was no evidence placed before the trial Court to gainsay any of these statements, in particular that the Appellant would be rendered homeless if she were forced to comply with the interdict and the notice served on her by the Sheriff.

[23] I fully agree with Mr Magardie that the trial Court ought to have been in doubt from the questioning of the Appellant as to whether the latter had the necessary intention to deliberately and *mala fide* to disobey the High Court Order. In effect the Appellant stated that she did not comply with the interdict because she had nowhere else to go if she had to demolish and vacate her informal structure. I mean this was to her for all intents and purposes a home and the only home.

[24] In conclusion, I return to her answer on the questions put to her by the trial Court. The cumulative effect of her statements that her home was not on or above the Sloot, that she had nowhere else to go (if required to "*verwyder*" her home) and the fact that the

Appellant was not legally represented, ought to have raised doubt about whether she was admitting all the elements of the offence, of a degree sufficient for the trial Court to invoke the provisions of Section 113 of the Act. I hold that failure by the trial Court to act in terms of Section 113 of the Criminal Procedure Act in the instant matter and in these circumstances constituted a serious misdirection which indeed resulted in a failure of justice. The misdirection which is so serious that it results in the failure of justice is of course a material misdirection having the effect of vitiating the proceedings before the trial Court.

[25] Indeed the second condition of the suspended sentence imposed by the trial Court requiring the Appellant to remove and vacate her informal structure by 20 June 2014 failing which the three (3) month suspended custodial sentence would become operative, is inconsistent with Section 26 (3) of the Constitution and is thus both incompetent and invalid. Section 26 (3) of the Constitution provides that no-one may be evicted from their home or have their home demolished without an Order of Court made after considering all relevant circumstances. When one considers the sentence imposed on the Appellant in the instant matter, it

becomes plain that in effect the sentence compels her to choose between homelessness and imprisonment. One would have thought that the Magistrate would by now be alive at the decision by this Court in **S v Koko** 2006 (1) SACR 15 (C) where the following guiding formulation was given:

"Although the second condition of suspension was, strictly speaking, not an order for the eviction of the accused from the premises, it obliged him to vacate the same by 30 June 2004, failing which he, as happened, could be arrested and brought before a competent court in terms of the provisions of s 297 (9) of the Criminal Procedure Act, for the purpose of having the suspended portion of the sentence put into operation or further suspended in the exercise of the court's discretion (see S v Titus 1996 (1) SACR 540 (C) at 543 h – i). As the obvious purpose of the imposition of the second condition of suspension was to indirectly achieve the same result as an order of ejectment, it, for practical purposes, in my view, should be equated therewith and, in any event, would ensure that the full measure of the protection afforded by s 26 (3) of the Constitution is accorded the accused."

"The magistrate by having imposed the second condition of suspension, without having conducted an enquiry into and

considered all the relevant circumstances, in my view, failed to act in accordance with the law. I, accordingly, incline to the view that the second condition of suspension was invalidly imposed."

[26] In conclusion it must be pointed out that a Court which grants an Order the effect of which is to evict a person from their home is obligated under Section 26 (3) of the Constitution to take all relevant circumstances into account before granting such an Order. See, *inter alia* **Port Elizabeth Municipality v Various Occupiers** 2005 (1) SA 217 (CC). Eviction Orders are not ordinarily made by Criminal Courts. It is not necessary for purposes of this judgment to enumerate the relevant circumstances envisaged in Section 26 (3) of the Constitution which must be taken into consideration before such an Order can be competently made. It suffices to mention that the condition requiring the Appellant to "*verwyder en ontruim*" her home was imposed by the trial Court without any judicial enquiry at all into the personal circumstances of the Appellant, the circumstances under which she occupied the land in question and built thereon her informal structure, her knowledge of the interdict at the time it was granted, the rights and needs of her children, the

consequences of eviction or the availability of suitable alternative accommodation for the Appellant and her children. Counsel representing the Respondent in this appeal wisely conceded k, *inter alia* as follows:

"Die klagstaat is ook so swak geformuleer dat dit nie duidelik is wat presies die misdryf was nie. Was dit omdat die appellant op of bo of onder die sloot `n struktuur opgerig het?

Die getuie Gerber het verklaar dat die hofbevel gemik was op strukture wat "op of bo" die sloot opgerig was.

Dit blyk verder nie uit die oorkonde wat die bewoording was van die kennisgewing wat die balju op die appellant beteken het nie.

Dit is dus glad nie duidelik dat die appellant `n misdryf gepleeg het of nie en indien wel, sy die nodige mens rea gehad het nie.

Dit word aan die hand gedoen dat, gegewe die lang tydsverloop, die skuldigbevinding en vonnis bloot tersyde gestel word."

ORDER

[27] On the strength of the above reasoning I make the following Order:

(a) The Appeal against both conviction and sentence is upheld.

(b) The conviction and the subsequently imposed sentence are set aside.

(c) The matter is remitted to the trial Court in terms of Section 312 of the Criminal Procedure Act; the trial Magistrate is directed to ensure that the provisions of Section 113 of the Criminal Procedure Act is complied with.

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DLODLO, J

I agree

_____
NUKU, AJ

APPEARANCES:

For Appellant	:	Adv S Magardie
Instructed by	:	Legal Resources Centre 3rd Floor Greenmarket Place 54 Shortmarket Street CAPE TOWN
For Respondent	:	Adv J H Theron
Instructed by	:	Director of Public Prosecutions Private Bag 9003 CAPE TOWN

REPORTABLE

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(WESTERN CAPE DIVISION, CAPE TOWN)

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JANINA SAMUELS Appellant

vs

THE STATE Respondent

PRESIDING JUDGE	:	**D V DLODLO**
For Appellant	:	Adv S Magardie
Instructed by	:	Legal Resources Centre 3rd Floor Greenmarket Place 54 Shortmarket Street CAPE TOWN
For Respondent	:	Adv J H Theron
Instructed by	:	Director of Public Prosecutions Private Bag 9003 CAPE TOWN
Date of Hearing	:	11 March 2016
Date of Judgment	:	31 March 2016