HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case no: 18205/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

29 June 2020 .....
Date Judge President D Mlambo

In the matter between:

THE RESIDENTS OF:
INDUSTRY HOUSE, 5 DAVIES STREET,
NEW DOORNFONTEIN, JOHANNESBURG First Applicants
ROSANA MODES, 32 AND 34 DAVIES STREET,
NEW DOORNFONTEIN, JOHANNESBURG Second Applicants
36 DAVIES STREET, DOORNFONTEIN, JOHANNESBURG Third Applicants
39-41 DAVIES STREET, DOORNFONTEIN, JOHANNESBURG Fourth Applicants
WELLINGTON COURT, 34 LEYDS STREET, JOUBERT PARK
JOHANNESBURG Fifth Applicants
REMINGTON COURT, CNR NUGGET AND JEPPE STREETS,
JOHANNESBURG Sixth Applicants
WEMMER SHELTER, TURFONTEIN, JOHANNESBURG Seventh Applicants
ERVERN 87 AND 88, BEREA, JOHANNESBURG Eighth Applicants
20 JANIE STREET, JEPPESTOWN, JOHANNESBURG Ninth Applicants
50, 52 AND 54 SOPER ROAD, BEREA, JOHANNESBURG Tenth Applicants
1 DELVERS STREET, MARSHALLTOWN, JOHANNESBURG Eleventh Applicants

and

MINISTER OF POLICE First Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Respondent
MINISTER OF HOME AFFAIRS Third Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS Fourth Respondent
MEC: ROADS AND TRANSPORT, GAUTENG Fifth Respondent
LIEUTENANT-COLONEL ERIC NKUNA N.O. Sixth Respondent
LIEUTENANT-COLONEL DELIWE SUZANDELANGE N.O. Seventh Respondent
HERMAN MASHABA N.O. Eighth Respondent
ALBERT MATSAUNG N.O. Ninth Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE Tenth Respondent

LAWYERS FOR HUMAN RIGHTS 1st Amicus Curiae
LEGAL AID SOUTH AFRICA 2nd Amicus Curiae

***Case Summary*: Search and seizure - Without warrant - including private homes in an area cordoned off on the authority of a national or provincial commissioner of police with the object of restoring public order or to ensure the safety of the public in the particular area – Provision infringing constitutionally entrenched right to privacy – Section 13(7) (c) of the SAPS Act is overbroad and therefore unconstitutional - Declaration of unconstitutionality suspended to afford legislature time to cure invalidity – Reading-in to regulate interim situation - South Africa Police Services Act 68 of 1995 (the SAPS Act), s 13(7).**
Review - Promotion of Administrative Justice Act 2 of 2000 (PAJA) – Decisions of the then acting provincial commissioner and of the former provincial commissioner to issue authorisations in terms of s 13(7) of the SAPS Act in respect of particular areas in the inner city of Johannesburg during the period 27 June 2017 to 3 May 2018, reviewed and set aside under PAJA.
Ancillary declaratory relief granted.

JUDGMENT

THE COURT

INTRODUCTION

[1] This application concerns the constitutional validity of s 13(7) of the South Africa Police Services Act 68 of 1995, a post-constitutional enactment. This provision

gives the police extended and intrusive powers to restore public order or to ensure the safety of the public in a particular area. It provides that where it is reasonable in particular circumstances, the national or provincial commissioner of the South African Police Services may, in writing, authorise the cordoning off of any area as well as the warrantless search of any person, vehicle and premises in the cordoned off area and the seizure of any article referred to in section 20 of the Criminal Procedure Act 51 of 1977.

[2] On the other hand, s 14 of the Constitution guarantees that everyone has the right to privacy, including the right not to have their person or home searched, their property searched, their possessions seized, or the privacy of their communications infringed.

[3] This application involves the warrantless search of the person, home and property of about three thousand occupants of eleven buildings in the inner city of Johannesburg between June 2017 and May 2018, by police officers acting on the authority of authorisations granted in terms of s 13(7) of the South Africa Police Services Act 68 of 1995 (the SAPS Act).

[4] Police intelligence during that period revealed inter alia that the Hillbrow, Berea and Joubert Park sectors in Johannesburg were areas where extraordinarily high incidents of serious and violent crimes occurred, such as murder, armed robbery, assault with the intent to do grievous bodily harm and so-called 'smash and grabs'. These crimes, in the inner city of Johannesburg, were prevalent in the immediate vicinity of dilapidated buildings that are occupied by people without the consent of the owners, and in certain instances 'hijacked' by people who unlawfully collect rent from those who occupy the buildings. Those who committed the serious and violent crimes, according to police intelligence, use the buildings as refuge and hide-outs for them. Criminal activity, such as the running of illegal shebeens and gambling places, also took place in those buildings.

[5] According to police intelligence reports, normal policing methods and daily police interventions proved to have been insufficient and ineffective, as a result inter alia of over-population of the affected areas and buildings concerned. The further difficulties experienced by police officers were their inability, upon entering these buildings, to find those suspected of having committed the serious and violent crimes

in the high-rise densely populated and poorly managed dilapated buildings. Extra-ordinary measures, according to the police, were required to combat the criminal activity in the affected areas, to restore public order and to ensure the safety of people in those areas. Police station commanders within the affected areas responded to the challenges faced by the police within the areas of jurisdiction of the police stations they command by applying for authorisations in terms of s 13(7) of the SAPS Act to cordon off parts of the affected areas in order to conduct search and seizure operations, and including some of the dilapated buildings within those parts of the inner city.

[6] On 27 June 2017, the then acting provincial commissioner, Lt. Gen. Nkuna, received an application in terms of s 13(7) of the SAPS Act from the station commander of the Hillbrow Police Station, Brigadier AS Nevhuhulwi, to cordon off an area identified as within sectors 4, 5 and 6 in Hillbrow, bordered by Louis Botha Avenue to the north, Joe Slovo Road to the east, North Street to the south and Hospital Street to the west, between the hours of 14h00 and 22h00 on 30 June 2017, which written authorisation he granted on the same day.

[7] The former provincial commissioner, Lt. Gen. de Lange, granted similar applications received from the station commander of the Hillbrow Police Station to cordon off the same area in Hillbrow between the hours of 14h00 and 22h00 on 14 July 2017; an area identified as within sectors 4, 5 and 6 in Hillbrow, bordered by Willie and Clarendon Streets to the north, Joe Slovo Road to the east, Hancock, Saratoga and Nugget Streets to the south and Twist Street to the west, between the hours of 14h00 and 22h00 on 31 August 2017, between the hours of 12h00 and 16h00 on 21 September 2017, between the hours of 12h00 and 18h00 on 16 November 2017, between the hours of 09h00 and 17h00 on 23 January 2018, and between the hours of 10h00 and 18h00 on 12 February 2018; an area identified as ‘CAS Block 5787 – Jeppestown’, bordered by Fawcus Street to the north, Long Street to the east, Jules Street to the south and Berg Street to the west, between the hours of 10h00 and 16h00 on 2 November 2017; areas identified as ‘Sector 2: CAS Block 5787 – Jeppestown and Doornfontein CAS Block 5779’, bordered by Albertina Sisulu and Beit Streets to the north, John Page, Betty and Sivewright Streets to the east, Durban Street to the south, and End Street to the west, between the hours of 09h00 and 18h00 on 21 November 2017; an area bordered by Rockey Street to the

north, Siemart Street to the east, Albertina Sisulu Street to the south and End Street to the west, between the hours of 10h00 and 18h00 on 23 January 2017; and an area that includes 5 Davies Street in New Doornfontein between the hours of 08h00 and 20h00 on 3 May 2018.

[8] The former provincial commissioner also granted similar applications received from the acting station commander of the Johannesburg Central Police Station to cordon off an area identified as 'Sector 2: Remington Court – Johannesburg', bordered by Bree Street to the north, End Street to the east, Jeppe Street to the south, and Nugget Street to the west, between the hours of 14h00 and 22h00 on 25 July 2017, and from the station commander of the Jeppe Police Station to cordon off an area identified as 'Sector 3: CAS Block 5779 – Doornfontein', bordered by Saratoga Avenue to the north, Angle Road to the east, Albertina Sisulu Road to the south and End Street to the west, between the hours of 10h00 and 18h00 on 24 August 2017.

[9] Each application for authorisation in terms of s 13(7) of the SAPS Act was supported by a letter from the station commander concerned, motivating the utilisation of s 13(7). Each application was accompanied by an operational plan setting out how each of the searches will be conducted, statements from a crime intelligence officer and from a visible policing (Vispol) commander, a summary of the affected area's reported crime statistics, and a map showing the area to be cordoned off. In each instance the application also required a recommendation from a legal services officer stationed at the South African Police Service's Provincial Office to the effect that the particular application was meritorious for a s 13(7) authorisation to be granted. In terms of each written authorisation the acting provincial commissioner or provincial commissioner, as the case may be, authorised the relevant station commander to cordon off the identified area, and without a warrant to search any person, premises, vehicle, receptacle or object in that area to achieve the objectives of restoring public order and/or of ensuring the safety of the public in that area. They further directed all the members acting in terms of the particular authorisation to exercise any of the powers authorised in terms thereof 'with due regard to the fundamental rights of every person and in such manner that their actions can be justified'.

[10] The search and seizure operations were carried out by police officers, assisted by officers of the Johannesburg Metropolitan Police Department and officials of the Department of Home Affairs. The occupiers and the units or rooms they occupy were subjected to warrantless searches by police officers. The search operations also resulted in arrests of undocumented foreigners. (Section 34(1) of the Immigration Act 13 of 2002, permits an immigration officer, without the need for a warrant, to arrest an illegal foreigner or cause him or her to be arrested.)

[11] The applicants, represented by the Socio-Economic Rights Institute (SERI), are more than 2 000 occupiers of various buildings in the inner city of Johannesburg – Industry House, 5 Davies Street, New Doornfontein; Rosano Modes, 32 and 34 Davies Street, New Doornfontein; 36 Davies Street, Doornfontein; 39-41 Davies Street, Doornfontein; Wellington Court, 34 Leyds Street, Joubert Park; Remington Court, corner Nugget and Jeppe Streets; Erven 87-88, Berea; 20 Janie Street, Jeppestown; and 50, 52 and 54 Soper Road, Berea - that are situated within the areas that were cordoned off and also searched pursuant to the s 13(7) written authorisations that were granted between June 2017 and May 2018.

[12] The applicants seek s 13(7) of the SAPS Act to be declared constitutionally invalid. They further seek that all the decisions authorising the searches to which they were subjected be reviewed and set aside in terms of the Promotion of Administrative Justice Act 2 of 2000 (PAJA) and that they be compensated for the infringement of their constitutional rights to privacy and dignity which the searches entailed. They also seek an interdict restraining similar searches of the units or rooms they occupy and of their person in the future, a declaration of unlawfulness of the searches they were subjected to pursuant to the granting of the authorisations as well as two other searches to which those of them residing at the Wemmer Shelter, Turfontein, Johannesburg were subjected on 20 October 2017 (the seventh applicants) and those of them residing at 1 Delvers Street, Marshalltown, Johannesburg were subjected to on 9 November 2017 (the eleventh applicants) without s 13(7) authorisations, and a declaration that their rights to dignity and privacy in terms of sections 10 and 14 of the Constitution have been unjustifiably infringed.

[13] The first, sixth, seventh and tenth respondents are the Minister of Police, the then acting provincial commissioner and former provincial commissioner of SAPS at the time, and the national commissioner of SAPS (jointly referred to as the police). They oppose the application. The second and eighth respondents are the City of Johannesburg and its executive mayor (jointly referred to as the City). They too oppose the application. The other respondents cited as the third, fourth, fifth and ninth respondents are the Minister of Home Affairs, the director-general of the Department of Home Affairs and the provincial head of the Gauteng Office of the Department of Home Affairs. Lawyers for Human Rights (LHR) and Legal Aid South Africa (Legal Aid SA) were admitted as *amici curiae*.

CONSTITUTIONAL VALIDITY OF SECTION 13(7) OF THE SAPS ACT 68 OF 1995

[14] Section 205(3) of the Constitution states that '[t]he objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. National legislation, in terms of s 205(2), 'must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces'. The SAPS Act was enacted to provide for the establishment, powers and functions of the South African Police Service.

[15] Section 13(7) reads thus:

'*(a)* The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, in writing authorise that the particular area or any part thereof be cordoned off.

(b) The written authorisation referred to in paragraph *(a)* shall specify the period, which shall not exceed 24 hours, during which the said area may be cordoned off, the area or part thereof to be cordoned off and the object of the proposed action.

(c) Upon receipt of the written authorisation referred to in paragraph *(a)*, any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation, without warrant, search any person, premises or vehicle, or any receptacle or object of whatever nature, in that area or part thereof and seize any article referred to in section 20 of the Criminal Procedure Act, 1977 (Act 51 of 1977), found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under

this paragraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation.'

[16] Section 13(7)(c) thus permits a warrantless search of any person, premises or vehicle, or any receptacle or object found in the cordoned off area and the seizure of any article referred to in s 20 of the Criminal Procedure Act 51 of 1977 (CPA) found in the possession of such person or in that area where it is reasonably necessary to achieve the object of restoring public order or of ensuring the safety of the public in the particular area. In contrast, s 22 of the CPA permits a warrantless search of any person, container or premises by a police official for the purpose of seizing any article referred to in section 20 only if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question, or if the police official on reasonable grounds believes that a search warrant will be issued to him under s 21(1)(a) if he applied for such warrant and that the delay in obtaining such warrant would defeat the object of the search.

[17] The applicants argue that s 13(7) in its entirety is constitutionally invalid since it permits warrantless searches of a person, a person's home and property and the seizure of his or her possessions, thus infringing the right to privacy that is entrenched in s 14 of the Constitution. Section 13(7) is a law of general application and its limitation of the right to privacy entrenched in the Bill of Rights, so they argue, is not 'reasonable and justifiable' as contemplated in s 36(1) of the Constitution. They argue that warrantless searches of private homes and warrantless searches in the course of investigating crime are generally impermissible and that time, manner and scope restrictions are an essential feature of statutes that authorise such searches. Section 13(7), they argue, does not meet those requirements: its reach is broad and permits warrantless searches of private homes; the provision is used to fight high levels of crime; and it enables a police commissioner to suspend the constitutional rights to privacy and dignity in a cordoned off area for up to 24 hours by subjecting the public within that geographical area and time period to the power of the state, often exercised by its most junior police officers. Section 22 of the CPA, they argue, provides adequately for warrantless searches pending any revision of the SAPS Act that Parliament may pursue in response to an order declaring s 13(7) invalid.

[18] LHR argues that s 13(7) is also constitutionally invalid because it unreasonably and unjustifiably limits the constitutionally entrenched rights of equality (s 9) and of access to court (s 34). It argues that s 13(7) unjustifiably differentiates between people on the basis of geographical location (it permits the designation of a particular area for cordoning off and any person who happens to find themselves within the area may be searched without a warrant), it enables the targeting of non-nationals (officials from the Department of Home Affairs were involved in the searches in question and anyone found not to be in possession of a South African identity document or passport, a foreign passport with a South African visa, or an asylum seeker permit, was detained under the Immigration Act 13 of 2002), and it unlawfully undermines and avoids the safeguards of s 22 of the CPA and of s 33 of the Immigration Act relating to warrantless searches and seizures. Section 13(7), it argues, is overbroad and cannot be justified in terms of s 36 of the Constitution.

[19] The police, to the contrary, argue that the limitation of the fundamental right to privacy is reasonable and justifiable within the meaning of s 36 of the Constitution. The infringement authorised in terms of s 13(7), so it argues, is not limitless. The section only permits a warrantless search of any person, premises, vehicle, receptacle or object, within a specified time period and within the cordoned off area 'where it is reasonably necessary in order to achieve the object specified in the written authorization', which is the restoration of public order and/or ensuring the safety of the public in that area. In all other instances, the provisions of sections 21 and 22 of the CPA relating to search and seizure find application. Section 13(7) enables the police service to fulfil its constitutional mandate of maintaining public order and protecting and securing the inhabitants of the Republic and their property, effectively. Here, the authorisations were granted on the strength of information provided to the acting provincial commissioner in one instance and to the former provincial commissioner in the other instances where extraordinary measures were necessary to combat the high level of serious and violent crimes in the inner city of Johannesburg that were directly or indirectly connected to the dilapidated and hijacked buildings within the areas in question.

[20] The City also argues that the limitation of the right to privacy introduced by s 13(7) is reasonable and justifiable, because it enables the police to discharge its responsibilities of restoring public order and of ensuring the safety of the public inter

alia in the inner city of Johannesburg. Legal Aid SA implores us to be cautious in declaring s 13(7) constitutionally invalid since extraordinary circumstances may arise in which the utilisation of s 13(7) could serve a legitimate and constitutionally valid purpose of maintaining public order and safeguarding the safety of the public in a particular area. But, it argues, the section should be restrictively interpreted, and it should best be left to the legislature to redefine its wording and limit its application.

[21] It is convenient first to dispose of two unmeritorious points raised. The first is that the applicants seek an order declaring the whole of s 13(7) constitutionally invalid on the basis that it infringes upon s 14 of the Constitution. We consider the scope of the relief sought to be impermissibly broad. Section 13(7)(a) empowers the national or provincial commissioner to authorise that a particular area be cordoned off in order to restore public order or to ensure the safety of the public in that area. Section 13(7)(b) in turn provides that such authorisation shall specify the period, which shall not exceed 24 hours, during which the particular area may be cordoned off, and the object of the proposed action. Neither of these provisions infringes upon the right to privacy in s 14 of the Constitution.

[22] The power to cordon off an area as envisaged in s 13(7)(a) of the SAPS Act is an important legislative mechanism that enables the police service to discharge its constitutional mandate effectively. Although the power to carry out a warrantless search afforded to a police officer in terms of s 13(7)(c) is ancillary to the power to cordon off an area as contemplated in subsections (7)(a) and (b), it is the section 13(7)(c) power to search any 'premises' without a warrant which is constitutionally offensive. This is because the term 'any premises' encompasses the power to search people's homes, their persons and property. Although on a purposive approach to interpretation, s 13(7)(a), (b) and (c) must be read as a whole, we see no justifiable reason to declare the entire section to be constitutionally invalid, when only one of its parts infringes upon a constitutional right. Importantly, s 172(1)(a) of the Constitution stipulates that any law or conduct that is inconsistent with the Constitution must be declared invalid 'to the extent of its inconsistency'. This means that if only a part of a law is inconsistent with the Constitution and the remainder is not, then it is only the 'inconsistent' part that should be declared invalid.

[23] The second unmeritorious point is the argument advanced by LHR that s 13(7)(c) infringes upon the right to equality in s 9 of the Constitution. Section 13(7)(c) cannot be said to be inconsistent with the right of equality as it inter alia permits the search of 'any person' found in the cordoned off area and the seizure of any article, referred to in s 20 of the CPA, found in the possession of such person, irrespective of that person's race, gender, ethnic or social origin, nationality and the like.

[24] We reiterate; the real focus of the applicants' constitutional challenge is the power given to police officers in terms of s 13(7)(c) to search someone's person, home and property and to seize his or her possessions. That statutory power afforded to police officers indisputably constitutes a violation of the right to privacy protected by s 14 of the Constitution. This right flows from the value placed on human dignity. (*Minister of Police and others v Kunjana* 2016 (2) SACR 473 (CC) para 14.)

[25] We must, therefore, assess whether that statutory limitation of the right to privacy is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Section 36 of the Constitution enjoins a court to balance five relevant factors in deciding whether a right in the Bill of Rights may be limited in terms of a law of general application, such as the SAPS Act, which are: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) whether there are less restrictive means to achieve the purpose. The limitation analysis involves proportionality, which calls for the balancing of different interests. There is no absolute standard for determining reasonableness and justifiability. (See, for example, *Magajane v Chairperson, North West Gambling Board and others* 2006 (5) SA 250 (CC) para 61.)

[26] In *S v Mlungwana and others* 2019 (1) SACR 429 (CC) para 57, Petse AJ articulated the justification analysis thus:

'The limitation of a right in the Bill of Rights needs to be justified under s 36. This justification analysis "requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment". This weighing-up must give way to a "global judgment on [the]

proportionality" of the limitation. It is also well settled that the onus is on the respondents to demonstrate that the limitation is justified.'
(Footnotes omitted.)

[27] First, *the nature of the right to privacy* that is limited in terms of s 13(7)(c). This first factor, as Van der Westhuizen J said in *Magajane* para 62-
'. . . raises at the outset the importance of the right the state seeks to limit. It focuses the court on the purpose of the right, the context that resulted in the right being enshrined in the Constitution and the seriousness of limiting the right.'

[28] In *Gaertner and others v Minister of Finance and others* 2014 (1) SA 442 (CC) para 1, Madlanga J stated, in the context of warrantless raids during apartheid that 'to the apartheid state the oppressed majority had no privacy to be protected, and no dignity to be respected', and that 'it is with this painful history in mind, that we consider the constitutional validity of statutory provisions that authorise searches without warrants'. Madlanga J also reminded us that-
'. . . [m]ost certainly for effect, and possibly heightened indignity, many of the egregious searches were conducted in the dead of the night: a time of relaxation, sleep, intimacy reckless abandon even, and when some, if not most, would be flimsily dressed. The sense of violation and degradation that the victims must have experienced is manifest. Even members of the then dominant race who were viewed as enemies of the state suffered this indignity.'

[29] In *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) para 25, Sachs J described the nature of the constitutionally protected right to privacy and the means through which s 14 of the Constitution repudiates repugnant past practices, thus:
'The existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systemised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 [of

the Interim Constitution] accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values.'

(Footnotes omitted.)

[30] And, in respect of warrantless entry into private homes and rifling through intimate possessions, Sachs J said this (para 23):

'. . . What is clear, nevertheless, is that however the terms "search" and "seizure" may be interpreted in a particular case, to the extent that a statute authorises warrantless entry into private homes and rifling through intimate possessions, such activities would intrude on the "inner sanctum" of the persons in question and the statutory authority would accordingly breach the right to personal privacy as protected by s 13.'

(Footnote omitted.)

[31] Privacy, however, like all rights, is not absolute. (*Kunjana* para 17.) In *Bernstein and others v Bester and others NNO* 1996 (2) 751 (CC) para 67, Ackermann J, as was pointed out by Van der Westhuizen J in *Magajane* para 42, 'described what can be seen as a series of concentric circles ranging from the core, most protected realms of privacy to the outer rings that would yield more readily to the rights of other citizens and the public interest', as follows:

'. . . The truism that no right is to be considered absolute implies that from the outset of interpretation each right is already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded by erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.'

[32] Also in *Gaertner* para 49, Madlanga J said this:

'Privacy, like all other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space does not mean that, once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the

right is attenuated, not obliterated. And the attenuation is more or less, depending how far and into what area one has strayed from the inner sanctum of the home.'
(Footnote omitted.)

[33] And in *Kunjana* paras 27 and 20, Mhlantla J said:
'The more a search intrudes into the 'inner sanctum' of a person (such as their home) the more the search infringes their privacy right.'
And
'How closely one infringes on the 'inner sanctum' of the home is a consideration that must be borne in mind when considering the extent to which a limitation of the right to privacy may be justified.'

[34] Our constitutional notion, therefore, is one of 'concentric circles of the privacy right'. (*Magajane* para 59.) Section 13(7)(c) does not discriminate between the types of 'premises' that may be searched for the purposes specified in s 13(7). There can be no doubt that the language used in s 13(7)(c) is so sweeping as to also permit warrantless entry by police officers into private homes and rifling through intimate possessions, which activities, in terms of our Constitutional Court's jurisprudence, intrude on the most protected inner sanctum of the person concerned. Section 13(7)(c) authorises an invasion of the 'relatively impervious sanctum of the home and personal life' of a person and constitutes a direct invasion of personal privacy.

[35] Second, *the importance of the purpose for which the right to privacy is limited* in terms of s 13(7). This factor, said Van der Westhuizen J in *Magajane* para 65, 'is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation'. Manifestly the SAPS Act, including its s 13(7), was put on the statute book to enable the police service to effectively fulfil its constitutional mandate 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. Restoring public order or ensuring the safety of the public in a designated crime ridden area through the exercise of the more intrusive powers provided for in s 13(7) when the national or provincial commissioner considers such action reasonable in the circumstances, enable the police service to fulfil its constitutional mandate effectively. Clearly, therefore, such police action of

necessity requires search and seizure operations of the sort contemplated in s 13(7)(c).

[36] The application of s 13(7), of course, is not limited to restoring public order or ensuring the safety of the public in areas ridden with high levels of serious and violent crimes such as the instances in question. An example of its other applications that springs to mind is for instance a bomb or other insurgent activity in an airport building or sports stadium. This too is acknowledged by the applicants in their founding affidavit where they state:

'212 I accept that, in an emergency, it may be necessary for the police to have extraordinary powers to search public places, business premises or persons who are in public places in order to deal with an emergency threat to public safety, but such powers can never constitutionally extend to warrantless searches of homes.

213 For that reason, I respectfully submit that it would be appropriate to suspend the declaration of invalidity on condition that section 13(7) may not be used to authorise a search of a person's home during the period of suspension. It may be that Parliament is able to fashion constitutionally appropriate legislation which permits the police, in an emergency, to search specified public places, business premises, or persons who are in public places, in order to deal with an emergent threat to public safety.'

[37] As was said by Petse AJ in *Mlungwana* para 81, '[t]he critical question always is how best to strike a balance between the exercise of the entrenched rights and ensuring a safe and secure environment'. The importance and necessity of restoring public order or ensuring the safety of the public in a designated area diminishes the invasiveness of warrantless searches under s 13(7)(c) in the outer rings of privacy, but not in its inner core without there being reasonable grounds for believing that an article would be found in a particular home or in the possession of an occupant within that home which is concerned in or is on reasonable grounds believed to be concerned in, or is intended to be used or is on reasonable grounds believed to be intended to be used in, or which may afford evidence of the commission or suspected commission of an offence.

[38] Third, *the nature and extent of the limitation*. Residents in an area which is cordoned off and where searches and seizures are conducted by the police in terms of s 13(7) to restore public order or to ensure the safety of the public in that area,

are, in our view, entitled to expect that the law will respect and protect their right to privacy insofar as the inner sanctum of their homes are concerned.

[39] As was said by Kriegler J in *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 68:

'Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of s 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights. It is well established that s 36 requires a court to counterpoise the purpose, effects and importance of infringing legislation on the one hand against the nature and importance of the right limited on the other. . . . The question we need to answer is whether the extent of the limitation is justified.'

[40] Section 13(7)(c) has no predetermined safeguards to minimise the extent of intrusions into the inner sanctum of a person's home within the cordoned off area where the nature of the s 13(7) police operations may make some invasion of privacy necessary, but technically gives members of the police *carte blanche* to enter any home within that cordoned off area and then to search every square inch of the home including the most private spheres of those living there. The extent of the limitation of the constitutional right to privacy – the invasion of the inner sanctum of a person's home - authorised by s 13(7)(c) as it stands, is substantially disproportionate to its public purpose. The provision is clearly overbroad, first in its reach, and second in leaving police officials without sufficient guidelines with which to conduct the searches within legal limits. (*Mistry* paras 28-30; *Magajane* para 71; *Kunjana* paras 22-24.)

[41] Fourth, *the relation between the limitation and its purpose*. In *Magajane* para 72, Van der Westhuizen J said:

'For law that limits a right to be reasonable and justifiable, there must be a causal connection between the purpose of the law, and the limitations imposed by it.'

Legislation providing for the cordoning off of a particular area and for warrantless searches and seizures to be conducted by police officers in that area with the object of restoring public order or of ensuring the safety of the public in that area in the public interest, must have a strong relationship to the limitation of the privacy right, because such police action aims at protecting the public interest.

[42] Equally apposite here is what Mhlantla J said in *Kunjana* para 25 regarding ss 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992, which allowed for warrantless searches and seizures without circumscribing the time, place and manner of the searches:

'The prevention and prosecution of offences under the Drugs Act, which concern illicit and harmful drugs that constitute a serious scourge to public safety and wellbeing, require search-and-seizure operations of the sort contemplated in the provisions. Intrinsic to such operations is an element of intrusion and the provisions must be construed in that context.'

[43] Fifth, are there *less restrictive means to achieve the purpose*? This factor, says Van der Westhuizen J in *Magajane* para 73, 'is important for the question whether the limitation of the right to privacy caused by the [search] is proportionate to the purpose of the legislative provision.' We accept that, apart from warrantless searches of a private home and its occupants without there being reasonable grounds for believing that an article referred to in s 20 of the CPA would be found in that particular home or in the possession of a person inside that home, s 13(7) could not have achieved its purpose if it required a warrant prior to searches being conducted in cordoned off areas in order to restore public order or to ensure the safety of the public in the particular area. Section 13(7), beyond question, serves a beneficial and most important public purpose.

[44] But, the searches permitted by s 13(7)(c) also permit police officials to reach well into a person's inner sanctum, which weighs strongly against the reasonableness and justifiability of that part of the section. Its overbreadth creates an impermissible threat to the right to privacy. The section gives police officers no guidance on how to lawfully and effectively carry out their functions when a private home is being searched. All is left to the discretion of any member of the police service to also search any or all homes within the cordoned off area and the persons present in those homes. The boundaries of a legally permissible search of a person's home are not delineated. The fact that the SAPS Act, including its s 13(7)(c), is manifestly in the public interest does not diminish the need for the powers of search and seizure to be exercised according to constitutionally valid criteria and procedures.

[45] Section 13(7) could have achieved its ends through other means less damaging to the right to privacy. Once the s 13(7) police operation extends to

private homes there would seem to be no reason why the time-honoured requirement of a prior search warrant being issued by a magistrate or judge in terms of s 21 of the CPA should not be respected, with exceptions similar to those provided for in s 22 of the CPA. Less restrictive measures, therefore, do exist to achieve the purpose of s 13(7) (c) of the SAPS Act, insofar as searches of private homes and their occupants within a cordoned off area are concerned, without emasculating the police operation. As was said in *Kunjana* para 24, '[a] warrantless search procedure implies the absence of a warrant providing guidance as to the time, place and scope of a search and it is therefore desirable that the statutory provision authorising a warrantless search procedure be crafted so as to limit the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances, which the warrant requirement would otherwise do.' This is an important consideration as it must be that the quest to insulate the inner sanctum of the privacy right should not be regardless of the legitimate purpose of the police operation.

[46] The jurisprudence of the Constitutional Court emphasises that exceptions to the warrant requirement should not become the rule. (*Mistry* para 29; *Magajane* paras 73-74; *Gaertner* paras 69-73; *Kunjana* paras 26-32.) In *Magajane*, for example, this was said:

'74. A warrant is not a mere formality. It is the method tried and tested in our criminal procedure to defend the individual against the power of the state, ensuring that police cannot invade private homes and businesses on a whim, or to terrorise. Open democratic societies elsewhere in the world have fashioned the warrant as the mechanism to balance the public interest in combating crime with the individual's right to privacy. The warrant guarantees that the State must justify and support intrusions upon individual's privacy under oath before a neutral officer of the court prior to the intrusion. It furthermore governs the time, place and scope of the search, limiting the privacy intrusion, guiding the State in the conduct of the inspection and informing the subject of the legality and limits of the search. Our history provides much evidence for the need to adhere strictly to the warrant requirement.

75. Of course, the law recognises that there will be limited circumstances in which the need for the State to protect the public interest compels an exception to the warrant requirement.'

(Footnote omitted.)

[47] A balancing of these factors leads us to conclude that the extent of the invasion of the innermost component of the personal right to privacy authorised by s 13(7)(c) of the SAPS Act is substantially disproportionate to its public purpose. The section is clearly overbroad in its reach insofar as it also permits warrantless, extensive and intrusive searches of private homes and persons inside them. It is furthermore deficient in failing to guide police officers as to the manner in which searches of private homes and those present in them should be conducted. Thus, taking into account all these relevant factors, we conclude that the limitation of the right to privacy of a person's inner sanctum, which is authorised by s 13(7)(c) of the SAPS Act, fails the limitation test in s 36 of the Constitution. Clearly s 13(7)(c) is overbroad and does not pass constitutional muster.

[48] We are of the view that the declaration of unconstitutionality should be prospective as an order of full retrospective force would render unlawful all s 13(7) searches of private homes and their occupants police officials undertook from 15 October 1995 when the SAPS Act came into effect. As pointed out by Cameron J in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and others* 2014 (3) SA 106 (CC) para 47- 48:

'. . . post-constitutional enactments are invalid from the date they came into effect. But this is subject to the court's remedial power, afforded by the Constitution, when declaring law or conduct inconsistent with the Constitution invalid, to make any order that is just and equitable, including an order limiting the retrospective effect of a declaration of invalidity.

. . . In fact this court almost invariably exercises the power to limit the effect of retrospective invalidity. Where good grounds exist to limit retrospectivity, the court will exercise its power to do so.'

(Footnotes omitted.)

[49] An order of full retrospective force could, as was held in *Mistry* and relied upon by Cameron J in *Auction Alliance* para 50, also 'create considerable uncertainty with regard to the validity of proceedings which were conducted on the basis of evidence obtained as a result of such searches' and 'give rise to delictual claims by persons subjected to searches and seizures after that date', further burdening the state financially.

[50] We are likewise of the view that in the light of the substantial public interest considerations at issue, that the declaration of invalidity be suspended for 24 months

to afford the legislature an opportunity to cure the constitutional defect. According to the police's answering affidavit, the legislature is in the process of amending the SAPS Act including s 13(7) thereof. Hence, the suspension of the declaration of validity will give it the opportunity to complete the process, mindful of the nature and importance of the right to privacy and its relationship to the values embodied in our Constitution.

[51] Suspension is not an exceptional remedy. In *Auction Alliance* para 55, Cameron J said this:

'. . . It is an obvious use of this court's remedial power under the Constitution to ensure that just and equitable constitutional relief is afforded to litigants, while ensuring that there is no disruption of the regulatory aspects of the statutory provision that is invalidated. This was well explained in *J* [*J and another v Director General, Department of Home Affairs and others* 2003 (5) SA 621 (CC) para 21]:

'The suspension of an order is appropriate in cases where the striking down of a statute would, in the absence of a suspension order, leave a lacuna. In such cases, the court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna. If the court is persuaded upon a consideration of these conflicting concerns that it is appropriate to suspend the order made, it will do so in order to afford the legislature an opportunity to correct the defect. It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants.'

[52] Here, not to suspend the declaration of invalidity would self-evidently hamper the police service in fulfilling its constitutional mandate *inter alia* of maintaining public order and protecting and securing the inhabitants of the Republic and their property. We do not know what stage the projected amendments to the SAPS Act have reached, and counsel were unable to advise us from the bar. It seems advisable, therefore, to grant the legislature a 24-month period of suspension. The interim relief that we propose to grant shall apply to the search of any private home and/or any person inside such private home within the cordoned off area, and the seizure of any article referred to in s 20 of the CPA found in any such private home or in the possession of any person inside such private home, and will, in our view, afford those subject to the invalid statutory regime temporary constitutional relief. Such an order seems to us to be 'the simplest and fairest solution' and 'one that minimally

intrudes on the statute, while ensuring that during the suspension unconstitutional searches cannot for the most part take place'. (*Auction Alliance* para 65.)

[53] We, therefore, consider that an appropriate interim remedy during the period of suspension of the declaration of invalidity would be for a reading-into section 13(7) that s 21 of the CPA with the exceptions provided for in s 22 of that act apply to the search of private homes and of the persons present in them, and the seizure of articles found in such homes and in the possession of persons inside them, within a cordoned-off area authorised in terms of s 13(7)(a).

PAJA REVIEW

[54] In view of the prospective effect coupled with the suspension of the declaration of invalidity of s 13(7)(c) of the SAPS Act, it has become necessary to determine whether the decision of the then acting provincial commissioner and the decisions of the former provincial commissioner (the decision-makers) to issue the first and second to thirteenth written authorisations respectively, in terms of section 13(7) are lawful under PAJA. The applicants seek to have all the raids declared unlawful on the basis that the decisions to issue the authorisations, on the authority of which the raids were carried out, constitute unlawful administrative action that falls to be set aside. They also seek certain declaratory, interdictory and compensatory relief consequent upon that declaration.

<u>Review is not moot</u>

[55] Before we deal with the review under PAJA, we need to dispose of the argument advanced, on behalf of the police, that the review application is moot because the decisions to carry out the raids have already been implemented and cannot be revisited in review proceedings. Distilled to its essence, the police's argument is that once an injury to rights has taken place, it cannot be challenged because it has already happened. However, the question of whether an organ of state has acted unlawfully is seldom ever moot. In *Buthelezi v Minister of Home Affairs* 2013 (3) SA 325 (SCA), the SCA held that the question of whether an authority has acted unlawfully remains a live issue even where the unlawful decision has been implemented. It also held that the question of whether a decision–maker can revisit the decision is only one aspect of whether a review would have a practical effect (at paras 3-4).

[56] An important consideration in determining if a decision-maker can revisit its decision is whether there is an assurance from the authority concerned, that its previous conduct is unlawful and would not recur in the future. If there is no such assurance, then the issue of whether the decision-maker acted unlawfully remains a live issue. There are no assurances provided by the police and the City, in the current matter, that the raids on the applicants were unlawful and will not recur in the future. Indeed, they do not seriously dispute that the City had threatened to repeat and intensify the raids on the applicants. The raids themselves were a recurrence of an earlier operation — known as 'Operation Fiela-Reclaim' that had the same objectives and legal basis as the raids in question. This is specifically referenced in the last application from Jeppe Police Station, dated 22 January 2018, to cordon-off and search inter alia Industry House, which is occupied by the first applicants.

[57] In the circumstances, we consider it to be essential that the legality of the raids be determined. A declaratory order to the effect that the decisions that authorised the raids are unlawful, including any relief consequent upon that relief, will have a practical effect on the parties. It follows that the question as to whether the decisions to issue the authorisations are lawful remains a live issue, and the review application is not moot.

Administrative Action

[58] The decision-makers' decisions to issue the s 13(7) authorisations constitute administrative action in terms of s 1 of PAJA. The decisions were taken in terms of legislation by public officials exercising public power. They also had a direct and external effect on the applicants' rights.

[59] The decision-makers considered thirteen applications for s 13(7) authorisations during the period 27 May 2017 to 2 May 2018. The former provincial commissioner considered seven applications from the Hilbrow Police Station, one from Johannesburg Central Police Station and four from Jeppe Police Station. The then acting provincial commissioner considered one application from Hilbrow Station.

[60] The former provincial commissioner deposed to the answering affidavit on behalf of the police. By and large, she repeats the contents of the various applications and their supporting documents which she and the then acting provincial commissioner received from Hilbrow, Johannesburg Central, and Jeppe Police

Stations during June 2017 to April 2018. She states with reference to all the applications considered, that the purpose of the raids was to fight high levels of crime, including street robberies, business robberies with firearms, murder, assault with intent to do grievous bodily harm and so called smash and grabs. She justifies their decisions to grant the authorisations on the basis that they were required by the police because 'normal' policing methods were not effective, due to dilapidated and poorly managed high-rise buildings in the area.

[61] She explains that in issuing the written authorisations, both she and the then acting provincial commissioner complied with the process set out in s 13(7) of the SAPS Act. She attributes compliance with that process, to the fact that the station-commanders provided the necessary information, including the purpose of the application and the crime statistics for each police station's area of jurisdiction. She says that 'prima facie' the crime statistics provided in support of the applications were indicative of a breakdown in public order and the failure of the police to meet their constitutional obligations under s 205(3) of the Constitution. Thus, extraordinary measures under s 13(7) were necessary to maintain public order. She steadfastly maintains that the decisions authorising the cordoning and search of the areas specified in the applications were not taken arbitrarily, as police officials, who were directly responsible for policing the affected areas, made well-motivated applications. According to her, the applications were well considered by both herself and the then acting provincial commissioner, as Legal Services of the Provincial SAPS (Legal Services) provided them with opinions on the legality of each of the applications prior to issuing the written authorisations.

[62] The applicants' primary challenge to the lawfulness of the decisions to issue the authorisations is founded on s 6(2)(f)(ii)(cc) of PAJA which provides that a court or tribunal has the power to review an administrative action if the action itself is not rationally connected to inter alia the information before the administrator. They contend that the decisions to issue the s 13(7) authorisations fall to be set aside because the decision-makers failed to apply their minds to the material before them and evaluate it rationally. Nor were the decisions, so they contend, connected to the information before the decision-makers at the time they were taken. They, therefore, urge upon the court to find that the decisions to issue the authorisations were so unreasonable that no reasonable decision-maker could have taken them.

Decisions contravene section 13(7) of the SAPS Act

[63] Before dealing with the contentions raised by the applicants, we would like to focus on a more fundamental anomaly in the decisions to issue the s 13(7) authorisations. In each of the thirteen authorisations issued, the decision-makers authorised both a cordoning off of the area specified in the application, as well as a blanket search of 'any persons, premises, or vehicle, or any receptacle or object of whatever nature, in that area or part thereof'. In doing so, they contravened s 13(7)(a) of the SAPS Act which only authorises a national or provincial police commissioner 'where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, in writing to authorise that the particular area or any part thereof be cordoned off'. In other words, the power which s 13(7) confers on a national or provincial police commissioner, is limited to authorising that a specified area be cordoned off. It does not extend to authorising the police to carry out warrantless searches and seizures as contemplated by s 13(7)(c) of the SAPS Act. However, as is apparent from items (b) and (c) of the authorisations issued (quoted below), they permit the police to do exactly that:

'(b) Without a warrant, search any person, premises, vehicle, receptacle or object (of whatever nature) in the mentioned area (or any part thereof), and/or

(c) Without a warrant, seize any article referred to in section 20 of the Criminal Procedure Act, Act 51 of 1977, found in the mentioned area (or any part thereof).'

[64] Each of the authorisations issued gives blanket permission to the police to carry out warrantless searches in the area specified in the application. The purpose of a written authorisation, issued in terms of s 13(7)(a) of the SAPS Act, is to authorise a member of the police to cordon-off a specified area in order to restore public order or to ensure the safety of the public. In terms of s 13(7)(c), receipt of the authorisation affords a member of the police a discretion to do three things. The first is to cordon-off the area concerned. The second is to carry out a warrantless search of any person, premises or vehicle, or any receptacle or object of whatever nature, where it is reasonably necessary in order to achieve the object of the operation specified in the written authorisation. And the third is to seize any article referred to in s 20 of the CPA found, by him or her, in the possession of the person searched or in the cordoned off area.

[65] Section 13(7) is an enabling provision. It enables a member of the police to carry out search and seizure operations on cordoning off an area, where it is reasonably necessary to achieve the object of the operation as specified in the written authorisation. Providing the police with a blanket authorisation to carry out search and seizure operations regardless of the necessity to do so, as contemplated in s 13(7)(c) of the SAPS Act, constitutes a fetter on the power of the police member concerned to exercise his or her discretionary power in the manner envisaged in that section.

[66] The blanket authorisations, in items (b) and (c) of the written authorisations, to search and seize provide insight into why the police carried out indiscriminate raids on the applicants' homes. By this we mean that the police searched the applicants' homes, without a warrant, regardless of whether they were involved in, or suspected of being involved in, any crimes, or were in possession of, or suspected of being in possession of, items contemplated in s 20 of the CPA. It bears emphasis that the operational plans, annexed to the four applications, made by Jeppe Police Station expressly state that 'doors and padlocks should not be broken unless there is positive information and/or reasonable grounds to believe that a crime is being committed or illegal items or substances being stored'. Thus, by providing the police with blanket permission to carry out searches and seizures in the written authorisations issued, the decision-makers contravened s 13(7)(c) of the SAPS Act. Their decisions, accordingly, fall to be set aside in terms of s 6(2)(f)(i) of PAJA as they contravened s 13(7)(c) of the SAPS Act.

Ulterior Purpose or Motive

[67] The decisions to issue the authorisations fall foul of s 6 of PAJA for yet another reason. All thirteen applications for the s 13(7)(a) authorisations reveal an ulterior motive for the cordoning off and search operations carried out by the police (s 6(2)(e)(ii) of PAJA.) The eight applications emanating from Hilbrow Police Station state that *'officials from the Department of Home Affairs, JMPD and the City of Johannesburg indicated that they need such integrated operations. Cordon and search within the area will be the only solution'*. Similarly, the operational plan of the Jeppe Police Station which is annexed to all four of its applications lists as one of its aims, the "arrest of illegal immigrants'. Under the heading "Execution" it reads: 'Conduct search operations in terms of SA Police Service Act 68/1995 at identified

areas to recover unlicensed firearms, stolen and or hijacked vehicles, stolen property, narcotics substances and liquor with members of Vispol, Detectives, *JMPD*, TRT, POP, EMS and *Home Affairs Officials*'(own emphasis). Similarly, the single application made by Johannesburg Central Police Station states that 'JHB Central and *other friendly forces will cordon off and search* Remington Court, Jeppe Street Corner, Nugget Street for illegal objects, possible stolen property, illegal drugs, *illegal immigrants*….' The operational plan attached to the application states that '*JMPD to conduct condoning off and searching rooms and occupants and Home Affairs to interview and arrest undocumented persons*' (own emphasis).

[68] These statements demonstrate that the decisions to issue the authorisations to the three inner city police stations were taken for an ulterior purpose or motive, as the raids during which the searches were conducted were intended in large part to achieve objectives other than 'to restore public order or ensure the safety of the public in a particular area'. The first ulterior purpose was to enable the Department of Home Affairs to search the applicants' homes and to arrest those suspected to be illegal immigrants without a warrant. It is impermissible for immigration officials to carry out random warrantless searches under the guise of s 13(7) of the SAPS Act. Section 13(7) is not intended for that purpose. Nor does it give immigration officials the authority to carry out warrantless searches. Only members of the SAPS are empowered to do so, on receipt of a s 13(7) authorisation, where it is reasonably necessary in order to achieve the object specified in the written authorisation. Section 33(5) of the Immigration Act would, in the ordinary course, require immigration officials to obtain a warrant subject to s 34(1) thereof. Section 34(1) of the Immigration Act empowers immigration officials to arrest and detain an illegal immigrant without a warrant for deportation purposes, specifically. By sanctioning the participation of immigration officials in the s 13(7) operations they authorised, the decision-makers effectively assisted the Department of Home Affairs to circumvent the requirements of the Immigration Act.

[69] The second ulterior purpose was to enable the City to survey the occupants of the buildings occupied by the applicants. The motivation for the raids on the applicants' homes did not come from the Minister of Police but rather from the City, in particular the office of Mr Herman Mashaba, its' former Mayor. The City's press release on the first raid which was carried out on 30 June 2017 in Hilbrow, declares

that the raid was conducted by the City and was led by the City's Group Forensic and Investigation Service Unit. The purpose of the raid was to deal with "hijacked buildings" which are described as a major problem in our inner city, with our people living in deplorable conditions and being abused by slumlords who extort money from them'.

[70] The deployment of raids under s 13(7) of the SAPS Act to enable the City to conduct occupancy audits of the dilapidated buildings, and the Department of Home Affairs to detain undocumented immigrants raises the spectre that the raids on the applicants' homes were not necessarily about the restoration of public order or of ensuring the safety of the public in the areas concerned. They appear to have been targeted at communities that were evicted or were under threat of eviction from inner city buildings, and had claimed alternative accommodation from the City. The raids were also conducted for the ulterior purpose of permitting the City to obtain information about these communities without meaningfully engaging with them.

[71] The former provincial commissioner explains, in the answering affidavit of the police, that the decisions taken by herself and the then acting provincial commissioner were motivated by the constitutional mandate in s 205(3) of the Constitution to prevent, combat and investigate crime and to maintain public order. She seeks to impress upon the court that the measures that were taken to involve the Department of Home Affairs, the JMPD and different divisions of the police were not taken lightly. She points out that the only way that the police can protect the public and, in particular victims of unresolved crime, is when the police take decisive steps to combat crime by restoring and maintaining public order.

[72] The court is mindful that, in terms of s 205(3) of the Constitution, 'the objects of the police service is to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. However, this mandate does not give the police carte blanche to use their extended and intrusive powers under s 13(7) of the SAPS Act for purposes other than those contemplated in the section. Nor can that mandate sanction the participation of state actors, such as the Department of Home Affairs and the JMPD, in cordoning-off and search and seizure operations carried out by the police under s 13(7) of the SAPS Act. To reiterate, neither the Department of Home

Affairs nor the JMPD had authority under s 13(7) of the SAPS Act to participate in the search and seizure operations which were carried out by the police during the period June 2017 to May 2018. Counsel for the police conceded as much during argument. Accordingly, the decisions to issue the authorisations fall to be set aside, in terms of sections 6(2)(e)(i) and (ii) of PAJA respectively, as they were issued for (a) a reason not authorised by s 13(7) of the SAPS Act and (b) for an ulterior purpose or motive.

Failure to comply with a mandatory condition

[73] Section 13(7)(b) of the SAPS Act specifically stipulates that the written authorisation issued by the national or provincial commissioner in terms of sub-section (a) 'shall specify the period, which shall not exceed 24 hours, during which the said area may be cordoned off, the area or part thereof to be cordoned off and the object of the proposed action'. This is a peremptory requirement. In each of the thirteen authorisations at issue, the decision-makers specified the object of the proposed s 13(7) operation as being: 'To achieve the following objective(s): restore public order in the mentioned area (or any part thereof), and/or ensure the safety of the public in the mentioned area (or any part thereof).' They merely repeat the words appearing in sub-section (7)(a). This is insufficient to describe the objective of the proposed action, more particularly where the particular application expresses the objective of the operation in different terms.

[74] The phrase 'to restore public order or ensure the safety of the public' are the jurisdictional requirements that must be present before the national or provincial commissioner may exercise his or her discretion in favour of authorising that a particular area may be cordoned off by the police in terms of s 13(7)(c) of the SAPS Act. These jurisdictional requirements do not, in and of themselves, constitute the objective of a proposed cordoning off and search operation. The objective of the proposed cordoning off operation must be gleaned from the application itself.

[75] Notably, all thirteen applications that were considered by the decision-makers expressly specified the objectives of the proposed cordoning off operations. For example, three of the applications made by Jeppe Police Station described the objective as being: 'to cordon and search known hotspots within blocks, structures, shelters, and shebeens in and around the cordoned area'. The last application made

by Jeppe Police Station, on 22 January 2018, described the objective of the operation as being: 'to cordon and search all structures, rooms, shelters and people in and around Industry House, through the deployment of relevant law-enforcement officers; 2.1. Focus will also be on offences committed in terms of the Liquor Act, drug related crimes, possession of unlicensed firearms, less-serious offences and the tracing of wanted suspects; 2.2 The purpose will further be to provide an integrated and multi-disciplinary approach to ensure that the incidents of priority crime are reduced and to ensure sustainability in stabilising priority crimes by way of normal, day to day policing interventions; 2.3 Maximum arrests will be aspired for.'

[76] Equally, all eight applications made by Hilbrow Police Station described the object of the proposed cordoning off operation in Sector 5 (Hilbrow) as being: 'to conduct cordon and search at Vanin Court cnr Quarts and Peter Street in order to prevent crime and arrest the perpetrators of crime in the vicinity around the area. To conduct stop and search in the area limited to Hilbrow, to prevent illegal possession of fire-arms, drug usage and dealing, street robberies, theft of motor vehicles, business robberies and house robberies with members of VISPOL/Flying Squad and K9'. All eight applications also described the objectives of the proposed cordoning off operation in Sectors 6 (Berea) and Sector 4 (Joubert Park). In so doing, they specifically identified the buildings/houses that the police intended to cordon-off and search. In respect of the application from Johannesburg Central Police Station, the 'purpose of the operation' was to inter alia 'achieve the following goals': 'stop and search structures, vehicles and persons; door to door searches; recover stolen goods, illegal firearms, drugs; tracing of illegal immigrants; trace and arrest wanted suspects; raiding of shebeens, taverns and recycling shops'.

[77] A national or provincial commissioner is required to expressly state the objective of the proposed s 13(7) operation in the written authorisation. This is a precondition because it has a direct bearing on any search operation to be carried out in terms of s 13(7)(c). As indicated, a member of the police involved in a s 13(7) cordoning-off operation may only conduct a warrantless search envisaged in s (7)(c) 'where it is reasonably necessary in order to achieve the objective specified in the written authorisation'. By way of illustration, in the eight applications emanating from Hilbrow Police Station, the station-commanders requested written authorisations to cordon-off the identified areas (in Sectors 4, 5 and 6) and search the identified

buildings. In relation to these operations, the operational plan identified the objective of the operations as being, inter alia, the cordoning off and search of: (a) Vanin Court on corner of Quartz and Peterson Streets in Sector 4 Hilbrow (sector 5); (b) Sandringham Court, corner Olivia and Lily streets as well as houses between Fife Street (North) and Joe Slovo (South), Barnato Street (West) and Mitchell Street (East) in Berea (Sector 6); and Eastgate Building corner Bok and Twist Street in Joubert Park (Sector 4). The decision-makers, however, ignored the objective of the s 13(7) operations, as described in the operational plan of Hilbrow Police Station, and authorised search and seizure operations to "all premises" in the cordoned off area.

[78] Thus, by failing to state the true objective of the proposed cordoning operation in the written authorisations they issued, the decision-makers did not comply with a mandatory and material procedure or condition prescribed by s 13(7) of the SAPS Act. Their decisions, accordingly, fall to be set aside in terms of s 6(2)(b) of PAJA, as a mandatory condition prescribed by s 13(7)(b) of the SAPS Act was not complied with.

No rational basis between the information before the decision-makers and their decisions

[79] The applicants contend that there is no rational connection made in any of the applications between the raids authorised and the true purpose of the section: 'the restoration of public order or the protection of public safety'. In applying their minds to the exercise of their statutory powers in terms of s 13(7) of the SAPS Act, the decision-makers were enjoined to consider whether the jurisdictional requirements of s 13(7) had been engaged; that being whether the information before them rendered it reasonable, for purposes of restoring public order or ensuring the safety of the public in each area forming the subject-matter of the application concerned, to cordon-off the area specified in the application. In other words, the decision-makers had to be convinced of more than a generally high level of crime in the area. What had to be established was that the level of crime had reached proportions that resulted in a breakdown of public order or threatened the safety of the public.

[80] The jurisdictional requirements in s 13(7)(a) of the SAPS Act are disjunctive. This means that either one or the other has to be present for a national or provincial

police commissioner to exercise his or her discretion in favour of issuing a written authorisation for the cordoning off of a specified area. All the applications essentially state that the high levels of crime in the specified areas, in particular, in and around the dilapidated, abandoned and hijacked buildings are a threat to the safety and security of the public, and that cordoning-off and search operations were necessary to ensure the safety and security of the community. The former provincial commissioner, on the other hand, alleges that it was necessary to issue the s 13(7) authorisations because the crime statistics, provided in each of the applications, indicated a breakdown of public order (in the areas specified) that needed restoring, and because the police were failing to meet their constitutional responsibilities.

[81] There is a dichotomy between her assertions in relation to the need to restore public order in the areas specified in the applications, and the motivation for the raids in the applications themselves. Not a single application suggested that the proposed cordoning-off operation was required to 'restore public order' in the specified area/s. Although the applications that were considered by the decision-makers established that serious and violent crimes, such as business robberies with firearms, murder, assault with intent to do grievous bodily harm, vehicle hijackings etc, had been committed in the areas in which the applicants resided, there was nothing in those applications that indicated there was a breakdown of public order.

[82] What does the term 'public order' mean? The SAPS Act does not offer a definition for the term. The Public Order Police: Crowd Regulation and Management during Public Gatherings and Demonstrations (*The National Instruction 4 of 2014)* defines it as follows:

'"public order" means the state of normality and security that is needed in a society and that should be pursued by the state in order to exercise constitutional rights and to thus benefit a harmonious development of society'.

The National Municipal Policing Standard for Crowd Management during Gatherings and Demonstrations [*GG* 30882 (*GN* 307) of 20 March 2008] defines public order units and the term '*maintain public order*' as follows:

'(o) "Public Order Policing Unit" means a unit which has been established by the Provincial Commissioner to maintain public order which is the managing and policing of events and incidents of public collective action and behaviour. This includes managing pre-planned and

spontaneous assemblies, gatherings and demonstrations whether of a peaceful or unrest nature'.

[83] In some jurisdictions, such as India for instance, the term 'public order' is equated with public safety, peace and tranquillity (*Thappar v State of Madras,* 1950 SCR 594: AIR 1950 SC 124: 51 Cri LJ 1514.) What we glean from these definitions is that 'public order' refers to something more than the maintenance of law and order but rather involves the peace, tranquillity and safety of the public at large (Khan F. & Schreier (eds.) '*Refugee Law in South Africa*' (2014) at paras 81-83.) These three conditions are necessary to achieve a 'state of normality and security' in society, that is envisaged in the meaning of the term 'public order' as defined in The National Instruction 4 of 2014 (referred to above.) The *Collins English Dictionary & Thesaurus* Third Edition 2006 at 206 ascribes the meaning 'of or concerning the people as a whole' to the adjective 'public' and the meaning of the noun 'order' to include 'condition of a law-abiding society'. Public order could thus be affected by only such contraventions which affect the community or public at large. How does one determine whether an act or event affects public order or law and order? The test espoused requires a consideration of whether the act or event causes a disturbance to the life of the community, or whether it merely affects an individual whilst leaving the tranquillity of society undisturbed ((Jayawickrama, *The Judicial Application of Human Rights Law* 466.)

[84] Since "public order' has a broader 'public collective' connotation than simply maintenance of law and order, what had to be demonstrated in each of the applications was that the section 13(7) operations were necessary to restore the normality and security of the community in the areas specified in the applications. In other words, there had to have been a breakdown of public order in the specified areas. No such motivation appeared in any of the thirteen applications which the decision-makers considered.

[85] We are of the view that the former provincial commissioner's reliance on the crime statistics as demonstrating a breakdown of public order in specified areas is misplaced. This is best illustrated by reference to the eight applications that were made by Hilbrow Police Station during the period 27 June 2017 to 2 May 2018. On scrutiny of those applications, it is immediately apparent that the station-commanders adopted a template-based approach to their compilation. For example,

in respect of all but one of the applications made by Hilbrow Police Station, the station commanders' letters of support, supporting affidavits, operational plans and crime statistics are virtually identical, with only individual police officer's names changed from operation to operation. In the operational plans of seven of the raids conducted out of Hillbrow Police Station from 30 March 2017 to 15 February 2018, the crime statistics for its area of jurisdiction remained the same. Each plan repeatedly states that within a period of three months '24 murders, 143 robberies and 43 business robberies' were committed in Hilbrow, Berea and Joubert Park.

[86] These statistics are not verified by a crime intelligence officer. Nor, for that matter, do they disclose which three months of the year are being referred to. If they related to the three months leading up to each of the applications, then they cannot be correct more than once. There is simply no clarity in relation to how these statistics related to the proposed s 13(7) operation in the area specified in each of the seven applications that emanated from Hilbrow Police Station during the period 27 June 2017 to 12 February 2018.

[87] These statistics suffer from a more fundamental deficiency as they appear to bear no relationship to the inventory of reported crimes annexed to the operational plans of Hilbrow Police Station in all seven applications referred to above. By way of example, on comparison of the crime statistics recorded in the 27 June 2017 application of Hilbrow Police Station, with the inventory of reported crimes for the period 1 April 2017 to 21 June 2017 (annexed to the operational plan) there is simply no correlation between the two documents. This error is replicated in each of the six other applications which the decision-makers received from Hilbrow Police Station during the period 27 June 2017 to 12 February 2018.

[88] It was only in the final application made by Hilbrow Police Station, on 2 May 2018, that the statistics changed to: '28 murders, 128 robberies with firearms and 21 trio crimes committed in [Hilbrow, Berea and Joubert Park] within a period of two months'. The months and the year to which the statistics apply are not disclosed. For obvious reasons, they could not have applied to the inventory of listed crimes attached to the operational plan, as those crimes were purportedly committed during the period 1 April to 29 April 2018. Yet the former provincial commissioner makes a

bare denial that 'the crime statistics provided never changed, or were in any way defective'.

[89] The sole application from Johannesburg Central Police Station, dated 21 July 2017, suffers from a similar shortfall yet it was granted on 24 July 2017. The crime statistics provided in that application describe the crimes committed, where they were committed and the days on which they were committed, but neglect to state the date of commission of the offence. The catalogue indicates that four offences were committed in Remington Court – the building where the search was to be carried out − the first and second were common assaults which occurred on a Monday at 09h30 and on a Saturday at 03h30, respectively. The third offence was an attempted common robbery (at 18h40 on a Wednesday) and the fourth was an offence under the Drugs and Drug Trafficking Act (at 03h30 on a Saturday). The dates on which these offences were purportedly committed are not provided. In the circumstances, how the appended catalogue of crimes related to the proposed cordoning off and search operation at Remington Court on 25 July 2017 is not discernible. We highlight Remington Court because the application listed it as one of the buildings that the police had earmarked for a s 13(7) operation, as crime was rife in and around the building. The application states: 'according to information received "Remington Court" is being occupied by mainly foreign nationals manufacturing narcotics. They also deal with drugs, illegal selling of liquor and possession of unlicensed fire-arms. There have been recoveries of stolen and or hi-jacked vehicles in this area, as well as recovered stolen goods'.

[90] This pattern of presenting deficient crime statistics is replicated in the application made by Jeppe Police Station, on 16 August 2017, to cordon off and search Sector 3: CAS BLOCK 5779, Doornfontein, bordered by North Saratoga, East Angle Road, South Albertina Sisulu and West End Street. Once again, it is unknown on what date the listed crimes were committed and, hence, how they related to the proposed cordoning off and search operation that was authorised to take place on 24 August 2017 from 10h00-18h00.

[91] There is no supporting documentation for the authorisation granted to Jeppe Police Station on 17 November 2017 for the repeat operation in Sector 2 CAS Block 5787 and CAS Block 5779. So it is not clear what statistics were used in support of

that application. The authorisation granted for this search is annexure I9 to the applicants' founding affidavit. However, as is apparent from the answering affidavit of the police, the former provincial commissioner erroneously states that this application was made by Hilbrow Police Station in November 2017. And although the application and supporting documents do not form part of the record, she says that she evaluated that application in the same way as she did the others. Although the error was pointed out in the applicants' replying affidavit, the police elected not to apply for the filing of a supplementary affidavit to correct the error.

[92] Although the inventory of crimes and/or crime analysis provided in the various applications establish high crime rates and that serious and violent crimes were committed in the areas of jurisdiction of the three police stations, none of them made out a case that the level of crime had reached proportions that resulted in a breakdown of public order such as to warrant the deployment of a section 13(7) operation in order to restore the public order.

[93] Lastly, the former provincial commissioner repeats the refrain that runs through all thirteen applications, which is that a s 13(7) operation was necessary in each instance because the normal policing methods were ineffective to combat the high levels of crime in the inner city buildings which were hijacked, dilapidated and mis-managed. Ineffectual policing methods and the failure of the police to combat crime in an area do not justify the engagement of s 13(7) operations. What must be established for the deployment of a s 13(7) operation is that it is reasonably necessary in order to restore public order or ensure the safety of the public.

[94] The template-based approach to the compilation of the s 13(7) applications alluded to above, is emulated in the written recommendations which Legal Services provided to the decision-makers in each of the thirteen applications. These recommendations are virtually 'word-for-word' identical for each and every application, right down to re-iterating that the measures to be taken, in terms of the authorisation, will be particularly 'intrusive' and that 'a written authorisation maybe issued where it is reasonably necessary for the purpose of control over illegal movement of people and goods across borders'. This statement incorrectly reflects the test for authorising an operation in terms of s 13(7) of the SAPS Act. Rather, it reflects the test for a warrantless search under s 13(6) of the SAPS Act. Yet, the

former provincial commissioner explains, in respect of some of the authorisations she issued, that prior to granting them, she was advised by Legal Services. In relation to others, she says that she 'received confirmation from Legal Services that the application was compliant'.

[95] Certain police stations made repeat applications to cordon off and carry out search and seizure operations in the same area. For instance, in relation to the block identified as Willie, Joe Slovo, Hancock, Saratoga and Twist Streets in Sector 4, 5 and 6 of Hilbrow, the Station Commander of Hilbrow Police Station made five applications on virtually identical facts and each of them was granted. Remarkably, Industry House, the building that the first applicants occupy, was raided five times. Four times by members of Hilbrow Police Station: on 30 June 2017; 14 July 2017; 24 January 2018 and 3 May 2018, and once by members of Jeppe Police Station: on 24 August 2017. Hilbrow Police Station also raided the eight applicants' homes in Kiribily Building thrice: on 16 November 2017, 24 January 2018 and 15 February 2018. The sixth applicants' homes at Remington Place were also raided twice; first by Jeppe Police Station on 25 July 2017 and then, two months later, by Hilbrow Police Station on 21 September 2017.

[96] We find it peculiar that the former provincial commissioner asked no questions. Why was it necessary to carry out the same operations more than once in the same area? What did previous search and seizure raids in the same area reveal or yield? Why were previous raids ineffective? What new information had police intelligence gathered that warranted a further raid of the same area? Why was it reasonably necessary to search the same buildings or homes again? What was the objective of these further operations? Regrettably, it appears from the record before us that she took none of these relevant considerations into account before issuing authorisations for the repeat raids (s 6(2)(e)(iii) of PAJA.)

[97] All of this demonstrates that neither of the two decision-makers applied their minds to the material before them before issuing the written authorisations. They simply rubber-stamped the applications on the basis of the Legal Services' recommendations that were made. Had they applied their minds to the material, the manifest defects in the applications would have been apparent, thus providing the necessary impetus to either decline them, or at the very least call for further and

proper information. The decision-makers, in our view, did not undertake an independent evaluation of the contents of the applications. We consequently conclude that there is no rational relationship between the information provided in the respective applications for s 13(7) authorisations and the decisions granting such authorisations (s 6(2)(f)(cc) of PAJA.)

[98] For all of these reasons, the authorisations issued by the decision-makers in the period 27 June 2017 to 3 May 2018 fall to be reviewed and set aside. The applicants are, accordingly, entitled to a declaratory order that the raids on their homes were unlawful because the authorisations on which they were based are also unlawful.

DECLARATORY RELIEF

[99] The raids on the applicants' homes were carried out in a manner that was cruel, humiliating, degrading and invasive. They were ostensibly also directed at harassing and intimidating the applicants into vacating the so-called 'hijacked buildings' on the pretext that the buildings were bought by new owners. Members of the police and the JMPD threatened some of the applicants with eviction and took photos of their water and electricity connections. The applicants were instructed by members of the police to leave their rooms after which members of the police, accompanied in most cases by JMPD members and/or officials from the Department of Home Affairs, routinely broke down locked doors and tore down internal partitions in the applicants' homes. They also vandalised and destroyed some of their homes. Some of the applicants' possessions including money were stolen during the raids. None of the applicants consented to the search of their homes.

[100] All of the properties occupied by the applicants are cited in eviction proceedings before this court. Many of the arrests that took place were of people who had deposed to affidavits in opposition to eviction applications instituted against them. An elderly woman was forced to undress in front of a JMPD officer, who refused to leave the room in order to allow her to change out of her nightdress. And a community leader was frog-marched out of one of the buildings in his underwear. Save for the arrest of a handful of undocumented migrants, police found no evidence of illegality at the applicants' homes. The intelligence on which the raids were based was obviously flawed. SAPS and JMPD officers arbitrarily detained those of the

applicants who ”looked too dark” to be South African. Even a security guard looking after one of the buildings was, for some unknown reason, detained.' As were two individuals who were visiting one of the applicant families. None of the applicants was given copies of the written authorisations, on the authority of which the raids were carried out. Moreover, the police simply refused to process complaints made about the manner in which the raids were carried out.

[101] As described earlier in the judgment, some of the applicants' homes were raided repeatedly throughout the period. The first applicants’ homes were raided five times: Four times by members of the Hilbrow Station and once by members of Jeppe Police Station. Members of the Hilbrow Police Station carried out the last raid on the first applicants’ homes at 02h50 in the morning, while they were asleep. They were awoken and ordered to stand outside – young children and old people included. Members of the Hilbrow Police Station also raided the eight applicants’ homes three times. The third raid on the eighth applicants' homes was used to disconnect their electricity supply.

[102] The raids on the seventh and eleventh applicants' homes took place on 20 October and 9 November 2017 without any apparent legal authority at all. They were not covered by authorisations issued in terms of s 13(7) of the SAPS Act. The seventh applicants were simply arrested *en masse* for being undocumented immigrants, and later released. As already established, the true purpose of at least some of the raids seemed to have been to enable the City to take a survey of the applicants, and for the Department of Home Affairs to arrest undocumented migrants without a warrant. None of these allegations are disputed.

[103] Despite the gravity of the allegations relating to the manner in which the raids on the applicants’ homes were carried out by members of the police, the former provincial commissioner has simply failed to name, or produce any affidavits from, any of her officers who participated in the raids of the applicants’ homes. There is simply no positive version from the police in respect of what occurred at the raids. The net effect of this omission is that the applicants' version stands undisputed.

[104] The undisputed facts demonstrate an egregious abuse of, and infringement of the applicants' constitutional rights to privacy and dignity. In the circumstances, we are disposed to the view that the applicants are entitled to a declaratory order that

the searches, seizures, fingerprinting and arrests conducted at the applicants' homes during the period 30 June 2017 to 3 May 2018 unjustifiably infringed their rights to dignity and privacy as protected by sections 10 and 14 of the Constitution, respectively.

INTERDICTORY RELIEF

[105] The applicants sought, in their notice of motion, an interdict restraining future warrantless searches of their homes by the respondents, ‘save in so far as those searches are done on the authority of an order of court or a warrant granted by a magistrate or judge in terms of any applicable law’. In their replying affidavit, the interdictory relief sought against the respondents was attenuated to ‘an interdict restraining warrantless searches in terms of section 13(7) of the SAPS Act’. Counsel for the applicants also accepted, during argument, that members of the police would be permitted to search the applicants' homes, in the future, provided they are able to establish the right to do so under section 22 of the CPA. They, accordingly, asked that the interdict be qualified to that extent.

[106] The applicants premise the interdictory relief sought on the claim that the City, which was instrumental in motivating for the raids under section 13(7) of the SAPS Act, has threatened to repeat the raids on their homes in the future. Indeed, the frequency and regularity of the raids on the applicants' homes, over the period 30 June 2017 to 3 May 2018, demonstrate a manifest propensity on the part of the police, the City and the Department of Home Affairs to engage in illegal raids at will. The applicants certainly have a clear right not to have their privacy, dignity and homes invaded by warrantless searches. As already established, a sizeable number of applicants have already suffered the harm of such an invasion multiple times. Neither the City nor the other respondents have denied the threat to repeat the raids on the applicants’ homes in the future. The applicants have a reasonable apprehension that the raids will be repeated in future and there is no other effective remedy opened to them.

[107] Although the applicants have made out a case for the interdictory relief sought, the Court exercises its discretion against granting them that relief. This is because the interim relief we propose to grant during the 24-month period of the suspension of the declaration of invalidity of s 13(7)(c) of the SAPS Act, shall prohibit

the search by members of the police of any private home and/or any person inside such private home within the cordoned off area, and the seizure of any article referred to in s 20 of the CPA found in any such private home or in the possession of any person inside such private home. This means that in the interim, the police may only carry out search and seizure operations in a specified area, pursuant to an authorisation issued under s 13(7)(a) and (b) of the SAPS Act, in accordance with either sections 21 and 22 of the CPA.

[108] The interim relief we propose will ensure that during the period of suspension of the declaration of invalidity of s 13(7)(c) of the SAPS Act, unconstitutional searches of persons and homes that infringe upon privacy rights are impermissible. The interim relief we propose will also protect the applicants' homes from being searched by the other respondents, under the guise of s 13(7) of the SAPS Act, to arrest illegal immigrants and carry out social-audits of the inner-city residents occupying abandoned or hijacked buildings.

COMPENSATORY RELIEF

[109] The applicants contend that they are entitled to appropriate relief in the form of constitutional damages for the infringement of their rights to privacy and dignity as a result of the unlawful raids on their homes. They seek, in their notice of motion, a solatium of R1000 to be paid by the Minister of Police to each of them, for every unlawful search to which that particular applicant was subjected, as compensation under s 8(1)(c)(ii)(bb) of PAJA alternatively under s 38 of the Constitution for the breach of each of their rights to privacy and dignity, caused by each of the unlawful searches referred to in paragraphs 4, 5 and 6 of the notice of motion. The applicants seek constitutional damages in the alternative in their notice of motion.

[110] However, during argument the applicants only asked for constitutional damages in terms of s 38 of the Constitution. The applicants are effectively seeking a blanket order of compensation to be paid to approximately 3 000 individuals that form part of the applicant communities in this matter. They bring their constitutional damages claim in motion proceedings. The police contend that the applicants must pursue damages for invasion of privacy, theft and unlawful arrest in delict. In addition, they argue that they have a right to test the 'allegations of theft, damage to property and unlawful arrest' through the leading of oral evidence and cross-

examination. They therefore argue that it is impermissible for the applicants to bring their damages claim in motion proceedings. In retort, the applicants argue that that position is misconceived because they do not seek damages for 'invasion of privacy' and 'theft, damage to property and unlawful arrest'. They merely seek damages for the breach of their constitutional rights to privacy and dignity caused by the unlawful raids to which each of them was subjected. They seek constitutional damages against the first respondent (Minister of Police) only.

[111] We are not persuaded by the respondents' contention that the applicants must bring their damages claim through a delictual action. The applicants seek constitutional damages for breach of their rights to privacy and dignity arising out of the unlawful raids on their homes. This claim is not grounded in delict but rather on the infringement of constitutional rights. Their remedy, therefore, lies in s 38 of the Constitution. As far back as in 2006, the SCA held in *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 22, that 'a direct breach of a substantive constitutional right' can be remedied directly through an award of constitutional damages, rather than indirectly through a delictual action. That the applicants may also have a right under the common law to damages for a breach of their constitutional rights, does not mean that they cannot bring a claim for constitutional damages. The real question for determination is whether relief in the form of constitutional damages is appropriate on the facts of a particular case?

[112] In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), the Constitutional Court held, in relation to what constitutes 'appropriate relief' that:

'It is left to the courts to decide what would be appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.' (paras 18-19.)

The Constitutional Court held further (at para 69):

'[T]his Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it… Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an

infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve that goal.'

The Constitutional Court in *Fose* also held that "appropriate relief" as envisaged in section 38 of the Constitution may include an award of constitutional damages where it is necessary to protect and enforce constitutional rights'. *(Fose* at para 60.)

[113] The applicants' submissions on the appropriateness of its claim for constitutional damages are broadly this: the value of each of their individual claims for the breaches of dignity and privacy are relatively small, and the facts on which damages are claimed are undisputed. The quantum claimed by each of them is very low. It is no more than a solatium meant to acknowledge the breach of their rights, and to serve as a deterrent against future unlawful raids. It would, therefore, be perverse to put them through the motions of a civil trial in which each of them — over 2 000 — would have to take the stand to give evidence of facts that are not in issue in these proceedings. They contend that damages are perhaps the only way of making them whole again as the respondents cannot undo the raids. Nor can they undo the humiliation that the raids entailed for them. Hence, constitutional damages are perhaps the only appropriate way of acknowledging the wrong done to the applicants.

[114] The essence of the applicants' submissions is that the token amounts sought by each of them can be granted in motion proceedings as the breach of their rights to privacy and dignity have been established on the papers. They rely for support on the decision of *Ngomane and Other v City of Johannesburg Metropolitan Municipality and Others* [2019] 2 All SA 69 (SCA) paras 25- 27, where the SCA held that the token amounts sought by the applicants in that matter need not be pursued through a delictual action. In *Ngomane*, a local authority, during a health law clean-up exercise unlawfully seized, removed and destroyed homeless peoples' property from a public space. The SCA found that the confiscation and the destruction of the applicants' property was a patent deprivation thereof and a breach of their right to privacy enshrined in s 14 of the Constitution 'which includes the right not to have their possessions seized'. The SCA also held that the conduct of the local authority's personnel was not only a violation of the applicants' property rights in their belonging, but also disrespectful and demeaning. This, it held, obviously caused

them distress and was a breach of their right to have their inherent dignity respected and protected. In the circumstances, it declared the local authority's conduct inconsistent with the Constitution and therefore unlawful. It also held that this finding entitled the applicants to appropriate relief for the violation of their fundamental rights as envisaged in s 38 of the Constitution. In awarding the applicants constitutional damages, it reasoned as follows:

'The applicants' property (for e.g. mattress, groceries, clothes, baby clothes, cell phone, books, blankets, medicine etc.) was not sufficiently described to enable the respondents to replace it with similar goods, or place a reliable value on the property. And it was extremely difficult to place a commercial value on it. However, these items were very valuable to their owners, and all that they possessed affording them the only bit of dignity which they enjoyed.'

The SCA went onto hold that:

'In light of these facts, I do not think that the applicants should be left to pursue the ordinary remedy in the form of a damages claim as suggested by the court a quo. They lamented the practical difficulties posed by this route, which were acknowledged by the court itself. Instituting a damages claim would involve them in costly and time-consuming civil litigation in respect of property, which although valuable to them, is otherwise mostly of trifling commercial value. The undisputed evidence is that many of the applicants' daily search for work and collect recyclable materials, which they sell in order to survive. They would be hindered in this if they were required to attend court proceedings. They have no money for transport to attend court. And for the very reason that it would not be possible for them to prove the market value of the property destroyed in the conventional way, an action for damages is not an appropriate remedy. Such an action is likely to fail or result in a nominal award of damages.'

[115] Since the applicants' were willing to accept a standard, nominal amount of R1 500 for each of them (39 in total) , as compensation for the loss of their property and the wrong they had suffered, the SCA held, that 'the amount of R 1 500 for each applicant, R 40 500 in total, is not a large sum of money but that it constituted appropriate relief in the specific circumstances of that case, as it would vindicate the Constitution and protect the applicants and others similarly situated against violations of their rights to dignity and property in the manner envisaged in *Fose*'. (paras 25-27.)

[116] The applicants' claim for constitutional damages is distinguishable from that in *Ngomane.* Here we have approximately 3 000 (and not 2 000 as suggested by counsel for the applicants during the hearing and in their heads of argument) applicants that seek constitutional damages for breach of their rights to privacy and dignity from the Minister of Police. The gravamen of the applicants' complaint is the demeaning and humiliating manner in which members of the police and the JMPD treated them. Unfortunately, there are insufficient primary facts in the applicants' founding affidavit to establish this in respect to each of the approximately 3 000 applicants. The allegations in the founding affidavit in relation to the searches of their homes, and the manner in which they were treated during the searches, are secondary facts or inferences for which no primary facts are alleged to support the applicants' case for constitutional damages. Put simply, even though the facts are largely undisputed, there is no primary evidence from each of the approximately 3 000 applicants in relation to the search of their homes, and the manner in which they were treated by the police during the search. What we have on the papers are secondary facts told through the voice of one or two members (at most three) of each of the eleven applicant communities, who confirm that they were present at all the raids in the concerned building, and have personal knowledge of all the facts of the raids. It is highly unlikely for these applicants to have personal knowledge of all of the searches, especially in the high-rise buildings such as Industry House or Remington House, which comprise several floors and partitioned rooms, and house approximately 428 and 517 residents, respectively.

[117] In addition to that, we know that in respect of some buildings, only one or two floors were searched, yet all the residents that occupied the building at the time are claiming constitutional damages from the Minister of Police. One such building is 36 Davies Street, New Doornfontein which is a disused factory known as 'Lion Leatherworks'. It is a three-story building with 62 rooms. It was occupied by the third applicants at the time of the raids on 14 July 2017 and 21 November 2017. During the first search on 14 July 2017, only the first floor was searched by the police, the JMPD and officials of the City. We are not told which members of the third applicants occupied the first floor, yet constitutional damages are sought in respect to each of the 102 applicants who resided there at the time of the searches. The seventh applicants, who form a community of 102 persons, also seek constitutional damages

against the Minister of Police, when the papers reveal that their homes were not raided by the police, but rather by the JMPD and officials from the Department of Home Affairs.

[118] For these reasons, we consider this case not to be an appropriate one, on the facts, to grant the blanket order for constitutional damages sought by the applicants. The applicants have succeeded in making out a case for declaratory relief that their rights to privacy and dignity have been infringed. We are of the view that the grant of that relief will effectively vindicate their constitutional rights to privacy and dignity. The applicants' claims for constitutional damages accordingly fail.

ORDER

[119] In the result the following order is made:

(a) Section 13(7)(c) of the South African Police Services Act 68 of 1995 (the SAPS Act) is declared constitutionally invalid.

(b) The declaration of invalidity is not retrospective.

(c) The declaration of invalidity is suspended for 24 months to afford the legislature an opportunity to cure the invalidity.

(d) Pending the correction of the defect(s), or the expiration of the expiry of the 24-month period, whichever occurs first: s 13(7)(c) of the SAPS Act is to be read as providing as follows:

'Upon receipt of the written authorisation referred to in paragraph *(a)*, any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation, without warrant, search any person, premises*, except any private home and/or any person inside such private home,* or vehicle, or any receptacle or object of whatever nature, in that area or part thereof and seize any article referred to in section 20 of the Criminal Procedure Act, 1977 (Act 51 of 1977), found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation*; Provided further that the provisions of section 21 with the exceptions provided for in section 22 of the Criminal Procedure Act 51 of 1977 shall apply to the search in terms of this subsection of any private home and/or any person inside such private home within the cordoned off area, and the seizure of any article contemplated*

in this subsection found in any such private home or in the possession of any person inside such private home.'

(e) The decision of the sixth respondent, taken on or about 9 June 2017, in terms of s 13(7) of the SAPS Act, to issue a "written authorisation for a cordon-off" of the area identified as "sectors 4, 5, and 6 in Hillbrow bordered by North — Louis Botha Street; East — Joe Slovo Street; South — Noord Street; West — Hospital Street", between the hours of 14h00 and 22h00 on 30 June 2017, is reviewed and set aside.

(f) The following decisions of the seventh respondent taken in terms of s 13(7) of the SAPS Act are reviewed and set aside —

(i) The decision taken on or about 11 July 2017, to issue a 'written authorisation for a cordon-off' of the area identified as 'sectors 4, 5, and 6 in Hillbrow, bordered by North — Louis Botha Street; East - Joe Slovo Street; South — Noord Street; West — Hospital Street' between the hours of 14h00 and 22h00 on 14 July 2017.

(ii) The decision taken on or about 24 July 2017, to issue a 'written authorisation for a cordon-off' of the area identified as 'Sector 2: Remington Court — Johannesburg, bordered by North — Bree Street; East — End Street; South — Jeppe Street; West — Nugget Street', between the hours of 14h00 and 22h00 on 25 July 2017.

(iii) The decision taken on or about 21 August 2017, to issue a 'written authorisation for a cordon-off' of the area identified as 'Sector 3: CAS Block 5779 - Doornfontein bordered by North — Saratoga Avenue; East — Angle Road; South- Albertina Sisulu Road; West - End Street', between the hours of 10h00 and 18h00 on 24 August 20.

(iv) The decision taken on or about 30 August 2017, to issue a 'written authorisation for a cordon-off' of the area identified as 'Sectors 4, 5 and 6 in Hillbrow, Johannesburg, bordered by North — Willie and Clarendon Streets; East —Joe Slovo Road; South — Hancock Street, Saratoga and Nugget Streets; West — Twist Street', between the hours of 14h00 and 22h00 on 31 August 2017.

(v) The decision taken on or about 19 September 2017, to issue a 'written authorisation for a cordon-off' of the area identified as 'Sectors 4, 5 and 6

in Hillbrow, Johannesburg bordered by North — Willie and Clarendon Streets; East — Joe Slovo Road; South — Hancock Street, Saratoga and Nugget Streets; West - Twist Street', between the hours of 12h00 and 16h00 on 21 September 2017.

(vi) The decision taken on or about 30 October 2017, to issue a 'written authorisation for a cordon-off' of the area identified as 'CAS Block 5787 — Jeppestown bordered by North — Fawcus Street; East — Long Street; South — Jules Street; West — Berg Street', between the hours of 10h00 and 16h00 on 2 November 2017.

(vii) The decision taken on or about 9 November 2017, to issue a 'written authorisation for a cordon-off' of the area identified as 'Sectors 4, 5 and 6 in Hillbrow, Johannesburg bordered by North — Willie and Clarendon Streets; East —Joe Slovo Road; South — Hancock Street, Saratoga and Nugget Streets; West - Twist Street', between the hours of 12h00 and 18h00 on 16 November 2017.

(viii) The decision taken on or about 17 November 2017, to issue a 'written authorisation for a cordon-off' of the areas identified as 'Sector 2: CAS Block 5787 — Jeppestown and Doornfontein CAS Block 5779 bordered by North — Albertina Sisulu Street and Beit Street; East — John Page Street, Betty Street and Sivewright Street; South — Durban Street; West — End Street', between the hours of 09h00 and 18h00 on 21 November 2017.

(ix) The decision taken on or about 18 January 2018, to issue a 'written authorisation for a cordon-off' of the area identified as 'Sector 4, 5, 6 bordered by North — Willie and Clarendon Street; Easts — Joe Slovo Road; South — Hancock Street, Saratoga and Nugget Streets; West - Twist Street', 17h00 on 23 January 2018.

(x) The decision taken on or about 23 January 2018, to issue a "written authorisation for a cordon-off' of the area identified as 'bordered by North — Rockey Street; East - Siemart Street; South — Albertina Sisulu Street; West - End Street', between the hours of 10h00 and 18h00 on 23 January 2018.

(xi) The decision taken on or about 12 February 2018, to issue a 'written authorisation for a cordon-off' of the area identified as 'Sector 4, 5 and 6 in Hilbrow, bordered by North — Willie and Clarendon Streets; East — Joe

Slovo Road; South — Hancock Street, Saratoga and Nugget Streets; West - Twist Street', between the hours of 10h00 and 18h00 on 15 February 2018.

(xii) The decision taken on or about 2 May 2018, to issue a 'written authorisation for a cordon-off' of the area identified as 'Sector 4, 5, 6 in Hilbrow, bordered by North –Willie and Clarendon Street; East − Joe Slovo Road; South –Hancock Street, Saratoga and Nugget Street; West – Twist Street' which includes 5 Davies Street, New Doornfontein, on 3 May 2018.

(g) It is declared that the raids, searches, inspections, seizures, fingerprinting and arrests undertaken on the authority of the written authorisations set out in paragraphs (e) and (f), were unlawful.

(h) It is declared that the searches, seizures, fingerprinting and arrests conducted at the eleventh applicants' homes at 1 Delvers Street, Johannesburg on 9 November 2017 by or on behalf of the first, second, third and eighth respondents, were unlawful.

(i) It is declared that the searches, seizures, fingerprinting and arrests conducted at the seventh applicants' homes at the Wemmer Shelter, Turfontein, Johannesburg on 20 October 2017 by or on behalf of the first, second, third and eighth respondents, were unlawful.

(j) It is declared that the searches, seizures, fingerprinting and arrests conducted at the applicants' homes on the dates set out in paragraphs (e), (f), (h) and (i) above unjustifiably infringed the applicants' rights to dignity and privacy contained in sections 10 and 14 of the Constitution, 1996.

(k) The applicants' claim for constitutional damages is dismissed.

(l) The first and second respondents are to pay the applicants' costs, jointly and severally, the one paying the other to be absolved, including those of two counsel.

MLAMBO JP
JUDGE PRESIDENT OF THE GAUTENG DIVISION
OF THE HIGH COURT

MEYER J
JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT, JOHANNESBURG

KATHREE-SETILOANE J
JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT, JOHANNESBURG

Date of Hearing:	16 March 2020
Date of Judgment:	29 June 2020

Appearances:

Applicants' Counsel:	Adv. S Wilson (with Adv. I de Vos and Adv. O Motlhasedi)
Instructed by:	SERI Law Clinic, Braamfontein, Johannesburg
1st, 6th, 7th and 10th Respondents' Counsel:	Adv. M Mphaga SC (with Adv. M Pompo)
Instructed by:	State Attorney, Johannesburg
2nd and 8th Respondents' Counsel:	Adv. MC Makgato
Instructed by:	Phambane Mokone Inc., Randburg
Counsel for 1st *Amicus curiae*:	Adv. J Bhima (with Adv. K Harding)
Instructed by:	Lawyers for Human Rights
Counsel for 2nd *Amicus curiae*:	Adv. HL Alberts (with Adv. Skibi)

Instructed by:	Legal Aid South Africa, Braamfontein, Johannesburg