

IN THE HIGH COURT OF SOUTH AFRICA  
(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

Case No:

In the matter between:

- |  |                   |
|--|-------------------|
| <b>CENTRAL METHODIST MISSION,<br/>JOHANNESBURG</b>                             | First Applicant   |
| <b>LAWYERS FOR HUMAN RIGHTS</b>  | Second Applicant  |
| <b>NYATHI, BUTHOLEZWE</b>  | Third Applicant   |
| <b>D.S.</b>  | Fourth Applicant  |
| <br>   |                   |
| and  |                   |
| <br>   |                   |
| <b>CITY OF JOHANNESBURG</b>  | First Respondent  |
| <b>CHIEF OF JOHANNESBURG<br/>METROPOLITAN POLICE DEPARTMENT</b>                | Second Respondent |
| <b>GAUTENG PROVINCIAL COMMISSIONER<br/>OF THE SOUTH AFRICAN POLICE SERVICE</b> | Third Respondent  |
| <b>NATIONAL COMMISSIONER OF<br/>THE SOUTH AFRICAN POLICE SERVICE</b>           | Fourth Respondent |
| <b>MEC FOR SAFETY AND SECURITY, GAUTENG</b>                                    | Fifth Respondent  |

MINISTER OF POLICE

Sixth Respondent

MEC FOR LOCAL GOVERNMENT, GAUTENG

Seventh Respondent

MINISTER OF CO-OPERATIVE  
GOVERNANCE AND TRADITIONAL AFFAIRS

Eighth Respondent

GAUTENG PROVINCIAL GOVERNMENT

Ninth Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Tenth Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**PAUL VERRYN**

do hereby make oath and state that:

- 1 I am an adult male national of South Africa and a Bishop of the Central District of the Methodist Church of Southern Africa. I currently hold the position of Superintendent of the Central Methodist Mission, located at 79 Pritchard Street, corner Smal Street, Johannesburg. I am authorised to depose to this affidavit in support of this application on behalf of the Central Methodist Mission, Johannesburg.
- 2 During the 1980s, the name of the "Central Methodist Mission" was specifically changed in order to reflect a shift of emphasis from a gathering of people ("church") to an intentional outreach community ("mission"). However, the Church continues to be

commonly referred to as the Central Methodist Church. For ease of reference I shall refer to both the premises at 79 Pritchard Street and the Central Methodist Mission as a legal entity as "the Church" in this affidavit.

- 3 The contents of this affidavit fall within my personal knowledge and belief, unless the context clearly indicates otherwise, and are both true and correct.
- 4 Any legal submissions contained in this affidavit are based on advice received from my legal representatives, which I believe to be correct.

## INTRODUCTION

- 5 This application was prompted most directly by the actions of the Johannesburg Metropolitan Police Department ("JMPD") and the South African Police Services ("SAPS") on the night of 3 July 2009 in the vicinity of the Central Methodist Mission.
- 6 On that night, approximately 350 people who were sleeping in the vicinity of the Church or happened to be in the area were arrested for "*loitering*" by the JMPD and SAPS. The vast majority was then detained for more than two days, before ultimately being released.
- 7 As will be described in further detail below, this event was one of a series of events resulting in the harassment of the community to which the Church ministers.
- 8 The applicants contend that:
  - 8.1 The arrests of 3 July 2009 took place in the context of stalled efforts by the First Respondent (the City of Johannesburg), the Fifth Respondent (the MEC for Local Government, Gauteng) and other role-players to address the plight of the people seeking shelter at the Church;

- 8.2 The by-law prohibiting "*loitering*" was used by the JMPD and SAPS for the ulterior and unlawful purpose of removing the poor and homeless from the streets around the Church, rather than in a genuine attempt at prosecuting the offence of loitering;
- 8.3 The manner in which the persons concerned were arrested, treated and detained was in and of itself unlawful;
- 8.4 Moreover, and in any event, the offence of loitering is unconstitutional.
- 9 Accordingly, this application has three main purposes:
- 9.1 First, the applicants seek an order directing the City to meaningfully engage with the Applicants, the people living at and around the Church and other role-players in order to identify steps that may be taken to alleviate the plight of the people living at the Church.
- 9.2 Second, the applicants seek an order:
- 9.2.1 declaring that the police raid and arrests that took place outside the Church on Friday, 3 July 2009 were unlawful, and
- 9.2.2 interdicting the respondents from conducting any further unlawful police raids on the Church and/or harassing, intimidating, punishing or arresting the persons living in and around the Church for an ulterior purpose not sanctioned by law.
- 9.3 Finally, and in any event, the applicants seek an order declaring the by-law prohibiting loitering to be unconstitutional and invalid. The by-law is municipal by-law 13(1), headed "Loitering on Public Roads" issued under Notice 832 of 2004 in the Gauteng Provincial Gazette Extraordinary of 21 May 2004. A copy



of the regulations containing this by-law ("the loitering by-law") is attached, marked "PV1".

10 In light of the above, the structure of this affidavit is as follows:

10.1 In the first section, I address the parties to the application; locus standi; and give a brief description of the Church and its relevant activities.

10.2 In the second section, I describe the State's stalled plans to accommodate those who reside at the Church which, together with the unlawful police conduct described in this affidavit, forms the basis for the relief sought in relation to meaningful engagement.

10.3 In the third section, I address the conduct by the SAPS and JMPD in relation to the Church and the people seeking shelter there, before, during and after the events of 3 July 2009.

10.4 In the fourth section, I address the applicants' entitlement to the declaratory and interdictory relief sought.

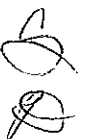
10.5 In the fifth and final section, I address the constitutionality of the by-law prohibiting "*loitering*".

11 I was not present at the Church during the police operation that occurred on 3 July 2009 outside of the Church building, but have been given direct information regarding the events of that night. Where possible, the events which I did not personally observe are confirmed by affidavits by the eye-witnesses who were present at the time of the raid which are filed together with this affidavit.

12 To the extent that any of the contents of this affidavit or any other affidavit filed together herewith constitute hearsay evidence that is not confirmed by confirmatory affidavits, I respectfully ask that such averments be admitted in terms of section 3(1) of the Law of

Evidence Amendment Act 41 of 1988. Further legal submissions in this regard will be made at the hearing of this matter, to the extent necessary.

- 13 There are a number of persons referred to in these papers who have asked that their names not be disclosed. They fear that such disclosure, together with possible press coverage, may place them or their families in danger. In the circumstances and in those instances only, initials have been used rather than full names. Their full names will be provided to the Court and the respondents upon request, on the basis that confidentiality will be maintained at all times.
- 14 While the application is not brought on shortened time-periods, I submit that it is plainly important that it be heard expeditiously. In the circumstances, the respondents will be held strictly to the time-periods set out in the rules of this Court and the applicants reserve the right to approach the Deputy Judge President for a date for hearing once the time-periods have expired.



## SECTION 1 – PARTIES, LOCUS STANDI, AND THE CHURCH

### *Parties*

- 15 The First Applicant is the **Central Methodist Mission, Johannesburg**, located at 79 Pritchard Street, corner Smal Street, Johannesburg. As stated above, I am the superintendent of the Church and the person in control of the Church buildings and property. A priority for the Church has been and remains ministry to the poor.
- 16 The Second Applicant is **Lawyers for Human Rights ("LHR")**, with its registered head office at Kutlwanong Democracy Centre, 357 Visagie Street, Pretoria.
- 16.1 LHR is a non-profit, non-governmental organisation whose principal aims and objectives are to promote, uphold, foster, strengthen and enforce in South Africa all human rights, including civil rights, political rights and socio-economic rights.
- 16.2 To this end LHR promotes the utilisation of law as an instrument for the promotion, protection and enforcement of the rights in the Bill of Rights; it assists in the maintenance of the highest standards of the administration of justice; and, protects and furthers fundamental human rights contained in the Constitution of the Republic of South Africa, 1996 as well as international human rights instruments.
- 16.3 An affidavit from Jacob van Garderen, the National Director of LHR, is attached as "PV2".
- 17 The Third Applicant is **Mr. Butholezwe Nyathi**, who is a community leader and volunteer at the Church.
- 17.1 He does not reside there, but attends refugee meetings regularly and was one of those arrested and charged with loitering on the night of 3 July 2009.
- 17.2 His affidavit is attached as "PV3".

- 18 The Fourth Applicant is **D.S.**, who is a refugee resident of the Church.
- 18.1 For reasons that are explained further in his affidavit, attached as "PV4," he has requested that he only be identified by his initials.
- 18.2 D.S. was arrested on the night of 3 July 2009 and was charged with loitering.
- 19 The First Respondent is the **City of Johannesburg** ("the City"), a municipality constituted in terms of the Local Government: Municipal Structures Act 117 of 1998 read with the Constitution of the Republic of South Africa. The City is cited as the authority responsible for the promulgation and administration of the loitering by-law which was relied upon in making mass arrests at the Church on 3 July 2009 and which is challenged in these proceedings, as well by virtue of its constitutional and statutory obligations to the persons living at and around the Church.
- 20 The Second Respondent is the **Chief of the Johannesburg Metropolitan Police Department (JMPD)**. The JMPD is a municipal police service established in terms of section 64A of the South African Police Service Act, 68 of 1995. Section 64E of the Act provides that the functions of a municipal police service are:
- (a) traffic policing, subject to any legislation relating to road traffic;*
  - (b) the policing of municipal by-laws and regulations which are the responsibility of the municipality in question; and*
  - (c) the prevention of crime.*
- 21 The Third Respondent is the **Provincial Commissioner of the South African Police Service, Gauteng**, who was appointed by the Fourth Respondent in terms of section 207(3) of the Constitution and who is responsible for policing in Gauteng Province.



- 22 The Fourth Respondent is the **National Commissioner of the South African Police Service**, who was appointed to control and manage the South African Police Service (SAPS) by the President in terms of section 207(1) of the Constitution.
- 23 The Fifth Respondent is the **Member of the Executive Council for Community Safety, Gauteng**, who was duly appointed by the Premier of Gauteng in terms of section 132 of the Constitution and who is cited by virtue of his political responsibility for policing activities within Gauteng Province.
- 24 The Sixth Respondent is the **Minister of Police**, who was duly appointed by the President in terms of section 91 of the Constitution and who is cited by virtue of his overall political responsibility for policing at national government level.
- 25 The Seventh Respondent is the **MEC for Local Government, Gauteng**, who was duly appointed by the Premier of Gauteng in terms of section 132 of the Constitution and who is cited by virtue of his political responsibility for local government matters within Gauteng Province and in light of the specific statements and undertakings made by the erstwhile MEC for Local Government, Gauteng, Ms Qedani Mahlangu, in relation to the Church, as described in more detail below.
- 26 The Eighth Respondent is the **Minister of Co-Operative Governance and Traditional Affairs**, who is cited by virtue of his political responsibility to develop national policies and legislation with regard to provinces and local government and to co-ordinate the functions of local and provincial government.
- 27 The Ninth Respondent is the **Gauteng Provincial Government** and the Tenth Respondent is the national **Government of the Republic of South Africa**. The provincial and national governments are cited for such interest as they have in this application, including by virtue of the state's constitutional and statutory obligations to the people seeking shelter at and around the Church.
- 28 Service on the First to Fourth Respondents will be effected at their offices reflected in the Notice of Motion to which this affidavit is attached. Service on the Fifth to Tenth

Respondents will be effected at the offices of the State Attorney for Johannesburg at 10<sup>th</sup> Floor North State Building, 95 Market Street (cnr Kruis), Johannesburg.

*Locus standi*

29 The Applicants bring this application in terms of section 38(a), (b) and (d) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") on behalf of

29.1 the four applicants (section 38(a));

29.2 the resident community who reside in and around the Church, the vast majority of whom are foreign nationals who seek refuge at the Church (section 38(b));  
and

29.3 in the public interest (section 38(d)).

30 I have been informed by my legal representatives that the Constitutional Court has established that the test for an applicant to bring an application under section 38 (d) of the Constitution is whether the application is "genuinely" in the public interest.

31 I submit that, in light of the following considerations, the application is plainly brought in the public interest:

31.1 The resident community at the Church is a particularly vulnerable group. The vast majority of the residents are nationals of Zimbabwe who have fled the political and economic meltdown in that country. Even now, while a fragile "government of national unity" is in place, there continues to be a flow of people into South Africa from that country.

31.2 Most of the people are stricken by poverty and have been unable to secure employment. This is despite the skills that they often bring with them from Zimbabwe, but which are not recognized in the South African marketplace.

Professionals whose skills are much needed in South Africa, including teachers, nurses and doctors, are unable to practice their professions in South Africa due to the non-recognition of their skills.

- 31.3 As will be further explained in detail below, the police operation in question involved the arrest and detention of approximately 350 individuals who were sleeping outside of the Church building on the night in question. These are poor and destitute people who sought the shelter of the Church due to their poverty and vulnerable status.
- 31.4 Poverty and destitution, however, do not only afflict non-nationals, but South African citizens as well. In fact, some of the residents of the Church are citizens of South Africa who are equally poor and destitute. The use of loitering to "clean up the streets" rather than deal directly with poverty is a matter of public interest.
- 31.5 The relief sought in this application includes a declaration of invalidity of the offence of "loitering" and / or the implementation of the loitering by-law to harass the residents of the Church with no serious intention to pursue a prosecution. Such direction by the Court will give clarity to the use of this drastic police power and will effectively have application for the entire population residing in South Africa.
- 32 My legal representatives will elaborate on this issue, to the extent necessary, during the hearing of this matter.

### ***The Church and its objectives***

- 33 The Methodist Church as a whole, and member churches, have since the earliest times regarded it as a core aspect of their religious mission to provide sanctuary to those desperately in need.

- 34 During the Second World War, for example, the Central Hall, a Methodist Church in London, provided sanctuary to approximately 250,000 people seeking refuge during the War in particular as a result of the bombing of London. Some of these people stayed for only one night, others lived at the London Church for the full duration of the War.
- 35 For the past twenty years, the Johannesburg Church (the First Applicant) itself has been engaged in a ministry to the homeless on the streets. This ministry has included a feeding scheme, primary health attention, a support group, counseling, advocacy and searching for appropriate job opportunities.
- 36 The nature of our work is humanitarian and there is no financial gain whatsoever from the work of the Church.
- 37 The Church has also provided shelter to those experiencing political persecution. The Church was active during the apartheid era in giving shelter and support to those persecuted by the security police during the 1980's. The Church itself was often used by such individuals to escape from violence as well as arrest and detention under unjust security legislation at the time.
- 38 In recent years, the Church has felt a need to provide shelter to thousands of displaced people who have sought refuge in South Africa. This is done in the absence of any publicly-provided social assistance to these individuals. The Church provides hospitality to approximately 3,500 displaced persons seeking refuge. The Church first decided to open its doors to this group of predominantly Zimbabwean people in 2004. At the time, there were approximately 50 people seeking refuge at the Church. By 30 January 2008, there were approximately 1,300 people living in the Church. The number of people grew radically after the xenophobic violence that broke out throughout the country in 2008. Subsequent to this, numbers have increased consistently in the building, particularly when certain crises have manifested themselves in Zimbabwe, for instance the most recent Zimbabwean elections in 2008 and the outbreak in cholera during November and December of 2008. Furthermore, the crackdown on educational institutions in

Zimbabwe, especially in 2008, seemed to lead to an increase in the arrival of Zimbabwean teachers seeking refuge at the Church.

- 39 Due directly to the political and economic instability in Zimbabwe, we have experienced a massive increase in the number of Zimbabweans, in particular, seeking our help, who are destitute, fleeing persecution and the economic and political meltdown of that country.
- 40 We provide services such as assisting asylum seekers in accessing the Department of Home Affairs to apply for documentation, providing meals and shelter to the homeless, assisting with educational and employment opportunities and finding schooling for children residing at the Church.
- 41 The Church also provides comprehensive training programmes to give the residents the tools to go into the workplace and become self-reliant. The Church's programmes including the following:
  - 41.1 cutting and design;
  - 41.2 waitering and catering;
  - 41.3 computers;
  - 41.4 electricity;
  - 41.5 Adult Basic Education and Training (ABET);
  - 41.6 adult education towards O and A Level examinations;
  - 41.7 a programme organised by the Centre for the Study of Violence and Reconciliation (CSVR) on self-actualisation and personal development; and



- 41.8 a programme on acting run by a well-known actress, Ms Irene Stephanou.
- 42 The residents of the Church have also organised French classes, ballroom dancing classes, karate and chess lessons. These take place once a week within the Church. The Church is also ranked on the Provincial Chess League. During July 2009, the Church hosted the provincial chess tournament.
- 43 It should be noted that the Church also provides shelter and assistance to South African citizens. Our overall humanitarian mission is to serve the poor, destitute and abused. We make no distinction based on nationality, race or gender.
- 44 There are approximately 3,500 people seeking shelter inside the Church. This is a massive increase from the approximately 1,300 people who were present at the Church prior to the arrests on 3 July 2009. The reason for this increase is that, following the events of 3 July 2009, people who had been living outside the Church no longer felt safe from arrest and harassment by the SAPS and JMPD. In the circumstances, the Church felt it was duty-bound to offer these people its protection by allowing them to seek shelter in the Church.
- 45 Every person who stays in the building is expected to report to the third floor of the Church and be registered on a database which captures next of kin, educational qualifications and skills. Due to the increase in numbers, our database is currently out of date. However, I do plan on re-instituting the database and the admissions procedures which were in place last year.
- 46 Moreover, every person who stays in the building must abide by the rules that we have collectively established, including: no drinking of alcohol, no smoking of any substance, no fighting, no stealing, no sexual relations in the building unless in the designated area for married couples, no littering, keeping the building clean, and attendance at daily community meetings at 19h00. Any person who is found in contravention of these rules may be asked to leave the Church.

- 47 The Church has a security committee, which consists of 18 members and one head of security, who are residents of the Church and receive a small stipend for their work. The head of security also attends a municipal emergency services meeting on a weekly basis with other municipal services, such as the police and fire departments.
- 48 There is a residents' meeting held every Friday evening in which the entire community comes together to report and account for work done in projects, in security, in the organizing of the building and generally to discuss issues affecting them and hear news. This meeting is usually held in the main Sanctuary.
- 49 To provide order in our community, the residents are divided into separate floor committees and elect representatives who may address residents' concerns and have access to the Church's administration, including myself, to address concerns and issues arising from the residents.
- 50 Previously, residents were able to stay in most parts of the Church except for the Sanctuary in which religious services are performed. Previously the Church also had many hundreds sleeping outside of the Church building because there was no space inside to house everyone.
- 1 As I have already indicated, due to the events of 3 July 2009, the Church has had no other choice but to open up the Sanctuary as well in order to avoid residents who previously slept outside from being arrested and detained by police under the loitering by-law.
- 52 I accept that the Church is not the ideal place for a shelter and certainly not a shelter for over 3,000 people. Unfortunately, however, our residents have no other opportunities for assistance and in fact have no option but to remain at the Church. Many of the residents who stay inside the Church have been there for years and have become community leaders.



- 53 The people who previously slept outside of the Church building are recipients of the Church's humanitarian assistance. The Church, however, does not have control over who sleeps outside of the Church.
- 54 For the most part, I have had a very cordial and professional relationship with the police leadership at the Johannesburg Central Police Station. I am in regular communication with them and the head of the Church's security has attended some of the weekly meetings convened for all of the emergency services in the Johannesburg area.
- 55 My relationship, however, with lower-ranking police officers has often been tense. In my experience, they have been abusive toward the residents of the Church and, as exemplified by the accompanying affidavits to this application, often target foreign nationals for bribes and corruption. This is often done using the loitering by-law, which is dealt with below.



SECTION 2: THE STATE'S PLAN TO RELOCATE AND HOUSE THE PERSONS  
SEEKING REFUGE AT THE CHURCH; MEANINGFUL ENGAGEMENT

*The background to the State's plan to provide alternative accommodation*

- 56 The conduct of the SAPS and JMPD described below, including the raid and arrests of 3 July 2009, must be considered in the context of the activities of other organs of state and civil society in relation to the situation at the Church. In particular, the raid occurred at a time when other state entities and United Nations bodies had made undertakings to provide alternative accommodation to the people living at the Church, and plans were underway to do so. I briefly describe below the context in which these plans were developed but have unfortunately stalled and the need for a process of court-directed meaningful engagement.
- 57 There have been attempts, which appear to have stalled or been aborted, to initiate dialogue between the relevant organs of state (principally the City and the Gauteng Provincial Government), the Church and other role-players aimed at seeking solutions to the situation at the Church.
- 57.1 On 13 February 2009, a meeting was held at the Parktonian Hotel to discuss the "Central Methodist Church Humanitarian Intervention Project".
- 57.2 The meeting was attended by various representatives of the City, utilities providers, the shop-owners in the Smal Street mall ("the Mall"), Médecins Sans Frontières ("MSF") and the Applicants. The Church was represented at the meeting by Reverend Khanyisile Nduli and Ms. Mary Metcalf of the University of the Witwatersrand, as I was unavailable.
- 57.3 I attach, marked "PV5", a copy of the minutes of the meeting.
- 57.4 As is apparent from the minutes of the meeting, Mr. Nathi Mthethwa, the Regional Director for the City, chaired the meeting and made an initial presentation in which he addressed the following topics:

- 57.4.1 the genesis of the problem at the Mission;
  - 57.4.2 emerging challenges;
  - 57.4.3 the need for inter-governmental collaboration;
  - 57.4.4 possible short-term solutions; and
  - 57.4.5 long-term solutions.
- 57.5 After Mr. Mthethwa's presentation, as appears from the minutes, the floor was opened to enable stakeholders to voice their concerns. Although the concerns are not attributed to individual speakers in the minutes, it is apparent from the minutes that the following issues were raised:
- 57.5.1 safety and security in and around the Mall;
  - 57.5.2 the public, temporary toilets;
  - 57.5.3 immigration issues;
  - 57.5.4 cleaning of the Mall and Pritchard Street;
  - 57.5.5 the reopening of the Sun International Hotel;
  - 57.5.6 the availability of water for the people living outside the Church; and
  - 57.5.7 the lack of dialogue with me, the Bishop of the Church.
- 57.6 As appears from the minutes, Mthethwa then "summarised" or concluded the meeting as follows:
- *"The City is well aware of its roles and responsibility in the crisis and has put together various plans to assist in clearing up the situation. Namely by establishing a Joint operational committee to formulise and*

*carry out a Plan Action. A balance is needed between the Humanitarian Crises and intervention.*

- *Support was needed from all sectors; Stakeholders, MoE's and the City alike. An operational committee is to be established to ensure the successful implementation of the proposed Action Plan and to monitor progress by means of Site meetings. Nathi put it to the forum on who would be interested in representing the Businesses and Stakeholders on the Committee.*
- *Communications should be directed through Region F's Stakeholder Management Unit, headed by Shaun O'Shea, where issues and suggestions will be captured. A bi-weekly news flash will be emailed to stakeholders. It was agreed that a monthly meeting will be arranged on a premises close to the Church – Pitje Chambers were offered as a venue. The City will endeavour to have the Bishop present at these meetings. Nathi and Shaun would liaise with Andre Bezuidenhout to represent the Stakeholders at the meeting."*

58 Notwithstanding the resolution quoted above, the initiative contemplated at the meeting of 13 February 2009 appears to have stalled and has not yielded any benefits for the people seeking refuge at the Church. In addition, I have not been invited to attend further meetings as contemplated and am not aware if any further meetings have been convened. Instead, as I describe below, the authorities, including the City and provincial engagement, have pursued minimal engagement with the Church and those seeking shelter there and the only real state attention directed at the Church has consisted of policing activities – under the guise of enforcing by-laws – which are apparently directed at the removal of the people living at the Church.

59 In March 2009, South African authorities forcibly expelled thousands of Zimbabweans from the Musina Showground. Thousands of Zimbabweans fled

from Musina to Johannesburg, and the majority came to the Church. More than 4,000 people sought refuge inside and around the Church at the height of the crisis.

60 Partly in response to the increased number of people seeking refuge in and around the Church, Pitje Chambers (Pty) Ltd made application in this Court (under case number 09/9411) seeking relief against the municipality, City of Johannesburg, and the Church.

60.1 Pitje Chambers (Pty) Ltd complained that the thousands of Zimbabweans and the crowded and unhygienic environment around the Church were impacting negatively on the business of the members of the group.

60.2 So as not to burden these papers unduly, a copy of the papers in the Pitje application is not attached. These will be made available at the hearing of this matter should the need arise.

61 Ultimately, the Pitje Chambers application was withdrawn on the basis that the state had undertaken to provide alternative shelter to the people living at the Church. I attach, marked "PV6", a copy of a letter dated 1 April 2009 to the Legal Resources Centre ("LRC") from the attorneys for Pitje Chambers (Pty) Ltd explaining the decision to withdraw the application on the basis that the City of Johannesburg had "*indicated through its legal advisors that the accommodation of refugees at the Johannesburg Central Methodist Church are (sic) now treated as a priority and that urgent steps are taken to address the subject matter of the application*". As events transpired, the envisaged steps did not happen expeditiously and again this promise of state assistance stalled.

61.1 On 23 March 2009, shortly before the application was withdrawn, the Star newspaper reported that the erstwhile MEC for Local Government, Gauteng, Ms Qedani Dorothy Mahlangu, had issued a statement that six buildings had been identified to house the people living at the Church. Mahlangu was further quoted as saying that priority would be given to those living on the streets but that

eventually all of the people living at the Church would be moved as well. A copy of the article is attached, marked "PV7".

- 61.2 A report on 6 June 2009 stated: *"In March, the provincial government said it had identified six buildings in and around the city for the refugees' relocation"*. A copy of the article is attached, marked "PV8". Various reports have stated that over 1,000 people would be housed under these plans, and that this housing would be available this year.
- 61.3 On 6 July 2009, The Star quoted City spokesman Nthatsi Modingoane as saying that the plans were to house 300 of the most vulnerable by "next week," i.e. between 12 and 17 July 2009, and to house another 700 by the end of the year.
- 61.4 Further housing plans for 150 individuals were said to be underway by the UN Development Programme ("UNDP"), as appears from the attached report, marked "PV9".
- 61.5 Also on 6 July, The Sowetan quoted Modingoane as saying that *"A city-owned building was refurbished by the Johannesburg Development Agency and phase one will be complete next week. It will accommodate 300 people and 700 people will be accommodated in phase 2."* A copy of the article is attached, marked "PV10".
- 62 In fact, progress has not been as great as the statements referred to above had hoped. One group of approximately 130 people was moved from the Church to My Lily Pot Shelter in or around April 2009. Arising from a task team that had been set-up to facilitate the shelter of vulnerable new entrants to the inner city, plans were also supposed to have been well advanced for the City of Johannesburg to arrange for a large number of Church residents to move to the MOTH Building, in Noord Street, Johannesburg.

- 63 By July 2009, I understood that the first phase of preparing the MOTH Building for occupancy was close to completion, and could accommodate 350 people in the first phase. The outstanding issues appeared to relate to which non-profit organization would manage the building and the criteria for admission to the building.

*The need for a process of meaningful engagement*

- 64 I now understand that the City has used at least part of the MOTH Building to accommodate unrelated people who were living in another building and who were the subject of a private eviction. This appears from a Press Release issued by the Centre for Applied Legal Studies on 9 September 2009, a copy of which is annexed as "PV11". I am still attempting to obtain clarity from the City in this regard.
- 65 The need to find shelter for the growing number of destitute people that were entering the inner city was recognized by the City. This was apparent in the aftermath of the xenophobic attacks in April 2008 and in the response by the City to the Pitje Chambers application.
- 66 The desperate circumstances of the people living at the Church have not improved despite stated commitments by the City to address the situation. Instead, there is a pattern of conduct by the JMPD that is aimed at harassing and intimidating people who are present in the vicinity of the Church, particularly through the use of the loitering by-law for the ulterior (and ineffectual) purpose of "cleaning-up" the city. This conduct is described below.
- 67 It evidences an inhumane response by state apparatus that disregards the constitutional obligation to respect and protect various constitutional rights, including the right to human dignity (section 10 of the Constitution), the right of access to adequate housing (section 26) and, in the case of the children living at the Church, the right to shelter (section 28(1)(c)).

68 The Constitution also requires that public power must be exercised justly and fairly. In the circumstances the reasonable course of action is for the City to seek to engage meaningfully with those who are affected in order to achieve a sustainable resolution. It is on this basis that we seek the relief in paragraph 4 of the Notice of Motion.



SECTION 3 – THE CONDUCT OF THE SAPS AND JMPD BEFORE, DURING AND AFTER THE EVENTS OF 3 JULY 2009

*The police raid of 30 January 2008*

- 69 It is regrettable that the events of 3 July 2009 constitute just one instance of various police operations at the Church which have taken place without me or the Church being involved or given any warning. This is despite the fact that, from the beginning, the Church and its staff have always attempted to work with the police to ensure that the Church is as safe as possible and that we are able to conduct our humanitarian work with the community.
- 70 Apart from the events of 3 July 2009, perhaps the most serious incursion by the police into the sanctity of the Church and the rights of those who reside in and around it was the raid that took place on the night of 30 January 2008 and the morning of 31 January 2008.
- 71 At approximately 11.00 p.m. on Wednesday 30 January 2008, I was in my office on the third floor of the Church when I heard disturbances outside. When I looked out of my window I saw a contingent of police vehicles, including passenger cars, police vans and trucks for the transport of people.
- 72 I began to go downstairs to find out what was happening. It was difficult to go down the stairs as people were swarming and running up the stairs in panic. I heard a loud noise and saw a police officer kicking down a door. I asked the officer: "What are you doing? Why don't you ask for the key?" But the officer ignored me and continued to break the door.
- 73 I could not establish the names of the officers involved because they were not wearing nametags that clearly reflected their identification. After repeated requests for an explanation for the raid I was eventually told that the SAPS were looking for "weapons, drugs and illegal aliens".



- 74 I subsequently found out that the raid was purportedly authorised under section 13(7) of the South African Police Service Act 68 of 1995, which allows for the cordoning off of a particular area to ensure the safety of the public or to restore public order. I am advised that even had I not specifically asked to see the authorisation I had a right to be shown it at the time of my enquiries in terms of section 13(7)(c) of the South African Police Services Act. The authorisation, which I had sight of only after the raid, specified that it was being conducted in order to search for firearms, ammunition and other criminal items. None were found.
- 75 The effects of the raid included damage to the Church, abuse and assaults on its residents and the arrest of approximately 1,300 people.
- 76 At the time of the raid, most residents of the Church were sleeping and there were security guards posted on every floor of the building. These security guards monitor the building and maintain the security of the residents. At the time of the raid no security threats had been reported to me by the guards.
- 77 I was shocked by the heavy-handed nature of the police action. I counted at least 50 police officers inside the Church. In addition to how heavily armed they were I was appalled by how police officers spoke to the residents. Police officers openly humiliated and degraded residents, and denied them basic needs such as access to toilets and access to their belongings. I too was subject to this belittling behaviour on the part of the police as I was shoved, grabbed by the scruff of my trousers and threatened with arrest.
- 78 Within hours of the raid, approximately 800 of those arrested were released and forced to walk through the Johannesburg Central Business District in the pre-dawn hours in order to get back to the Church. Over the next couple of days, over 500 were kept in custody and brought to court on charges of being illegally in the country. Many were released when it became clear that they would not be brought before the court within 48 hours of their arrest. The remaining detainees were represented by a variety of private law firms and public interest NGOs, including LHR, the Aids Law Project ("ALP") and the LRC.



- 79 The remaining detainees were finally released after the magistrate was reprimanded by Sutherland AJ in the Johannesburg High Court for having abused her powers during the bail applications. Despite the stated purpose of the raid, the only persons arrested during the raid who were ultimately charged only faced charges on immigration-related offences.
- 80 Although immigration officers were present during the raid, they did not participate. Most of those arrested were taken to the police station without being seen by these officers to verify their status.
- i I have co-operated with the police in the past and would have been willing to facilitate a search of the building. This would have prevented the unnecessary physical damage to the building and the psychological trauma to the residents and staff of the Church. There has been no compensation for the unlawful conduct against individuals who sustained injuries during the raid on the Church in January 2008; nor has any of the damage done to the Church property during the raid been repaired. This is despite the fact that the then Minister of Safety and Security personally visited the Church and indicated that this would be undertaken.

***The arrest of three teachers in September 2008***

- 2 The vulnerability of those living in and around the Church is substantial. In September 2008, three of the teachers who teach at the Methodist Church school near the shelter were accused of a variety of immigration related offences and sexual offences. The prosecution opposed bail on the basis, among other things, that the three teachers were foreigners, did not have a fixed address, did not own sufficient property to tie them to South Africa and were therefore a flight risk. The case against the teachers was subsequently struck from the roll.
- 83 However, the case illustrates the vulnerability of foreign nationals living in the Church to arbitrary and discriminatory treatment in the context of arrest and detention. Jason Brickhill of the LRC represented the three teachers, and I refer to his confirmatory affidavit, which is attached as "PV12".

### *The raid of February 2009*

- 84 In February 2009 a raid was conducted by the JMPD, SAPS and officers employed by Wozani Security (Pty) Ltd, colloquially referred to as the "Red Ants". It was conducted by a 100-member force and the people affected were those Zimbabwean nationals sleeping in front of the High Court, next to the Church. They were harassed, intimidated, and arrested. Some South Africans were also arrested.
- 85 Though I did not witness the raid personally, it was witnessed by Bianca Tolboom, then the co-ordinator of the MSF project in Johannesburg, which runs a clinic at the Church. An affidavit from Nurse Tolboom is attached as "PV13".

### *Sporadic arrests for loitering: Reymond Mapakata – April 2009*

- 86 Residents of the Johannesburg inner city, including those living at and around the Church, and especially foreign nationals, are frequently subjected to police harassment and unlawful arrest on the basis that they are allegedly unlawfully in the country or for loitering. By way of example, I attach the affidavit of a young man now resident at the Church, Reymond Mapakata, marked "PV14". Mapakata describes several instances of unlawful arrest and assault by the police during 2008 and 2009, including, most recently, his arrest in April 2009 for loitering. I pray that the contents of the affidavit of Mapakata be read as specifically incorporated into this affidavit.

### *'Water-spraying' by the Red Ants – June 2009*

- 87 At or around 8:45 p.m. on Friday, 5 June 2009, a motor vehicle with registration number GMX523GP, occupied by men wearing Red Ants uniforms, drove down Pritchard Street in an easterly direction towards the Church. The occupants directed a hosepipe, which



was connected to a vat of liquid, at people eating and sleeping alongside the street, spraying them with a foul-smelling liquid which appeared to be some sort of sewage. Again the essential facts are set out in the affidavit of Nurse Tolboom.

88 Lawyers from the LRC, including Jason Brickhill, identified 72 people who had been sprayed and interviewed approximately 28 of them at the Church on or around 22 June 2009. I refer again to the confirmatory affidavit of Brickhill.

*The events of 3 July 2009 and the aftermath – the experience of those arrested*

89 On the evening of 3 July 2009, I was attending a conference in the United States and was not present at the Church during the raid itself. I have, however, been informed by residents and refugee service providers about the events of that night.

89.1 I received a telephone call at approximately 11:00 p.m. South African time from Evans Kuntonda ("Kuntonda"), an MSF employee who was off duty at the Church following the end of his shift, who informed me that the police were conducting an operation and arresting people who were sleeping outside of the Church building.

89.2 I immediately telephoned Director Mphembe, who informed me that he was no longer the Station Commander of the Johannesburg Central Police Station, but was aware of the operation. He informed me that there had been a lot of pressure from the local shopkeepers and the High Court to "enforce the by-laws" and remove the people who were sleeping on the sidewalks lining Pritchard Street.

89.3 I asked him why the police were focusing their resources on the people sleeping outside of the Church. He stated that Commissioner Mashao was in command

of the operation and referred me to him. I was unaware at the time that Mashao had become the new commissioner of the Johannesburg Central Police Station.

89.4 I phoned Mashao and told him that the operation should no longer continue. I was unaware of it at the time, but I later found out that he was present at the Church during our telephone conversation. He did not make any undertakings during our telephone conversation and did not give any details. He asked, "what do you want me to do?" I stated that I wanted the people to be released to which he responded that they would not be released.

90 In the immediate aftermath of the arrest on 3 July, lawyers from the LRC and ALP took statements from those who had been arrested.

90.1 A total of 61 statements were taken. I refer in this regard to the confirmatory affidavits of Sushila Dhever, Anna Heimbichner, Bongumusa Sibiya, Kgaogelo Nchaupe, Brian Honerman, and Dora Anne Pretorius, who were some of the people responsible for taking the statements. They are attached as "PV15" to "PV20".

90.2 These statements tell similar stories about the night in question, mainly about individuals who were arrested for loitering while sleeping on the pavement and then mistreated by the arresting officials.

90.3 In order to avoid unduly burdening the papers, however, only four of the statements have been converted into affidavits. Those are the affidavits of Michael Naidoo, Saidi Chiyesa, Abednego Tawha that are attached as "PV21" to "PV23" and the affidavit of D.S, which is "PV4".

91 In addition, two statements were taken from Butholezwe Nyathi and Evans Kuntonda, setting out the events of 3 July 2009 and beyond. The affidavit by Mr. Nyathi, the Third

Applicant in this matter, has already been referred to and is "PV3". Kuntonda's confirmatory affidavit is attached as "PV24".

91.1 Neither Mr. Nyathi nor Kuntonda live in or outside the Church. However, they happened to be at the Church on the evening of 3 July 2009.

91.2 Mr. Nyathi was at the Church to run a training programme. Kuntonda was involved in volunteer work at the Church in his personal capacity following the end of his employment shift at MSF.

91.3 They both came out of the Church to see what was causing the commotion and were arrested for loitering.

92 In this affidavit, for the convenience of the Court, I provide a summary of certain of the key facts and events relating to 3 July 2009 and the days that follow it. I refer in this regard to the affidavits of Michael Naidoo, Saidi Chiyesa, Abednego Tawha, D.S., and Butholezwe Nyathi ("the supporting affidavits") that are filed together herewith. I pray that the contents of the supporting affidavits be read as specifically incorporated herein.

93 I point out that the supporting affidavits are not entirely consistent in respect of issues such as when the raid and arrests started and the events thereafter. This is hardly surprising given the chaos and confusion of the events that night and the fact that the officials conducting the raid acted in what appears to have been a haphazard and arbitrary manner. Nevertheless, in what follows I summarise the key features of the events of that night, as they emerge from the supporting affidavits.

94 The raid and arrests occurred late at night on 3 July 2009 and in the early hours of the morning on 4 July 2009. This was, of course, in the middle of winter.

94.1 The bulk of those arrested were sleeping on the pavement when they were awoken and arrested. No warning was given to them of any kind. Instead they

were woken abruptly – many by being kicked or slapped – and were told to accompany the officials involved.

- 94.2 The officials who woke the sleeping persons often did not identify themselves, did not inform those arrested that they were being arrested and did not produce any warrant of arrest.
- 94.3 Those who attempted to put on their shoes and get dressed before going with the arresting officials were stopped and assaulted by the officials for taking their time.
- 94.4 Some of those arrested were told they were arrested for loitering.
- 94.5 Those arrested were told to leave their bags and belongings behind. This is notwithstanding the fact, as I set out below, their bags often contained the essential documents and possessions of those arrested. The officials then threw the bags and belongings into the rubbish.
- 94.6 Other persons, who were not sleeping on the pavement, were also arrested. This included people who lived in the Church or were busy at the Church and who came out of the Church to see what the cause of the commotion was. Examples of such persons are Kuntonda and Butholezwe Nyathi. Those arrested also included people simply walking along the street. An example is the individual known as "Brighton", a man whom Kuntonda knew was not residing at the Church.
- 94.7 Kuntonda saw Brighton walking by, visibly drunk. There are a number of taverns in the area, and it is not unusual for there to be non-residents of the Church in this area of the City at night. Brighton seemed to be unaware of the police operation that was taking place.

- 94.8 Although he was not among the people who had been sleeping outside the Church, he was nevertheless rounded up with the rest of the people and made to sit in front of the court building. When he refused, he was kicked by an officer whose name badge identified him as "E.C. Sithole." Brighton eventually complied and sat down with the others.
- 94.9 Those arrested were forced to sit in front of the Church and the High Court until police vans arrived. When that happened, the officials forced them to get into the vans, yelling at them to do so and assaulting people who did not respond swiftly enough. Some of those arrested were subjected to electric shocks (by means of a tazer) by the officials to force them to get into the vans. Tear gas and pepper spray was also used.
- 94.10 The vans were heavily overcrowded. In at least one case, freezing water was poured into the vans when those arrested were already inside.
- 94.11 Throughout this process, the officials verbally abused and insulted those arrested. Kuntonda overheard officials shouting at those arrested that "you think you are in Zimbabwe", "you should be sleeping in your house in Zimbabwe", "Uzinja wena" (You are dogs), "you have no rights" and "Makwerekwere, go back to Zimbabwe".
- 95 The vans then proceeded to take those arrested to the Johannesburg Central Police Station ("Johannesburg Central").
- 95.1 The vans were then unloaded. The detainees were divided into different rooms. The officials did not distinguish between those who had been sleeping on the pavements and those who merely happened to be in the area.
- 95.2 Some detainees had their fingerprints taken with an electronic scanner while others did not. It appears it depended on the whim of the relevant officials who would have their fingerprints verified and who would not.



- 95.3 Some of the rooms were so full that it was impossible to sit down and everyone was forced to stand.
- 95.4 Officers from the JMPD and SAPS were present and brought in "Notification of Rights" forms. Each detainee was instructed to sign the forms. Most of these forms indicated that the detainees had been arrested for "loitering".
- 95.5 Nyathi and Kuntonda told the group to refuse to sign the papers as they believed that they had not been loitering and anyone who signed the forms would be admitting that they were in fact loitering there.
- 95.6 When detainees refused to sign the forms, the officials told them that "you may not see your lawyers until we have finished processing you" which included the signing of forms. When people still refused to sign, officials became violent and beat people and, in some instances, used electric shocks to force people to sign. One person was shocked so badly that he fell to the ground.
- 95.7 Eventually, all detainees signed either out of fear or because Kuntonda had relayed to them a statement by the police officer that the form was not an admission of guilt form.
- 95.8 The charges that were recorded against the detainees were extraordinarily arbitrary. For example, when Nyathi arrived at the front of the line, he was identified as "the clever one" by one of the officers. This was because he had taken a photograph on his cell-phone of the arrests, which the officer had instructed him to delete. He was then passed to a female SAPS officer who charged him with obstruction of a police officer. He was charged with loitering only the following day when a new group of police officers did not understand why he had not been charged with the others.
- 95.9 Nyathi observed and heard the other officers struggling with the documentation and inserting the correct details. It appeared to Nyathi that in fact they were



making up some of the facts with statements such as "let's say..." before writing down an incorrect fact in Nyathi's charges.

- 95.10 After signing the forms, the detainees were put in a cell. The cells were cold and there were insufficient blankets, toilet facilities and washing facilities.
- 95.11 Many of the detainees were not informed of their right to consult with a lawyer.
- 95.12 The manner in which the detainees were provided with food was extraordinarily arbitrary and random. It appears that everything appeared to rest on which cell the particular detainees had been put into.
- 95.13 By the middle of the morning on 4 July 2009, according to Kuntonda, only two of the eight rooms full of detainees had been given any food.
- 95.14 The first time that Nyathi's group was given any food was at 7:00 p.m. on Saturday 4 July 2009 – that is twenty hours after their arrest. They were given two slices of bread and a tablespoon of beans. Prisoners were asked to clean and dish out food with the promise of additional food.
- 95.15 The verbal abuse of the detainees, much of which was xenophobic, continued throughout their detention.
- 96 Eventually every one of the detainees were released on the morning of Monday 6 July 2009. No charges were pursued against them – whether for loitering or otherwise.
- 97 The effect of the arrests on the detainees has been extraordinarily severe. Quite apart from the emotional damage and the damage to their dignity, the manner of the arrest caused many to lose virtually all of their physical possessions. These included their clothes, blankets, money, medical supplies and essential documents.



*The events of 3 July 2009 and the aftermath – the experience of MSF and the legal practitioners*

- 98 I have explained above the experience of the detainees during the period from their arrest on the night of Friday, 3 July, until their release on Monday, 6 July 2009. I shall now describe the events that were unfolding during the same period involving efforts of the legal representatives of the Church and the detainees to secure the release of those in custody. I also describe the experiences of the MSF employees who were present at the police station on a humanitarian basis in order to conduct a medical assessment of the detainees and who later called for the release of certain detainees on humanitarian grounds.
- 99 Soon after the police operation at the Church began late on the night of 3 July 2009, Bianca Tolboom of MSF telephoned Jason Brickhill of the LRC and explained what was happening to him. Nurse Tolboom also telephoned Jacob van Garderen of LHR. While the arrests were still continuing, van Garderen and then Brickhill arrived separately at the Church in an attempt to assist the people who were being arrested.
- 100 Van Garderen and Brickhill described to me the events which they observed. Their affidavits, confirming the facts set out herein, have already been referred to and are "PV2" and "PV12".
- 101 Van Garderen arrived at the Church at approximately 10:30 p.m. and observed numerous JMPD officers and a few SAPS officers. He also observed rows of detainees sitting in front of the Church under the custody of the police officials. He also observed a SAPS truck parked on the curb outside of the High Court building as well as a Pikitup truck.
- 102 He clearly identified himself as a lawyer with Lawyers for Human Rights and that he wished to speak to the SAPS officials. He was told by the JMPD officers that he "had no right to be here" and was physically pushed back from the curb and prevented from approaching the SAPS officials.

- 103 Van Garderen backed away from the situation and began to take photographs of the scene with his mobile telephone.
- 104 He also observed detainees being loaded into the SAPS truck for transport to the police station. Among the detainees being loaded into the truck, he observed young boys who were clearly not 18 years old being loaded into the same trucks as adults. He further noticed disabled people and elderly men who needed assistance being loaded into the truck.
- 105 He was finally able to speak to one of the SAPS officers who informed him that the detainees would be taken to Johannesburg Central.
- 106 At that point Nurse Tolboom and Brickhill arrived and the three decided to go to Johannesburg Central Police Station and attempt to speak to higher ranking officials. It was approximately midnight when they decided to leave the scene and attend the police station.
- 107 Van Garderen states that when they arrived at the Johannesburg Central, he noticed that it was not busy and that there were plenty of staff at the front desk to deal with them.
- 108 Van Garderen and Brickhill approached the desk and Van Garderen spoke with a Superintendent Revenamani. He identified himself as a lawyer with LHR and asked for information regarding the detainees and also requested to speak to them. Revenamani appeared to Van Garderen to not be involved in the raid and said that he did not have any information.
- 109 Van Garderen then spoke with a Senior Superintendent who was directly involved with the detainees. He knew this because he had seen the detainees being moved through the building behind the charge desk and had observed the superintendent go between the charge desk and this back area.

110 Van Garderen attempted to get more information from this officer such as:

110.1 What the process would be?

110.2 Whether the detainees would be released?

110.3 Whether they would be allowed to pay admission of guilt fines?

110.4 He also asked whether he would be allowed to see and consult with the detainees.

111 Van Garderen was in telephone communication with a number of the detainees including Nyathi about what the officers were saying and doing in the detention area.

112 Nyathi and Kuntonda informed Van Garderen that there were a number of children in detention. This was confirmed by Van Garderen's observations while at the Church.

113 The superintendent released one of the children named Tinashe, who is 16 years old, on a warning, but refused to look for the other children. Van Garderen was told by the detainees of approximately 12 children in total who remained in detention with the adults.

114 Van Garderen, Brickhill and Tolboom continued to ask the Superintendent for information throughout the night. The superintendent gave conflicting information.

114.1 At one point she said that they would be taken to the Lindela Holding Facility for deportation;

114.2 At other times, she said that they would all be released on warning.

115 Van Garderen informed the superintendent that he and Brickhill wished to consult with the detainees as the LRC and LHR had been asked by many of them and by the Church for legal advice and representation. They were denied access to the detainees by the superintendent.

116 Van Garderen, Brickhill and Tolboom remained at the police station the entire night and continued to address their concerns to the Senior Superintendent who continued to give contradictory statements. In the meantime, several telephone calls were made to other service providers for more information.

117 At around 9:30 a.m. the next morning, Van Garderen was informed that he would be allowed to consult with the detainees which he did at approximately 11:00 a.m. By this point, the group in which Kuntonda and Nyathi had been was moved from the fingerprint room to a communal cell.

118 Van Garderen consulted briefly with Kuntonda and Nyathi in the cells, at which point they informed him that they had been forced to sign "Notification of Rights" documents with electric shocks and beatings.

119 At that point, Van Garderen left the police station and Nurse Tolboom resumed her efforts to give medical attention to the sick and injured detainees.

120 A separate affidavit by Nurse Tolboom of MSF has already been referred to and is "PV13". That affidavit describes in detail Tolboom's attempts to provide medical assistance to those detainees who had been injured or otherwise in need of medical attention. I pray that it be read as if specially incorporated herein.

120.1 Suffice it to say that Tolboom provided medical care to 15 detainees who were sick or injured during the arrest. She faced obstruction by the police officers on duty in her attempts to provide care. The detainees she attended to included:



- 120.1.1 A man who was HIV positive and whose antiretroviral (ARV) treatment was taken from him during the arrest. He urgently needed a supply of ARV treatment;
- 120.1.2 Three men who needed care for injuries that they sustained during the arrest;
- 120.1.3 An asthmatic man who had his salbutamol inhaler destroyed by a police officer;
- 120.1.4 A man who was deaf and mute and had been vomiting uncontrollably; and
- 120.1.5 A pregnant woman who needed ante natal care.
- 120.2 Tolboom provided care to the detainees within the cells and secured the release of those seven who needed more urgent medical care by paying their admission of guilt fines.
- 121 Van Garderen and Brickhill returned on Monday 6 July 2009 to assist in representing the detainees in court. They were present with lawyers from LHR, the LRC, the ALP and a private attorney by the name of Mr. Ian Small-Smith who had agreed to assist on a pro bono basis.
- 121.1 Van Garderen and the group of lawyers attempted to speak to the prosecutor and inform him that the detainees had not been brought to court and that the dockets were incomplete, in particular in that the dockets did not identify with sufficient precision the facts of the alleged offences and the circumstances of the arrests.
- 121.2 The group was referred to the chief prosecutor and then to the control prosecutor. They made representations to the control prosecutor that the matter should be withdrawn considering that the loitering charge was inappropriate for the facts, as well as the fact that the dockets were incomplete.



121.3 Van Garderen observed that it was obvious that the court had not been prepared for the number of accused nor was the prosecutor in a position to proceed with the charges. The incomplete files from the police were sitting on a chair and on the verge of falling on the floor.

121.4 The prosecutor was concerned about releasing the detainees but eventually agreed to withdraw the charges against them. At this point, it was decided to facilitate the release of the detainees. Van Garderen asked two of the candidate attorneys from LHR to assist the police in the release of all detainees and request the police to transport them back to the Church. The police agreed to do this.

#### *Events following the raid on 3 July 2009*

- 122 Since 3 July 2009, JMPD have maintained a regular presence at the Church. Most recently, during July, August and September 2009, JMPD members have raided the area outside the Church on several occasions, confiscating the goods being sold by vendors operating near the Church entrance. These raids have often been accompanied by the use of pepper spray on the vendors and other people present outside the Church.
- 123 Two such raids took place during the week of 10 August, and the JMPD conducted daily raids during the week of 17 August 2009. The raid during the evening of 20 August involved more than 6 JMPD vehicles and approximately 50 JMPD members. No one was arrested, but goods belonging to vendors were again confiscated. Kuntonda personally witnessed this raid.
- 124 On 29 July 2009, the SAPS harassed Mr. Austin Zinyemba who lives at the Church. An affidavit from Mr. Zinyemba is attached as "PV25". I pray that the contents of his affidavit be read as specifically incorporated herein.

- 124.1 Mr. Zinyemba is wheelchair bound and has been since 2004 due to cancer. He lives at the Church and is a patient of the MSF Clinic, which he attends on a daily basis to have his cancerous sores dressed and bandaged.
- 124.2 On 29 July 2009, at about 4:00 p.m., Mr. Zinyemba was sitting on the Pritchard Street pavement, a few metres from the Church. An SAPS van pulled up and three uniformed SAPS officers came through to the area where Mr. Zinyemba was sitting. The bandages on his feet were visible.
- 124.3 One of the police officer shouted at him, "What are you still doing there?" He responded that he was sick and just resting and that he was disabled and could not move. The officer proceeded to kick his legs with her boot and yelled at him "You are joking" and to "Wake up!"
- 124.4 The officer then began to hit Mr. Zinyemba with a pepper spray bottle on his lower legs. He was in so much pain that by the fourth blow he began to cry from the pain and begged her to stop.
- 124.5 Eventually she stopped hitting Mr. Zinyemba and walked away, as did her two colleagues who had been in the vicinity throughout. Mr. Zinyemba spent the entire night in severe pain, unable to lie down to sleep and too weak to get any donations for food.
- 125 On 30 July 2009, further harassment took place at the hands of the SAPS. The facts relating to this incident appear from the affidavit of Agnieszka Wlodarski-Welz, which is attached as "PV26". I pray that the contents of her affidavit be read as specifically incorporated herein.
- 125.1 On that day at about 3:00 p.m., five Zimbabwean women and their children, all of whom stay at the Church, were sitting on benches in the area in front of the High Court. Other people who stay at the Church were also there.

- 125.2 Five SAPS officers then arrived and started telling people to go back to the Church. They used insulting and threatening language, including saying "We don't want to see you .... Go back your country" and "We don't want to see you here. We are tired of you. Go stay at the Church".
- 125.3 The people who had been in the area of the High Court responded to the SAPS officers' instructions and started to make their way back to the Church. The five women were amongst them. One SAPS officer said to them that "We are going to arrest you and take you to the police station".
- 125.4 When the group reached the Church, the five women were singled out and forced to follow the SAPS officers to a police van. Most had their children with them. They were then forced to wait to be told what was going to happen to them and whether they would be arrested. The women waited there while the SAPS officers debated what to do with them. These deliberations appeared to focus on what they were going to tell their colleagues at the Police station if they took the women there – in particular what reason they were going to offer for bringing the women there.
- 125.5 Eventually, one of the police officers said "You can go, we don't want to see you again". They were then released and warned that they would be arrested if they were caught sitting on the benches outside the High Court again.



SECTION 4 - DECLARATORY AND INTERDICTIONARY RELIEF TO PREVENT FURTHER POLICE RAIDS AND HARRASSMENT

126 I am advised and respectfully submit that, in order to satisfy the requirements for a final interdict, the Applicants must demonstrate:

126.1 a clear right;

126.2 ongoing harm or a reasonable apprehension of harm; and

126.3 no reasonable and practical alternative remedy.

127 I shall address each of these requirements in turn below.

*Clear right*

128 As has been described above, none of the persons arrested on the night of 3 July 2009 was ultimately charged. It is apparent from the circumstances of the raid and arrests, as well as subsequent media statements by JMPD, in particular, that the purpose of the arrests was not the legitimate purpose of fighting crime, but an attempt to "clean up" the City and the street outside the Church. The phrase "clean up" in this regard appears to be a euphemism for the City's attempts to remove people it considers undesirable from public places.

129 I am advised and submit that the arrests were unlawful in a series of respects:

129.1 They occurred for an ulterior purpose, that is, for a purpose other than to prosecute the person for the offence that formed the purported basis of the arrest.

- 129.2 They were directed at people who had nowhere else to sleep or go – a fact demonstrated by the recognition by the City and other role-players that efforts needed to be made to accommodate the people concerned.
- 129.3 They were conducted for the purpose of harassing the people who live in or outside the Church and were xenophobically motivated in that they were intended to target persons of Zimbabwean origin.
- 129.4 Moreover, and in any event, I submit that the JMPD and SAPS had no reasonable cause for the arrests of the persons concerned, whether under the loitering by-law or otherwise.
- 129.5 Finally, and again in any event, whatever the lawfulness of the arrests themselves, the manner in which the arrests took place and the manner of the subsequent detention of those arrested was unlawful in and of itself.
- 130 In the circumstances, the arrests of 3 July 2009 and the detention subsequent thereto were unlawful, and the Applicants seek a declaration to that effect.
- 131 The Applicants also seek a declaration that the arrests and subsequent detention violated the following provisions of the Constitution:
- 131.1 The right to equality in section 9 of the Constitution, including the right to equality before the law in section 9(1) and the prohibition on unfair discrimination in section 9(3) of the Constitution;
- 131.2 The right to human dignity in section 10 of the Constitution;
- 131.3 The right to freedom and security of the person in section 12 of the Constitution, including the rights not be deprived of freedom arbitrarily or without just cause in section 12(1)(a) of the Constitution;
- 131.4 The right to freedom of movement in terms of section 21 of the Constitution;

- 131.5 The right of access to adequate housing in terms of sections 26(1), the right not to be evicted from one's home without a court order in terms of section 26(3) of the Constitution and the right of children to shelter in terms of section 28(1)(c) of the Constitution;
- 131.6 The rights of detained persons in section 35(2) of the Constitution, including the rights to choose, and to consult with, a legal practitioner; to conditions of detention that are consistent with human dignity, including at least the provision of adequate accommodation, nutrition and medical treatment.
- 132 Moreover, it follows that any subsequent police raid and arrests of a similar nature would similarly be unlawful. Accordingly, the individual persons living in and outside the Church have a clear right not to be subject to such unlawful arrest in the future.

***Ongoing harm or a reasonable apprehension of harm***

- 133 It is evident from the facts set out above that there have been further incidents of harassment, temporary detention and threats of arrest subsequent to 3 July 2009.
- 134 In addition, several media statements issued by the SAPS and JMPD since the arrests and detention of 3 July 2009 have stated unequivocally that the arrests form part of a campaign called "Operation Chachamela", that the campaign will continue and that more arrests will be made.
- 134.1 An article in The Star on 6 July 2009 quoted JMPD Director David Tembe as saying that "*We'll have more raids*". That article has already been referred to. A second article quoted Chief Superintendent Wayne Minnaar as saying: "*This is a campaign and we will continue with it... There will be follow up operations...the focus is to clean up the city*". A copy of the article is attached, marked "PV27".
- 134.2 The Star online, along with other sources, claim that this is being done in anticipation of the World Cup in 2010, as appears from the attached article,

marked "PV28". Numerous articles have referred to the raids as a "blitz," and The Star on 7 July 2009 quoted one refugee as saying "*We've lost our papers during the raid and they will use that to come back for us.*" I attach, marked "PV29", a copy of the article.

134.3 JMPD Spokesperson Wayne Minnaar gave a radio interview to the SABC discussing the arrests of 3 July 2009. A full transcript of the interview is attached, marked "PV30". He specifically stated that the arrests were part of a larger operation, "Operation Chachamela," and that they would continue: "*the operation on Friday was part of a campaign which is ongoing. It started prior to the Confederations Cup and will be ongoing and that is to ensure that citizens and people comply with the by-laws and that we clean up the city.*" In the interview Minnaar referred several times to using the by-laws to "*clean up the city*" in advance of the World Cup in 2010.

134.4 In an article that appeared in the Star on 16 September 2009, attached as "PV30A", the then JMPD Police Chief, David Tembe, is described as being "*unbowed in his conviction*", stating that "*The city by-laws are not discriminatory. As far as we are concerned, the people in front of the High Court are loitering.*" The same article states that Tembe "*sees no point in trying to negotiate a solution*" and quotes him as saying "*Talking is for politicians. I am here to enforce the law.*"

135 On 6 July 2009, LHR addressed a letter to the SAPS, JMPD, the MEC for Safety and Security and the Gauteng Provincial Commissioner of Police, in which LHR requested an undertaking that no further arrests would take place. A copy of the letter is attached, marked "PV31". No response was received.

136 On 25 August 2009, the LRC addressed a further letter to the same recipients, enclosing a copy of LHR's letter of 6 July, noting that JMPD has continued to conduct policing operations at the Church that appear to be intended to intimidate and harass,

and again requesting an undertaking to desist from such operations. A copy of the LRC's letter is attached, marked "PV32".

137 No response was received to this letter either until 1 September 2009, when Jason Brickhill received a call from the office of the MEC for Community Safety, requesting an extension to respond to the letter. Brickhill agreed to an extension until 7 September 2009. Notwithstanding this, no response was forthcoming.

138 In the circumstances, taking into account the pattern of harassment and arrests described above, the express statements by certain Respondents that policing operations at the Church, including arrests, will continue, and the failure and/or refusal of the Respondents to provide the undertaking sought by the Applicants, the Applicants have a reasonable apprehension that further unlawful mass arrests will occur.

***No reasonable and practical alternative remedy***

139 The only other remedies available to the Applicants and the individuals whose unlawful arrest and harassment this application is intended to interdict would be to seek release, whether on bail or by the withdrawal of charges as has occurred during the mass arrests of January 2008 and July 2009 and perhaps to sue for damages for unlawful arrest.

140 It is respectfully submitted that, where it has been established that prior mass arrests were unlawful and where there is a real fear of repeat operations by the SAPS and JMPD, the Applicants and the individuals on whose behalf this application is made cannot be expected to simply wait for a fresh raid.



## SECTION 5 – UNCONSTITUTIONALITY OF THE LOITERING BY-LAW

141 As set out above, one of the purposes of this application is to seek an order striking down as unconstitutional the loitering by-law, which is regulation 13 of the "Public Road and Miscellaneous By-Laws" published in the Provincial Gazette by the City of Johannesburg in Notice 832 of 2004.

142 The loitering by-law provides:

*"13.(1) No person may –*

*(a) lie, sit stand (sic), congregate, loiter or walk, or otherwise act, on any public road in a manner that may obstruct traffic;*

*(b) jostle or loiter at or within 20 metres of the entrance of any place of public worship during the time of divine service or during an assembly at the place of worship or departure from such place of the congregation so as to obstruct or annoy any person going to, attending at, or leaving such place of worship.*

*(2) Any person contravening subsection (1) must, upon instruction by an authorised official, discontinue doing so."*

143 "Public road" is defined in regulation 1(1) to mean "a square, road, *sidewalk*, island in a road, subway, avenue, bridge, public passageway and any thoroughfare shown on the general plan of a township or in respect of which the public has required a prescriptive or other right of way and which is vested in the council..." (emphasis added).

144 Since this broad definition of public roads includes sidewalks, the meaning of "traffic" in regulation 13 must necessarily extend beyond vehicles and include pedestrian and other use of public roads. Certainly that is the manner in which the SAPS and JMPD appear to understand it.



145 An "authorised official", which is referred to in regulation 13(2) is defined in regulation 1(1) to include a member of JMPD or "any person authorised in writing as such by the Council".

146 The loitering by-law must be read with regulation 30, dealing with offences and penalties, which provides:

*"30. Any person who –*

- (a) contravenes or fails to comply with any provision of these By-laws;*
- (b) fails to comply with any notice issued in terms of these By-laws; or*
- (c) fails to comply with any lawful instruction given in terms of these By-laws; or*
- (d) who obstructs or hinders any authorised representative or employee of the Council in the execution of his or her duties under these By-laws,*

*is guilty of an offence and liable on conviction to a fine or in default of payment to imprisonment for a period not exceeding six months, and in the case of a continuing offence, to a further fine not exceeding R50, or in default of payment, to imprisonment not exceeding one day, for every day during the continuance of such offence, after a written notice has been issued by the Council, and served on the person concerned, requesting the discontinuance of such offence."*

147 Accordingly, the effect of regulation 13, read with regulation 30, includes, among other things, the following:

147.1 No person may lie, sit, stand, loiter or walk, or otherwise act, in a manner that may obstruct traffic, including pedestrians, on a sidewalk.

147.2 Any person acting in such a way must, on the instruction of a member of JMPD or other authorised official, cease to do so.

147.3 Any person acting in the way described in sub-paragraph 101.1 or failing to follow an instruction issued as described in sub-paragraph 101.2 commits a criminal offence.

148 As a result, the loitering by-law is so vague as to catch within its ambit an extraordinarily broad array of activities. This includes, purely by way of example:

148.1 A person standing or sitting on the sidewalk having a conversation;

148.2 A person standing or sitting on the sidewalk to eat lunch;

148.3 A person sleeping on the sidewalk;

148.4 A person engaged in an otherwise lawful protest on the sidewalk.

149 Wherever such activities occur in a way that *may* obstruct traffic, the persons concerned are committing a criminal offence. This is irrespective of whether and to what extent traffic is actually being obstructed. It is also irrespective of whether the persons concerned are homeless and have anywhere else to go.

150 Moreover, when read with regulation 30, the person concerned is committing an offence even before being instructed to move by an authorised official. As such, this provision appears to authorise police authorities to treat such behaviour as a criminal offence that is in progress.

151 The vagueness of the by-law encourages an arbitrary enforcement of the law. In a recent radio interview on Talk 702 (the Redi Direko show) the JMPD spokesperson, Edna Mamonyane, was not sure of the correct interpretation of the by-law.

151.1 Ms Mamonyane said "loitering is when you are standing in or at a place the whole day or you're laying down. We have people who will actually even nap at the park." According to Mamonyane, responding to Redi Direko's statement that even "basking in the sun" is made illegal by the by-law, "it has been very difficult for us...to enforce loitering."



- 151.2 Regarding enforcement of the by-law, Mamonyane said that "we might not even try and arrest these people for loitering because you would have to issue them with a fine. But then that person has got to have a valid ID so you can be able to trace them. And a residential address. So these people who don't have anything, you have to take them in to the Police Station so that they can pay the spot fine and then be released." This in particular seems to target the homeless.
- 151.3 Mamonyane also discussed the "clean-up" efforts of the Police and its effectiveness: "In the operation we did about three weeks ago...it was like 700 plus people that were in front of the High Court... As I speak to you, there is not even a single soul in front of the High Court. The place is clean because we had to bring in...Pikitup to come and help us so that we can clean up the place. The Roads Agency as well. We needed to clean up."
- 151.4 The transcript of this radio show is attached hereto as "PV33". A digital recording will also be made available to the Court, should the Court consider it necessary.
- 152 Nor does the by-law appear to require any form of intent. The intent of the person said to be loitering, including whether they intend to obstruct traffic, appears to be irrelevant. Therefore the offence appears to be one of strict liability.
- 153 In addition, while the by-law is facially neutral, it operates disproportionately harshly on poor people. It is poor people who are, by far, most likely to be found on the streets or pavements in situations where an arrest for loitering is likely to occur. It is poor people who are most likely to sit, stand, sleep or lie on the streets or pavements in manner that obstructs traffic. Indeed, this case demonstrates as much. In the circumstances, the by-law discriminates unfairly against people on the basis of their ethnic or social origin and poverty. In addition, because the vast majority of poor people are black, the by-law discriminates unfairly against people on the basis of their race.
- 154 The discriminatory use of the law is reflected in the statements by Ms. Mamonyane in the radio interview referred to above. In response to a caller who had been arrested for

loitering even though she had been shopping, Ms Mamonyane stated: "I don't know why they decided that you were loitering," to which Redi Direko responded, "but I suspect that it had a lot to do with them [the police officers] thinking that you were an illegal immigrant and then upon finding out that your documents were in order they charged you with that."

155 The use of the by-law is disturbingly reminiscent of the use of pass laws during apartheid in order to control the movement of people in the cities.

156 In light of the above, it is submitted that the loitering by-law is inconsistent with the Constitution, in particular the following rights:

156.1 The right to equality in section 9 of the Constitution, including the right to equality before the law in section 9(1) and the prohibition on unfair discrimination in section 9(3) of the Constitution;

156.2 The right to human dignity in section 10 of the Constitution;

156.3 The right to freedom and security of the person in section 12 of the Constitution, including the rights not be deprived of freedom arbitrarily or without just cause in section 12(1)(a) of the Constitution;

156.4 The right to freedom of expression in section 16 of the Constitution;

156.5 The right to assemble, demonstrate and picket in terms of section 17 of the Constitution;

156.6 The right to freedom of movement in terms of section 21 of the Constitution;

156.7 The right of access to adequate housing in terms of sections 26(1) and the right not to be evicted from one's home without a court order in terms of section 26(3) of the Constitution;

156.8 The right of children to shelter in terms of section 28(1)(c) of the Constitution;



156.9 The right to a fair trial in terms of section 35(3) of the Constitution, including the right to be presumed innocent in terms of section 35(3)(g) of the Constitution; and

156.10 The requirement that all laws be sufficiently clear and precise, rational and not arbitrary, as is required by the rule of law.

157 Further legal submissions in this regard will be made at the hearing of this matter.

### CONCLUSION

158 I am advised and submit that the Applicants have satisfied the requirements for declaratory relief in respect of the arrests and detentions of the weekend of 3 July 2009 and established a basis for interdictory relief in relation to future such arrests and detentions at the Church.

159 In addition, for the reasons set out above, the Applicants have satisfied the requirements for an order that the loitering by-law is inconsistent with the Constitution and invalid.

**WHEREFORE** I pray for an order as contained in the notice of motion to which this affidavit is attached.

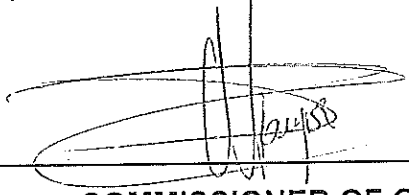


PAUL VERRY

I HEREBY CERTIFY that the Deponent has acknowledged that s/he knows and understands the contents of this affidavit, which was sworn to and signed before me at



JOHANNESBURG this 28<sup>th</sup> day of October 2009 in compliance with the regulations contained in Government Notice R.1258, dated 21 July 1972, as amended.



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COMMISSIONER OF OATHS

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