REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 3378/07

In the matter between:

THE SEX WORKER EDUCATION AND ADVOCACY TASK FORCE	Applicant
and	
THE MINISTER OF SAFETY AND SECURITY	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Second Respondent
THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE FOR THE WESTERN CAPE PROVINCE	Third Respondent
THE STATION COMMISSIONER, WYNBERG POLICE STATION	Fourth Respondent
THE STATION COMMISSIONER, WOODSTOCK POLICE STATION	Fifth Respondent
THE STATION COMMISSIONER, CLAREMONT POLICE STATION	Sixth Respondent
THE STATION COMMISSIONER, SEA POINT POLICE STATION	Seventh Respondent
THE CITY OF CAPE TOWN	Eighth Respondent

JUDGMENT DELIVERED: 20 APRIL 2009

FOURIE, J:

INTRODUCTION

[1] Applicant is a nonprofit organisation registered as such in terms of Act No. 71 of 1997, which seeks to promote the health and human rights of sex workers. It has approached the Court for relief aimed at preventing the alleged continued unlawful and wrongful arrest of sex workers by members of the South African Police Service ("the SAPS") in the Cape Metropolitan area and members of the Cape Town City Police ("the City Police") in the area of jurisdiction of eighth respondent. The sex workers concerned are predominantly outdoor sex workers rather than ones who ply their trade indoors.

[2] Applicant has the necessary standing to bring this application in terms of the provisions of sec 38 of the Constitution of the Republic of South Africa, Act No. 108 of 1996 ("the Constitution"). It seeks an order:

> *"1. Declaring that no member of the South African Police Service in the Cape Metropolitan area and no member of the Cape Town City Police is entitled to arrest sex workers for an ulterior purpose.*
>
> *2. Interdicting and restraining all members of the South African Police Service in the Cape Metropolitan area and of the Cape Town City Police from:*

2.1 unlawfully arresting sex workers;

2.2 in particular, arresting sex workers only to harass, punish or intimidate them or for any other ulterior purpose not sanctioned by law.

3. Directing the first, second, third, fourth, fifth, sixth and seventh respondents to take all steps reasonably necessary, within their respective areas of responsibility and authority, to prevent members of the South African Police Service in the Cape Metropolitan area and of the Cape Town City Police from unlawfully arresting sex workers, in particular by arresting them only to harass, punish or intimidate them or for any other ulterior purpose, not sanctioned by law."

[3] Applicant contends that it is entitled to this relief on two distinct causes of action. Firstly, that sex workers are often arrested in violation of the principle of legality and, secondly, that members of the SAPS and the City Police routinely use the powers of arrest conferred by the Criminal Procedure Act No. 51 of 1977 ("the CPA") to arrest sex workers for the ulterior purpose of harassing them rather than for the lawful purpose of having them prosecuted. It seems to me that the "ulterior purpose" cause of action may, strictly speaking, also be described as a breach of the principle of legality, as the power of arrest is allegedly used for a purpose not authorised by the CPA. See the remarks of Harms DP in **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at 295

A-E (paras. 37 and 38). However, for the sake of convenience, I will continue to use the "ulterior purpose" label given to it by applicant.

[4] Respondents oppose the application and it is clear from the affidavits filed by the parties that there are material disputes of fact. As no application was made for the referral of the matter to oral evidence, applicant would only be entitled to the relief sought if the facts as stated by respondents, together with the admitted facts in applicant's affidavits, justify such an order, or when it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted. See **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd** 1957(4) SA 234(C) at 235 E-G. In **Plascon–Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at 634 H-I, Corbett JA held that in certain cases the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If, in such a case, the respondent has not applied for the deponents concerned to be called for cross-examination, and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness of that averment and include same among those upon which it determines whether the applicant is entitled to the final relief it seeks.

FACTUAL BACKGROUND

[5] The founding papers contain wide-ranging allegations from or about sex workers, as well as thirteen confirmatory affidavits from current or former sex workers. These include details of alleged mistreatment or other inappropriate behaviour by the SAPS and the City Police, all of which have been denied by the relevant respondents. In its replying affidavit, however, applicant has adopted the attitude that it seeks relief from the court only on a matter of principle, in regard to which, applicant contends, there is, on a proper analysis of respondents' answering affidavits, no real factual dispute. The matter of principle, is whether it is lawful for members of the SAPS and the City Police to arrest and detain sex workers in circumstances where they know with a high degree of probability that no prosecution will result. Applicant contends that the details of the arrests of individual sex workers, as well as the allegations by particular sex workers of mistreatment or other inappropriate behaviour by the SAPS or the City Police, play no role in the determination of this point of principle. It maintains that the SAPS and the City Police know very well that sex workers are virtually as a matter of course not prosecuted after having been arrested. This, says applicant, is not seriously in issue, as the SAPS and the City Police effectively acknowledge that this is the position.

[6] It will be immediately apparent that the factual basis for the relief sought, as articulated by applicant in reply, is far more restricted than that relied upon in the founding affidavit. As alluded to hereinbefore, the issue for determination on this restricted basis, is whether the sex workers are arrested in circumstances where the arresting officers know with a high degree of probability that no prosecution will result and, if so, whether this renders the arrests unlawful.

[7] A reading of the affidavits filed on behalf of respondents, in my view, justifies the conclusion that respondents do not seriously dispute that the sex workers are arrested in circumstances where the arrestors know with a high degree of probability that the arrestees will not be prosecuted. A brief analysis of respondents' allegations in this regard will suffice.

[8] In his affidavit, Mr. Cloete, the SAPS senior legal officer in the Western Cape, who deposed to an affidavit on behalf of the first, second and third respondents, claims to have no knowledge as to whether sex workers are seldom prosecuted in Court following their arrest. However, later on in his affidavit, he admits that it emerges clearly from the statements made by arresting officers to sex workers, that members of the SAPS are aware that sex workers are virtually as a matter of course not

prosecuted. He adds that during the period 2000 to 2005 he had numerous discussions with the senior public prosecutors in the Western Cape, concerning "the failure by the prosecutors to prosecute regarding prostitution-related cases". This appears to have been in response to complaints from certain station commissioners that "they would arrest sex workers the one day and they would be not be prosecuted." They apparently referred to this process as the "revolving door" scenario where there are no consequences for the unlawful conduct of sex workers after an arrest.

[9] The SAPS station commissioners, i.e. fourth to seventh respondents, also claim that they have no knowledge as to whether sex workers are seldom brought to Court following arrest. However, since police officers under their command effected the arrests of the sex workers described in the founding papers, it is inconceivable that they would not know in general terms what happens to the sex workers so arrested. If the station commissioners believed the true position to be other than as stated in the founding papers, they would no doubt have denied the allegations in this regard and produced evidence to the contrary.

[10] In his affidavit Mr. Kiewitt, the former station commissioner of Claremont, annexes a copy of the record of arrests of sex workers for the period January to December 2006 in Claremont. This records 106 arrests, of which not one resulted in a prosecution. In each instance, the record reflects a withdrawal at court of the charge against the arrested person.

[11] It is significant to note that the documents forming part of the answering papers of first to seventh respondents, disclose that police dockets, which are normally prepared by the SAPS following an arrest, for submission to the public prosecutor who has to take the decision whether to prosecute or not, are generally not opened in respect of arrests of sex workers. These annexures also show that during the period 29 September 2005 to 22 February 2007, no police dockets were opened in respect of the arrests of sex workers for "loitering", a charge often preferred by the arrestors.

[12] Mr. Jonas, the Chief of the City Police, has deposed to an affidavit on behalf of eighth respondent. He, too, does not directly refute the allegation that it emerges clearly from the statements made by arresting officers to sex workers, that members of the SAPS and the City Police are aware that sex workers are virtually as a matter course not prosecuted. In

effect, he falls back on the defence that it is not the fault of the City Police that there is no prosecution.

[13] The confirmatory affidavits of the sex workers confirm the absence of any prosecutions. A few examples will suffice. One sex workers describes having been arrested approximately 200 times during the last six years, but never prosecuted. Another claims that that she has been arrested over a 100 times, without being prosecuted. Of the 32 recent arrests described in the supporting affidavits of the sex workers, only three have resulted in court appearances, but all charges were subsequently withdrawn. And so the tale continues. The theme which clearly emerges from the affidavits of the sex workers, is that after their arrests, they are invariably detained overnight in the police cells whereafter they are usually taken to the magistrate court cells the next morning, where they are released after being detained for a few hours.

[14] This pattern of conduct is also borne out by the records of the Wynberg police station, which show that a certain sex worker had been arrested six times in 2005 and 2006 on a charge of "loitering with the intent to commit prostitution", however it is reflected that she has no criminal record.

[15] In view of this evidence, I conclude that no real, genuine or *bona fide* dispute exists in this regard and that applicant has shown, on a balance of probabilities, that the arrests of sex workers during the period referred to in the founding affidavit and the confirmatory affidavits of the sex workers, took place in circumstances where the arresting officers knew with a high degree of probability that no prosecutions would result.

ULTERIOR PURPOSE

[16] I first consider applicant's cause of action based on the arrest of sex workers for an ulterior purpose, whereafter I will deal with the cause of action founded on the violation of the principle of legality.

[17] The gravamen of applicant's case in regard to the ulterior purpose cause of action, is that as the SAPS and the City Police know with a high degree of probability that the sex workers will not be prosecuted, the arrests are made without any legitimate purpose and are accordingly unlawful. In this regard applicant relies on the principle enunciated in **Van Eck, NO, and Van Rensburg, NO, v Etna Stores** 1947(2) SA 984 (A) at 996, that when a public official is given a power for a particular purpose, that power cannot be used for obtaining any other object, however laudable. At 997 the Appellate Division stated that:

> *"To pretend to use a power for the purpose for which alone it was given, yet in fact to use it for another, is an abuse of that power and amounts to mala fides."*

The Constitutional Court has confirmed the correctness of the approach adopted in **Van Eck.** See **Bernstein and Others v Bester and Others NNO** 1996(2) SA 751 (CC) at 780 G-H and **Ex Parte Speaker of the National Assembly: I*n Re* Dispute Concerning the Constitutionality of Certain Provision of the National Education Policy Bill 83 of 1995,** 1996(3) SA 289 (CC) at 305 D-E.

[18] The power to arrest without a warrant is granted to a peace officer in terms of sec 40 of the CPA. In considering the lawfulness of an arrest, it should be borne in mind that sec 12(1) of the Constitution protects each person's right to freedom, which includes the right not to be deprived of his or her freedom arbitrarily or without just cause. Section 35(2)(d) of the Constitution accordingly provides that every detained person has the right to challenge the lawfulness of his or her detention before a court and, if the detention is unlawful, to be released. In view of the high premium placed upon a person's right to freedom in terms of the Constitution, an arrest is *prima facie* wrongful and unlawful and it is for the arrestor to prove that the arrest was lawful. See **Louw and Another v Minister of Safety and Security and Others** 2006(2) SACR 178 (T);

Minister of Justice and Constitutional Development v Zealand [2007] 3 All SA 588 (SCA) at 590 (para. 4) and **Brown and Another v Director of Public Prosecutions and Others** 2009(1) SACR 218 (C) at 221 d-i.

[19] In the decision of **Minister van Wet en Orde v Matshoba** 1990(1) SA 280 (A), at 285J – 286D, the following was held in regard to the onus of proof and the evidence to be produced by a person who had been deprived of his or her freedom and liberty:

> *"Daar is nie veel gesag in ons reg oor wat 'n aansoekdoener wat hom oor sy vryheidsberowing bekla, in sy stukke behoort te beweer nie. Die analoge geval van 'n eienaar wat by wyse van 'n rei vindicatio die besit van sy eiendom terugvorder, het egter heelwat aandag geniet en kan tot 'n mate van hulp wees. In 'n lang reeks sake is daar beslis dat so 'n eienaar aanvanklik slegs hoef te beweer dat hy die eienaar van die saak is en dat die verweerder dit hou. Die bewyslas is dan op die verweerder om aan te dui kragtens watter reg hy aanspraak maak op besit van die eiser se saak..... Die reg op persoonlike vryheid is meer fundamenteel as eiendomsreg, en daar kan myns insiens geen twyfel bestaan dat 'n persoon wat teen sy aanhouding beswaar maak, in eerste instansie niks meer hoef te beweer as dat hy deur die verweerder of respondent aangehou word nie (waarskynklik hoef hy nie eers te beweer dat die aanhouding wederregtelik of teen sy sin is nie - sien Chetty v Naidoo (supra op 20D - E)). Die verweerder of respondent dra dan die bewyslas om die aangehoudene se aanhouding te regverdig."*

[20] It has often been stressed by our Courts that the purpose or object of an arrest must be to bring the suspect before a court of law, there to face due prosecution. In **Ex parte Minister of Safety and Security and Others: In Re S v Walters and Another** 2002(4) SA 613 (CC), it was put as follows at 640 H- 641 A (para. 50):

> *"The express purpose of arrest should be remembered. It is a means towards an end. Chapter 4 of the CPA lists the four legally permissible methods of securing the presence of an accused in court. The first of these is arrest. Chapter 5 then sets out the rules which govern the application of this process in aid of the criminal justice system. Whatever these individual rules may say, …… the fundamental purpose of arrest - and the main thrust of everything that goes with it under chapter 5 - is to bring the suspect before a court of law, there to face due prosecution."*

[21] In **Tsose v Minister of Justice and Others** 1951(3) SA 10 (A), at 17 C-H, the Appellate Division dealt as follows with the distinction between the object and motive of an arrest made by a peace officer without a warrant of arrest:

> *"If the object of the arrest, though professedly to bring the arrested person before the court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearing in court, the arrest is, no doubt, unlawful. But if the object of the arrestor is to bring the*

arrested person before the court in order that he may be prosecuted to conviction and so may be led to cease to contravene the law the arrest is not rendered illegal because the arrestor's motive is to frighten or harass the arrested person into desisting from his illegal conduct. An arrest is not unlawful because the arrestor intends and states that he intends to go on arresting the arrested person till he stops contravening the law if the intention always is after arrest to bring the arrested person duly to prosecution. In such a case the only remedy of the arrested person would be an action for malicious prosecution in which he would have to prove not only an improper motive but also the absence of reasonable cause for the prosecution. An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such an arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal."

[22] Further, with regard to the object or purpose of an arrest, the Appellate Division held as follows in **Duncan v Minister of Law and Order** 1986(2) SA 805 (A) at 820 C-E:

" ..... an arrest without warrant is not unlawful merely because the arrestor intends to make further investigation before deciding whether to release the arrestee or to proceed with a prosecution as

contemplated by s 50 (1). If the object of the arrestor is to do just that, it cannot be said that he acted with an extraneous or ulterior purpose such as SCHREINER JA had in mind in Tsose's case…… Put negatively, an arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court."

It is not suggested by respondents that the arrests of sex workers were made with the object of carrying out further investigation before prosecuting the arrestees. On the contrary, respondents contend that the sex workers are arrested because they commit criminal offences in the presence of the arresting officers. No further investigation would thus be required before prosecuting the sex workers.

[23] It was argued on behalf of applicant that the arrests of sex workers with the knowledge that prosecutions would not follow, are unlawful as the arrests are not also accompanied by the requisite purpose of having the arrestees prosecuted. Applicant contends that, in the circumstances, the purpose of the arrests is an ulterior one, namely to harass, punish or intimidate the sex workers.

[24] It was argued on behalf of respondents that the police are, in terms of sec 205 (3) of the Constitution, obliged to carry out the arrests of sex workers as part of their crime prevention duties. They contend that it would be unprecedented to order an organ of State not to carry out the

duties which it is constitutionally obliged to do. This, it was argued, would intimidate police officers into not making arrests, thereby causing them to fail in their duty to prevent crime.

[25] It was emphasised on behalf of respondents that by arresting the sex workers, the police officers intended to have them prosecuted, but that the prosecuting authorities have failed to do so. It was argued that the blame for the failure to prosecute the sex workers can accordingly not be laid at their door. The City Police added that, in any event, their members have no control over whether prosecutions are brought, or even for how long arrested persons are detained by the SAPS. This is so, by virtue of the provisions of sec 64H of the South African Police Service Act, No. 68 of 1995, which requires a person arrested by a member of a municipal police service, to be brought as soon as possible to a police station under the control of the SAPS. Finally, respondents submitted that applicant's failure to have joined the National Prosecuting Authority ("the NPA") in this application, is fatal.

[26] Whilst accepting that police officers are constitutionally obliged to carry out arrests as part of their crime prevention duties, and that the discretion whether or not to prosecute any particular case vests in the NPA in terms of sec 179(2) of the Constitution, it should be borne in

mind that the peace officer making an arrest must do so with the object of bringing the arrestee under the physical control of the State to enable the prosecuting authority to institute criminal proceedings in appropriate cases. I agree with the submission on behalf of applicant, that in the circumstances prevailing in the instant matter, the peace officers who effected the arrests of the sex workers during the relevant period, did not do so with the required object or purpose of having the sex workers prosecuted. This is so because they knew with a high degree of probability that no prosecutions would follow.

[27] In their answering affidavits respondents stressed that the arresting officers wished to have the sex workers prosecuted, but that it is for the prosecuting authorities to decide whether or not to do so. I agree with the submission on behalf of applicant, that respondents are in this regard confusing desire and purpose. Even if the arresting officers wished to have the sex workers prosecuted, they knew with a high degree of probability that it would not happen. The history of arrests without prosecution recounted by the sex workers, as well as respondents' own records, confirm that, to the knowledge of the arrestors, sex workers are virtually as a matter of course not prosecuted after having been arrested. A peace officer who arrests a person, knowing with a high degree of

probability that there will not be a prosecution, acts unlawfully even if he or she would have preferred a prosecution to have followed the arrest.

[28] I accordingly conclude that arrests of sex workers in circumstances where, as I have already found, the peace officers know with a high degree of probability that no prosecutions will follow, are unlawful.

LEGALITY

[29] The principle of legality is implicitly recognised in section 1(c) of the Constitution, which describes the supremacy of the Constitution and the rule of law as one of the foundational values of the Republic of South Africa. The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised. It follows that all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. See **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another** 2007(1) SA 343 (CC) at 372 I – 373 B (para 68).

[30] In argument counsel for applicant submitted that the founding papers and affidavits of the sex workers show that the sex workers were routinely arrested on the basis of non-existent statutory powers or in circumstances where the statutory powers upon which respondents rely,

do not authorise the arrests. Applicant accordingly contended that the arrests violate the principle of legality. In view of the conclusion that I have reached in regard to applicant's cause of action based on the principle of legality, it is not necessary for me to consider the details of the arrests relied upon by applicant in this regard. It will suffice to say that there had been occasions when arrests were made on the strength of non-existent or inapplicable statutory provisions.

[31] Counsel for the SAPS and the City Police submitted that the introduction of this cause of action is not permitted. They argued that it has it not been identified as a cause of action in the founding affidavit, while in its replying affidavit, applicant has expressly confined its case to the ulterior purpose cause of action.

[32] It is trite that an applicant in motion proceedings must identify its cause of action and set out the facts upon which it relies in order to substantiate the cause of action, in its founding affidavit. In **Director of Hospital Services v Mistry** 1979(1) SA 626 (A), Diemont JA put it as follows at 635 H – 636 A:

> *"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by*

KRAUSE J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:

> *'... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'."*

[33] The founding papers and confirmatory affidavits of the sex workers contain certain references to non-existent or incorrect statutory provisions in terms of which sex workers were arrested, but in the main the foundation of the application is the ulterior purpose cause of action. Had it not been for the stance taken by applicant in its replying affidavit, I may have been persuaded that the references to these statutory provisions in the founding papers, would have sufficed. However, in view of the restriction of the basis on which it seeks relief, as set out in the replying affidavit, applicant is, in my opinion, not entitled to resurrect its legality cause of action in argument.

[34] I am of the view that, at best for applicant, it would be entitled to argue that the arrests made in terms of non-existent or incorrect statutory provisions, serve as illustration that the SAPS and the City Police did not

anticipate the eventuality of an ensuing prosecution when they arrested the sex workers.

RELIEF SOUGHT BY APPLICANT

[35] I now deal with the relief sought by applicant, namely declaratory and interdictory relief.

[36] It is trite that a Court has a discretion to grant declaratory relief in terms of sec 19(1)(a)(iii) of the Supreme Court Act, No 59 of 1959. In **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005(6) SA 205 (SCA) at 213 E-G, it was held that the said section requires a two-stage approach. Firstly, the Court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. Secondly, if the Court is satisfied that such an interest exists, it must be considered whether or not the order should be granted. This latter stage involves the exercise of a discretion with due regard to the circumstances of the case.

[37] As explained by **Erasmus, Superior Court Practice,** at A1-34/34A, a Court may, in the exercise of its discretion whether to grant or refuse a declaratory order, decline to deal with the matter where there is no actual dispute. It may also, in the exercise of its discretion, decline

to grant a declaratory order if it regards the question raised before it as hypothetical, abstract and academic. Nor will a Court grant a declaratory order where the issue has already been decided by a Court of competent jurisdiction, or where the legal position has been clearly defined by statute. See **Garment Workers' Union, Western Province and Another v Industrial Registrar and Another** 1967 (4) SA 316 (T). In **Naptosa and Others v Minister of Education, Western Cape and Others** 2001(2) SA 112 (C) at 125 D, Conradie J (as he then was) emphasized that:

> *"A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved….. A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a cause of action, would entitle the litigant to an appropriate remedy. "*

[38] It has been argued on behalf of applicant, that in view of the infringement of the constitutional rights of the sex workers, it is entitled to invoke sec 172(1)(a) of the Constitution, which provides that when deciding a constitutional matter within its power, a Court must declare any law or conduct that is inconsistent with the Constitution, invalid to the extent of its inconsistency. Reliance was also placed on sec 172(1)(b)

of the Constitution which provides that in such event a Court may make any order that is just and equitable.

[39] Applicant contends that by arresting the sex workers for an ulterior purpose, the SAPS and the City Police violate their rights to dignity and freedom, enshrined in sections 10 and 12 of the Constitution. It is accordingly submitted that applicant is, by virtue of the provisions of sec 172(1)(a) of the Constitution, entitled to the declaratory relief sought in paragraph 1 of the Notice of Motion.

[40] This raises the question whether a Court has a discretion to refuse a declaratory order in a constitutional matter. I did not understand it to be argued on behalf of applicant, that section 172 (1) (a) of the Constitution deprives a Court of its discretion to grant or refuse a declaratory order. In my view, a Court retains this discretion, whether or not constitutional issues are involved.

[41] In **JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others** 1997(3) SA 514 (CC), the Constitutional Court considered sec 98(5) of the Interim Constitution (Act 200 of 1993), which is similar to sec 172(1)(a) of the final Constitution. It concluded that a declaratory order is a discretionary remedy and the discretion to grant same ought not to be exercised in favour of deciding points which are

merely abstract, academic or hypothetical. Didcott J put it as follows at 525 A-C:

> *"…. a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible."*

The correctness of the approach adopted in the **JT Publishing** case was confirmed by the Constitutional Court in **Islamic Unity Convention v Independent Broadcasting Authority and Others** 2002 (4) SA 294 at 302 D-F.

[42] In any event, it appears to me that, insofar as the constitutional rights of sex workers have been infringed by the conduct of the SAPS and/or the City Police, the declaratory order which applicant seeks is rather covered by sec 38 of the Constitution. This section provides that anyone listed in the section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened,

and the Court may grant appropriate relief, including a declaration of rights. In such event, the Court is clearly vested with a discretion to grant or refuse the declaratory order, having regard to the peculiar circumstances of the case. I am of the view that what applicant seeks is not a declaration of invalidity in terms of sec 172(1)(a) of the Constitution, but a declaration of rights as envisaged in sec 38 of the Constitution.

[43] The order sought in paragraph 1 of the Notice of Motion, is that members of the SAPS and the City Police are not entitled to arrest sex workers for an ulterior purpose. As I understand applicant's case, an "ulterior purpose" is a purpose other than the purpose of bringing the arrested person before a Court (or at least to conduct further investigation) with the view of having him or her prosecuted. The difficulty that I have with a declaration of rights in these terms, is that the issue on which applicant seeks the declaration, has already been decided by courts of competent jurisdiction, i.e. the former Appellate Division and the Constitutional Court. See: **Tsose v Minister of Justice and Others,** *supra;* **Duncan v Minister of Law and Order**, *supra*, and **Ex Parte Minister of Safety and Security and Others**,*supra*.

[44] It seems to me that if I were to grant an order in terms of paragraph 1 of the Notice of Motion, I would merely be restating the law in regard to the purpose of an arrest without a warrant in terms of sec 40 of the CPA. Put differently, there can be no dispute that an arrestor is not entitled to make an arrest in terms of sec 40 of the CPA for an ulterior purpose, i.e. a purpose other than to have the arrestee prosecuted.

[45] It follows, in my view, that the granting of the declarator sought by applicant, would infringe upon the well-established policy which directs a Court not to exercise its discretion in favour of deciding issues that are merely abstract, academic or hypothetic. I therefore conclude that applicant is not entitled to the declaration of rights which it seeks in paragraph 1 of the Notice of Motion.

[46] The requirements for the granting of a final interdict are trite, namely, a clear right; injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy available to the applicant. See **Setlogelo v Setlogelo** 1914 AD 221.

[47] As explained by **Prest, The Law and Practice of Interdicts**, p44, the "injury" actually committed or reasonably apprehended, means an act of interference with, or an invasion of, an applicant's right and resultant prejudice. The injury must be a continuing one. The Court will not grant

an interdict restraining an act already committed, for the object of an interdict is the protection of an existing right; it is not a remedy for the past invasion of rights. However, a past infringement of rights may constitute evidence upon which the Court implies an intention to continue in the same course. See **Philip Morris Inc and Another v Marlboro Shirt Co SA Ltd and Another** 1991(2) SA 720 (A) at 735 B and **Stauffer Chemicals Chemical Poducts Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company** 1988 (1) SA 805 (T) at 809 F.

[48] An unlawful arrest constitutes an infringement of the arrested person's rights under sections 10 and 12 of the Constitution. I have found that the arrests of the sex workers had been made in circumstances where the arrestors did not have the necessary lawful object, namely to ensure a prosecution. Applicant has therefore established, on a balance of probabilities, the right which it seeks to protect by means of interdictory relief, as well as an infringement thereof. However, the question remains whether applicant has shown that the infringement of the rights of the sex workers, is a continuing one.

[49] The latest incidents of arrest of sex workers on which applicant relies, date back at least 27 to 36 months. Respondents accordingly argued that applicant has not produced evidence to show that a future

infringement of the rights of sex workers is reasonably apprehended. Eighth respondent also contended that, apart from one sex worker whose complaints were investigated and found to be without merit, there had been only nine arrests involving six sex workers, by the City Police during the period February 2006 to December 2006. It was submitted that this does not represent a sufficiently representative sample from which reliable inferences can be drawn regarding possible future arrests of sex workers by members of the City Police.

[50] As I have previously mentioned, proof of a past infringement of rights may constitute evidence upon which a court may imply an intention to continue in the same course. Applicant urged me to find that, having regard to the history of the arrests of the sex workers in the past, it is reasonable to imply that arrests by the SAPS and the City Police, without the required lawful object, will continue in the future.

[51] The submissions made on behalf of respondents in this regard, do not, in my opinion, take sufficient account of the body of evidence produced by applicant. In particular, it should be borne in mind that, apart from the latest incidents, some of the sex workers have given an account of their frequent arrests over an extended period of time. In so doing, members of both the SAPS and the City Police are regularly identified as

the arresting officers. One sex worker says that in the last year and a half she has been arrested by members of the SAPS and the City Police on a regular basis. Another estimates that she had been arrested over 200 times in the last six years. According to her, these arrests were made by members of the SAPS and the City Police. Yet another sex worker says that in the last three years she had been arrested more than fifty times. From the latest incidents described by her, it appears that she had been arrested by members of the SAPS and the City Police. I am accordingly of the view that in the case of both the SAPS and the City Police, the history detailed by the sex workers represents a sufficiently representative sample from which reliable inferences can be drawn.

[52] Counsel for respondents also submitted that applicant should not be granted relief as it has failed to bring the court up to date regarding the more recent state of arrests of sex workers. In my view, this submission loses sight of the fact that the records of recent arrests of sex workers and their prosecution (if any) would be peculiarly within the knowledge and possession of the SAPS and, possibly, the City Police. I would have expected that, had there been a change of policy, particularly in regard to prosecutions following upon the arrests of sex workers, the SAPS and the City Police would have placed such information before the Court. As stated by applicant in reply, it is generally difficult for applicant to

contact sex workers, who tend to be itinerant, with the result that applicant's contact with them is largely dependent on sex workers approaching it, rather than the other way around. One would therefore rather have expected the SAPS and the City Police, who have access to the necessary records and documentation, to have placed any relevant fresh information before the court. Put differently, I believe that the failure of respondents to place such information before the court, justifies the inference that there has been no material change in the pattern of conduct which emerges from the founding papers, viz that sex workers are seldom, if ever, prosecuted after being arrested. To this I should add that it is significant to note that notwithstanding undertakings by the Director of Public Prosecutions, Western Cape, in 2001, to instruct prosecutors to prosecute cases of prostitution, no prosecutions seem to have followed. It appears to be common knowledge that due to the clogged rolls of the lower courts, or even due to policy considerations, sex workers are seldom, if ever, prosecuted after having been arrested.

[53] I accordingly conclude that the reasonable inference to be drawn from the evidence before the court, is that arrests of sex workers by the SAPS and the City Police, without the required lawful object or purpose, namely to ensure the prosecution of the sex workers, will probably continue in the future.

[54] It was submitted on behalf of some of the respondents, particularly the eighth respondent, that interdictory relief should not be granted, as alternative remedies are available to sex workers. In particular, reference was made to the availability of internal police complaint procedures. However, the internal complaint procedures do not appear to constitute a satisfactory alternative remedy. The deponent to applicant's founding affidavit has dealt with the unsatisfactory response and results that applicant experienced in the cases where it attempted to rely on internal police complaint procedures. These procedures are by their very nature cumbersome and do not address the real issue, namely the arrest of sex workers in circumstances where the arrestors know with a high degree of probability that no prosecutions will follow.

[55] In the granting or withholding of interdicts the court possesses large discretionary powers. See Prest, **The Law and Practice of Interdicts**, page 233 – 253. These discretionary powers must be exercised on a judicial basis, i.e. not arbitrarily or capriciously, but on sound principle and for substantial reasons. All the relevant circumstances are to be taken into account before an interdict is granted.

[56] Respondents argue that the granting of an interdict would intimidate peace officers into not arresting sex workers, thereby causing

them to fail in their constitutional duty to prevent crime. In this regard they contend that all the police can do is to perform the arrest and then leave it up to the prosecuting authority to carry out its prosecutorial duty. However, whilst accepting that the prosecuting authority exercises an independent discretion in deciding whether or not to prosecute any particular case, one should not confuse this power to institute criminal proceedings on behalf of the State with the exercising of the power of arrest by a peace officer in terms of section 40 of the CPA. A peace officer who arrests a person without a warrant must do so with the purpose of bringing such person under the physical control of the State to enable the prosecuting authority to institute criminal proceedings in appropriate cases. Where, as in the instant case, the peace officer knows, with a high degree of probability, that the prosecuting authority seldom, if ever, exercises its discretion to institute criminal proceedings, the arrest is unlawful as same is not accompanied by the requisite lawful purpose of bringing the arrestee before a court. It is this unlawful conduct which applicant seeks to have interdicted. In these circumstances there is, in my view, no need to join the NPA as a party in this application.

[57] Respondents further maintain that the granting of an interdict would be pointless as it would only amount to a restatement of the law with regard to the making of a warrantless arrest by a peace officer. I do

not agree. The pattern of police conduct described hereinbefore, is directed at outdoor sex workers, a particularly vulnerable segment of our society. They are rounded up, arrested, detained and, virtually without fail, thereafter discharged without being prosecuted for any offence. I agree with the contention of applicant, that what the police are therefore targeting, is not the illegality of sex work *per se*, but rather the public manifestations of it. The arrests of the sex workers therefore amount to a form of social control. This clearly infringes on the sex workers' rights to dignity and freedom, as enshrined in sections 10 and 12 of the Constitution. This cannot be countenanced and a failure to grant the sex workers interdictory relief would, in my view, amount to the court shirking its duty as an enforcer of the law.

CONCLUSION

[58] In the light of the aforegoing, I conclude that I should exercise my discretion in favour of applicant by granting it prohibitory and mandatory relief. I am of the view that the relief sought in paragraphs 2 and 3 of the Notice of Motion is too broadly stated. It should rather be aimed at effectively restraining the arrestors from making arrests in circumstances where they know with a high degree of probability that no prosecutions will follow.

[59] As to costs, it was submitted on behalf of applicant that the matter justifies the employment of three counsel. Whilst accepting that the application raises novel and complex legal issues and that it required a substantial volume of work to be done, I am not convinced that it is one of such exceptional or extraordinary difficulty or complexity that it would be reasonable to allow the costs of two junior counsel. (See **Compagnie Interafricaine De Travaux v South African Transport Services and Others** 1991 (4) SA 217 (A) at 242A and **Fisheries Development Corporation of SA Ltd v Jorgensen and Another**; **Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others** 1980 (4) SA 156 (W) at 172).

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

1. The members of the South African Police Service in the Cape Metropolitan area and of the Cape Town City Police, are interdicted and restrained from:

    1.1 arresting sex workers in terms of section 40 of the Criminal Procedure Act No. 51 of 1977, for a purpose other than to bring the arrestees before a court of law, there to face due prosecution;

1.2 in particular, arresting sex workers while knowing with a high degree of probability that no prosecution will follow such arrests.

2. The first to seventh respondents are directed to take all steps reasonably necessary, within their respective areas of responsibility and authority, to prevent members of the South African Police Service in the Cape Metropolitan area and of the Cape Town City Police, from breaching the order in paragraph 1 above.

3. The first to eighth respondents are declared liable, jointly and severally, for payment of the costs of the application, including the costs attendant upon the employment of two counsel.

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P B Fourie, J

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 3378/07

In the matter between:

THE SEX WORKER EDUCATION AND ADVOCACY TASK FORCE	Applicant
and	
THE MINISTER OF SAFETY AND SECURITY	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Second Respondent
THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE FOR THE WESTERN CAPE PROVINCE	Third Respondent
THE STATION COMMISSIONER, WYNBERG POLICE STATION	Fourth Respondent
THE STATION COMMISSIONER, WOODSTOCK POLICE STATION	Fifth Respondent
THE STATION COMMISSIONER, CLAREMONT POLICE STATION	Sixth Respondent
THE STATION COMMISSIONER, SEA POINT POLICE STATION	Seventh Respondent
THE CITY OF CAPE TOWN	Eighth Respondent

Advocate for Applicant : Adv. W H Trengove (SC)

Adv. E W Fagan (SC)

		Adv. G A Du Toit
Advocate for First to Seventh Respondents	:	Adv. I Jamie (SC)
		Adv. R Nyman
Advocate for Eighth Respondent	:	Adv. A Schippers (SC)
	:	Adv. P Farlam
Attorney for Applicant	:	C Fortuin of the
		Legal Resources Centre
Attorney for First to Seventh Respondents	:	The State Attorney
Attorney for Eighth Respondent	:	S Sirkar of Herold Gie
		Attorneys
Date of hearing	:	5 March 2009
Date of Judgment	:	20 April 2009