IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case 28791/2020

In the matter between:

MAKHOSINI MATTHEW NHLAPO	First Applicant
AGNES DUDUZILE KHOZA	Second Applicant
MAPULE MOAGI	Third Applicant

And

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	First Respondent
MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION	Second Respondent
DIRECTOR GENERAL: NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR COOPERATIVE GOVERNANCE, TRADITIONAL AFFAIRS AND HUMAN SETTLEMENTS	Fourth Respondent
MINISTER OF BASIC EDUCATION	Fifth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR BASIC EDUCATION, GAUTENG	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR ROADS AND TRANSPORT, GAUTENG	Seventh Respondent

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APPLICANTS' AMENDED HEADS OF ARGUMENT

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INTRODUCTION

1 This application concerns the constitutionality and lawfulness of the applicants' current housing conditions and, concomitantly, the rationality, reasonableness, constitutionality and lawfulness of the first respondent's election to preserve the status quo. These heads of argument are intended to replace the applicants' heads of argument dated 19 September 2021.

2 The applicants have been living in the mixed formal/informal settlement of Langaville for between 22 and 29 years. In 2010, members of the Langaville informal settlement ("**the settlement**") took the first respondent, the City of Ekurhuleni Metropolitan Municipality ("**the Municipality**"), to court for failing to provide even the most basic of sanitation services to the settlement. They won, and in 2011 they were provided with temporary portable chemical toilets which were placed on the road surrounding the settlement.[1] While the Municipality initially made repeated assertions about the temporary nature of the portable chemical toilets, it has failed to upgrade them for over 10 years. In its answering affidavit, the Municipality has confirmed that it has no intention of ever providing improved sanitation to the erven on which the applicants live.[2] Its main reason for refusing is that the erven are zoned for 'communal facility' and 'industrial' use and not 'residential' use.

3 The applicants seek a declarator that the Municipality has violated its obligation to progressively realise their right to access to adequate housing, of which

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1 Caselines 1-24: FA par 63 and 1-69: Annexure "MN2".

2 Caselines 6-25: AA par 66 and 6-23: AA par 61.

adequate sanitation is a part and, to the extent necessary, the review and setting aside of two Municipal decisions that have preserved the status quo:

3.1 In December 2019, upon being presented with a recommendation from the South African Human Rights Commission ("**SAHRC**") to rezone the land upon which the applicants live, the Municipality refused to do so, despite insisting that the current zoning renders the provision of improved sanitation impossible.

3.2 On 16 January 2020, the decision to continue to provide interim sanitation services in the form of portable chemical toilets to the Langaville settlement under 2019 tender A-WS-03-1029.

4 The applicants accept that it is possible for this Court to grant effective relief to the applicants if it grants the orders sought in prayers 9 to 11 of the amended notice of motion.

5 In respect of the review applications, the applicants adopt the following position:

5.1 The rezoning decisions: The Municipality contends in its answering papers, not only that there is no violation of the right under section 26 but that, even if a constitutional violation has occurred, it is barred from meeting its constitutional obligations as a result of the zoning of the three erven. Based solely on the stance adopted by the Municipality, the applicants persist with the relief sought in prayers 1 to 7 of the amended notice of motion. This is necessary should the Court take the view that zoning constitutes an absolute bar on the Municipality's ability to comply

with its constitutional obligation to progressively realise the applicants' rights to sanitation services.

5.2 The continued provision of interim sanitation services: The decision in the e-mail of 16 January 2020 records the Municipality's decision to continue with the award and contract pursuant to the 2019 tender A-WS-03-2019 for the provision of interim sanitation services in informal settlements. The applicants accept that the 2019 tender lapses on 30 June 2022 and that the procurement contract has been performed. The applicants persist with the review provided for in prayer 8 of the amended notice of motion, on the basis that the Municipality stands by its decision to provide only temporary portable chemical toilets to the settlement.

6 In approaching the Court for relief, these heads of argument are structured as follows:

6.1 The concise material facts of the matter;

6.2 The basis for the relief claimed in the amended notice of motion;

6.3 The legal principles on the progressive realisation of the right to access to adequate housing;

6.4 The extent to which the Municipality breached its obligations to progressively realise the applicants' right to access to adequate housing;

6.5 The grounds of review of the Municipality's decision not to consider to rezone the erven;

6.6 The appropriate relief.

THE BACKGROUND FACTS

7 In 1993, the first and third applicants, Mr Nhlapo and Ms Moagi, settled on land which came to be known as erf 4737 and erf 4710, respectively.[3] The second applicant, Ms Khoza, settled on erf 4652 in 2000.[4] The three erven form part of the larger Langaville informal settlement.

8 In 1996, three years after the first and third applicant settled there, the settlement was recognised in the Conditions of Establishment.[5] The Conditions of Establishment state that the use zone of erven 4737 and 4710 shall be "community facility" and the use zone of erf 4652 shall be "industrial".[6] It also states in paragraph 3(7)(a)(I)(bb) that, for all erven:

> *"The use zone of the erf can on application be altered by the local authority on such terms as it may determine and subject to such conditions as it may impose."*[7]

9 While the informal settlement became more established, various pieces of legislation were introduced to give effect to the Constitution, including the Housing Act 107 of 1997 and the Local Government: Municipal Systems Act 32

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3 Caselines 1-7: FA par 5 and 1-8: FA par 9.

4 Caselines 1-8: FA par 7.

5 Caselines 2a-411: Record p 407 and 4-23: AA par 32.

6 Caselines 2a-411: Rule 53(3) Record p 407 and 2a-415: Record p 411.

7 Caselines 2a-413: Rule 53(3) Record p 409.

of 2000 ("**MSA**"). Despite these legislative developments, the settlement was not provided with basic sanitation in any form.

10 In 2011, members of the community launched litigation against the Municipality for the provision of basic sanitation and an order was granted in the residents' favour.[8] The provision of temporary portable chemical toilets to the settlement began soon thereafter.[9]

11 Over the past decade, the Municipality made various public statements that the chemical toilets were temporary and that it was doing away with portable chemical toilets and moving toward the provisions of waterborne toilets.[10] In one such statement to the Parliamentary Portfolio Committee on Human Settlement, Water & Sanitation, it said that residents had "access to basic amenities at their disposal <u>while awaiting decent services</u>".[11]

12 On 30 October 2014, the Ekurhuleni Town Planning Scheme was approved by the Council.[12] A spatial development framework was subsequently developed for the Municipality.[13]

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8 Caselines 1-24: FA par 63 and 1-69: Annexure "MN2".

9 Caselines 1-24: FA par 64.

10 Caselines 1-73: Annexure "MN3" and 1-199: Annexure "MN7".

11 Caselines 1-201: Annexure "MN7".

12 Caselines 2a-833: Rule 53(3) Record p 829.

13 Caselines 2a-505: Rule 53(3) Record p 501.

13 On 31 March 2015, the Municipal Council took a resolution to develop the John Dube Village Mega City Project as a joint venture with the Gauteng Province.[14] The project will consist of 10,500 units and housing will be available to those who qualify over a period of 10 years from the commencement of the project. The project was launched on 10 October 2017.[15]

14 In late 2018, the first applicant together with other residents of the Settlement made repeated requests to the Municipality to consider the provision of improved sanitation.[16] Despite request, in March 2019 the Municipality issued another 3-year tender for the supply of temporary portable toilets to informal settlements within the municipal area.[17]

15 On 30 April 2019, the first applicant lodged a complaint to the SAHRC. In the communication that followed between the SAHRC, the Municipality, and the attorneys for the applicants,[18] the Municipality in December 2019 stated that it would not provide improved sanitation because:

15.1 The zoning of the erven did not permit permanent toilets, and it refused to apply for rezoning of the erven in question, and

15.2 The 2019 tender was for chemical toilets.

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14 Caselines 6-4: AA par 8 and 6-36: Annexure “TM1”.

15 Caselines 6-4: AA par 9 and 6-39: Annexure “TM3”.

16 Caselines 1-256: Annexure “MN11.1” and 1-258: Annexure “MN 11.2” and 1-260: Annexure “MN 11.3” and 1-262; Annexure “MN 11.4”.

17 Caselines 1-28: FA par 81.2 and 1-168: Annexure “MN5.2”. The 2019 tender will lapse in June 2022.

18 Caselines 1-284: Annexure “MN18” and 1-286: Annexure “MN19” and 1-288: Annexure “MN20” and 1-291: Annexure “MN21” and 1-294: Annexure “MN22” and 1-317: Annexure “MN23” and 1-320: Annexure “MN24”.

16 The present litigation was instituted in October 2020 and on 27 October 2020 the Municipality filed its review record. The record includes various local government policy documents and frameworks, but notably does not include:

16.1 any mention of the John Dube Village Mega City Project.

16.2 any comparative costing estimates, or any other budgetary assessments.

16.3 any information on the range of non-permanent toilet options available, and the feasibility of installing those in the Langaville settlement.

16.4 any plans for how it plans to improve the access of residents of erven 4737, 4710 and 4652 to adequate housing, either through relocation or *in situ* development.

17 The record of proceedings thus places only before this Court the policy and town planning framework within which the Municipality's decision taken some 10 years ago was made. This significantly does not address the crux of the constitutional challenge raised in the amended notice of motion, that the Municipality has failed to take steps to progressively realise the rights of the applicants to improved sanitation services under the right to housing.

18 We note that in relation to the Langaville settlements, the Municipal Informal Settlement Re-blocking Programme, May 2017[19] records that Langaville falls within the larger Ekurhuleni administrative region E and that:

[19] Caselines 2a-914: Rule 53(3) Record p 909.

18.1 The existing area is used for residential purposes by informal settlers and that there are vehicle repair activities, retail and spaza shops located within the area;[20]

18.2 In respect of water, there were no standpipes identified during the site visit, but reticulation is available for possible connections and, in respect of sewerage, "chemical toilets are situated haphazardly on the boundaries of the site. Reticulation is available for possible connections";[21]

18.3 The population is 2,564 individuals and density is 42 dwelling units per hectare with approximately 754 informal structures throughout the area.[22]

19 We turn to the basis for the relief sought below.

THE BASIS FOR THE RELIEF SOUGHT

20 The applicants' challenge is founded in sections 7(2) and 26(2) of the Constitution and section 9(1) of the Housing Act 107 of 1997. The applicants submit that:

20.1 The Municipality has violated its constitutional and statutory obligation to progressively realise the applicants' right to adequate housing, of which adequate sanitation is a part:

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20 Caselines 2a-916: Rule 53(3) Record p 912.

21 Caselines 2a-916: Rule 53(3) Record p 912.

22 Caselines 2a-916: Rule 53(3) Record p 912 and 2a-918: Rule 53(3) Record p 914.

20.1.1 The Municipality failed to take steps, as expeditiously and effectively as possible, towards the full realisation of the right.[23]

20.1.2 Where the Municipality did take steps, the steps were unreasonable:

(a) Appropriate financial resources were not made available to provide for improved sanitation for the settlement in the short- and medium-term;

(b) The programme was not flexible or regularly reviewed to respond to the permanent nature of the settlement;

(c) The programme was not implemented in a reasonable way, as even on the Municipality's plans improved sanitation will only become available in the John Dube Development over the next 10 years, and only to those residents who qualify for housing;

(d) The programme was not transparent.

20.1.3 The Municipality took deliberately retrogressive steps by initially asserting the temporary nature of the portable chemical toilets and later asserting that the portable chemical toilets would be supplied in perpetuity so long as the settlement persists.[24]

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23 In violation of section 26(2) of the Constitution and article 11(1) the International Covenant on Economic, Social and Cultural Rights ("ICESCR") as read with article 2(1) and CESCR General Comment No 3 *The Nature of States Parties Obligations* UN doc E/1991/23 (1990).

24 In violation of article 11(1) of ICESCR as read with article 2(1) and CESCR General Comment No 3 (above).

21 Based on section 33 of the Constitution and section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), the applicants submit that:

21.1 The decision not to initiate the rezoning process is reviewable:

21.1.1 The Municipality failed to consider relevant considerations,[25] including:

(a) the recommendation by the SAHRC;

(b) the National Housing Code's preference for *in situ* development;[26] and,

(c) the long-term and ongoing use of the erven for residential purposes.

21.1.2 The decision was not based on a legitimate policy decision:[27] The John Dube Village Mega City Development Project did not form part of the review record but is now relied upon as a reason why the rezoning cannot take place.

22 We turn below to address each aspect of the above claims. First, the ambit of the constitutional obligation on the Municipality to progressively realise the applicants' rights is set out below.

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25 PAJA s 6(2)*(e)*(iii).

26 Caselines 1-21: FA par 60.1.1.

27 PAJA s 6(2)*(f)*(ii)(cc).

THE PROGRESSIVE REALISATION OF THE RIGHT TO HOUSING

Progressive realisation under international law

23 International law provides useful guidance to the ambit and obligations contemplated in the constitutional injunction on the State to progressively recognise socio-economic rights. Under section 7(2) read with section 223 of the Constitution, international law, whether domesticated into South African law or not, infuses the text of the Constitution and ought not to be ignored.[28]

24 On this understanding Article 11 of the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**")[29] recognises the right of everyone to an adequate standard of living, including adequate housing, and to the continuous improvement of their living conditions. Housing is described as a place to live in security, peace and dignity.[30]

25 General Comment No 3[31] gives context to Article 2(1) of the ICESCR, and the Committee on Economic, Social and Cultural Rights ("**the Committee**"), states that each State Party undertakes to take steps "to the maximum of its available resources" in order to progressively achieve "the full realization of the rights recognized in the present Covenant by all appropriate means."[32] State Parties

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28 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) par 189.

29 Ratified by South Africa, 12 January 2015.

30 CESCR General Comment No 4 *The Right to Adequate Housing* UN doc E/1992/23 (1991).

31 CESCR General Comment No 3 (above).

32 ICESCR art 2(1).

are thus obliged “to move as expeditiously and effectively as possible” towards full realization of the right.[33]

26 The ICESCR places particular emphasis on the following three requirements:

26.1 There must be immediate, tangible and continuing progress towards the full realisation of the rights;[34]

26.2 States cannot pursue deliberately retrogressive measures;[35]

26.3 States must introduce targeted special measures for vulnerable and disadvantaged groups.[36]

27 Retrogression toward the realisation of the right may be empirical, meaning a decrease in the actual level of rights enjoyment, or normative, meaning a revocation of entitlements guaranteed by a legal norm. In the present case, it is submitted that the Municipality has over the past decade taken normative retrogressive measures.

28 Any deliberately retrogressive measures “would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.[37] The Constitutional Court too, has held that the

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33 CESCR General Comment No 3 (above) par 9.

34 Limburg Principles on the Implementation of the ICESCR UN doc E/CN4/ 1987/17 Annex par 21.

35 CESCR General Comment No 3 (above) par 9.

36 CESCR General Comment No 3 (above) par 12.

37 CESCR General Comment No 3 (above) par 9.

understanding and meaning of the phrase "progressive realisation" in CESCR General Comment No 3 accords with the use of the concept in the Constitution.[38]

29 The African Charter of Human and Peoples' Rights, 1981[39] does not use the terminology of progressive realisation. However, in explaining the obligations assumed by State Parties, including South Africa, the African Commission has stated:

> "*While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with articles 61 and 62 of the African Charter. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.*"[40]

30 The constitutional imperative therefore is not isolated and underscores the arguments advanced by the applicants.

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38 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 45.

39 Ratified by South Africa, 9 July 1996.

40 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* par 14. Articles 61-62 recognise that the Commission will take into account general principles of law in assessing State Parties conduct and impose on State Parties the obligation to report to the Commission on the continued realization of rights every two years.

Progressive realisation under the Constitution

31 Section 26(1) of the Constitution explicitly guarantees the right of access to adequate housing to all people.[41] The Constitutional Court has held that:

> *"[Section 26(1)] recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling."*[42]

32 The level of entitlement to a progressively realisable right under section 26(2) must be determined by assessing the compliance of the State with the prescripts of the Constitution: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of the right.[43] Thus, claimants are entitled to the enjoyment of the right to a standard that would be available if the State had taken reasonable steps, within its available resources, towards enhancing the enjoyment of the right over time.[44]

33 In *TAC*,[45] the Constitutional Court held that the reasonableness standard does not mean "that everyone can immediately claim access" to the right in question,

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41 The Constitution of the Republic of South Africa, 1996 s 26(2).

42 *Grootboom* (above) par 35.

43 *Grootboom* (above) par 21 & 38; *Minister of Health v Treatment of Action Campaign* (No. 2) 2002 (5) SA 721 (CC) par 30.

44 *Grootboom* (above) pars 21 & 38; *Treatment of Action Campaign* (No. 2) (above) par 38 & 41.

45 *Treatment of Action Campaign* (No. 2) (above).

but that the State is obliged to make “every effort” to extend access to the right “as soon as reasonably possible”.[46]

34 The Constitutional Court has asserted that “reasonableness must be determined on the facts of each case”,[47] and to this end has identified several considerations in reviewing the reasonableness of a government programme adopted to comply with positive constitutional obligations. In relevant part, this includes:

34.1 The programme must be comprehensive and coordinated and must ensure that “the appropriate financial and human resources are available”.[48]

34.2 The programme “must be capable of facilitating the realisation of the right”.[49]

34.3 Policies and programmes must be reasonable both in their conception and their implementation.[50]

34.4 The programme must be context-specific, flexible and subject to continuous review.[51]

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46 *Treatment of Action Campaign* (No. 2) (above) par 125.

47 *Grootboom* (above) par 92.

48 *Grootboom* (above) par 39.

49 *Grootboom* (above) par 41.

50 Grootboom (above) par 42.

51 *Grootboom* (above) par 43; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 (Pty) Ltd and Another (2011 (4) SA 337 (SCA) par 61; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) par 95.

34.5 The contents of the programme must be transparent and made known appropriately.[52]

34.6 The programme must be carried out with care, concern, and appreciation of the value of the human beings at the centre.[53]

35 National legislation affirms the role of local government in the obligation to progressively realise the right to housing.

36 The National Housing Act provides in section 9(1) that:

> *"Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to —*
>
> *(a) ensure that —*
>
> *(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;*
>
> *(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;*
>
> *(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;*
>
> *(b) set housing delivery goals in respect of its area of jurisdiction;*
>
> *(c) identify and designate land for housing development;*
>
> *(d) create and maintain a public environment conducive to housing development which is financially and socially viable;*
>
> *(e) promote the resolution of conflicts arising in the housing development process;*

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52 *Treatment of Action Campaign* (No. 2) (above) para 123.

53 *Grootboom* (above) par 44.

(f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and

(h) plan and manage land use and development."

37 The MSA also imposes a duty on local government to contribute toward the progressive realisation of the right to housing.[54] Section 8(2) of the MSA provides that local government may do "anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers".[55] Sections 11(3) and 23(1) further outline the extensive set of powers and obligations on local government for the fulfilment of the right to housing.

38 The above legislative framework is complemented by:

38.1 Chapter 13 of the National Housing Code, which provides for *in situ* upgrading of informal settlements. It relates to the provision of grants to a municipality to enable it to upgrade informal settlements in its jurisdiction in a structured way and on the basis of a phased development approach.

38.2 Section 3 of the Water Services Act 108 of 1997 provides that everyone has a right of access to basic water supply and basic sanitation. Every water services authority is prompted to take reasonable measures to realise these rights.

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54 MSA s 4(2)(j).

55 MSA s 8(2).

38.3 Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (promulgated under the Water Services Act)[56] describes the minimum standard for basic sanitation services as a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against weather, well ventilated, keeps smells to the minimum and prevents the entry and exit of flies and other disease-carrying pests.

39 The applicants do not challenge the provisions of the legislative framework.

40 The Constitutional Court too has recognised the central role of municipalities in the fulfilment of the right to housing. In *Port Elizabeth Municipality*,[57] the Court held that municipalities "have a duty systematically to improve access to housing for all within their area".[58] Of particular relevance in the present case, the Court in *Mazibuko*[59] stated that merely complying with a national government-established minimum norm will not exonerate a municipality from taking further reasonable steps to enhance access on a progressive basis.[60]

41 We turn below to consider the extent to which the Municipality has breached its obligations to progressively realise the applicants' right to improved sanitation services.

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56 Published as GN R 509 in *Government Gazette* 22355 of 8 June 2001.

57 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

58 *Port Elizabeth Municipality* (above) par 56.

59 *Mazibuko and Others v City of Johannesburg and* Others 2010 (4) SA 1 (CC).

60 *Mazibuko* (above) par 74.

THE MUNICIPALITY HAS BREACHED ITS OBLIGATIONS TO PROGRESSIVELY REALISE THE APPLICANTS' RIGHTS

42 The Municipality contends that:

42.1 The current level of sanitation provided to the settlement is constitutionally compliant and lawful, and the Municipality has thus met its obligations.[61]

42.2 The Municipality's decision to not initiate the rezoning is not subject to review because it is based on rational policy decisions, including that:

42.2.1 Zoning decisions are complex and polycentric.[62]

42.2.2 The rezoning process is lengthy.[63]

42.2.3 The current zoning is prescribed by the Conditions of Establishment, dated 2 September 1996.[64]

42.2.4 Rezoning would be retrogressive.[65]

42.2.5 Rezoning would legitimate queue-jumping.[66]

42.2.6 There is a development project underway, the John Dube Village Mega City Development Project, that will be built over 10 years and will house some qualifying residents in the applicants' communities.[67]

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61 Caselines 6-24: AA par 64.

62 Caselines 6-8: AA par 17.

63 Caselines 6-8: AA par 18.

64 Caselines 6-16: AA pars 40-1.

65 Caselines 6-7: AA par 15.

66 Caselines 6-89: Supporting AA pars 24-5.

67 Caselines 6-5: AA pars 9.6 & 11.

42.3 Its decision to continue to provide interim sanitation services in the form of portable chemical toilets is also not subject to review because it is based on rational policy decisions, including that:

42.3.1 Improved sanitation is unaffordable.[68]

42.3.2 Improving the sanitation will lead to tension in the community and queue-jumping.[69]

42.3.3 Improving the sanitation is unnecessary 'double-dipping', as some residents will be accommodated in a new housing development within the next 10 years.[70]

42.3.4 The township Conditions of Establishment, dated 2 September 1996, places limits on the type of developments allowed on land zoned for different purposes.[71]

42.3.5 Improving the sanitation would mean that residents will be incentivised to stay on the land.[72]

42.3.6 The residents are only entitled to basic services.[73]

43 The Municipality's reasons and justification must be considered against the legal threshold it is required to meet. The above reasons do not answer the rights

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68 Caselines 6-6: AA par 14.

69 Caselines 6-13: AA par 29.

70 Caselines 6-88: Supporting AA par 23.

71 Caselines 6-16: AA pars 40-41.

72 Caselines 6-8: AA par 16.3 and 6-89: Supplementary AA par 24.

73 Caselines 6-25: AA par 66 and 6-84: Supplementary AA par 10.

violation alleged, do not place before the court information underscoring a possible claim of limited resources, and are not evident in the record of proceedings placed before this Court.

44 In *Mazibuko*[74] the Constitutional Court has stated that in most cases where a municipality complies with minimum standards set out in its policy and the policy is not challenged, a court will find that compliance with the policy requirements is reasonable.[75] However, in this case, the facts are different and further inquiry is warranted. In *Mazibuko* paragraph 74 the Court considered the application of the principle of constitutional subsidiarity and held:

> "*The constitutional obligation imposed upon government by section 27(2) is to take reasonable legislative and other measures to achieve the right. If national government legislates for a national minimum, do other steps taken by other levels of government escape scrutiny as long as they comply with the national minimum, despite the fact that other spheres of government share the obligation to take reasonable steps? What national government has done is legislated a minimum. Does that mean that a municipality that has, for example, easily within its resources supplied that minimum to all, automatically acted reasonably? I am not sure that it does. However, given the conclusion I reach below, that the City's policy is in any event not unreasonable, it is not necessary to decide this question now* …"[76]

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74 *Mazibuko* (above).

75 *Mazibuko* (above) par 76.

76 *Mazibuko* (above) par 74.

45 In order to reach a determination in this case, it is necessary therefore to consider the Municipality's conduct over the past three decades and whether this conduct may be regarded as reasonable.

46 First, the Municipality is required to have a comprehensive and coordinated programme that sets out planning and targets for the short-, medium-, and long-term housing needs of residents as well as the allocation of resources to meet those needs.[77] In response to a justification of resources constraints:

46.1 The Constitutional Court held in *Rail Commuters*[78] that:

> *"In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided."*

46.2 The Constitutional Court and the Supreme Court of Appeal have elsewhere confirmed the need for "clear evidence" on the nature of the resource constraints and what the additional costs of expanding the service, in the way prayed for by the applicants, would be.[79]

46.3 In *Blue Moonlight,*[80] a case concerning the City of Johannesburg's failure to provide emergency temporary shelter for indigent residents faced with

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77 *Grootboom* (above) par 43; *Treatment of Action Campaign* (above) par 17.

78 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) par 88, in which the Court applied the reasonableness test developed in *Grootboom* because the case concerned a positive obligation on the State.

79 *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) par 62; *Blue Moonlight Properties* (above) par 50.

80 *Blue Moonlight Properties* (above).

eviction, the Supreme Court of Appeal held that financial constraints could not be relied upon to justify inaction where proper planning and resource allocation could have ensured that resources were available. It concluded:

> *"To a great extent the City is to blame for its present unpreparedness to deal with the plight of the occupiers. It knew of their situation from the time that the litigation started, through its many delays extending over three financial years. It did not, in all that time, make any provision, financial or otherwise, to deal with a potentially adverse court order or take steps to re-allocate resources or re-work priorities so that the occupiers could be accommodated. As a result, the City has, through its general reports, vague responses to its budget surplus and denial of any obligations towards the occupiers, failed to make out a case that it does not have the resources to provide temporary accommodation for the occupiers if they are to be evicted."*[81] [emphasis added]

47 It was said in *Grootboom* that "[e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing".[82] An argument in response to an infringement of progressive realisation cannot be vague or amount to mere inaction by the State. At minimum, it is submitted that the Municipality must establish reasonable timeframes with specific and ongoing actions in response to service delivery needs.

48 Accordingly, the following necessary conclusion results. The Municipality:

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81 *Blue Moonlight Properties* (above) par 52.

82 *Grootboom* (above) par 82.

48.1 has failed to place the necessary evidence of financial constraints (limited resources) before the court.

48.2 has not denied that there are different forms of temporary sanitation provision that the Municipality can implement that do not comprise chemical toilets (such as ablution block toilets) and still need not connect to the bulk water and sewerage infrastructure network.

49 If this is accepted, the Municipality's contention that it is inhibited from considering the progressive realisation of sanitation services because of the rezoning of the three erven fall away. To persist with this argument appears disingenuous and diverts from the applicants' claim. We hold this view because:

49.1 The applicants have not in their papers insisted on permanent flushing toilets linked to the bulk sewerage system;

49.2 The Municipality's Basic Minimum Water and Sanitation Guideline, 2014 does not exclude the provision of portable sanitation services that amount to an upgrade to the current chemical portable toilets that have no light, no locking mechanism from the inside,[83] use chemicals that are so dangerous and strong that they cause infection and illness in users,[84] and do not adequately cater to special needs or vulnerable residents.[85]

50 We consider the implications of the Municipality's argument on this aspect below.

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83 Caselines 1-34: FA par 99.1.1.4.

84 Caselines 1-35: FA par 99.2.3.

85 Caselines 1-36: FA par 99.5.3 and 1-37: FA par 100.

The Basic Minimum Water and Sanitation Guideline, 2014

51 The Basic Minimum Water and Sanitation Guideline, 2014 ("**the Guideline**")[86] provides for five levels of sanitation services benchmarked against three categories of land types, (i) government or council land, occupation permitted; (ii) private land and (iii) encumbered or land in which occupation is prohibited.[87]

52 The Municipality has stated that Langaville is a Category B settlement. This accords with the table set out in paragraph 4.5 of the Guideline, which states that depending on whether a migration plan exists for the occupants, the settlement is treated as either a Category B or Category C settlement.

52.1 A Category B settlement is described as informal settlements where short to medium term plans are in place, whether in terms of relocation or in-situ development; and

52.2 A Category C settlement is described as informal settlements where no short to medium term plans are in place either for relocation or in-situ development.[88]

53 The Guideline provides that where bulk infrastructure is available within economical distance (and this is common cause) and dependant on whether upgrading is planned, the occupants are entitled to either Level 2 (intermediate),

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86 Caselines 2a-94

87 Caselines 2a-111: Rule 53(3) Record pp 108-9.

88 Caselines 3-72: Supplementary FA par 67, in which the Municipality's internal inconsistencies are revealed as it refers to the settlement as a Category C settlement in the tender specifications which is at odds with the Langeville settlement's status as a Category B settlement.

Level 3 (basic) or Level 4 (essential) sanitation levels.[89] The Municipality contends that the applicants are only entitled to basic services and refuses to consider alternatives to chemical toilets.[90]

54 These minimum standards as set out in the Guideline are themselves challenged by the applicants on the basis that they do not meet the minimum sanitation service levels prescribed in legislation, and are inconsistent with the operating guidelines.[91] This coupled with the Municipality's acknowledgement that it does not have a policy on the provision of sanitation services to informal settlements,[92] infers that despite the passage of national legislation and over two decades of knowledge of the constitutional obligations on local government for the provision of basis minimum services, the Municipality has little concrete evidence to place before the Court.

55 A further anomaly arises on the Municipality's version. Despite the Municipality's stance that the erven fall within Category B, the 2019 Bid Adjudication Committee Report for the award of the tender for the provision of chemical toilets to informal settlements indicates that the tender is aimed solely at Category C informal settlements.[93] Langaville settlement fell within the ambit of the tender award and thus, as recent as 2019, it remains unclear how the Municipality categorised the

89 Caselines 2a-111: Rule 53(3) Record p 107.

90 Caselines 6-25: AA par 66.

91 Caselines 3-75: Supplementary FA par 77.3.-77.4.

92 Caselines 2a-4: Rule 53(3) Record p 4.

93 Caselines 2a-265: Rule 53(3) Record p 261.

Langaville settlement and accordingly, the sanitation services its residents are entitled to. In summary, if the validity of the Guideline is accepted, then:

55.1 If the applicants fall within a Category C settlement (in accordance with the 2019 tender), no migration is planned and upgrading of the settlement is contemplated. Residents are thus entitled to full level 1 sanitation services – individual household toilets connected to a water borne system, or level 2 sanitation services – including shared water borne toilets with a servicing ratio of 1:5 households.

55.2 If the applicants fall within a Category B settlement (as understood by the residents), a migration plan does exist and no upgrading of the settlement is contemplated. In this case, residents are entitled to basic level 3 sanitation services – shared toilet with a servicing ratio of 1:5 households and the toilets are to be lined VIP or chemical toilets.

56 The continued provision of only essential, Level 4 sanitation services, at a service ratio of 1:10 households, after 30 years of settlement is on the Municipality's own version, a clear and egregious violation of the obligation on the Municipality to progressively realise the applicants' right to adequate housing, including sanitation.

57 However, the applicants extend the argument further:

57.1 The Guideline is not the minimum threshold of the constitutional obligation the Municipality is to meet. To the extent that the Guideline is

unreasonable and does not meet the threshold obligation to progressively realise the rights of the applicants, the Guideline inadequate.

57.2 It is evident that the Municipality is capable of providing water borne toilets or ablution blocks to residents and has provided such services to other informal settlements.[94] The Municipality has stated that this form of sanitation services will not be implemented because of cost constraints and vandalism.[95] Again, it is noted that no evidence of budget implications, cost constraints or comparative expenditure is included in the record.[96]

57.3 This alternative form of portable toilet facilities is not dependant on the property zoning of the erven concerned, but rather on the Municipality's determination of whether the settlement is a Category B or C informal settlement. This is not a categorisation provided for in the national legislation and is thus an irrelevant consideration when determining whether a violation of rights has taken place.

58 On these grounds, the applicants contend that the Municipality has not placed before this Court evidence to substantiate its justification not to consider the progressive realisation of sanitation services to the applicants. On the evidence before this Court, prayers 8 to 11 of the amended notice of motion fall to be granted in favour of the applicants.

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94 Caselines 6-90: Supporting AA par 29.1.-29.5. and 6-108: Annexure "WM7"

95 Caselines 6-91: Supporting AA par 29.5.

96 It is noted that the in 2009 the Municipality allocated R 100 million per annum for interim sanitation services to informal settlements and that in 2019 the total project cost for the interim sanitation services tender was valued at R 1,637 billion (over the three-year tender) – Caselines 2a-382: Rule 53(3) Record p 378.

59 In the event that the Court determines that the current zoning of the three erven amounts to a bar on the Municipality's ability to provide upgraded portable toilet facilities to the three erven, then and in that event, the applicants persist in their review of the zoning decisions as prayed for in paragraphs 1 to 6 of the amended notice of motion. We consider these grounds of review below.

REVIEW GROUNDS: REZONING ERVEN 4710, 4373 AND 4652

60 In the ordinary course judicial intervention in review proceedings has been limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.[97] The effect of the Constitution on this common-law approach is clear from *Fedsure*, *SARFU* and *Pharmaceutical Manufacturers*.[98]

61 In *Pepcor Retirement Fund*,[99] the SCA considered the development of administrative law in England and New Zealand and expanded the traditional grounds of review at paragraph 47:

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97 *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93B-C.

98 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) par 59, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) par 148 and *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) par 45.

99 *Pepkor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA).

"*In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of inter alios the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly ie on the basis of the true facts; it should not be confined to cases where the common law would categorize the decision as ultra vires.*"[100]

62 In *Bato Star*,[101] the Constitutional Court listed the relevant factors to be considered in assessing the reasonableness criterion[102] for successful judicial review:

"*Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and*

100 *Pepkor Retirement Fund* (above) par 47.

101 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) par 45.

102 PAJA s 6(2)(h).

reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

63 In *Dumani*[103] the SCA clarified mistake of fact as a basis for judicial review as follows:

"*[32] In our law, where the power to make findings of fact is conferred on a particular functionary – an "administrator" as defined in PAJA – the material-error-of-fact ground of review does not entitle a reviewing court to reconsider the matter afresh. This appears, in the context of the particular ground of review being considered, from para 48 of Pepcor, quoted in para [29] above; and in the context of review generally, from the following passage in the judgment of O'Regan J in Bato Star Fishing … [par 45]*"

64 The SCA in *South Durban Community Environmental Alliance*[104] concluded that the present position of our law was correctly articulated in paragraph 12 of *Airports Company South Africa*:[105]

"*In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error.*

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103 *Dumani v Nair and Another* 2013 (2) SA 274 (SCA).

104 *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another* [2020] 2 All SA 713 (SCA) par 23

105 *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) par 12.

The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts."

65 Thus, while it is correct that the courts will give due weight to the findings of fact and policy decisions of those with special expertise and experience in a sector,[106] this does not mean that decisions of this kind are insulated from judicial oversight nor does it mean that a court will not interfere with the decision-maker's assessment of the material facts where this is warranted. For example, where vital relevant information is ignored and a decision will be coloured by irrationality because there is no rational connection between the information available to the official, the purpose of the empowering provision, the decision and the reasons for it, the decision is clearly reviewable.

66 The Municipality took the decision during December 2019 not to seek to rezone the erven to "residential". The Municipal department's decision not to initiate the rezoning process is reviewable because:

66.1 It failed to consider relevant considerations,[107] including:

66.1.1 the recommendation by the SAHRC;[108]

106 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) par 48.

107 PAJA s 6(2)*(e)*(iii).

108 Caselines 1-288 FA annexure "MN20"

66.1.2 the National Housing Code's preference for *in situ* development;[109] and,

66.1.3 the long-term and ongoing use of the erven for residential purposes.

66.2 The decision was not based on legitimate policy decision:[110] The John Dube Village Mega City Development Project did not form part of the review record but is now relied upon as a reason why the rezoning cannot take place.

67 It is clear that a consideration of the merits of the matter necessitates a form of value judgement by the Courts. The view set out in the LAC decision of *Carephone*,[111] remains relevant to the rationality criterion of judicial review:[112]

> "*In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the merits of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order*."

68 In addition, the Municipality's executive decision-making falls to be reviewed and set aside for lack of rationality. It is irrational for the Municipality, acting through

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109 Caselines 1-21: FA par 60.1.1.

110 PAJA s 6(2)*(f)*(ii)(cc).

111 *Carephone v Marcus NO and others* 1999 (3) SA 304 (LAC) par 36.

112 PAJA s 6(2)(f)(ii). See also, *Trinity Broadcasting, Ciskei v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) par 21.

the Mayoral Committee, to continue to provide the same form of temporary sanitation services to the applicants for a period of 30 years.

69 The Municipality's reliance on its policy-making prerogative is not correct. The Courts remain seized with considerations of policy. In *Ed-u-College*,[113] the Constitutional Court confirmed:

> "*[P]olicy may also be formulated in a narrow sense where a member of the executive is implementing legislation. The Formulation of policy in the exercise of such powers may often constitute administrative action … it is quite possible to for action to be administrative even where it has political implications*."[114]

70 The Court recalled the different functions that the executive may exercise:

> "… *At times the exercise of their functions will involve administrative action and at other times it will not. In particular, the Court held that when such a senior member of the executive is engaged upon the implementation of legislation, that will ordinarily constitute administrative action. However, senior members of the executive also have constitutional responsibilities to develop policy and initiate legislation and the performance of these tasks will generally not constitute administrative action*."[115]

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113 *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE) (Section21)* 2001 (2) SA 1 (CC).

114 *Ed-U-College* (above) par 17.

115 *Ed-U-College* (above) par 18.

71 In addition, despite the guidance in *Mazibuko*,[116] the Municipality has failed to place before this Court any evidence of the budget restrictions and its alternative plans to progressively realise the sanitation rights of the applicants:

> "*When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open*."

72 We submit that in the present case the following considerations weigh in favour of the applicants' grounds of review. The Municipality's principal justifications are three-fold, the first two are spurious and the third appears to be a justification arrived at after the fact.

73 The <u>first</u> reason placed emphasis on the bona fides of the applicants in seeking better and improved sanitation. The genuine plight of the applicants for dignified toilets has been disparagingly referred to as cynical and an attempt at queue jumping for RDP housing.[117]

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116 *Mazibuko* (above) par 161.

117 Caselines 4-20: AA pars 22 & 29 and 4-17: AA par 16.4 and 4-93" Supplementary AA par 8.6.

74 This is not the first time a municipality has sought to infer ill intent on the part of vulnerable individuals. In *Blue Moonlight*,[118] that court dismissed such a spurious allegation on the facts of that case and in this matter, it is submitted that the submission holds little weight.

75 The Municipality has moreover provided no evidence that the applicants or other residents of the three erven have contested their placement on the waiting list or sought to agitate tensions with the informal settlement. The insinuations are demeaning of the validity of the basic needs of vulnerable people and unfortunate.

76 The second reason provided is that the town planning ratio of residential to communal space in Langaville is carefully balanced and cannot be upset.[119]

76.1 This presupposes that any alternative to chemical portable toilets amounts to permanent sanitation linked to the bulk sewerage infrastructure.

76.2 Even if this were the case, the more fundamental fallacy for purposes of the review grounds is that the standard of the planned suburb, contemplated in 1992 on the establishment of the township, has not been realised in 30 years. The library, junior school, religious worship facilities and parks and green spaces simply do not exist. It is with respect demeaning and degrading of individual rights to basic services for the

118 *Blue Moonlight* (above) par 55.

119 Caselines 4-42: AA par 88.2.

Municipality to deny constitutional rights for a thirty-year promise of communal spaces.

77 Third, the express disregard of the SAHRC Report, without due consideration of the contents thereof and the rights at stake. On this point the opportunity to consider the rezoning and its implications was not even placed before the Mayoral Committee for a vote.

78 It emerges from the pleadings that the Municipality's view is that it did not have to consider the SAHRC's recommendation of December 2019. There is no evidence that the recommendation was evaluated or placed before the Mayoral Committee for consideration.

79 Section 18(4) of the SAHRC Act 40 of 2013 provides:

> "*If the Commission makes any finding or recommendation in respect of a matter investigated by it known to the head of the organisation or institution or the executive authority of any national or provincial department concerned, the head of the organisation or institution or the executive authority of any national or provincial department concerned must within 60 days after becoming aware of such finding or recommendation respond in writing to the Commission, indicating whether his or her organisation, institution or department intends taking any steps to give effect to such finding or recommendation, if any such steps are required*."

80 The SAHRC communicated with the Municipality on 1 August[120] and 3 December 2019. At all times the Municipality directed its correspondence only to Ms Scher, the applicants' legal representative, and to the Municipality's corporate legal services department.[121] The reasons for the Municipality's decision in annexure "MN22" and the Municipality's memorandum and correspondence of 13 August 2019 enclosed therein, include:

80.1 that the proposed re-blocking defeats the purposes of sound planning that enhances sustainable townships;

80.2 acknowledgment that the chemical toilets have no light and are dark at night, and that this was never part of the tender specifications to bidders;

80.3 all informal settlements are provided with rudimentary services; and

80.4 that the Municipal department is still investigating alternative sanitation at different informal settlements.

81 Two features are apparent. First, that the reasons are not directed to the SAHRC as requested in paragraph 8 of its letter of 3 December 2019, and second that the explanations directed to the applicants' legal representatives acknowledge the inadequacy of the sanitation provided by the Municipality but focus entirely on rezoning as inhibiting municipal action. We have submitted above this premise is false.

120 Caselines 1-284: Annexure "MN18" and 1-288: Annexure "MN20".

121 Caselines 1-286: Annexure "MN19" and 1-294: Annexure "MN22" and 1-320: Annexure "MN24".

82 The failure to consider, evaluate and debate, let alone take a decision, on rezoning thus falls to be reviewed and set aside. This is one of the central arguments to the applicants' grounds of review.

APPROPRIATE RELIEF

83 We have set out reasons why the applicants have sought the relief as framed in the amended notice of motion.

84 The applicants maintain the stance that the portable sanitation services provided by the Municipality is capable of upgrade and that the Municipality is within its available resources constitutionally obligated to progressively realise the rights of the Langaville community. The declaratory relief and mandamus sought in prayers 8 to 11 of the amended notice of motion fall to be granted.

85 The Supreme Court of Appeal has held that there is a two-stage enquiry for granting a declaratory order in terms of section 21(1)(c) the Superior Courts Act:[122] in the first leg the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation' establishing the conditions precedent for the exercise of the court's discretion; in the second leg the court exercises its discretion by deciding either to refuse or grant the order sought.[123]

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122 Superior Courts Act 10 of 2013.

123 *Refugee Appeal Board of South Africa and Others v Mukungubila* 2019 (3) SA 141 (SCA) par 36. In *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Others* [2011] 1 All SA 487 (SCA) par 45, the Supreme Court of Appeal held:

"*In considering whether to grant a declaratory order a court exercises a discretion with due regard to the circumstances. The Court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. If the court is so satisfied it must consider whether or not the order should be granted, In exercising its discretion, the court may decline to deal with the matter where there is no actual dispute. The court may decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract or academic.*

86 Declaratory orders are vital in the right context and on the specific facts of a case to bring certainty, to consider and address issues of public importance and where there are compelling public interests. The present is undeniably such a case. Certainty is necessary both for the applicants and the Municipality.

87 The mandamus in prayer 11 that the Municipality, within its planning, ensure that informal settlements are not left languishing for 30 years in the limbo of a promised 1992 town planning scheme is critical to improved and progressive service delivery.

88 In the event that this Court determines that the provision of improved portable sanitation services require the rezoning of the erven on which the applicants have resided for 30 years, then the applicants' relief sought in paragraphs 1, 2 and 4 of the amended notice of motion are required.

Costs

89 Should the application be successful, the applicants seek that costs follow the cause, including the costs of counsel.

90 However, in the event that the applicants are only partially successful or of if the application is refused, we submit that the applicants are indigent and have relied on the services of the Centre for Applied Legal Studies for legal representation.

Where a court of first instance has declined to make a declaratory order and it is held on appeal that the decision is wrong the matter will usually be remitted to the lower court."

In accordance with the *Biowatch* principle[124] and given that the applicants have sought no more than to advance the progressive realisation of their constitutional rights, we submit that the applicants ought not to be mulcted with costs.

Sha'ista Kazee
Chambers, Sandton
24 May 2022

124 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) par 56.

APPLICANTS' LIST OF AUTHORITIES:

1. *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ)
2. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)
3. *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)
4. *Carephone v Marcus NO and others* 1999 (3) SA 304 (LAC)
5. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA)
6. *Dumani v Nair and Another* 2013 (2) SA 274 (SCA)
7. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC)
8. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)
9. *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC)
10. *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A)
11. *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC)
12. *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC)
13. *Minister of Health v Treatment of Action Campaign* (No. 2) 2002 (5) SA 721 (CC)
14. *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE) (Section21)* 2001 (2) SA 1 (CC)
15. *Pepkor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA)
16. *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)

17. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)

18. *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC)

19. *Trinity Broadcasting, Ciskei v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA)

20. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC)

21. *Refugee Appeal Board of South Africa and Others v Mukungubila* 2019 (3) SA 141 (SCA)

22. *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another* [2020] 2 All SA 713 (SCA)

23. *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Others* [2011] 1 All SA 487 (SCA)

International instruments

24. CESCR General Comment No 3 *The Nature of States Parties Obligations* UN doc E/1991/23 (1990)

25. CESCR General Comment No 4 *The Right to Adequate Housing the Nature of States Parties Obligations* UN doc E/1992/23 (1991).