**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2020/28791

REPORTABLE: ON SAFLII

OF INTEREST TO OTHER JUDGES: NO

JUDGE KUNY 14 MARCH 2024

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|---|---|
| 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 |
| MEC COOPERATIVE GOVERNANCE, TRADITIONAL AFFAIRS AND HUMAN SETTLEMENTS GAUTENG | Fourth Respondent |
| MINISTER OF BASIC EDUCATION | Fifth Respondent |
| MEC FOR BASIC EDUCATION, GAUTENG | Sixth Respondent |
| MEC ROADS AND TRANSPORT, GAUTENG | Seventh Respondent |

JUDGMENT

KUNY J

**INTRODUCTION**

1 In August 2020 the applicants instituted proceedings in terms of Rule 53, seeking *inter alia* to review decisions of the Ekurhuleni Municipality ("the first respondent") for certain relief relating to sanitation provided to them at the properties on which they reside. The properties are erf 4652, erf 4710 and erf 4735, Extension 8, Langaville.

2 Although the applicants have cited national and provincial arms of government, relief is only sought against the first respondent and it is the only party that opposes this application.

3 In essence, the applicants claim they have a constitutional right to proper sanitation and they seek to vindicate these rights by:

3.1 compelling the first respondent to re-zone erven 4652, 4710 and 4735 to residential.

3.2 reviewing and setting aside the first respondent's decision to continue to provide interim sanitation services in the form of temporary portable chemical toilets;

3.3 obtaining a declaration that the first respondent has failed to meet its constitution obligation to provide proper sanitation to the applicants and other residents who live in the area; and by

3.4 compelling the first respondent, by way of declaratory relief and a *mandamus,* to provide alternatives to the chemical toilets currently being provided.

4 On 27 October 2020, the first respondent delivered a record, said to comprise the documents that related to the decision that the applicants seek to review. On 17 March 2021 the applicants filed a supplementary founding affidavit and on 4 May 2021, they filed a further amended supplementary founding affidavit.

5 The amended notice of motion dated 17 March 2021 is as follows:

> 1 Reviewing and setting aside the decision of the first respondent reflected in the memorandum dated 14 December 2019 refusing to rezone erf numbers 4710 and 4737 of Extension 8 Langaville ("the stands") from Community Facility to Residential use.
>
> 2 Ordering that erf numbers 4710 and 4737 of Extension 8 Langaville, are hereby rezoned from Community Facility to Residential use.
>
> 3 In the alternative, remitting the matter to the first respondent for reconsideration, and directing the first respondent to report to this Honourable Court, within 30 days of this order, on the outcome and reasons therefor.
>
> 4 Declaring that erf number 4652 is zoned for Residential use.
>
> 4.1 In the event that prayer 4 is granted, directing the first respondent to take measures to provide that stand with basic services, including permanent flushing toilets, and to report back to this Honourable Court within 30 days of the order on the steps it has taken to give effect to the order.
>
> 5 Alternatively to prayer 4, reviewing and setting aside the first respondent's decision to correct and/or rezone erf 4652 from Residential to Community Facility or Public Garage.
>
> 6 In the event that prayer 5 is granted:
>
> 6.1 Ordering that erf 4652 Extension 8 Langaville is hereby rezoned from Community Facility or Public Garage to Residential use.

7 In the alternative, remitting the matter to the first respondent for reconsideration, and directing the first respondent to report to this Honourable Court, within 30 days of this order on the outcome and reasons therefor.

8 Reviewing and setting aside the decision taken by the first respondent to continue to provide the interim sanitation service to the Extension & Langaville informal settlement in the form of temporary portable chemical toilets, the reasons for which are reflected in the email dated 16 January 2020.

9 Declaring that the first respondent's continued provision of temporary portable chemical toilets to Extension & Langaville informal settlement is irrational, unreasonable, unconstitutional and, [is] unlawful.

10 Declaring that the first respondent has failed to comply with its obligations in terms of sections 7(2) and 26(2) of the Constitution of the Republic of South Africa. 1996, section 9(1) of the Housing Act 107 of 1997 and section 3(2) of the Water Services Act 108 of 1997.

11 Directing the first respondent to take measures to progressively realise the applicants' rights to access to adequate housing and basic sanitation, and to report to this Honourable Court, within 30 days of this order, of the measures it has taken or intends to take to realise those rights.

12 Costs of the application.

13 Granting further and/or alternative relief.

6 The applicants claim a right to waterborne flushing toilets and assert that the first respondent is obliged to fulfil this right.[1] They buttress their claim by alleging that there is existing water and sewerage infrastructure in place in Ext 8, Langaville,[2] that could provide the applicants with these facilities. The applicants rely on the fact that first respondent provides waterborne toilets to other informal settlements in Ekurhuleni. They contend that there is no reason why they are not

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1 See paragraph 76 and 79, founding affidavit, para 58, supplementary founding affidavit, para 62 of the amended supplementary affidavit and para 128 replying affidavit

2 See for example paragraphs 40, 45.7, 60.4, 60.4.2, 60.5, 61.1, 81.1, 102.1, 106, 114 and 178.6 of the founding affidavit

being provided either with the same, or similar technology.

7 The reasons advanced by the first respondent for refusing to rezone their erven to residential are set out in a memorandum dated 14 December 2019 where it is stated there that the rezoning is not supported by the City Planning Department.[3] They state that for as long as the properties they live on are not zoned for residential use, they will never have adequate basic sanitation. By compelling the first respondent to rezone their properties as residential the applicants aim to force the first respondent to provide them with flushing toilets.

8 In support of their claims, the applicants rely upon their fundamental right to access to adequate housing and basic sanitation in section 26 and 27 of the Constitution, read together with section 9(1) of the Housing Act 107 of 1997 and section 3(1) of the Water Services Act 108 of 1997. They argue that these entrenched rights impose an obligation on the first respondent to take measures to realise their right to basic to sanitation.

9 They also assert their constitutional rights in the Bill of Rights to equality (section 9), human dignity (section 10), privacy (section 14) and a safe and protected environment (section 24), as well as the rights of children in section 28(c).

**FACTS RELIED UPON BY THE APPLICANTS**

10 The applicants reside at Extension 8, Langaville:

10.1 The first applicant lives on erf 4737 in shack D268, with his wife and two minor children.

10.2 The second applicant lives on erf 4652 in shack D01, in a household of three adults and three minor children.

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[3] Caselines, p1-295/6

10.3 The third applicant lives on erf 4710 in shack D393, in a household of six adults and three minor children.

11 The applicants allege:

11.1 Langaville has been in existence for three decades. The first and third applicant have lived in Langaville for 30 years and the second applicant has lived there for approximately 20 years.

11.2 Erf 4737 and erf 4710 are zoned as community facilities and erf 4652 is zoned for use as a public garage.

11.3 Initially when Langaville was founded, the settlement consisted only of shack dwellings.

11.4 Langaville was upgraded in or about 1999 when, as part of its reconstruction and development programme, the government started building RDP houses among the shack dwellings. The applicants' shacks are situated alongside RDP dwellings.

11.5 The applicants alleged that municipal bulk engineering services, including a comprehensive sewerage network, extends throughout Langaville township. The first respondent provides proper sanitation to the RDP dwellings. However, despite the presence of the facilitating infrastructure, the applicants are denied basic municipal services.

11.6 Initially, the applicants used self-dug pit latrines for sanitation. They allege these were hazardous. In or about 2011 residents living at Ext 3, 6 and 18 Langaville took legal action against the first respondent arising from a lack of water and sanitation services. As a result, the court granted an order compelling the first respondent to provide a certain number of water points and chemical toilets to residents.

11.7 Shortly after the above order was granted, the first respondent introduced "interim sanitation measures" to Ext 8, Langaville, in the form of chemical toilets. The applicants complain that this form of sanitation has become permanent and that first respondent does not, in the foreseeable future, intend to progressively realise their right to adequate housing and basic sanitation.

12 The applicants' allege that the first respondent's decision to continue to provide chemical toilets and not proper sanitation *inter alia* is irrational, arbitrary, and unreasonable for the following reasons:

12.1 Residents in informal settlements have a right to adequate housing and basic sanitation.

12.2 The first respondent has failed to take measures to realise the applicants' rights to adequate housing and basic sanitation. The sanitation services provided by the first respondent are defective and fall short of basic sanitation.

12.3 The chemical toilets are not suited for long-term use. Initially intended as an interim measure, they have now become permanent. The first respondent has failed to provide proper alternative sanitation facilities to the applicants.

12.4 The first respondent has failed to take into account the existing infrastructure in the settlement that could be used to provide proper sanitation to their settlement.

12.5 Rented chemical toilets are costly and economically inefficient. Public money spent for over a decade could have been used to pay for more permanent and less costly solutions. The applicants alleged that installing flushing toilets would be more cost effective.

12.6 The first respondent has informed residents that they are not entitled to proper or permanent sanitation because they live in an informal settlement and that they will not get proper or permanent toilets until the area is re-zoned.

12.7 The first respondent has decided to continue to provide the applicants' informal settlement with temporary movable plastic chemical toilets by issuing and awarding a tender for such toilets for a further three years.

12.8 The applicants have repeatedly informed the first respondent of the defects in the chemical toilet sanitation services and have requested proper basic sanitation. Their requests have been supported by the South African Human Rights Commission.

12.9 The applicants have made numerous requests to rezone their stands to residential. The first respondent has failed to apply its mind to these requests and, in deciding not to rezone the erven, has failed to consider all the relevant facts and information.

13 The specific complaints in regard to chemical toilets are as follows:

13.1 The residents have to leave their homes to use the toilets. The toilets are not lit and do not lock from the inside. This exposes vulnerable persons to dangerous elements and their personal safety is at risk. The toilets do not cater for people with special needs.

13.2 The toilets are shared by multiple households. They fill up quickly. Cleaning and emptying services are irregular and unreliable. The toilets lack ventilation and are a breeding ground for diseases. Toilets are not situated close to water points. Users are not able to immediately wash their hands after using the toilets. They are unhygienic and a health hazard. The chemicals used to sanitise the toilets are toxic and unhealthy.

13.3 The toilet housings are unstable. They often fall over, especially in bad weather, causing sewerage to spill into the streets. They flood during heavy rainfalls, making them unusable. They attract flies and other undesirable pests when it is hot, especially as they are not properly ventilated.

13.4 The majority of the chemical toilets are dilapidated. Many are not in proper working order. Most of them have not been replaced for years.

14 The first respondent did not deal with or deny any of these allegations about the dire condition of the chemical toilets they currently provide.

15 The applicants also annex and rely upon on a social audit report produced from studies conducted in 2017 and 2018 by PLANACT, a development organisation, in conjunction with the Ekurhuleni Water and Sanitation Operations Division. The report did not deal with the interim nature of chemical toilets or alternative sanitation measures. However, the report points to a host of problems with chemical toilets provided by the first respondent. Its findings, alleged by the applicants to confirm the legitimacy of their complaints, are not disputed.

**FIRST RESPONDENT'S ANSWER**

16 The first respondent's answering affidavit was deposed by Mr Mdletshe, the Executive Manager: Support Services in the Human Settlements Department of the City of Ekurhuleni.

17 *In limine*, it is contended that the relief sought by the applicants infringes on the principle of the separation of powers and, if granted, would amount to judicial over-reach.

18 On the merits, the first respondent contends that its decision to provide chemical toilets is rational and constitutional due to the following:

18.1 There are 119 informal settlements in Ekurhuleni. Hundreds of thousands of people are living in similar and some instances, even worse conditions than the applicants. Some of the informal settlements have been upgraded. However, due to the first respondent's limited financial resources, most have not.

18.2 The first respondent is unable to meet the demand for housing in the face of decreasing resources and an exponential growth in the need for adequate housing.

18.3 In 2015 the first respondent resolved to develop mega projects to meet the demand for housing. In October 2017 it entered into a joint venture project with the Gauteng Province, on land belonging to the municipality, to develop the John Dube Village Mega City. Mega city projects will have integrated facilities that will benefit many communities and large numbers of people in need of housing.

18.4 The first respondent is best placed to make decisions in relation to planning, spatial development and land use. These are complex decisions involving many specialists and highly technical consideration. They also concern matters of policy.

18.5 The development of the community sites in Langaville for residential use does not align with the first respondent's decision to embark on mega projects.

18.6 The effect of granting the relief to the applicants would be to force the first respondent to follow a path that does not conform with its long-term planning and development goals. Scarce resources would have to be redirected in order to satisfy a minority of residents, at the expense of sustainable projects that are intended to transform the lives of thousands of the City's residents.

18.7 The process of re-zoning land owned by the first respondent is lengthy and complex. An application for re-zoning would have to be made in terms of section 48 of the first respondent's Spatial Planning and Land Use Management By-Law, 2019. The process could take up to three years.

18.8 The applicants are attempting to push their way to the front of the housing queue. There is a trend for residents in informal settlements to use "lawfare" to jump the queue. If their properties were upgraded, the applicants (and others who benefit from these upgrades) would have no incentive to move to the new housing projects that are being developed. The benefits of the current housing policy would not be appropriately distributed to those persons most in need of housing.

19 The following is set out in relation to the John Dube development:

19.1 It reflects the first respondent's policy of building sustainable and integrated residential developments. The project has an estimated budget of R34 billion and will be constructed in 3 phases over 10 years. The first respondent is funding and installing the bulk infrastructure and engineering services and the Province is funding the construction of the houses on the land.

19.2 The current housing delivery model is based on projects that yield less than 7 500 units per project. The John Dube Development will yield between 10 500 and 17 000 units. The housing mix will include over 4110 RDP units, 1500 BNG standalone units, 2203 subsidised units, 700 rental stock units and 900 sites and serviced stands. The first 680 RDP houses are expected to be completed by January 2023.

19.3 The intended beneficiaries are people living in the Kwatsaduza area, comprising the greater Kwa-Thema, Tsakane and Duduza areas. The

Province is responsible for beneficiary identification and administration. Langaville is one of the beneficiary communities of the John Dube Development and it will house residents occupying the community facility sites, if they meet the national qualifying criteria for housing.

20 The first respondent filed a supporting affidavit of Mr William Matloha, the Chief Area Engineer in the first respondent's Water and Sanitation Department, Nigel depot. His department is a service provider to the first respondent's Human Settlements Department. He deals with the following in his affidavit.

20.1 The first respondent provides around 37 500 chemical toilets to the 119 informal settlements in the City. Langaville has a total of 180 chemical toilets: nine for 20 households on erf 4710, four for 13 households on erf 4652, and 37 for 120 households erf 4737.

20.2 The ratio of chemical toilets per household provided to the applicants is better than the ratio stipulated in the first respondent's 2009 policy, ie. one toilet per 10 households. In recent years the first respondent has been providing chemical toilets in informal settlements at a ratio of one chemical toilet per five households.

20.3 There are sewerage pipes traversing erf 4710 and erf 4737 servicing 2025 residential units in Langaville. However, Matloha cannot say whether the sewerage infrastructure on erven 4662, 4710 and 4737 are able support further residential development on these sites without a feasibility study being conducted.

20.4 The first respondent does not have the financial resources to provide for all the people who live in informal settlements in Ekurhuleni. The need for housing and basic services grows exponentially each year. The applicants' demand for permanent services does not take into consideration the financial burden on the first respondent in providing

basic sanitation to all the residents of the 119 informal settlements in the City.

20.5 If more money was earmarked for the upgrading of informal settlements, money allocated for new housing developments would have to be redirected. This would have a domino effect on the first respondent's planning and strategy. Identified beneficiaries would have to wait longer for their houses and people living in informal settlements will have no incentive to relocate to permanent housing developments.

21 Matloha outlines the process of re-zoning land to residential:

21.1 The first respondent would have to conduct a capacity study to establish if the current bulk infrastructure can accommodate the additional households on the land proposed to be rezoned.

21.2 A professional consulting engineer would have to do a preliminary design and if approved, a detailed design. The design would have to take cognizance of the number of stands to be developed, the piped capacity available, and the sewer and bulk water services that would be required.

21.3 The installation of the required bulk services is dependent on the financial resources available to the first respondent in a particular financial year. A contractor would have to be appointed for the construction and installation of the water and sewer pipes and construction of toilets.

21.4 The process of installing water-borne, flushing toilets in a new residential development takes approximately three to five years if township establishment processes are complete.

22 The first respondent recognises the applicants' desire for permanent water-borne sanitation. However, because of the above factors, it has taken a decision not to

rezone and develop the properties occupied by the applicants for residential use.

**DECISIONS APPLICANTS WANT REVIEWED**

23 There are essentially two decisions the applicants want to review:

23.1 The refusal to rezone erven 4652, 4710 and 4735 to residential.

23.2 The decision to continue to provide interim sanitation services to the Langaville in the form of temporary portable chemical toilets.

24 On 7 January 2020, CALS addressed a letter to the first respondent stating inter alia:

> *3. In our letter, and pursuant to section 5 of the PAJA, we accordingly requested adequate reasons for the following administrative action:*
>
> *3.1. the decision not to rezone all land within Langaville Extension 8 - and particularly stands 4653, 4737, 4773 and 4710 - into 'residential' land;*
>
> *3.2. the decision to continue with the provision of temporary chemical toilets to the residents of the informal settlement of Langaville Extension 8 until June 2022;*
>
> *3.3. the decision to issue tender number A-WS 03-2019; and*
>
> *3.4. the decision to award tender number A-WS 03-2019.*

25 On 16 January 2020 the first respondent replied to the applicants' attorneys in the following terms:

> *Your follow-up letter pursuant to our response of 20 December 2019 refers.*
>
> *In our response the Human Settlements Department and the City Planning Department addressed the main issue of contention i.e. as per paragraph 3.1 of your letters, [pertaining to] the rezoning of certain properties. This rezoning was linked to the rights to adequate basic sanitation which we also recognize that your*

*clients' have. The provision of chemical toilets is to address this need throughout the City of Ekurhuleni and indeed in many other jurisdictions, to meet the obligation to provide adequate basic sanitation and the City has even strived to increase the number of toilets for this purpose.*

*Having addressed then the fact that the properties referred cannot be re-zoned the obligation to continue with the provision of chemical toilets continues and the decision to issue and award tender number A-WS 03-2019 stems from this obligation throughout the Municipality.*

*We trust that we have addressed the concerns raised in paragraphs 3.2, 3.3 and 3.4 of your letters.*

26 Tender number *A-WS 03-2019* has ostensibly run its course. However, the first respondent has stated its intention to continue to provide chemical toilets to residents in informal settlements, on a vast scale, well into the future. It has adopted a clear and unequivocal policy in this regard.

**CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK**

27 Section 26 (1) and (2) of the Constitution provides:

**26 Housing**

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

28 Section 27 of the Constitution provides:

**27 Health care, food, water and social security**

(1) Everyone has the right to have access to-

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social

assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

29 In terms of the Constitution, municipalities are responsible to supply water and provide sanitation services, with the support and oversight of the provincial and national government.[4]

**The Water Services Act 108 of 1997 ("the Act")**

30 The Act regulates and controls the supply of water in South Africa. In terms of section 1 of the Act the first respondent is a water service authority and also a water service provider. Basic sanitation and basic water supply are defined as follows:

> '**basic sanitation**' means the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households
>
> '**basic water supply**' means the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.[5]

31 The preamble to the Act recognises that there is a duty on all spheres of government to ensure that water supply and sanitation services are provided in a manner that is efficient, equitable and sustainable. Furthermore, although municipalities have the authority to administer water supply and sanitation services, all spheres of Government have a duty, within the limits of what is

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4 Section 156 of the Constitution read with Part B to Schedule 4, lists water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems, as one of the powers and functions of a municipality.

5 Section 1 of Act 108 of 1997

physically and financially feasible, to work towards this object.[6]

32 One of the objects of the Act, as set out in section 2(a), is to provide for:

32.1 the right of access to basic water supply; and

32.2 the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being.

33 Section 3 states:

> **3 Right of access to basic water supply and basic sanitation**
>
> (1) Everyone has a right of access to basic water supply and basic sanitation.
>
> (2) Every water services institution must take reasonable measures to realise these rights.
>
> (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.
>
> (4) The rights mentioned in this section are subject to the limitations contained in this Act.

34 In terms of section 9 the Minister is empowered to prescribe compulsory national standards for the provision of water services. Regulation 2 of the 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water'[7] provides the following in regard to basic sanitation:

> **2. Basic sanitation**
>
> The minimum standard for basic sanitation services is-

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6 See the preamble to the Act 108 of 1997

7 Published under Government Notice R509 in Government Gazette 22355, commencing on 8 June 2001

(a) the provision of appropriate health and hygiene education; and

(b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.

**Housing Act 107 of 1997**

35 Section 9(1) provides the following:

**9 Functions of municipalities**

(1) 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;

**COST OF PROVIDING CHEMICAL TOILETS**

36 The first respondent states that 37 500 chemical toilets are in use in the municipality. However, in the budget in 'Annexure B to Ekurhuleni's Draft Medium Term Revenue and Expenditure Framework 2022/23- 2024/25', the table lists 43 958 chemical toilets, with an intended increase of 200 toilets in the budgeted year. The total allocated budget for the year 2023/24 is R381 225 373 (see table below).

37 An amaBhungane report dated 17 July 2019,[8] (annexed and incorporated into the founding affidavit), makes the following claims in relation to the costs of providing chemical toilets:

37.1 Ekurhuleni metro spent a staggering R1.9 billion on chemical toilets over three financial years from 2017 to 2019.

37.2 At the start of the project in 2016, the municipality provided 16 098 toilets and increased the number the following year to 30 795. For the 2018/19 financial year the city provided 39 112 chemical toilets.

37.3 Answers provided by the municipality to amaBhungane show that spending increased from R379 million in 2016/17 to R828 million in 2017/18 and R758 million in 2018/19.

38 In response, the first respondent issued a statement headed 'Response to amaBhungane on Chemical Toilets Scandal', stating as follows:

> The City wishes to make it categorically clear that the money spent in the 2017/18 financial year on this project was nowhere near R1.6bn **but approximately R800m**. It must further be clarified that this cannot only be attributed to the 1 (toilet):5 (per structure) ratio, but also the rollout of toilets in areas that previously did not have such, the unpredictable nature of the mushrooming of informal settlement, and the exponential increase of adverse court findings against local government for provision basic services, including decent sanitation, to residents.[9] [emphasis added]

39 The figures quoted by the applicants are not substantially disputed by the first respondent. Although the evidence in relation to the costs of providing chemical toilets is not clear, it must be accepted that amounts spent on chemical toilets,

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8 Annexure MN 12, Caselines p1-262

9 Annexure MN 13, Caselines p1-273

over a sustained period, range in the billions of rands.

**INTERIM v PERMANENT SANITATION**

40 The decision to continue to provide interim sanitation in the form of chemical toilets appears to have its genesis in the 2011 litigation and a court order that compelled the first respondent to provide 131 chemical toilets to certain residents in Extension 3, 6 and 18, Langaville. The situation has become entrenched, to the point where first respondent appears to be currently providing and servicing almost 44 000 chemical toilets to residents in informal settlements in Ekurhuleni. The number is growing.

41 Central to the applicants' case is the argument that chemical toilets provided to informal settlements were always intended to be an interim solution. They argue that the first respondent has breached its own policies by providing chemical toilets on a permanent basis.

42 On 8 September 2017 the National Norms and Standards for Domestic Water and Sanitation Services ("the Norms and Standards") were promulgated.[10] 'Improved Sanitation' is defined as:

> A sanitation that meets the basic requirements. All facilities not meeting this requirement, are taken as unimproved. Notwithstanding this, pit toilets without a slab or platform or vent pipe, bucket toilets, **chemical toilets (unless used in a temporary or emergency situation)**, and open defecation in fields, forests, bushes, beaches, bodies of water, or with solid waste **are unimproved facilities**. [emphasis added]

43 Referring to the National Sanitation Strategy (2005), the Norms and Standards state:

> The National Sanitation Strategy (DWAF, 2005a) was compiled to

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[10] Government Gazette No 41100, 8 September 2017, Notice No 982

> provide a coherent approach to sanitation delivery in South Africa. The strategy states that: "informal settlements must not be treated as emergency situations for the purpose of this strategy but should be provided with viable and sustainable solutions. Solutions such as communal facilities and **chemical toilets should not be used where the system is expected to have a duration of more than one month.**" [emphasis added] [11]

44 The first respondent's Integrated Development Plans for the years from 2019 to 2023 repeats the following statement:

> *"Free chemical toilets were provided as **an interim service delivery measure** while proper sanitation is being delivered parallel to this."* [emphasis added]

45 In its Annual Report for the year 2022/2023, the first respondent states that access to dignified, sanitation, and long-term sanitation services in the city remains a *"top issue for attracting investors and expanding the economy"*. It is further stated that communities of informal settlements rely on chemical toilets *"that are neither adequate nor sustainable in terms of service costs"*.[12] And yet the report also states:

> "*the provision of chemical toilets in the informal settlement was one of the significant performance highlights.*"[13]

and:

> "*A key performance highlight included the provision of chemical toilets in the informal settlement.*"[14]

46 In 'Annexure B to Ekurhuleni's Draft Medium Term Revenue and Expenditure

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11 The Norms and Standards (supra), page 86

12 Ekurhuleni Annual Report for the year 2022/2023, p25

13 Ibid, page 25

14 Ibid, page 93

Framework 2022/23 - 2024/25', the cost of providing chemical toilets is not mentioned anywhere. The document merely states:

> The Operating Expenditure Budget of the Water and Sanitation Department consists mainly of the repairs and maintenance of existing water infrastructure, bulk purchases and water and sewer services sales in respect of operating income. [15]

47 Annexure A of the Review of the Integrated Development Plan 2022/23 - 26/2027,[16] lists the provision of chemical toilets in its schedule as follows:

**Water and Sanitation Department**

| Outcome | Ref: No | Performance Indicator | Baseline (2022/2023) | Annual Target (2023/2024) | Target for 2023/24 SDBIP per Quarter | | | | Resources Allocated for 2023/2024 SDBIP per Quarter | | | | | Indicator Definition | Portfolio of Evidence |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | Q1 Planned Target | Q2 Planned Target | Q3 Planned Target | Q4 Planned Target | Q1 Planned Budget as Table SA 25, 29 and 30 | Q2 Planned Budget as Table SA 25, 29 and 30 | Q3 Planned Budget as Table SA 25, 29 and 30 | Q4 Planned Budget as Table SA 25, 29 and 30 | Total Budget allocated | | |
| Increased accesses to sanitation services | 1.AB | Number of Additional Chemical Toilets Provided to Informal Settlements | 43958 | 200 | 50 | 50 | 50 | 50 | 95 306 345.2 | 95 306 345.2 | 95 306 345.2 | 95 306 345.2 | R381,225,373.00 | This indicator measures the count additional of chemical toiles provided to informal settlements | Dated and signed close out report for the installation of services. |

48 None of the documents comprising the various versions of the National Water and Sanitation Master Plan[17] developed by the Department of Water and Sanitation, make any reference whatsoever to chemical toilets. The only reference, insofar as non-waterborne sewerage is concerned, is to ventilate improved pit latrines (VIPs), where it is stated that facilities previously provided to households have become inadequate in some areas. The reasons given include that they are not emptied regularly, ageing infrastructure, poor facility operation and maintenance and infrastructure operated above its design capacity.

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15 Annexure B to Ekurhuleni's Draft Medium Term Revenue and Expenditure Framework 2022/23- 2024/25, page 156

16 See Annexure 2, (Departmental Service Delivery and Budget implementation Plan) p532 of Annexure A Review of the Integrated Development Plan 2022/23-2026/2027

17 Some 840 pages of documents, comprising Volumes 1, 2 and 3

49 Therefore, taking the above into consideration, chemical toilets are designated as unimproved sanitation. Furthermore, according to government policy, they are an interim measure and are not intended to be a permanent solution to the sanitation needs of the populace.

**RELIEF SOUGHT**

50 The applicants' demand for flushing toilets has to be considered in tandem with financial and budgetary constraints. This aspect was dealt with in *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC), where the Constitutional Court held:

> [11] What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which s 27(3) must be construed.
>
> .....
>
> [43] However, the guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the State must take reasonable legislative and other measures, within its available resources `to achieve the progressive realisation of each of these rights'. In its language, the Constitution accepts that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources.....

51 I have no doubt that the decisions made by the first respondent in relation to the provision of chemical toilets are capable of being reviewed. I do not subscribe to argument, advance by the first respondent, that the court is precluded from enquiring into the decision to provide chemical toilets because this would amount

to judicial overreach. [18]

52 However, the decisions challenged in this application are highly policy-laden and polycentric. In *Foodcorp (Pty) Ltd v Deputy Director-General, Dept of Environmental Affairs & Tourism, Branch Marine & Coastal Management,*[19] it was held that in reviewing issues of policy that relate to the development and application of a highly technical and complex system, a court must take careful and meticulous cognisance of all the relevant facts and circumstances in the context of the applicable legal principles and statutory provisions.[20]

53 In *Minister of Environmental Affairs & Tourism v Phambili Fisheries* (Pty) Ltd [21] Schutz JA stated the following:

> [53] Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say. Accordingly I am of the view that the attack based on capriciousness must also fail.

54 The test of reasonableness in relation to managerial and policy decisions of government was dealt with in De Smith, Woolf & Jowell's 'Principles of Judicial Review' (June 1999), where it was said:

> 5-030 Yet there are some decisions which the courts are ill-

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18 President of the RSA v SARFU 2000 (1) SA 1 (CC), para 141 - 143, Foodcorp (Pty) Ltd v Deputy D-G, Dept of Environmental Affairs & Tourism, Branch Marine & Coastal Management 2006 (2) SA 191 (SCA), Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others 2021 (3) SA 593 (SCA), DA v Ethekwini Muni 2012 (2) SA 151 (SCA), Mazibuko v City of Johannesburg and others 2010 (4) SA 1 (CC)

19 2004 (5) SA 91 (C)

20 Supra, paragraph 59

21 Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA)

> equipped to review; those which are not justiciable, either because they admit of no objective justification or because the issues they determine are polycentric in effect. Such decisions include those that necessitate the evaluation of social and economic policy, or the allocation of scarce resources among competing claims. Courts are institutionally unsuited to resolving these kinds of problem, which are best left to be decided in the political area.[22]

12-055 These two cases[23] do not entirely rule out the possibility of a finding of unreasonableness in decisions that are in general area of social and economic policy, but they do show that the intensity of review in such cases will be low.... [24]

12-056 The rationales of both cases have a sound constitutional basis: budgetary decisions are quintessential policy decisions involving calculations of social and economic preference. Such questions are more suited to decisions by elected representatives than by courts. Nevertheless, the courts have in the past intervened in decisions about local authority expenditure.....The grounds of the court's intervention, in these cases, as we have seen, was, normally, illegality, rather than unreasonableness.[25]

55 The principles set out in the above English authorities, have been accepted in our law. The wider question of the progressive realisation of constitutional rights was pertinently dealt with in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC). The Constitutional Court held:

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22 De Smith, Woolf & Jowell (supra), p169

23 R. v. Secretary of State for the Environment, ex p. Nottinghamshire C.C. [1986] A.C. 240 and R. v. Secretary of State for the Environment, ex p. Hammersmith and Fulham L.B.C [1991] 1 A.C. 521

24 De Smith, Woolf & Jowell, (supra), p493

25 De Smith, Woolf & Jowell, (supra), p494, see also *Logbro Properties CC v Bedderson NO and Others*, 2003 (2) SA 460 (SCA), at paragraph 21

> [37] It should be borne in mind that in dealing with such matters the Courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. ..... (quote from Soobramoney (supra) omitted.)
>
> [38] Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

56 Declaratory relief is intended to provide legal and practical guidance to resolve underlying disputes and to prevent new ones from arising. Such relief is essentially remedial and corrective and most appropriate where 'it would serve a useful purpose in clarifying and settling the legal relations in issue'. [26] Allied to this is the principle that court orders must be effective, enforceable and immediately capable of execution. They should give finality to the dispute between the parties and not leave compliance to the discretion of the party expected to comply.[27]

**CONCLUSION**

57 The applicants did not ask that the court refer any issues to evidence and they accept that the matter must be decided on the papers as they stand. The applicants also do not tender any evidence of an expert nature and the issues must be approached from a lay person's perspective.

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[26] MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA), at para 28

[27] Eke v Parsons 2016 (3) SA 37 (CC), Monteiro and Another v Diedricks 2021 (3) SA 482 (SCA), at para 23 & 24

58 These proceedings, although instituted in the name of three individuals, concerns the plight of a vast number of people living in informal settlements, who do not have waterborne sewerage and flushing toilets. The litigation falls squarely within the category of public interest litigation.[28]

59 There are at least 160 other households on the affected erven. The order proposed by the applicants would result in demand being made on the first respondent, at the very least, to supply all the residents on the rezoned properties with waterborne flushing toilets.

60 Inevitably, many thousands of other residents in informal settlements in surrounding areas, would similarly demand the rezoning of their properties and flushing toilets. The progressive realisation of citizens' rights to proper sanitation would not be served if a small selection of informal settlers were provided with flushing toilets, while others, similarly deserving, did not receive the same benefits. Where is the line to be drawn?

61 In my view, the applicants' case suffers *inter alia* from the following deficiencies:

61.1 There is a dispute of fact in relation to whether the existing infrastructure in the area is capable of providing waterborne sewerage facilities to the applicants and other residents. These disputes are an obstacle to the applicants obtaining relief.

61.2 The applicants do not refer to any developmental studies or cost-benefit analyses to support the argument they advance. There is no evidence that there will be a cost-benefit to providing waterborne sewerage in place of chemical toilets or, to diverting funds from mega city projects to upgrading

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[28] Ex Parte Goosen & others 2020 (1) SA 569 (GJ), FNB of SA Ltd t/a Wesbank v CSARS 2001 (3) SA 310 (C), Hlatshwayo v Hein 1999 (2) SA 834 (LCC), Kalil NO and Others v Mangaung Metropolitan Municipality and Others 2014 (5) SA 123 (SCA), Permanent Secretary, Dept of Welfare, EC v Ngxuza 2001 (4) SA 1184 (SCA), Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)

the sewerage infrastructure in informal settlements.

61.3 There is no budgetary analysis of the costs that would be incurred to replace chemical toilets with waterborne sewerage. There is no evidence that the first respondent has the financial resources to provide waterborne flushing toilets to the applicants and other informal settlements.

61.4 Common sense dictates that the removal, processing and disposal of raw sewerage is an important component of any waterborne sewerage system. The applicants do not deal with whether the sewerage treatment plants that receive and process raw sewerage, have the capacity to handle the additional load that would be placed on them.

61.5 The applicants do not deal with who is liable to bear the cost of the construction, servicing and maintenance of the additional infrastructure. Is the first respondent liable for these costs or, should other tiers of government be required to fund such an extraordinary expense and, is the consumer required to bear any of the costs of the service demanded?

61.6 No information has been placed before court regarding the viability and cost of providing alternatives to flushing and chemical toilets, such as improved VIPs.

61.7 The applicants did not request information in terms of PAIA,[29] technical or otherwise, that might have assisted the court in understanding the nature, complexity and extent of the problem and how it can be resolved.

62 Notwithstanding the above, there is much to be said in favour of the applicants' complaints:

62.1 The admitted facts justify the complaints about the conditions in which

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[29] The Promotion of Access to Information Act, No 2 of 2000

chemical toilets are supplied, serviced and maintained.

62.2 There is a failure to comply with the norms and standards and the first respondents' own policy statements, to the effect that chemical toilets are an interim sanitation measure. The complaint that interim sanitation measures in the form of chemical toilets, have now become permanent, is therefore justified.

62.3 In my reading of the voluminous government reports, master plans, policy statements, budgets and integrated development plans, (running into thousands of pages), the respondents fail abysmally to engage with the interim nature of chemical toilets and alternatives of a more permanent nature. It cannot be said that the manner which basic sanitation services are planned and budgeted for is transparent.

62.4 Importantly, the respondents do not deal with the sustainability of providing chemical toilets on such a vast scale, in the face of burgeoning costs and numbers (both in regard to users and number of units supplied).

63 In *Mazibuko v City of Johannesburg*,[30] it was said that when challenged, the government must disclose what it has done to formulate its policy on the realisation of socio-economic rights. This should include its investigation and research, the alternatives considered and the reasons why the options underlying the policy were selected. In my view, the channelling of resources into the mega city projects and the fact that a section of the population will benefit from these developments, does not adequately explain the first respondent's entrenched policy in relation to the provision of chemical toilets on a vast scale. The first respondent and the government departments and agencies responsible for these decisions can and should be held to account.

64 However, in my view, the applicants have not made out a case for the relief they

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[30] Mazibuko v City of Johannesburg (supra), paragraph 71, 161

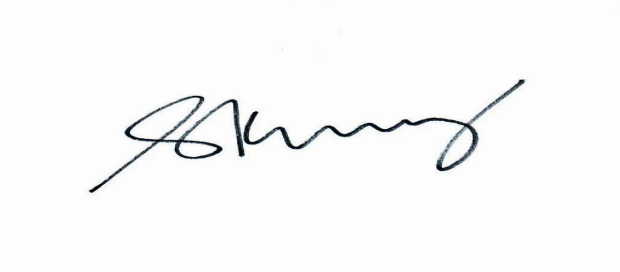
seek. The orders proposed by the applicants are very general and far-reaching in their application and effect. They will not give finality to the disputes. Instead, they will spawn innumerable arguments and further litigation in relation whether and if so, how the orders sought are to be complied with and implemented.

65 As far as costs are concerned, the principle enunciated in *Biowatch Trust v Registrar, Genetic Resources*[31] should prevail.

66 In all the circumstances I make the following order:

1 The application is dismissed.

2 There is no order as to costs.



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JUDGE S KUNY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 9 May 2023

Date of judgment: 14 March 2023

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[31] 2009 (6) SA 232 (CC)

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