CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/24

In the matter between:

MAWETHU LAWRENCE SAZIWA	First Applicant
SIPHO SAKATHA	Second Applicant
ASHUMIKAZI TANTAN	Third Applicant
MAWELE MAQOMA	Fourth Applicant
NOMAWENDU MADEBEZA MADEBEZA	Fifth Applicant
MACKSON TSOTSOYI JIYA	Sixth Applicant
PHUMLISO TSHIKINI	Seventh Applicant
NOLUSINDISO NGWAYISHE	Eighth Applicant
NTANDAZO MBIKO	Ninth Applicant
MINAZANA JAMA	Tenth Applicant
BATHOBILE MADLAVU	Eleventh Applicant
NONTEMBEKO MATAMO	Twelfth Applicant
ERIC LINDELA MENZIWA	Thirteenth Applicant
MNONOPHELI MFONDISI	Fourteenth Applicant
ZANDISE FANA	Fifteenth Applicant
NDIMPHIWE MOUNTAIN GABULA	Sixteenth Applicant
SIYAMCELA BETSHE	Seventeenth Applicant

NOMALWANDLE MAFUMANEKILE DELIHLAZO	Eighteenth Applicant
NOLINDILE LINAH PANDA	Nineteenth Applicant
AVELA KHOLWANE	Twentieth Applicant
NWABISA NYEMBEZI	Twenty-First Applicant
NKOSOVUYO PETROS NOMZANGA	Twenty-Second Applicant
BANDILE GETYENGANA	Twenty-Third Applicant
NOTHUKELA MATAMO	Twenty-Fourth Applicant
MDUDUZI NYEMBEZI	Twenty-Fifth Applicant
MERCY NOBHETELE GQADA	Twenty-Sixth Applicant
TEMBISA MANKAYI	Twenty-Seventh Applicant
NOWINILE FENTE	Twenty-Eighth Applicant
NOSEBENZILE GQAGHA	Twenty-Ninth Applicant

and

MHLONTLO LOCAL MUNICIPALITY	First Respondent
MUNICIPAL MANAGER: MHLONTLO LOCAL MUNICIPALITY	Second Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HUMAN SETTLEMENTS	Third Respondent
O.R. TAMBO DISTRICT MUNICIPALITY	Fourth Respondent

Neutral citation: *Saziwa and Others v Mhlontlo Local Municipality and Others* [2026] ZACC 10

Coram: Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J and Tshiqi J

Judgment: Opperman AJ (unanimous)

Heard on: 27 February 2025

Decided on: 17 March 2026

Summary: Temporary emergency shelter — Disaster Management Act 57 of 2002 — Housing Act 107 of 1997

ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court, Eastern Cape Local Division, Mthatha):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Supreme Court of Appeal and the High Court of South Africa, Eastern Cape Local Division, Mthatha (High Court) are set aside.
4. The following orders are made:
    (a) The Mhlontlo Local Municipality and the O.R. Tambo District Municipality's failure and/or refusal to come to the aid of the applicants after the occurrence of a natural disaster on 8 February 2022 is declared unlawful and unconstitutional.
    (b) The matter is remitted to the High Court, to be heard by another Judge, to determine the disputes of fact relating to the need for temporary emergency shelter. It is recorded that:
        (i) The affidavits filed pursuant to the directions issued by this Court on 10 March 2025 shall serve as the pleadings for purposes of determining the disputes of fact relating to the need for temporary emergency shelter.
        (ii) Applicants 10, 14, 17, 19 and 21 no longer need temporary emergency shelter.

(iii) Applicants 3, 7, 9, 16 and 22 failed to provide affidavits upon being afforded the opportunity to do so by this Court in relation to their need for temporary emergency shelter.

(iv) The *locus standi* of applicants 2, 5 and 15 has been placed in dispute and falls to be determined by the High Court.

(v) No evidence in relation to the weather event on 8 February 2022 and which is tendered to disprove same shall be admissible at such hearing.

(c) Once the High Court has made findings on those applicants in need of temporary emergency shelter and the extent of such need, the first, second and fourth respondents are to deliver a report to the High Court within two months of the date of such order, which report is to be confirmed on affidavit, in which they detail how the needs of the applicants are to be addressed.

(d) The applicants may serve and file affidavits, if any, responding to the contents of the report referred to in the preceding paragraph, within 10 court days of the service and filing of the aforesaid report.

(e) The matter shall thereafter be finalised by the High Court which may make any further order or determination, following a hearing if need be, as may be necessary or appropriate with a view to finalising the needs of the applicants so identified.

(f) The High Court shall have the powers to make further orders necessary to reach a speedy finalisation of this matter and may specify any additional reporting or relief required.

(g) The High Court may, on good cause shown, (i) extend any time period provided for in this order; and (ii) permit applicants 3, 7, 9, 16 and 22 to file affidavits on the current need for temporary emergency shelter upon such terms as it deems appropriate.

(h) The costs to be incurred in the High Court in the remitted proceedings are to be determined by the High Court.

5. The first and fourth respondents jointly and severally must pay the applicants' costs in this Court, those already incurred in the High Court and the costs of the Supreme Court of Appeal petition.

6. The third respondent must pay its own costs.

JUDGMENT

OPPERMAN AJ (unanimous)

Introduction

[1] The role of municipalities in our country has recently been underscored by the President of the Republic of South Africa. He is quoted as having said of local government:

> "All too regularly, corruption, mismanagement and an outrageous lack of consequence management and accountability allow this dysfunctionality to continue with impunity, thus prolonging the suffering of our people living in affected communities."[1]

[2] The focus of this case is the role of municipalities in a situation of disaster. The facts lamentably expose how they contribute to, rather than diminish, the suffering of the people for whom they are obliged to care.

[3] The applicants were the victims of an extreme weather event which occurred on 8 February 2022 (weather event). Heavy rains and high winds destroyed or severely

[1] Tandwa "Ramaphosa threatens purge of failed councillors" *Sunday Times* (14 September 2025).

damaged their homes in the rural district of Qumbu, in the Eastern Cape Province. As a result of their diminished housing conditions, the applicants approached their ward councillors and urged them to address their plight with the first respondent, the Mhlontlo Local Municipality (Local Municipality) to come to their assistance by providing them with shelter. A school hall, a municipal building or even tents would have been a start.

[4] Certain applicants launched proceedings against the Local Municipality within 10 days of the weather event. The proceedings were issued out of the High Court of South Africa, Eastern Cape Local Division, Mthatha (High Court), seeking a declarator that they were entitled to temporary emergency shelter, and a mandatory interdict that the respondents be directed to provide temporary emergency shelter to the applicants. The application was heard eight months later after the High Court had decided that the applicants' cause of action was judicial review under the Promotion of Administrative Justice Act[2] (PAJA) or a legality review. The High Court dismissed it with costs, having found that the applicants had not exhausted their internal remedies; and that the litigation was not *bona fide* (genuine), as the applicants had failed to prove that a disaster had occurred and that one had to have been declared for them to qualify for relief. The High Court awarded costs against the applicants, and ruled that *Biowatch*[3] protection was not available to them as "frivolous litigation" was to be discouraged.

[5] In the foundational constitutional case of *Makwanyane*,[4] it was held:

> "The very reason for establishing the new legal order . . . was to protect . . . others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of

[2] 3 of 2000.

[3] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[4] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

> our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."[5]

[6] This case is about an apparent unwillingness on the part of the respondents to protect the most vulnerable amongst us and the lower courts' failures to require the respondents to give expression to the willingness required in the new legal order. Every link in the chain appears to have failed the victims of a weather event in one of the poorest parts of our country.

[7] There is a terrible irony in that we are dealing here with a former "homeland" of the apartheid state where the people of the area in the Eastern Cape, formerly known as the Transkei, were confined to rural labour reserves in reduced circumstances where their dignity and quality of life were impaired by the apartheid-state legal structures around them. While these structures were replaced by our Constitution, the treatment of the applicants by the bureaucracy appears to be reminiscent of the past. Officials in the apartheid state were notorious for making it their business to treat the people of the "homelands", such as the Transkei, with indignity and obstruction rather than with respect and support. If that repugnant old ethos has somehow been allowed to persist in the offices and corridors of the respondents, it is deserving of the strongest deprecation. It needs to be urgently replaced with the constitutional ethos of the new legal order which infuses the founding values of our Constitution into how officials of municipalities and provinces ought to deal with inhabitants to live up to the high standard expected of our public servants by replacing the ways of the old with the ways of the new.

Parties

[8] The applicants comprise 29 residents of the fourth respondent, the O.R. Tambo District Municipality (District Municipality), who are, in many instances, elderly, and in some instances, women who head households with minor children and disabled

[5] Id at para 88.

persons. They describe themselves as "a category of persons who are uneducated, highly impoverished and reliant on social assistance derived from the South African Social Security Agency".

[9] The first respondent is the Local Municipality and the second respondent is its municipal manager. The third respondent is the Member of the Executive Council for the Department of Human Settlements, Eastern Cape (Provincial Department). These four respondents are cited as the parties responsible for the provision of temporary emergency shelter in their area of jurisdiction.

Background

[10] On 8 February 2022, the weather event struck. The applicants approached their ward councillors shortly thereafter advising them of their plight and urging them to call upon the Local Municipality to provide temporary emergency shelter. On 11 February 2022, the attorneys of record for Ms Tembisa Mankayi, one of the applicants, wrote a letter to the Local Municipality and copied the Provincial Department. In it, her attorneys recorded that during 2013, the Provincial Department had started the construction of a Reconstruction and Development Programme (RDP) house for their client but the house had never progressed beyond the foundations and a concrete slab as the construction company had abandoned the site.

[11] Since then, Ms Mankayi had, as recorded by her attorneys, been residing in a mud hut. This mud hut was partially destroyed in the weather event of 8 February 2022, compelling her and her three children to reside in one side of a remaining room. This portion of the mud hut posed a threat to their lives as it was at risk of collapsing, in addition to the risk which had been created by an exposed electricity supply cable. Her attorneys requested that she be given urgent temporary emergency shelter.

[12] In response, the Local Municipality's attorneys focused on the RDP house request only, disavowing any responsibility for "building houses for rural communities"

and contending that the Provincial Department is responsible for housing. The Local Municipality did not focus on the request for temporary emergency shelter at all. They undertook to investigate the situation "based on [u]buntu" without acknowledging any legal liability to act. The Provincial Department concluded that if "no report is received by [Ms Mankayi's attorneys] on or before 30th March 2022", Ms Mankayi was free to approach the courts.

[13] This was met, on 15 February 2022, with the following response from Ms Mankayi's attorneys:

> "Firstly, in circumstances of disaster the local municipality bears the responsibility to afford the affected persons emergency housing so as to protect the subject's constitutional right to shelter. Secondly, expecting the affected person to live without adequate shelter for a period of over thirty days whilst the municipality conducts the investigation is rather heartless and cannot be allowed in this constitutional dispensation premised on the advancement of human rights."

[14] The Local Municipality was afforded until close of business on Wednesday, 16 February 2022 to respond on whether they would provide temporary emergency shelter. In its response to this second letter, the Local Municipality did not address the allegation of being "rather heartless" and once again merely disavowed responsibility for building RDP houses, stating that it simply collected data and forwarded this information to the Provincial Department. The response did not address the issue of temporary emergency shelter and again suggested seeking recourse through the courts.

[15] Shortly thereafter, on 18 February 2022, Ms Mankayi approached the High Court for declaratory relief that the Local Municipality's failure to afford her temporary emergency shelter was unlawful and unconstitutional, as well as an order declaring her eligible for temporary emergency shelter and for consequential relief. The matter was enrolled for hearing on 1 March 2022. By then, it had become apparent that there were other persons who were affected by the same weather event and it was agreed that these further applicants would serve their applications by 7 March 2022. On

7 March 2022, the Local Municipality's attorneys delivered a letter in which they requested a list of affected persons, stating that it wanted to assist. A list was supplied the following day.

[16] On 18 March 2022, a further group of affected persons launched their application. On 28 March 2022, the Local Municipality revealed the outcome of its investigations. It had utilised the time that it had said it would use in the spirit of ubuntu to obtain the applicants' RDP housing information from the Provincial Department. The Local Municipality seemed bent on exposing the applicants' application as a ploy to "jump the queue" in the wait for the allocation of RDP housing. On 19 April 2022, a consolidation order[6] was granted so that all the applicants' cases would be heard together by the High Court. The District Municipality was joined as a party to the proceedings and all the respondents opposed the application on several grounds.

[17] Returning to the applicants' situation, after the weather event, some applicants, including Mr Mawethu Lawrence Saziwa, the first applicant, were taken in by relatives. Mr Saziwa described his living circumstances after the weather event as deplorable. He is a 72-year-old man whose wife is also elderly with "dysfunctional" legs. She does not have a wheelchair and is reliant on the support she gets from others to be able to move around. At the time of the weather event, his four grandchildren, who were of school-going age and who attended a nearby school, were residing at his residence. All of them moved into a kindly relative's three-roomed house which had to serve as the bedroom, kitchen, bathroom and living room for both families. These conditions impaired everyone's privacy and interfered with the children's ability to study and do homework.

[18] On behalf of all the applicants, Mr Saziwa stated that they were rendered homeless by the destruction of their houses, that they had neither the means nor the capacity to rebuild their homes, nor did they have alternative places of residence. This

[6] Case No 810/2022, 1225/2022 and 2017/2022 were consolidated under Case No 2016/2022.

necessitated them being taken into the homes of neighbours and extended family members. In his affidavit he stated:

> "The circumstances under which we live are shameful and have no regard for the rights enshrined in the Bill of Rights including the right to dignity, privacy, sufficient food . . . We became a nuisance to the people we sought shelter from since we also came with our children and/or grandchildren."

[19] Much was made in the respondents' opposing papers about whether a severe weather event had struck on 8 February 2022 and about the absence of a declaration of a disaster. It is instructive to quote in full the portions of the answering affidavit of the manager of the District Municipality, deposed to on 28 April 2022, who appears to have taken literally the applicants' use of the term "hurricane" to describe the weather event that left their homes damaged or destroyed. He places in issue not so much the conditions of their homes as the severity of the weather on that day:

> "The only report for the month of February 2022 related to hazardous events arising from heavy rains and structural fires and the affected eighteen households were referred to the Department of Social Development for assistance. None of such households included the applicants herein. Such events could not be classified as a disaster in terms of section 1 of the Disaster Management Act as they fell short of that definition.
>
> I have taken the trouble to scan through the media reports about such an incident but I have not been able to find any newspaper, radio or television report on any or similar incident as that described by the applicants. I say this because a hurricane is unlike any other ordinary storm as it is a storm with a violent wind. It could not have escaped media attention as it causes devastation in its wake. I have also viewed the South African Weather Services website for such incident and none is reported."

It is worth explicitly mentioning that no visit was made by municipal officials to the affected area.

Litigation history

High Court

[20] The applicants sought to hold the respondents constitutionally bound to provide them with temporary emergency shelter. According to the applicants, the respondents failed to act in terms of the Disaster Management Act[7] and thus breached their constitutional obligations.

[21] The respondents opposed the application on several grounds. First, they contended that no disaster had occurred within the jurisdiction of the Local Municipality on 8 February 2022. Second, they argued that a state of disaster must be declared in accordance with the Disaster Management Act and that, in this instance, there was no such declaration. Third, the Local Municipality could only act in terms of empowering provisions, and there was no provision empowering the Local Municipality to provide temporary emergency shelter. Last, insofar as the applicants relied on the provisions of PAJA, the respondents argued that the applicants had failed to exhaust internal remedies. The District Municipality and the Provincial Department submitted that there was no case made against them.

[22] The Provincial Department contended that its involvement was limited to responding to requests for assistance from the Local Municipality during a declared disaster. It contended that it had not received any application from the Local Municipality and was thus unaware of any disaster. It maintained that the applicants failed to establish a case against it.

[23] The District Municipality contested the existence of a disaster as claimed by the applicants, stating further that housing provision is a joint responsibility of the national and provincial governments and that it lacked the power to deliver housing unless accredited to do so. It contended that it did not possess the authority to carry out functions typically performed by other spheres of government during a disaster, as its

[7] 57 of 2002.

role was confined to the coordination and management of local disasters within its jurisdiction. It alleged that it was not informed of any disaster that had occurred within the jurisdiction of the Local Municipality, thus, claiming that there was no case against it by the applicants. It seemed to treat a disaster as an official event rather than a reality.

[24] The High Court held that the cause of action chosen by the applicants was predicated on section 6(2)(g) of PAJA, which deals with a situation tantamount to the remedy of a *mandamus* (mandatory interdict).[8] The High Court invoked section 7(2)(a) of PAJA,[9] which requires internal remedies to be exhausted before a court may review administrative action. It held that the applicants ought to have appealed the conduct or omission complained of in terms of section 62(1) of the Local Government: Municipal Systems Act[10] (Systems Act). The High Court thus found an additional ground for the respondents' failure to help the applicants and that the applicants had fatally missed a step on the perilous procedural path to the doors of justice.

[25] The High Court found that there was no evidence that the applicants had informed the Local Municipality of the alleged disaster prior to approaching their legal representatives and that there was no proof that a report to the ward councillors had been made. It criticised the applicants for not identifying by name those ward councillors they alleged they had approached.

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[8] Section 6(2)(g) provides:

> "A court or tribunal has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision."

[9] This provision provides:

> "subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedies provided for in any other law has first been exhausted."

[10] 32 of 2000. The provision provides:

> "A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision."

[26] The High Court held that the applicants had failed to prove that a disaster had occurred which, in turn, meant that the Local Municipality could not invoke the Disaster Management Act. It stated that the Disaster Management Act only conferred a discretion on the Local Municipality to provide resources within its budget, but that this would require an investigation of the incident and a decision that there was a disaster as defined under the Disaster Management Act. The High Court found that not every natural incident, such as rainfall, thunderstorms or other similar occurrences, qualified as a disaster under the Disaster Management Act.

[27] Turning to whether the applicants were entitled to any form of relief under either form of review, the High Court held that the relief envisaged under section 55(2) of the Disaster Management Act could only be implemented after a state of disaster had been declared. It held that the applicants had not produced any evidence to substantiate the allegations of a disaster or hurricane and hence it was found not to have occurred and review-based relief was not available.

[28] Referring to section 23 of the Disaster Management Act, which provides for the classification and recording of disasters, the High Court found that "the disaster" relied upon by the applicants had neither been classified nor declared. It consequently held that the applicants failed to make out a case under the legality review rubric and that they were not entitled to any relief. The High Court also found that no case had been made out against the Provincial Department and the District Municipality. Hence, it dismissed the applicants' application and ordered them to pay the costs of the litigation on the basis that they were not deserving of the protection of *Biowatch*. The application for leave to appeal was also dismissed.

Supreme Court of Appeal

[29] The applicants applied, in terms of section 17(2) of the Superior Courts Act,[11] to the Supreme Court of Appeal for leave to appeal to the Full Court of the Eastern Cape

[11] 10 of 2013.

Division against the whole of the judgment of the High Court. On 25 October 2023, their application for leave to appeal was dismissed with costs on the grounds that there were no reasonable prospects of success and was no compelling reason why an appeal should be heard.

Submissions before this Court

Applicants

[30] The applicants submit that they were rendered homeless by virtue of a disaster. They do not contend that this case is purely one of housing. Rather, they contend that the respondents' failure and/or refusal to avail emergency shelter to affected persons was the catalyst for their claim that their housing rights (among other rights) were infringed. The applicants contend that the respondents' obligations are those contained in section 54 of the Disaster Management Act, which, read with the provisions in the Constitution relating to co-operative governance,[12] mandates the respondents to deal with the disaster, even if no disaster has been declared in terms of section 55.

[31] They argue that the Disaster Management Act's broad coverage speaks to the provision of emergency relief and the management of disaster situations. These, they claim, implicate their constitutional rights to, amongst others, life, dignity, privacy, shelter, food and safety of children.[13]

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[12] Section 41 of the Constitution provides:

> "(1) All spheres of government and all organs of state within each sphere must—
>
> . . .
>
> (h) co-operate with one another in mutual trust and good faith by—
>
> (i) fostering friendly relations;
>
> (ii) assisting and supporting one another;
>
> (iii) informing one another of, and consulting one another on, matters of common interest;
>
> (iv) co-ordinating their actions and legislation with one another;
>
> (v) adhering to agreed procedures; and
>
> (vi) avoiding legal proceedings against one another."

[13] Sections 10, 11, 14 and 25-8 of the Constitution.

First and second respondents

[32] In response to these claims, the first and second respondents (the Local Municipality and its manager) persist in this Court with the denial that there was a disaster on 8 February 2022. These two respondents claim that, even if there was a weather event that qualified as a disaster, the ward councillors were not informed of it by the applicants. They submit that, in the absence of a declaration of a disaster in terms of section 55(1) of the Disaster Management Act,[14] the relief sought could not be granted. The first and second respondents contend that the applicants failed to present evidence which, on a proper application of the provisions of the Disaster Management Act, could and should have triggered the declaration of a disaster. A declaration of a disaster, they claim, was a prerequisite for them to be able to come to the assistance of the applicants, other than on the basis of a general willingness to be of assistance to persons in distress in the spirit of ubuntu.[15]

[33] The Local Municipality and its manager submit that even if there was a disaster, the responsible organ of state was not the Local Municipality, but the national or provincial government. They deny that they had a constitutional obligation to build houses for persons in the position of the applicants. They dispute the ownership of the houses that were destroyed. They also complain that the applicants failed to exhaust

[14] Section 55(1) provides:

> "In the event of a local disaster the council of a municipality having primary responsibility for the co-ordination and management of the disaster may, by notice in the Provincial Gazette, declare a local state of disaster if—
>
> (a) existing legislation and contingency arrangements do not adequately provide for that municipality to deal effectively with the disaster; or
>
> (b) other special circumstances warrant the declaration of a local state of disaster."

[15] As per *Makwanyane* above n 4 at para 308:

> "Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality." (Emphasis in original.)

internal remedies in terms of section 62 of the Systems Act.[16] If the applicants were not satisfied with any decision taken by the municipal manager or Local Municipality, they should have prosecuted an appeal and exhausted that process before launching these proceedings.

Third respondent

[34] The Provincial Department contends that the applicants did not make out a case against it in any of the Courts. It contends further that its obligation to provide adequate housing (either temporary or permanent) for the people of the province is based on section 26 of the Constitution, and that the Housing Act[17] was enacted in response to

[16] This section provides:

"Appeals

(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

(4) When the appeal is against a decision taken by—

(a) a staff member other than the municipal manager, the municipal manager is the appeal authority;

(b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or

(c) a political structure or political office bearer, or a councillor—

(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.

(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.

(6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law."

[17] 107 of 1997.

section 26(2) of the Constitution.[18] It argues that, as a result, the Provincial Department derives its statutory power to provide adequate housing from that Act, which does not oblige it to respond to situations of this sort. In effect, it contends that it is entitled to ignore demands of the nature made by the applicants.

[35] The Provincial Department references the Housing Act and Volume 4 of the National Housing Code (NHC), which provides practical guidelines on the application of the Housing Act. There, housing assistance in emergency circumstances is provided for in terms of co-operative governance, in that it involves all spheres of government, national, provincial and local. Local government is placed on the frontline in the practical application or implementation of the Housing Act. This is because the relevant municipality is either the landowner where the houses are to be built, or is the first point of contact with the community, through the ward councillor or other community stakeholders.

[36] In a nutshell, as far as the Provincial Department's responsibilities are concerned, it contends that the provision of emergency housing for people is initiated by the municipalities and, absent such initiation, the Provincial Department has no responsibilities. It is a municipality's duty to identify an emergency, whether or not the Provincial Department declared a disaster. If the municipality finds that it lacks the resources to provide the emergency housing it needs to deal with the victims of the emergency, then it must approach the Provincial Department and make an application to the Provincial Department for the allocation of funds to deal with the disaster in its area. The Provincial Department's position is that it only reacts once it receives an application from a municipality. It submits that it cannot know of any disaster or emergency without it first being reported by a municipality through a request for funding because such municipality lacks the resources to deal with the emergency situation. None of this occurred in this instance.

[18] This section provides:

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

[37] The Provincial Department's position is that it neither received a report about the disaster from the applicants nor an application for funding from either the Local or District Municipality or individuals. It submits that it could not have been expected to have rendered assistance without knowledge.[19]

Fourth respondent

[38] The District Municipality explains that it opposed the application in the High Court mainly on the basis that the provision of housing is a concurrent national and provincial competence in terms of Schedule 4 Part A of the Constitution, and that this competence (or responsibility) has not been assigned to the District Municipality. The applicants, according to the District Municipality, did not provide any evidence of the existence of any disaster that took place within its area. This led to a dispute of fact, with the result that the applicants' case had to be decided on the facts put up by the District Municipality. It argues further that the applicants did not make out any case against it at all, pointing out that the applicants' case concerned the failure of the Local Municipality, not the District Municipality, to provide assistance.

[39] The District Municipality also argues that it cannot exercise any power or perform any function that it is not authorised to exercise or perform in terms of the Constitution and any legislation promulgated thereunder. The Disaster Management Act does not extend powers and functions of the District Municipality in the event of a disaster, it argues. It points out that the powers and functions of a district municipality are set out in section 84(1) of the Local Government: Municipal Structures Act[20] read with Part B of Schedule 4 and Part B of Schedule 5 of the Constitution.

[19] The letter of 11 February 2022, copied by Ms Mankayi's attorneys to the Department of Human Settlements, East London, would appear to contradict this averment. Since the Provincial Department's counsel submitted in this Court that it would co-operate with an order we grant, we make no more of this on the basis that that co-operation will indeed be forthcoming.

[20] 117 of 1998.

[40] The District Municipality denies that a disaster occurred in the area where the applicants resided. Further, it states that even if such a disaster did occur, a state of disaster would have to have been declared for the District Municipality to mobilise resources to assist the applicants. In such mobilisation, the District Municipality would be, it claims, careful not to usurp the functions and powers of other organs of state, such as the national and provincial governments, to provide housing, that not being its functional competence. In short, it disavows responsibility to help the applicants by stating that a declaration of a state of disaster was a prerequisite for it to have any duty to discharge, and that it would assiduously avoid stepping on the legislated areas of responsibility of other organs of state which bore legal duties to deal with the alleged disaster.

[41] The District Municipality asserts that the Housing Act and the NHC do not assign the function to provide housing (including emergency housing in the case of a disaster) to the District Municipality, and neither the national nor the provincial government has assigned such a function to it. Consequently, it would not be able to provide emergency housing to the applicants.

Issues

[42] The issues to be determined are—

(a) whether condonation in respect of a variety of non-compliances with stipulated timelines should be granted;

(b) whether this Court's jurisdiction is engaged and, if so, whether it is in the interests of justice for leave to appeal to be granted;

(c) whether the Local and District Municipalities failed to comply with their statutory obligations and thereby infringed the applicants' constitutional rights, including their rights to temporary emergency shelter and dignity;

(d) whether the applicants were entitled to temporary emergency shelter on the case pleaded; and

(e) the appropriate remedy, if any.

Analysis

Condonation

[43] The parties seek condonation for failing to comply with a number of rules of this Court as well as directives issued by the Chief Justice. None of the parties oppose the condonation sought by the non-complying parties, but it still remains for this Court to consider the reasons advanced for the non-compliance, as condonation is not there just for the taking.

[44] The applicants seek condonation for the late filing of the application for leave to appeal, the late delivery of the record, the late filing of written submissions and late filing of explanatory and replying affidavits in respect of the appropriate remedy, which opportunity was afforded to the applicants after the hearing of the application. The applicants' primary grounds for seeking condonation are that they are destitute, living below the poverty line and mainly reliant on social grants for their survival. They contend that they struggled to raise funds for the costs associated with the appointment of a correspondent firm of legal practitioners and for the preparation of the record. The applicants thus submit that their inability to timeously lodge the application, the record and the written submissions was occasioned by their indigence.

[45] In respect of the late filing of the further affidavits permitted by this Court after the hearing, the applicants explain through their attorneys that the task of arranging consultations and the preparation of the supplementary affidavits was time-consuming. The filing of the affidavits was complicated by the fact that the District Municipality's attorneys had relocated their offices to an undisclosed location and that service could only be effected on the attorneys for the Provincial Department. The Registrar of this Court would not accept the affidavits without service on all the respondents and, because the affidavits sought to be filed were late, insisted on a condonation application being filed simultaneously with such affidavits.

[46] The explanations advanced by the applicants constitute reasonable explanations. Their prospects of success are reasonable, as shall appear later in this judgment. Condonation is granted.

[47] The Local Municipality states that it filed the answering affidavits to the application for leave to appeal late due to the fact that the application served on them did not reflect a case number, and it did not consider service of such papers as service of a duly issued application. Its attorneys contacted the attorneys for the applicants to alert them to their stance. This was remedied and the answering papers were filed. They explain further that the written submissions were filed late due to the record having been filed late.

[48] The Provincial Department filed its answering affidavit late due to the Regional Director, who had deposed to the affidavits filed in the High Court and the Supreme Court of Appeal, having vacated his office. A new person was appointed. There was a delay between the former Regional Director vacating his office and another being appointed. The written submissions were filed two days late because of a miscommunication between counsel and his new secretary, who failed to alert him to the brief. The Provincial Department also seeks condonation for the late filing of the answering affidavit permitted after the hearing and following directions by this Court. It contends that this was necessitated by the content of the affidavit of the Local Municipality, which disclosed serious allegations of misrepresentations by the applicants, which required further investigations.

[49] The District Municipality filed its written submissions 52 days late, of which 21 of such days are attributable to the record having been filed out of time. No explanation was proffered for the remaining 31 days, save for the argument that no prejudice to the applicants, who were partly to blame for the delay, was suffered.

[50] When application papers do not have a case number, they are not to be ignored as though they were not served, as was done by the Local Municipality. Such an

explanation is certainly not adequate, nor is it acceptable not to explain the entire period of the delay as the District Municipality did here. In the end, all the papers as well as the written submissions were considered by this Court, because such arguments are of benefit to it. As was emphasised by Mokgoro J in *De Lange*, although in a different context, a court "must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance".[21]

[51] It follows that, in the particular circumstances of this case, condonation is granted.

Jurisdiction and leave to appeal

[52] Jurisdiction is determined with reference to the case pleaded in this Court.[22] This matter clearly raises constitutional issues, as it involves the intersection between the Housing Act and the Disaster Management Act. At this confluence is a pool of rights that are potentially infringed. The applicants' right to have their dignity respected and protected is centrally implicated. Moreover, this Court is required to interpret the Disaster Management Act considering the Constitution. Section 26 of the Constitution, the right to housing, is of course also implicated.

[53] As was said by this Court in *Scribante*:[23]

> "This takes us to the nub of this matter: the right to security of tenure. An indispensable pivot to that right is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity. Though said in relation to the right to life, the words of O'Regan J are apt: '[W]ithout dignity, human life is substantially diminished.' Addressing herself directly to human dignity, she said:

[21] *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 131.

[22] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 14 and *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

[23] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

> 'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights].'"[24]

[54] There can be no doubt that this matter engages constitutional issues of importance. The dispute relates to the application of the Disaster Management Act, the Housing Act and the NHC, being reform-driven legislation giving effect to the Constitution, in particular section 26. The responsibilities of various organs of state under the Disaster Management Act also come into focus. The issues require consideration by this Court. There are reasonable prospects of success. It is thus in the interests of justice to grant leave to appeal.

Merits

What was the case pleaded in the High Court?

[55] The substantive prayers claimed in the notice of motion in the High Court were:

> "2.1 That the respondents' conduct of failing and/or refusing to afford the applicants emergency temporary shelters, structures and/or dwellings sequel a disaster be and is hereby declared unlawful and unconstitutional.
>
> 2.2 That the applicants be and are hereby declared eligible to obtain emergency temporary shelters that afford privacy, dignity and amenities as envisaged in law and as a result of a disaster.
>
> 2.3 That the respondents be and are hereby directed to afford the applicants emergency temporary habitable structures that afford shelter, privacy and amenities at the applicants' site within 3 days of the grant of this order."

[24] Id at para 2 (footnotes omitted.)

[56] Section 38 of the Constitution expressly permits the seeking and granting of declaratory relief.[25] The passage in support of these prayers in the founding affidavit records that the law places a duty on local municipalities to take measures to—

> "37.1 prepare a disaster management plan for the inhabitants of its area according to the circumstances prevailing in its area of jurisdiction;
>
> 37.2 make contingency plans and emergency procedures in the event its inhabitants are affected by a disaster; and
>
> 37.3 provide prompt response and relief to the inhabitants of its area in the event of a disaster".

[57] Although not mentioning the Disaster Management Act by name, the obligations listed are clearly rooted in it. The passages are in essence a synopsis of section 53 of the Disaster Management Act.[26]

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[25] Section 38 provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

[26] The section provides:

> "(1) Each municipality must—
>
> (a) conduct a disaster risk assessment for its municipal area;
>
> (b) identify and map risks, areas, ecosystems, communities and households that are exposed or vulnerable to physical and human-induced threats;
>
> (c) prepare a disaster management plan setting out—
>
> . . .
>
> (vi) contingency strategies and emergency procedures in the event of a disaster, including measures to finance these strategies; and
>
> (vii) specific measures taken to address the needs of women, children, the elderly and persons with disabilities during the disaster management process;
>
> . . .
>
> (2) A disaster management plan for a municipal area must—
>
> . . .
>
> (b) anticipate the types of disaster that are likely to occur in the municipal area and their possible effects;
>
> (c) place emphasis on measures that reduce the vulnerability of disaster-prone areas, communities and households;
>
> . . .
>
> (e) identify the areas, communities or households at risk;

[58] Further, the following paragraphs in the founding affidavit, that support the cause of action, bear quoting:

> "The respondents' conduct is contrary to the basic values and principles governing public administration as contained in section 195 of the Constitution which requires a high standard of professional ethics, accountability and transparency.
>
> Since the respondents are government organs it was reasonably expected that they would play an active role and that they would be responsive and come to our assistance. To the contrary, the respondents [were] derelict [in] their duty and displayed ignorance of their role in circumstances of disaster.
>
> The matter is of high importance as it concerns utter violation of enshrined constitutional rights which inter alia include the right to shelter, dignity, privacy, sufficient food and life."

[59] Mr Saziwa records in his affidavit a version which notably was met only with a bare denial by the respondents:

> "From time immemorial we established our homes within the first respondent's district. Our houses were by no means formal or sophisticated as the majority thereof were built through mud bricks.
>
> We resided with our children and/or grandchildren who are attending school in the nearby schools.
>
> We were affected by the disaster and/or hurricane that swept the first respondent's district on 8 February 2022.
>
> We were rendered homeless by the destruction of our houses. We neither had means nor capacity to rebuild our homes. Moreover, we do not have alternative places of residence and the affected shelters were our only homes. . . .

. . .

(k) contain contingency plans and emergency procedures in the event of a disaster, providing for—

. . .

(ii) prompt disaster response and relief."

> We communicated with the relevant ward councillors imploring that they address our plight to the first respondent."

[60] It bears emphasis that it was the attorney for Ms Mankayi who addressed a letter to the Local Municipality on 11 February 2022, three days after the weather event of 8 February 2022, and copied the Provincial Department. The letter was headed: "Request for provision of emergency housing or a habitable structure sequel [to] a disaster which caused dismantling of the home of Tembisa Mankayi". How that request and those of the other applicants in similar positions were dealt with is the focus of this judgment.

[61] It was common cause on the papers before the High Court that the respondents did not inspect the site of the alleged disaster. The High Court recorded that "[a]ccording to the weather forecast during February 2022, there was no hurricane reported within the area of jurisdiction of the [Local Municipality]".[27] It appears that this perfunctory search provided the basis for the conclusion that, as a matter of fact, the disaster, be it a hurricane or extreme weather conditions, had not happened. Of course, had one of the municipal officials got into a car on 11 February 2022, three days after the event, and driven to the area of the alleged disaster, that official might have seen the homes depicted in the photographs, or might have been able to provide other first-hand evidence. They could have found out whether there was any damage, what the state of dereliction was and what the impact on the community was. However, this rudimentary step was not taken. That left the respondents with no admissible evidence with which to refute the applicants' version.

[62] The Local Municipality, despite having no evidence, denied that the "hurricane" had occurred. It therefore denied that it had any duty to assist the applicants. It had offered to investigate in the spirit of ubuntu. What the evidence reveals, however, is

[27] *Saziwa v Mhlontlo Local Municipality*, unreported judgment of the High Court of South Africa, Eastern Cape Local Division, Mthatha, Case No 2016/2022, 810/22, 1225/22, 2017/22 (10 January 2023) (High Court judgment) at para 20.

that instead of rendering assistance, the Local Municipality diverted its focus away from the applicants' request for temporary emergency shelter to an irrelevant issue, that of the applicants' permanent (not emergency) housing in the form of RDP housing and the applicants' positions in that queue. The consequence of the Local Municipality and its manager's misplaced focus on RDP housing was that the applicants received no temporary emergency shelter assistance at all from the respondents.

[63] The applicants sought a declarator in terms of section 38 of the Constitution, read with the provisions of the Disaster Management Act, to enforce their alleged right to temporary emergency shelter. This case concerns the proper interpretation and application of the Disaster Management Act, and this was fully appreciated by all the parties in the High Court hearing who focussed, amongst other things, on whether a disaster under section 55 of that Act had been declared. There can be no doubt therefore that the Disaster Management Act was central to the proceedings before the High Court.

[64] No case for a PAJA review was made on the papers. The applicants pleaded squarely that the Local and District Municipality's failure to comply with their statutory obligations infringed upon their constitutional rights, including the rights to shelter, dignity, privacy, sufficient food and life. As stated, the Disaster Management Act was not mentioned by name in the founding affidavit. Nonetheless, it is clear from the judgment of the High Court that it too appreciated that the case of the applicants was that the Local Municipality had failed to comply with its obligations provided for in the Disaster Management Act. The High Court stated:

> "In this case, the complaint is that the [Local Municipality] is bound in terms of the Disaster Management Act to provide temporary accommodation to the applicants because a disaster had occurred which rendered the applicants homeless or without shelter."[28]

[28] Id at para 51.

What was the case decided in the High Court?

[65] Despite the express portions of the notice of motion and the founding papers quoted here[29] and the High Court's express formulation of "the complaint",[30] the High Court approached the application as if it were one seeking a PAJA or legality review. The High Court, in its judgment, identified the cause of action in the following terms:

> "The cause of action chosen by the applicants under PAJA is predicated on the provisions of section 6(2)(g) and the [Local Municipality] is relying upon section 7(2)(a) of PAJA as a ground to oppose the relief."[31]

[66] This was a mischaracterisation of the pleaded case, as the applicants had not brought a review application. Rule 53 of the Uniform Rules[32] was not referred to or used.[33] The format of the notice of motion did not require the respondents to produce a record, as is customarily done in rule 53 reviews, and there was no prayer for the reviewing and setting aside of any of the respondents' decisions. It was inappropriate to treat the matter as a review. It should have been decided based on the pleadings as presented.[34]

[67] Our courts have repeatedly stated that it is for the parties to set out and define the nature of their dispute and it is for the court to adjudicate those issues.[35] The Supreme Court of Appeal, in *Fischer*,[36] held:

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[29] See [55] to [56].

[30] See [64].

[31] High Court judgment above n 27 at para 35.

[32] The provision deals with reviews.

[33] This, of course, is not a requirement but certainly an indicator of the chosen cause of action.

[34] *Fischer v Ramahlele* [2014] ZASCA 88; [2014] 3 All SA 395 (SCA); 2014 (4) SA 614 (SCA) (*Fischer*) at paras 13-14.

[35] *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at paras 27-8.

[36] *Fischer* above n 34 at para 14.

> "Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* [(of its own accord)] raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone. It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits."[37]

[68] It bears repetition that the focus in the High Court proceedings was squarely on the Disaster Management Act, although exclusively and erroneously so, on section 55. I will start by analysing the disputes of fact.

[37] Id at paras 13-14.

The "disputes of fact" and the role of this Court

[69] The High Court identified two disputes of fact, being (a) the existence of a weather event and (b) whether it had been communicated to the ward councillors or the Local Municipality's administration. Before addressing these disputes, it is important to make some observations about the role of this Court. This Court does not normally involve itself in determinations of disputes of fact.[38] However, where this Court is faced with a dispute of fact, it must apply the trite principles applicable to a determination of disputes of fact on motion.

[70] In terms of the *Plascon-Evans*[39] rule, given that the matter was one for final relief on motion, the respondents' version would prevail provided that there was a *bona fide* dispute of fact. However, there was no *bona fide* dispute of fact here. The answering affidavits contained no more than bare denials of the allegations made by the applicants regarding the occurrence of a weather event. A respondent cannot generally, by simply denying the averments made by the applicant in circumstances such as this, defeat a claim by invoking the *Plascon-Evans* rule. That is a misapplication of the rule. A *bona fide* dispute of fact requires that there be something of consequence raised by the respondents, both as to substance and factual detail, that enables a factual dispute to be identified and to be categorised as a genuine or *bona fide* dispute of fact.[40]

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[38] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[39] *Plascon-Evans Paints (TVL) Ltd v Van Riebeek Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634-5.

[40] See *Wightman t/a J W Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (*Wightman*) at para 13, as endorsed in *African Congress for Transformation v Electoral Commission of South Africa; Labour Party of South Africa v Electoral Commission of South Africa; Afrikan Alliance of Social Democrats v Electoral Commission of South Africa* [2024] ZACC 7; 2024 (8) BCLR 987 (CC) at para 93:

> "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the [*Plascon-Evans*] test is satisfied."

Was there a bona fide dispute about the existence of the weather event?

[71] As was emphasised in *Wightman*,[41] factual averments seldom stand apart from a broader matrix of circumstances. Having regard to such circumstances, the bare denials are therefore particularly startling. Annexed to Mr Saziwa's affidavit are several photographs of mud and clay brick structures in various states of destruction. One, for example, is of a mud brick rondavel, the walls of which have collapsed to ground level. The conical grass roof of the rondavel, typical of the rural Eastern Cape, rests upon the rubble of the walls at ground level. In the background, other houses of different designs in better condition can be seen stretching across the rolling Eastern Cape landscape. Another photograph attached to Mr Saziwa's affidavit depicts a concrete brick structure with the roof blown off, the roof timbers visible and the dwelling exposed to the elements.

[72] Ms Mankayi, a 64-year-old woman, attached to her founding affidavit a photograph of a severely damaged mud hut with a partially unsupported corrugated iron roof. One wall has collapsed and lies as rubble in the foreground of the photograph. Blankets and pillows are arranged at the front of the space created by the collapsed wall. These are open to the elements next to a wooden door that stands in a gaping hole. A temporary water tank stands next to the partially destroyed structure. In her affidavit deposed to some 10 days after the weather event, Ms Mankayi says that she had built this two-roomed hut for herself and her dependants. She resides in that hut with her children. This is her description of the weather event, which is worthy of reproduction:

> "On 8 February 2022 there was a strong hurricane that hit my locality. As a result one side of my mud hut collapsed and the roof thereof got blown off. By God's grace we once again miraculously escaped without major injuries except trauma and severe emotional shock and discomfort."

[41] *Wightman* id at para 13.

[73] The Municipalities in the High Court challenged the authenticity of the photographs that the applicants alleged depicted the damage caused by "the hurricane". I have already described some of these. According to the Municipalities, no acceptable evidence was placed before the Court for the acceptance of those photographs as authentic.

[74] A bare challenge to the authenticity of the photographs or a mere denial of the weather event will not suffice to create a genuine dispute of fact such that the *Plascon-Evans* rule would operate in favour of the respondents. This conclusion is supported by: the timing of the application, which was shortly after the weather event; the writing of the letters of the applicants' attorneys, which were similarly within a very brief period after the weather event; the fact that a number of applicants had the same complaints; the evidence provided by the photographs of numerous homes all damaged or destroyed; and the many statements made by the 29 applicants in their affidavits that this is what had happened to them.

[75] The respondents could have used the seven months between the time of the launching of the applications and the hearing of the consolidated applications to conduct inspections and provide detailed reports from the weather department supported by affidavits and experts if they had the evidence to create genuine disputes of fact. They could not simply sit back and rely on denials and hypothetical questions premised on the assumed (and insulting) "unreliability" of the applicants' evidence.

[76] The High Court quite correctly ignored the ill-conceived challenge to the ownership of these dwellings. It mattered not, for purposes of establishing the need for temporary emergency shelter, who the owner of the destroyed or damaged dwelling was. The issue was whether a previously occupied dwellings no longer provided shelter due to the disaster.

[77] The respondents' version came down to an accusation against the applicants that they had all conspired to allege a fictitious weather event at the same time, and to use

false evidence of damaged and destroyed homes in order to deceive the respondents into providing housing to which the applicants were not, or not yet, entitled. This is, apart from being profoundly contrary to the probabilities, deeply injurious to the dignity of the applicants.

[78] Therefore, I have no hesitation in finding that there is no genuine dispute of fact on these papers in respect of the weather event and I find that it occurred on 8 February 2022 as alleged by the applicants.

The dispute about the communication to the ward councillors

[79] The next dispute of fact identified by the High Court is whether the weather event was communicated to the ward councillors. Here, the High Court once again resorted to questions rather than evidence to assess this issue. The High Court observed that the names of the ward councillors were not mentioned in the applicants' papers and asked why this information was omitted, thereby implying that the omission was sinister. That implication is refuted by the fact that there is only one ward councillor per ward, and the identification of the ward councillor would obviously fall within the knowledge of the Local Municipality. There could be no uncertainty in this regard. The question raised by the High Court was therefore no foundation for a sinister inference. The question should rather be why, during the period between 18 February 2022, when Ms Mankayi's application was launched (or even 11 February 2022 when the first letter was written), and October 2022, when the consolidated applications of all 29 applicants were heard, the respondents did not ask the relevant ward councillors whether they had been approached by the applicants.

[80] Crucially, this dispute, being whether or not the ward councillors had been approached, is not relevant to the true issue, which is whether the Local Municipality was informed of the weather event. This fact was established with crystal clarity: the Local Municipality was informed, as it had responded to the 11 February 2022 letter from Ms Mankayi's attorneys. Both the Local Municipality and the Provincial Department were informed of the event in the 27th applicant's attorney's letter of

11 February 2022. The District Municipality was informed on 11 March 2022. The High Court appears to have disregarded this correspondence in deciding this issue. Nothing turns on whether the individual ward councillors had been told.

[81] Much was made by the High Court of the fact that the applicants had not mentioned the names of the ward councillors to whom they reported their predicament. This was something that should have been dealt with by the Local Municipality. To say "until you give me a name I won't do anything and you will have to be content with my bare denial" is not good enough. It would have been a simple matter to locate the ward councillors and to get them to depose to affidavits relating to such communications (or the absence of such communications). This did not occur. The consequence of this omission is that, under the circumstances of this case, no relevant dispute of fact was created, genuine or otherwise.

Did a disaster as defined in the Disaster Management Act occur?

[82] "Disaster" is defined in the Disaster Management Act in the following terms:

> "'[D]isaster' means a progressive or sudden, widespread or localised natural or human-caused occurrence which—
>
> (a) causes or threatens to cause—
>
> (i) death, injury or disease;
>
> (ii) damage to property, infrastructure or the environment; or
>
> (iii) significant disruption of the life of a community; and
>
> (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources."[42]

[83] It will be noted that a disaster means an occurrence which is either progressive or sudden, widespread or localised, natural or human-caused. The occurrence of whatever nature must, in terms of sub-paragraph (a) of the definition, cause or threaten

[42] Section 1 of the Disaster Management Act.

to cause any of the results listed in paragraphs (a)(i), (ii) or (iii). And the occurrence resulting in any of those results must have a particular magnitude.

[84] That magnitude is defined in paragraph (b) as "a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources". Who are those "affected by the disaster"? In this case, it is the applicants. Certainly, they say in their founding papers, and this is not disputed, that they do not have the resources to cope with the damage to their homes. That is exactly why they require emergency temporary structures or shelter. Given the breadth of the definition and the evidence in the applicants' affidavits, there is no point in spending any more time on this question. The event clearly falls within the definition of a "disaster". The next step in the enquiry is the classification of the disaster.

Classification of the disaster

[85] Classification is governed by section 23 of the Disaster Management Act.[43] The important section is subsection 23(7), which provides that "[u]ntil a disaster is classified

[43] Section 23 provides:

> "(1) When a disastrous event occurs or threatens to occur, the National Centre must, for the purpose of the proper application of this Act, determine whether the event should be regarded as a disaster in terms of this Act, and if so, the National Centre must immediately—
>
> . . .
>
> (b) classify the disaster as a local, provincial or national disaster in accordance with subsections (4), (5) and (6);
>
> . . .
>
> (4) A disaster is a local disaster if—
>
> (a) it affects a single metropolitan, district or local municipality only; and
>
> (b) the municipality concerned, or, if it is a district or local municipality, that municipality either alone or with the assistance of local municipalities in the area of the district municipality is able to deal with it effectively.
>
> . . .
>
> (7) Until a disaster is classified in terms of this section, the disaster must be regarded as a local disaster.
>
> (8) The classification of a disaster in terms of this section designates primary responsibility to a particular sphere of government for the co-ordination and management of the disaster, but an organ of state in another sphere may assist the sphere having primary responsibility to deal with the disaster and its consequences."

in terms of this section, the disaster must be regarded as a local disaster". The classification, in turn, determines who bears the primary responsibility for the coordination and management of the disaster and its consequences.[44] There was no classification of the disaster in this matter and, accordingly, the default position of section 23(7) applies. The disaster must thus be regarded as a local disaster. That being the case, section 54, dealing with local disasters, comes into play.

[86] The introductory words of section 54(1) are: "Irrespective of whether a local state of disaster has been declared in terms of section 55".[45] It is important to bear in mind that there is a difference between the classification of a disaster and the declaration of a disaster. Classification is done in terms of section 23, and the declaration of a local disaster is done in terms of section 55.[46] Section 54 prescribes the primary

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[44] Section 23(8).

[45] Section 54 provides:

> "(1) Irrespective of whether a local state of disaster has been declared in terms of section 55—
>
> (a) the council of a metropolitan municipality is primarily responsible for the co-ordination and management of local disasters that occur in its area; and
>
> (b) the council of a district municipality, acting after consultation with the relevant local municipality, is primarily responsible for the co-ordination and management of local disasters that occur in its area.
>
> (2) A district municipality and the relevant local municipality may, despite subsection (1)(b), agree that the council of the local municipality assumes primary responsibility for the co-ordination and management of a local disaster that has occurred or may occur in the area of the local municipality.
>
> (3) The municipality having primary responsibility for the co-ordination and management of a local disaster must deal with a local disaster—
>
> (a) in terms of existing legislation and contingency arrangements, if a local state of disaster has not been declared in terms of section 55(1); or
>
> (b) in terms of existing legislation and contingency arrangements as augmented by by-laws or directions made or issued in terms of section 55(2), if a local state of disaster has been declared.
>
> (4) This section does not preclude a national or provincial organ of state, or another municipality or municipal organ of state from providing assistance to a municipality to deal with a local disaster and its consequences."

[46] The provision provides:

> "(1) In the event of a local disaster the council of a municipality having primary responsibility for the co-ordination and management of the disaster may, by notice in the *Provincial Gazette*, declare a local state of disaster if—
>
> (a) existing legislation and contingency arrangements do not adequately provide for that municipality to deal effectively with the disaster; or

responsibility in the event of a local disaster and identifies the three categories of municipalities: the metropolitan municipality (which does not find application in this case), the district municipality (which in this case is the fourth respondent), and the local municipality (the first respondent). Section 54 makes it clear that the primary responsibility for a local disaster where there is no metropolitan municipality rests with the district municipality, the O.R. Tambo Municipality in this case. It is important to note that in terms of section 54(1)(b), the council of a district municipality, acting "*after consultation with the relevant local municipality*," bears the primary responsibility for the coordination and management of local disasters that occur in its area.

(b) other special circumstances warrant the declaration of a local state of disaster.

(2) If a local state of disaster has been declared in terms of subsection (1), the municipal council concerned may, subject to subsection (3), make by-laws or issue directions, or authorise the issue of directions, concerning—

(a) the release of any available resources of the municipality, including stores, equipment, vehicles and facilities;

(b) the release of personnel of the municipality for the rendering of emergency services;

(c) the implementation of all or any of the provisions of a municipal disaster management plan that are applicable in the circumstances;

(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;

(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;

(f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;

(g) the control and occupancy of premises in the disaster-stricken or threatened area;

(h) the provision, control or use of temporary emergency accommodation;

(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

(k) the dissemination of information required for dealing with the disaster;

(l) emergency procurement procedures;

(m) the facilitation of response and post-disaster recovery and rehabilitation; or

(n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster."

[87] Section 54(2) authorises the district municipality, by agreement with the local municipality, to shift the primary responsibility for coordination and management of a local disaster that has occurred or may occur in the area of the local municipality to that local municipality. The obligations, which are then peremptory, are imposed by section 54(3). The section provides that the municipality with primary responsibility must deal with the local disaster—

> "(a) in terms of existing legislation and contingency arrangements, if a local state of disaster has not been declared in terms of section 55(1); or
> (b) in terms of existing legislation and contingency arrangements as augmented by by-laws or directions made or issued in terms of section 55(2) if a local state of disaster has been declared."

[88] This reveals that the purpose of the declaration of a disaster in terms of section 55(1) is to confer extraordinary legislative and other powers on the local authority so that it can make contingency arrangements with by-laws or directions issued in terms of section 55(2). If there is no declaration of a disaster in terms of section 55, that does not mean that the local authority does not have the responsibility to deal with it. It just means that it does not have the additional powers provided in section 55(2) to deal with the disaster by extraordinary subordinate legislation and other related means.

[89] The High Court found that a declaration of disaster was necessary. However, in light of the above analysis, that was an incorrect application of its provisions.

What is the existing legislation referred to in section 54(3)?

[90] Section 54(3) of the Disaster Management Act directs the municipality that has primary responsibility to deal with a local disaster in terms of existing legislation. That existing legislation must, out of necessity, include the Housing Act and the NHC.

[91] The Housing Act gives effect to section 26 of the Constitution. Section 9(1)(a) of the Housing Act requires the Municipality to ensure that the inhabitants of its area of

jurisdiction have access to adequate housing on a progressive basis and to remove conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction.

[92] The NHC was enacted under section 4(1) of the Housing Act. The NHC contains the National Housing Policy and sets out the principles, guidelines and standards that apply to various programmes required of the state in relation to housing and the responsibilities of the different spheres of government. Part 3 in Volume 4 of the NHC sets out the policy for the provision of emergency housing. Clause 2.3.1 of Part 3 contains a definition of emergency housing circumstances. That clause provides that "[t]his [emergency housing] [p]rogramme will apply to emergency situations of exceptional housing need, such situations being referred to as '[e]mergencies'". The parts of the definition of "emergencies" relevant to this case are as follows:

> "2.3 APPLICATION OF THE PROGRAMME
> 2.3.1 DEFINITION OF EMERGENCY HOUSING CIRCUMSTANCES
> This Programme will apply to emergency situations of exceptional housing need, such situations being referred to as 'Emergencies', as defined below:
> An emergency exists when the [Member of the Executive Council], on application by a municipality and or the [Provincial Department], agrees that persons affected owing to situations beyond their control:
> . . .
>
> b) Have become homeless as a result of a situation which is not declared as a disaster, but destitution is caused by extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents."

[93] While I do not hold that the Local Municipality should have made the application as provided for in clause 2.3.1 of the NHC, a failing on the part of the respondents in this matter is that they did not even consider making such an application. Instead, they resisted the correspondence from the applicants' attorneys and found reasons not to assist the applicants without a consideration of what may be called the toolkit of legislation available to municipalities to deal with situations such as this.

[94] The case law is well-developed as far as temporary emergency accommodation in respect of evictions is concerned.[47] However, emergency situations arising from disasters are different and need to be dealt with in accordance with the available legislation which has been outlined in this judgment and which is addressed in the remedy set out at the conclusion hereof. I distinguish between temporary emergency accommodation (which is the subject of eviction cases) and temporary emergency shelter (which is the subject of this case).

[95] Temporary emergency shelter was the subject of *Mbatha*,[48] in which the High Court dealt with a case involving applicants who resided in informal houses on a flood line in Kliptown Township, Johannesburg. The residents were periodically displaced due to the flooding. At times, they had been accommodated in a community hall. After yet another such occurrence, the ward councillor was informed of the flooding, but no support was received from the City of Johannesburg Metropolitan Municipality (City). The City, in addition to alleging that the houses were not flooded, had also refused to relocate the residents. The Court granted an order directing the City to relocate the applicants from the flood line to an emergency housing programme area. The Court also declared that the City's failure to act was in contravention of the applicants' constitutional rights to dignity and access to adequate housing. In addition, the Court directed that the City investigate the circumstances of all 250 affected households on the flood line in terms of the emergency housing programme of the NHC.

[96] Accommodation in a community hall or in tents would often be the minimum of what would constitute temporary emergency shelter. It is the sort of shelter that could have been provided to the applicants by the respondents in the present case. The respondents ought to have investigated such solutions to the circumstances faced by the applicants before finding reasons not to help them. Instead, the respondents appear to

[47] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

[48] *Mbatha v Johannesburg City* [2014] ZAGPJHC 370; [2015] 1 All SA 575 (GJ); 2015 (4) SA 591 (GJ).

have ignored the available legislative and policy tools and remedies available when the applicants' attorneys asked for assistance, and focused on finding legal obstacles through misapplication of the law. The respondents failed to investigate whether there was a disaster and complained that they did not have resources, without having regard to the provisions of section 54 of the Disaster Management Act, let alone the Housing Act and NHC, which they ought to have done, as demonstrated above.

[97] I have found that the appropriate section requiring consideration and application by the respondents is section 54 and, in particular, section 54(3)(a), which obliges the Municipality, having primary responsibility, as contemplated in sections 54(1) and 54(2), to have regard to existing legislation if a local state of disaster has not been declared in terms of section 55. That existing legislation includes the Housing Act and the NHC.

Can the respondents be required to consider this legislation when it was not mentioned by name in the affidavits (the pleadings)?

[98] In *Bato Star*,[49] the Minister and the Chief Director had submitted that the applicant did not disclose its cause of action sufficiently clearly or precisely for the respondents to respond. O'Regan J held:

> "Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative."[50]

[99] O'Regan J further held that the imprecise cause of action was not fatal to the applicant's case, although she pointed out that it is desirable that the facts and legal basis of the cause of action be identified in the founding papers. In the circumstances of this case, I do not think it is unreasonable to require the respondents who, after all,

[49] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[50] Id at para 27.

are charged with these legislative responsibilities, to have applied the correct section (that is, 54(3)(a)), and to enquire, upon reading that section of the Disaster Management Act, what the "existing legislation" is. That enquiry would have naturally led to the Housing Act and NHC.

[100] These enactments set out obligations that the respondents should know that they have. To complain about an imprecise pleading that does not direct them to the exact section of the exact legislation that they are responsible for, where they have legal representation and legal advisers, does not sit well with me. It is true that no reference was made to the Housing Act or the NHC in the founding papers. However, the substantive relief sought from the outset of the litigation is housing relief in the form of temporary emergency shelter. It is incumbent upon an official to know the legislation applicable to their employment, to consider and apply that legislation and to use it to do their job to serve the people in their area of responsibility.

[101] In *KwaZulu-Natal Joint Liaison Committee*,[51] Cameron J, writing for the majority, held:

> "It is true that this was not the clasp on which the applicant originally pegged its hopes. The applicant relied in its founding and subsequent papers on what it simply and persistently described as an enforceable undertaking to pay the entire year's subsidy without any reduction. This cast the claim in contractual, or ostensibly contractual, terms. In my view the undertaking is indeed enforceable, but on broader public law and regulatory grounds rather than bilateral agreement."[52]

[102] This Court thus held that although the cause of action pleaded was contractual, the undertaking could be enforced based on public law grounds not pleaded. Prejudice was the overriding consideration. This Court eschewed formalism.

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[51] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC).

[52] Id at para 58.

[103] This approach, in my view, is totally reconcilable with that pronounced by this Court when it said:

> "Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded."[53]

[104] The latter observation was made in the context of a declaration of invalidity of a statutory enactment of Parliament. The Court emphasised that orders of constitutional invalidity have a reach that extends beyond the parties in a case and are also binding on all persons and organs of State, not just the litigating parties. The principle to be distilled is that such circumstances increase the potential for prejudice. In contrast, the order granted herein will only be binding on the litigating parties identified, and the order granted will only affect them. The scope of the potential prejudice is accordingly already far more limited, particularly having regard to the relief which I have crafted.

[105] In this Court's recent decision of *Smuts*,[54] it was held that the purpose of pleadings is to define the issues for adjudication for both the other party and the court. This Court had to consider whether a privacy case was properly brought before the High Court, and whether this Court was properly placed to adjudicate the privacy issue. With reference to the notice of motion and the founding affidavit of the applicant, together with the replying affidavit, it was held that the privacy issue was raised.[55] Kollapen J found that the founding affidavit is instructive in determining what the issue is, subject to certain narrow exceptions.[56]

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[53] *SATAWU v Garvas* [2012] ZACC 13; 2012 (8) BCLR 840 (CC); 2013 (1) SA 83 (CC) at para 114. See also *Public Servants Association obo Ubogu v Head, Department of Health, Gauteng* [2017] ZACC 45; 2018 (2) BCLR 184 (CC); 2018 (2) SA 365 (CC) at paras 50 and 57.

[54] *Botha v Smuts* [2024] ZACC 22; 2024 (12) BCLR 1477 (CC); 2025 (1) SA 581 (CC) at para 56.

[55] Id at paras 57 and 59.

[56] Id at paras 60-4. The exceptions are: (i) where there is no unfairness caused to the other party by the late raising of a point; (ii) where the applicant is a layperson; (iii) where a point is raised in oral argument, it must be legal in nature, foreshadowed in the pleadings and not prejudice the other party; and (iv) where the new point does not add a material advantage to a party's case.

[106] Despite no reference being made to the Housing Act or the NHC by name, the substantive relief sought from the outset of the litigation is housing relief in the form of temporary emergency shelter. That should surely be enough to alert officials in government to ask themselves whether the Act, which deals with housing, perhaps bears some relevance to the case against them, and for their legal representatives to conduct the same enquiry to be able to guide their government clients.

[107] The applicants strongly opposed the framing of the cause of action as a review under PAJA or the principle of legality. They maintain that the cause of action "was a declaratory order premised on section 38 of the Constitution". Section 38 affords a court the power to grant appropriate relief for a violation of a constitutional right. As a necessary corollary, the applicants submit that their section 26 rights were implicated, as the Constitution mandates the provision of adequate housing and places an obligation on the state to progressively realise this right. The applicants also draw attention to the Disaster Management Act, stating that the primary objective of the Act is to "realise the constitutional commitment of affording everyone access to housing by ensuring that people affected by a disaster are afforded rapid and effective response and by providing for post-disaster recovery". In the High Court, the applicants' notice of motion sought an order declaring the refusal "to avail prompt response and relief unlawful and unconstitutional", as well as a declaratory order rendering the applicants eligible for emergency temporary shelter following the disaster.

[108] Based on the pleadings, it is clear that the applicants do not seek a review of the decision not to provide suitable temporary housing. Instead, the applicants require an assessment of the respondents' constitutional obligations to act concomitantly in disaster situations (even if not declared). In the event that the respondents have not done so, the applicants seek appropriate relief from this Court.

What obligations did Chapter 3 of the Constitution bring about?

[109] A disturbing feature of this case has been the shifting of responsibility from one respondent to another. Chapter 3 of the Constitution is headed "Co-operative

Government". Section 41(1)(b) of the Constitution provides that all spheres of government and all organs of state within each sphere must secure the well-being of the people of the Republic. Section 41(1)(h) obliges all spheres of government and all organs of state to co-operate with one another.[57] That very injunction finds expression in sections 23(8) and 54(4) of the Disaster Management Act.

[110] Section 23(8) provides:

> "The classification of a disaster in terms of this section designates primary responsibility to a particular sphere of government for the coordination and management of the disaster, but an organ of state in another sphere may assist the sphere having primary responsibility to deal with the disaster and its consequences."

[111] Section 54(4) provides:

> "This section does not preclude a national or provincial organ of state, or another municipality or municipal organ of state from providing assistance to a municipality to deal with a local disaster and its consequences."

[112] The primary responsibility to manage a local disaster in terms of the Disaster Management Act rests with the district municipality.[58] This responsibility does not fall directly on the local municipality unless an agreement has been concluded between the local and district municipalities. Such an agreement does not appear from the facts of this case, so it follows that the primary responsibility lies with the District Municipality. This does not mean that either the Local Municipality or the Provincial Department was absolved of responsibility.

[113] The Constitution promotes co-operative governance.[59] Municipalities are constitutionally mandated, among other things, to co-operate with one another by

[57] See n 12 above.

[58] Section 54(1)(b) of the Disaster Management Act.

[59] Section 41 of the Constitution.

assisting and supporting one another,[60] informing one another of, and consulting one another on, matters of common interest,[61] coordinating their actions with one another[62] and adhering to agreed procedure.[63] Despite this, to effectively and efficiently ensure the equitable and sustainable delivery of municipal services, with due consideration to municipalities' respective capacity, there is a division of functions among municipalities, including between district and local municipalities.[64] A district municipality has been charged with the primary responsibility to manage local disasters, because district municipalities, arguably, have greater capacity to effectively manage and coordinate a response to a local disaster, which is a necessity given the nature and importance of the responsibility. The Disaster Management Act requires the council of the district municipality to deal with the local disaster in terms of existing legislation and any contingency arrangements.[65]

[114] It is worth recalling that the letters of demand that initiated this litigation were sent on 11 February 2022 and 11 March 2022 by the applicants' attorneys to the Local Municipality and the District Municipality respectively. The Provincial Department was copied in the letter to the Local Municipality. These respondents were all alerted to the plight of the applicants at a very early stage. Instead of investigating the facts underpinning the applicants' plight by simply getting into a car and driving out to where they were alleged to have suffered the destruction or damage to their homes, the respondents remained in their offices and cynically assumed that the applicants were jumping the queue for RDP houses. There was a further improper assumption that all 29 applicants had perjured themselves in their affidavits in which they had explained their circumstances and predicament.

[60] Section 41(1)(h)(ii) of the Constitution.

[61] Section 41(1)(h)(iii) of the Constitution.

[62] Section 41(1)(h)(iv) of the Constitution.

[63] Section 41(1)(h)(v) of the Constitution.

[64] Section 83(1)-(2) of the Municipal Structures Act.

[65] Section 54(3) of the Disaster Management Act.

[115] The manager of the District Municipality confined himself to conducting a desktop search[66] to verify the weather situation and denied the circumstances in which the applicants found themselves. The respondents did this without going out to find evidence to affirm or contradict this. They worked off a cynical assumption with a lack of care, which is to be deprecated, as it is contrary to the principles of the legislation referred to in this judgment and in breach of their constitutional obligations. The conduct of the respondents was appallingly uncaring. The facts drive one to conclude that they were more intent on avoiding their constitutional obligations than helping the applicants. Well-knowing that the applicants complained of being in dire circumstances, and without any evidence to counter that of 29 applicants, the respondents conveyed that they would use the time before the hearing, after receipt of the letters of demand, to investigate the situation of the applicants and professed to do so in the spirit of ubuntu.

[116] Instead, they conducted the investigation to gather ammunition to resist the claims of the applicants by exploring their RDP housing situation. They used the well-known and unacceptable technique of deny, divert and deflect to resist the applicants' claims. This was not a claim for permanent housing; it was not a claim in relation to the RDP housing. The letters were clear. The urgency was clear. They professed to be investigating the need for emergency shelter. They did no such thing. They kept the applicants in a situation of desperate need and false hope for some assistance. The respondents were not seeking ways to help them. They were finding ways to resist the claims. The respondents did not gather evidence of the circumstances in which the applicants found themselves, nor did they find ways to give temporary emergency shelter, such as simply accommodating them in a town hall or other temporary measures. They went instead into questions of permanent housing and RDP housing, which were irrelevant to the emergency temporary shelter required.

[66] See [19].

[117] The officials and their legal representatives went looking into the records relating to the applicants' RDP housing applications and, having looked into the permanent housing situation (not temporary emergency shelter), they came back to point out that the applicants were either not entitled to permanent housing or that, because they had applied for permanent housing, they did not need temporary emergency shelter. It was offensive and detrimental to the applicants in the situation in which they found themselves, some with children, some being elderly and disabled and all without homes or in homes that were threatening to collapse. This was a dereliction of the respondents' constitutional duties.

[118] Whatever their motives, the inaction of the Local and District Municipalities upon being notified of a disaster situation was unconstitutional and contrary to the principles of co-operative governance. Even if ubuntu was their only guiding principle (as they claimed), they failed to take the applicants' plight seriously and did not treat the applicants with enough respect even to go out and see whether what they were saying was true. A computer search on the weather in the area sufficed in the minds of these officials to impugn the applicants' credibility. They adopted an adversarial posture and throughout the period of litigation left the applicants to their own devices. This is very far removed from the spirit of ubuntu.

[119] The High Court essentially permitted side-stepping of the case pleaded by the parties and decided the case on the self-constructed basis of PAJA and the principles of legality. The outcome of the High Court case was a continuation of the violation of the rights of the applicants. The order of the High Court therefore falls to be set aside.

Conclusion on merits

[120] The applicants approach this Court alleging that a concatenation of rights in the Bill of Rights have been infringed. The point of departure for a section 38 analysis is that an applicant alleges that an infringement or threat to infringe her rights in the Bill

of Rights has occurred.[67] *Doctors for Life*[68] outlines the various ways the provisions of the Constitution may be infringed. These include conduct which is inconsistent with the Constitution and a failure to fulfil constitutional obligations placed upon an actor.[69]

[121] I have demonstrated how the respondents have breached their constitutional obligations, stemming from section 26 of the Constitution, placed upon them by the Disaster Management Act, the Housing Act and the NHC. The failure to comply with the statutes and to come to the aid of the applicants in this matter transgresses another foundational value of our Constitution, being the rule of law.[70] It follows that the applicants are entitled to a declarator that the conduct of both the Local and the District Municipalities, in failing and/or refusing to come to their aid after the occurrence of the natural disaster on 8 February 2022, is unlawful and unconstitutional. This declaration brings into play the provisions of section 172(1)(b), which enables this Court to craft a just and equitable remedy.

Remedy

[122] After the hearing of this matter, on 10 March 2025, the Chief Justice issued the following directions:

> "1. This application was set down for hearing and heard on Thursday, 27 February 2025.
> 2. The Court understands it to be agreed that the applicants to this application are those listed in Annexure "A" hereto which is the same as the Annexure "A", consisting of two pages, which was attached to the notice of motion in this Court (the applicants).

[67] *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2013] ZACC 19; 2013 (2) SACR 443 (CC); 2013 (10) BCLR 1180 (CC).

[68] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[69] Id at para 254.

[70] Section 1(c) of the Constitution.

3. The parties jointly are to file a list electronically on or before Monday, 17 March 2025, identifying the applicants in Mr Saziwa's case in the High Court after the consolidation order which was granted on 19 April 2022.
4. In adjudicating the matter, the Court understands it to be agreed that the Court can have regard to the founding affidavits in respect of *Gqagha 2017/2022* and *Panda 1225/2022* previously electronically filed in this Court on Thursday, 6 June 2024.
5. The applicants are each to file a supplementary affidavit dealing concisely and in no more than five pages with their current need, if any, for temporary emergency shelter flowing from the occurrence on 8 February 2022, which affidavits are to be filed by no later than Friday, 4 April 2025.
6. The respondents are granted leave to file answering affidavits, should they so wish, on or before Tuesday, 22 April 2025.
7. The applicants are granted leave to file replying affidavits but only if a reply is strictly necessary, on or before Wednesday, 30 April 2025.
8. Further directions may be issued."

[123] In compliance with these directions, a composite list, identifying all the applicants in this Court, was provided.

[124] In paragraph five of the directions, the applicants were afforded the opportunity to file supplementary affidavits dealing concisely with their current need, if any, for temporary emergency shelter flowing from the weather event. The respondents were afforded the opportunity to file answering affidavits and the applicants to reply.

[125] In summary, this is what the directions yielded:

(a) Five applicants (applicants 3, 7, 9, 16 and 22)[71] failed to provide affidavits.

(b) Five applicants (applicants 10, 14, 17, 19 and 21) no longer need temporary emergency shelter.

[71] The applicants are referred to by their numbers. No disrespect is intended in failing to refer to them by name. The reference to the applicants by number facilitates the reading of the judgment and the identification of an applicant.

(c) Two of the applicants (applicants 5 and 15) have passed away, but in their stead, children or other relatives have deposed to affidavits contending that they are in need of temporary emergency shelter and were resident with the deceased at the time of the occurrence on 8 February 2022. Their *locus standi* (legal standing) has been disputed.

(d) One applicant (applicant 2) has been incarcerated and, in his stead, his sister deposed to an affidavit contending that at the time, she and others were staying in the now destroyed home. In this instance, *locus standi* is disputed because it is alleged that she is not the applicant's sister.

(e) In respect of the need for temporary emergency accommodation for the remainder of the applicants, a multitude of disputes of fact have arisen:

(i) The state of the structures currently occupied, which condition is in some instances conceded, but the cause of which is universally denied, with the respondents alleging that it is due to neglect or lack of maintenance (not the weather event), which in turn is due to poverty.

(ii) Accusations that the applicants intentionally attached incorrect photographs of their homes to the most recent affidavits and that they do not live in the structures depicted in said photographs.

(iii) Statements that the candidate attorney who took the photographs of the homes photographed uninhabitable structures which do not belong to the applicants.

(iv) One applicant (applicant 1) is alleged to have an RDP house in another province.

(v) Allegations that this application was used opportunistically by applicants 12 and 24 to secure benefits to which they are not entitled and that they have colluded to create a need when neither is in need.

The disputes identified in paragraph (e) above are hereinafter referred to as the "disputes of fact".

[126] I intend remitting the matter to the High Court, Mthatha, to be heard by another Judge to determine the disputes of fact relating to the need for temporary emergency shelter. The affidavits filed pursuant to the directions issued by this Court on 10 March 2025 shall serve as the pleadings for purposes of determining the disputes of fact relating to the need for temporary emergency shelter.

[127] Much was made by the High Court and the respondents of the applicants' failure to mention the names of the ward councillors to whom they had made the reports in their founding affidavits in the High Court. Without being authorised to file affidavits on the issue of whether there was a weather event on 8 February 2022, some of the ward councillors were, pursuant to the issuing of the directives and despite the lapse of three years, located and deposed to affidavits in which they disputed the existence of the weather event. The introduction of this evidence was not authorised by the directives issued on 10 March 2025. It is accordingly inadmissible and falls to be disregarded in its entirety. The remittance to the High Court will contain a separate order excluding any evidence that tends to disprove the weather event on 8 February 2022. That finding has been made in this Court and that issue is excised from the enquiry remitted to the High Court for resolution.

[128] Once the High Court has made findings on those applicants in need of temporary emergency shelter and the extent of such need, the Local and District Municipalities are to deliver a report to the High Court as to how the needs are to be addressed. The High Court may then deal further with the matter in accordance with this Court's order. The applicants did not seek any relief against the Provincial Department in this Court. Counsel for the Provincial Department conceded that, although the primary responsibility lies with the District Municipality in terms of section 54(4) of the Disaster Management Act, it did by no means follow that the Provincial Department could not become involved, and it gave an undertaking to co-operate in any order made against the Local and District Municipalities. This undertaking was correctly given and accords with the spirit of Chapter 3 of the Constitution relating to co-operative governance.

Costs in the High Court

[129] Something further needs to be said about the costs order which was granted against the applicants in the High Court. The cause of action presented to the High Court was changed from one in which they alleged that their rights in the Bill of Rights had been infringed to one in which they were told that their cause of action was in truth a PAJA review. Counsel for the applicants, who also represented the applicants in the High Court, was adamant that he had not conceded the nature of the cause of action as formulated by the High Court. It matters not whether he did or did not do so; the papers speak for themselves. I have found that there was no factual foundation on the papers which served before the High Court to conclude, as it did, that the litigation was not *bona fide* and that the applicants should pay the costs to discourage frivolous litigation. These applicants approached the Court alleging constitutional infringements. They are the quintessential litigants who should be shielded from the costs of the state. This finding, however, should in no way bind the High Court when making a costs order in respect of the disputes of fact remitted to it for determination. It may well be that, after considering evidence on the disputed issues, it is established that some applicants have abused the process and should forfeit *Biowatch* protection. This caveat should not be read as authorising the High Court to determine all questions of costs afresh. The High Court is to determine only those questions of costs in respect of the further proceedings upon remittal.

Costs in this Court

[130] The applicants, having been successful, are entitled to their costs against the Local and District Municipalities. The applicants did not persist with relief against the Provincial Department and, in the exercise of my discretion and shielding them by applying the *Biowatch* principle, I shall order the Provincial Department to pay its own costs.

Order

[131] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Supreme Court of Appeal and the High Court of South Africa, Eastern Cape Local Division, Mthatha (High Court) are set aside.
4. The following orders are made:
   (a) The Mhlontlo Local Municipality and the O.R. Tambo District Municipality's failure and/or refusal to come to the aid of the applicants after the occurrence of a natural disaster on 8 February 2022 is declared unlawful and unconstitutional.
   (b) The matter is remitted to the High Court, to be heard by another Judge, to determine the disputes of fact relating to the need for temporary emergency shelter. It is recorded that:
      (i) The affidavits filed pursuant to the directions issued by this Court on 10 March 2025 shall serve as the pleadings for purposes of determining the disputes of fact relating to the need for temporary emergency shelter.
      (ii) Applicants 10, 14, 17, 19 and 21 no longer need temporary emergency shelter.
      (iii) Applicants 3, 7, 9, 16 and 22 failed to provide affidavits upon being afforded the opportunity to do so by this Court in relation to their need for temporary emergency shelter.
      (iv) The *locus standi* of applicants 2, 5 and 15 has been placed in dispute and falls to be determined by the High Court.
      (v) No evidence in relation to the weather event on 8 February 2022 and which is tendered to disprove same shall be admissible at such hearing.

(c) Once the High Court has made findings on those applicants in need of temporary emergency shelter and the extent of such need, the first, second and fourth respondents are to deliver a report to the High Court within two months of the date of such order, which report is to be confirmed on affidavit, in which they detail how the needs of the applicants are to be addressed.

(d) The applicants may serve and file affidavits, if any, responding to the contents of the report referred to in the preceding paragraph, within 10 court days of the service and filing of the aforesaid report.

(e) The matter shall thereafter be finalised by the High Court which may make any further order or determination, following a hearing if need be, as may be necessary or appropriate with a view to finalising the needs of the applicants so identified.

(f) The High Court shall have the powers to make further orders necessary to reach a speedy finalisation of this matter and may specify any additional reporting or relief required.

(g) The High Court may, on good cause shown, (i) extend any time period provided for in this order; and (ii) permit applicants 3, 7, 9, 16 and 22 to file affidavits on the current need for temporary emergency shelter upon such terms as it deems appropriate.

(h) The costs to be incurred in the High Court in the remitted proceedings are to be determined by the High Court.

5. The first and fourth respondents jointly and severally must pay the applicants' costs in this Court, those already incurred in the High Court and the costs of the Supreme Court of Appeal petition.

6. The third respondent must pay its own costs.

For the Applicants:	L Matotie, Z Nabela, S Zimema and F Letoaba, instructed by SR Mhlawuli and Associates
For the First and Second Respondents:	N R Mtshabe SC and M Mxotwa, instructed by NZ Mtshabe Incorporated
For the Third Respondent:	S Sintwa, instructed by Office of the State Attorney, Mthatha
For the Fourth Respondent:	T W Mgidlana, instructed by KB Mabanga Incorporated