REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 21332/10

In the matter between:

NTOMBENTSHA BEJA	First Applicant (in the main application) First Respondent (in the counter-application)
ANDILE LILI	Second Applicant (in the main application) Second Respondent (in the counter-application)
ANDISWA NCANI	Third Applicant (in the main application) Third Respondent (in the counter-application)

and

PREMIER OF THE WESTERN CAPE	First Respondent (in the main application) Fourth Respondent (in the counter-application)
MAYOR OF THE CITY OF CAPE TOWN	Second Respondent (in the main application)
CITY OF CAPE TOWN	Third Respondent (in the main application) First Applicant (in the counter-application)
MEC FOR HUMAN SETTLEMENTS, WESTERN CAPE	Fourth Respondent (in the main application) Fifth Respondent (in the counter-application)
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Fifth Respondent (in the main application) Sixth Respondent (in the counter-application)

THE MINISTER OF HUMAN SETTLEMENTS	Sixth Respondent (in the main application) Seventh Respondent (in the counter application)
THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	Seventh Respondent (in the main application) Eighth Respondent (in the counter-application)

JUDGMENT DELIVERED ON THIS 29TH DAY OF APRIL 2011

ERASMUS, J

Introduction:

1. The Constitution of the Republic of South Africa[1](hereinafter referred to as the "Constitution") has as its primary objective the protection and the restoration of human dignity; it means simply that human beings be treated as human beings[2]. We have a duty, more particularly public representatives and government to promote human dignity. This duty must be fulfilled responsibly and with the utmost maturity. A failure to do this diminishes us all.

2. It is unfortunate that in the scramble for limited resources, which have to address the historical imbalances and to cater for immediate needs, it has become the subject of political contest and patronage as opposed to the responsible use thereof to fulfill the State's constitutional obligations.

[1] The Constitution of the Republic of South Africa Act 108 of 1996.

[2] *Residents of Joe Slovo Community, WC v Thubelisha Homes* 2010 (3) SA 454 (CC).

3. In this matter we have seen, various government organisations litigating on opposing sides at a high cost to the tax payer. The Mayor of the City of Cape Town (the second respondent, hereinafter referred to as the "Mayor") Mr Dan Plato and second applicant, Mr Andile Lili, who purports to be a political leader and an Executive member of the African National Congress Youth League, (hereinafter referred to as "ANCYL") simply failed to rise above their political contest as opposed to their duty towards those that need to benefit the poor and vulnerable.

4. In Shabalala and Others v Attorney-General of the Transvaal and Others[3] the Constitutional Court stated: ***"****What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution ..., is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is "justifiable in an open and democratic society based on freedom and equality". .... <u>The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment".</u>* (my underlining)

[3] *Shabalala and Others v Attorney-General of Transvaal and Others* 1996 (1) SA 725 at para 26.

5. The marginalisation of poor and vulnerable groups in our society remains an obstacle in the realisation of our national goals. "*It must be emphasised that the entrenchment of a Bill of Rights, enforceable by a judiciary, is designed, in part, to protect those who are the marginalised, the dispossessed and the outcasts of our society. They are the test of our commitment to a common humanity and cannot be excluded from it*"[4].

6. The Preamble to the Constitution states:

> "*We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to;*
>
> *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
>
> *Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*
>
> *Improve the quality of life of all citizens and free the potential of each person; and*
>
> *Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations*"[5]. (my underlining)
>
> Hence the realisation of rights and the demands therefore should never be trivialized and made off lightly.

[4] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 332.

[5] The constitution of the Republic of South Africa Act 108 of 1996, preamble.

The Application:

7. The first, second and third applicants approached this court for the following relief:

7.1 "*Declaring the conduct of the first, second third and fourth respondent, in providing open toilets to the applicants and the community of Makhaza informal settlement, to be in violation of their constitutional rights as contemplated in sections 9, 10, 12, 14, 24, 26 and 28 of the Constitution of the Republic of South Africa.*

7.1 Declaring that any written or oral agreement purported to have been entered into between the third respondent and individual members of the community of Makhaza in respect of the provision of open toilets, to be unlawful, and inconsistent with [sic] constitutional duties of the third respondent as contemplated by sections 7(2), 24, 26 and 28 of the Constitution of the Republic of South Africa.

7.2 Ordering the third and fourth respondents to enclose all 1316 toilets including the 51 open toilets, which form part of the Silvertown Project, Khayelitsha (which includes those erected in the Makhaza informal settlement), in accordance with the Upgrading of Informal Settlement Programme ("UISP") which was evaluated and approved, in principle, by the fourth respondent on 12 July 2005 in terms of a memorandum of understanding concluded between the third and fourth respondents on 21 November 2005, as governed by Part 3 of the National Housing Code ("the Code"), 2009 read together with the National Housing Act ("the Act") No 107 of 1997, as amended.

7.3 Ordering the third and fourth respondents, in complying with their obligations as prescribed under the Code and the Act (as per prayer above) to comply, in

addition, with Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (GN R509 in GG 22355 of 8 June 2001) promulgated in terms of the Water Services Act No 108 of 1997, as amended.

7.4 Directing the first, second, third and fourth respondents to pay the costs of this application".

8. A provisional counter application was brought by the City of Cape Town (third respondent hereafter referred to as the "City") should the applicants obtain any relief in the main application, seeking the following relief:

8.1 "Declaring that the "National Housing Code ("the Code"), published by the Department of Human Settlements in terms of s4 of the Housing Act 107 of 1997, is unconstitutional, unlawful and invalid to the extent that:

8.2 The Code, properly interpreted, improperly requires a minimum of one toilet per five households/erven in chapters dealing with "incremental interventions" for the provision of housing and services under the "Emergency Housing Programme" and the "Upgrading of Informal Settlements Programme" (or "UISP");

8.3 The Code enjoins, permits and requires all spheres of government to consult and make agreements with beneficiary communities regarding the level of services which can be provided within budgetary constraints – including the standard, type and extent of services – even though the agreed outcomes cannot be lawfully implemented;

8.4 The provisions of the Code dealing with the projects funded under the UISP are premised on the unlawful assumption that beneficiaries can be made responsible (by their agreement or otherwise) for building their own dwellings, or aspects of their dwellings;

8.5 The Code unlawfully fails to provide guidance as to what constitutes an adequate enclosure for toilets in projects funded under the UISP or other chapters dealing with incremental intervention; and/or

8.6 The provision of the Code relating to the quantum of the subsidy which can be claimed by the City (or other implementing municipalities) when undertaking a project funded under the UISP, do <u>not</u>: (a) provide any component for the construction of individual, enclosed toilet facilities on each erf in a newly created formal township; and (b) provide any process to claim supplementary amounts to cover all the actual reasonable expenses incurred in supplying necessary services in a specific area;

8.7 Directing the seventh respondent, within an appropriate time-frame, to publish a revised version of the Code:

8.8 Correcting the unlawful aspects dealt with above; and providing a process for all municipalities to seek additional funding in projects funded under the UISP to cover the construction and enclosure of individual toilets on each erf; and to cover all the actual reasonable expenses incurred in supplying necessary serviced erven in a specific area;

8.9 Declaring that, in the context of the project undertaken by the City to upgrade the Silvertown area in Khayelitsha under the UISP (by the creation of 1316 serviced sites), an adequate enclosure for the individual toilets supplied by the City on each erf is one constructed of corrugated iron and timber, including a

polyurethane door (suspended on a steel bar, and capable of being locked from both the inside and the outside), with an internal spacing of not less than 2.5 metres in height, 1.5 metres in depth and 1.0 metres wide".

The Facts:

9. The Government of the Republic of South Africa is a party to the United Nations Millennium Development Goals, which provides for significant improvement in the lives of at least 100 million "slum"[6] dwellers by 2020. In addition to this convention, South Africa adheres to the following declarations under the UN Habitat programme: the Vancouver Declaration on Human Settlements (1976), the Istanbul Declaration on Cities and Other Human Settlements (1996) and the Habitat Agenda (1996), the focus of which is to address the plight of persons without adequate housing. The Upgrading of Informal Settlements Programme (UISP) is consistent with the above conventions with its primary objective being to cater for the special development requirements of informal settlements[7].

10. The Programme at hand is instituted in terms of section 3(4) (g) of the Housing Act, 1997 (Act No.107 of 1997)[8], ("The Housing Act") and is referred to as the National Housing Programme: Upgrading of Informal Settlements.

11. The City made the decision to upgrade the informal settlement at Silvertown Khayelitsha in terms of the Upgrading of Informal Settlements Programme (UISP). However the

[6] The word slum if used in the United Nations Millennium Development Goals. It is placed in inverted commas as I do not deem it appropriate to refer to a human beings abode in those terms.

[7] National Housing Code of 2009

[8] The Housing Act 107 of 1997

Silvertown area, known as SST, was not big enough to accommodate the number of people in the area based on the erf size that the city had intended for the residents.

12. The City then decided to use two undeveloped sites nearby and relocated some of the residents in the SST area to the two other sites known as Makhaza and Town 2, in an effort to allow for all 1316 households to be accommodated. Therefore the three areas, being Makhaza, Town 2 and SST now all formed part of the Silvertown project.

13. The original tender by the City was for the whole of the Silvertown project. The upgrade provision was for interim services, full engineering infrastructure and relocation assistance. This upgrade would consist of four phases. The top structure, which was phase 4, was to be implemented at a later stage. During October 2004 the City submitted the application to the Province of the Western Cape (the fourth respondent, hereinafter referred to as the “Province”) for funding of this project. It is unclear from the papers whether the funding provided for individual or communal toilets.

14. The Province approved the project in July 2005 on condition that, an agreement between the Province and the City was entered into regulating the obligations of the parties, project milestones and the implementation programme for the project. This memorandum of understanding was concluded in November 2005, recording the agreement between the City and the Province and stating that the provisions of The National Housing Code (hereinafter referred to as the “Code”) would govern the agreement.

15. For this project the City decided to install communal toilets on a ratio of 1:5; this meant that one toilet would be provided for every five families. During consultations the three identified sites were discussed and it was established that SST had 897 erven, Makhaza

had 298 erven and Town 2 had 121 erven. The breakdown of the communal toilets was therefore: 179 toilets to be installed in SST, 59 toilets to be installed in Makhaza and 25 toilets to be installed in Town 2. A tender, in March 2005, was awarded to three contractors for the construction of the communal toilets for the entire project. These communal toilets consisted of a concrete slab on which the toilet was built with the cistern and water pipes and this was enclosed with a pre-cast concrete structure. I pause to note that I was not referred to any meaningful community engagement before this decision was made.

16. The installation of the communal toilets began in 2007. 63 toilets were constructed in Makhaza, 30 in Town 2 and 63 in SST. From these figures it is evident that more toilets were built in Makhaza and Town 2 than the original number envisaged on the 1:5 ratio. There was however, a shortfall of the communal toilets constructed in the SST area. By July 2007 the contractor had installed 63 toilets in SST and whilst busy with another 62 toilets, the community expressed their unhappiness with communal toilets and requested that the installation thereof to be stopped. The community demanded an individual toilet for each erf. Therefore construction of the communal toilets was discontinued and only 156 of the 282 communal toilets were completed.

17. The City allegedly had a meeting with the community in late November 2007. It was said that the community, community leaders, ward councillor and the project manager for the City were present. Various topics were discussed at the meeting including the individual toilets to be installed by the City in addition to the communal toilets that were already in use by the community. Each of the erven would now have an individual toilet; however, the community would have to enclose the individual toilets themselves as the City would be providing 1316 unenclosed toilets. I shall return to this meeting later in this judgment.

18. A second tender for the individual toilets to be constructed on each erf as per the community's request was done on 2 April 2009; two years after the alleged meeting took place with the community and almost 4 years after funding was approved.

19. The City then began to install the unenclosed toilets in Silvertown, Khayelitsha, during May 2009 and completed this in December 2009. The unenclosed toilets installed in SST and Town 2 were all enclosed by the residents themselves. However in Makhaza 225 toilets were installed and all but 55 toilets were enclosed by the residents. The unenclosed toilets consisted of a concrete slab for the toilet to stand on with the cistern and a water pipe that was not affixed to any walls. The toilets were completely open and in full view of every person in the community, and mostly situated close to the road. It is disturbing to note from correspondence between the consulting engineers and the municipal managers that these structures were referred to as "a loo with a view". This term unfortunately also found its way into official reports and was used as a description, in the media. I wish to point out that this description and the continued use thereof, even after complaints were lodged with the SAHRC, is reprehensible and fails to afford any regard to the dignity of poor people, compelled to use these toilets in unfortunate circumstances.

20. The ANCYL of the Dullah Omar Region then engaged with the community about the 55 unenclosed toilets and approached the South Africa Human Rights Commission (the fifth respondents, hereinafter referred to as the "SAHRC"). A complaint was filed stating that it was a violation of human dignity that the residents of Makhaza have to use these unenclosed toilets and cover themselves with blankets in full view of the public.

21. The SAHRC investigated the complaint that led to considerable public interest and media reports. The City tried to enclose the remaining unenclosed toilets with corrugated galvanised iron and timber with a secure door. The City's contractors were interrupted by unknown members of the community who put up resistance to the construction of the enclosures and the contractors were unable to enclose the toilets and as a result had to leave Makhaza.

22. A Councillor met with the community to establish an agreement, for the City to enclose the toilets, however the meeting was unsuccessful. The City went to Makhaza again in March 2010 in an attempt to enclose the toilets. 26 toilets were enclosed and then immediately destroyed and broken down by persons claimed to be ANCYL members. Again the construction was stopped. The City then laid criminal charges for the structures that were broken down, removed and stolen.

23. One evening in April 2010, Mrs Beja, the first applicant, a 76 years old female, used one of the unenclosed toilets to relieve herself covering herself with a blanket. Once she relieved herself she got up and started approaching her dwelling when she was attacked and stabbed. She received medical treatment for the injuries sustained.

24. The Mayor then went to the residents of Makhaza to address the community but was confronted by community members who tried to stop him from addressing the community affected by the unenclosed toilets. On 17 May 2010 the Mayor met with the second applicant and other members of the ANCYL, the ward councillor and the senior housing officials of the City. The outcome of the meeting was that construction to enclose the unenclosed toilets was to commence once again.

25. The construction resumed on 24 May 2010 and several toilets were enclosed until the community members once again became aggressive and demolished the structures. Once again the contractors had to leave Makhaza. The Mayor ordered that the unenclosed toilets were to be removed completely and a further 10 toilets were removed thus making the total of 65 toilets removed from Makhaza. It is important that at this time the Mayor made the following comments at a press conference: “I want to throw it back at the community... that you need to tell those rude hooligans, those thugs, that you must march and burn tyres against those hooligans,"

26. During this time the SAHRC continued their investigation and discussed their findings in a press conference on 4 June 2010. The Mayor and the Premier of the Western Cape (the first respondent, hereinafter referred to as the “Premier”) went to Makhaza on 23 June 2010 to address the community about reinstalling the toilets. No success was achieved instead the focus was shifted to a public attack on the integrity and perceived impartiality of the SAHRC.

27. In July 2010 the City appealed against the findings of the SAHRC through the internal appeal process which appeal was dismissed on 21 September 2010. On 23 September 2010 Mrs Beja together with second and third applicants, who are also residents of Makhaza filed this application against the City of Cape Town and others. A review application was brought by the Premier and the City in respect of the SAHRC findings, which application was postponed *sine die*.

28. The matter appeared before me on the 29th of November 2010 for a directions hearing. As it was evident that the hearing of the main application was only to be done by 2011, the Court held an inspection *in loco* to determine whether any interim relief should be ordered.

29. At the inspection *in loco* the court was accompanied by the legal representatives of all the parties. We observed firsthand the living conditions of the affected community. I noted in particular the aspects relating to the toilets. It was apparent that it is an impoverished community where only the basic services existed. Most of the toilets that were enclosed by the residents themselves, clearly showed that it was enclosed with whatever, often mixed, materials that could be found. Most of the self enclosed toilets were unsatisfactory to satisfy dignity and privacy. E.g. I observed a toilet, pointed out by a woman occupier that had no door. The opening faced a public thoroughfare. She indicated she could not afford a door. There was no provision made for the disabled, the elderly and other vulnerable groups. I was particularly disturbed by the conditions observed in the case of an elderly, wheelchair bound, gentleman who had to use a makeshift enclosure. It was constructed with pieces of wood and no roof. Access with a wheelchair was almost impossible. The only access to water for use to him was from the cistern above the toilet bowl.

30. The communal toilets that were visited were in a bad state and it can hardly be said that it satisfied the minimum requirement to promote dignity. They were positioned less than a metre from the kerbside with doors facing the road and generally filthy and underserviced. Some of the residents were also excessive distances from the nearest communal toilets. I observed that the area had no streetlights and we measured in an area of 70-80 paces from one point, one communal toilet with 10 dwellings having this as their closest toilet.

31. I was of the view that it was appropriate to at least order interim relief to alleviate the conditions of the community and restore some dignity, albeit interim. The structure, that I ordered to be installed, was available and tendered by the City. I observed same, knowing that the community were unhappy with it, but with the full knowledge that the

interim relief was urgent, the festive season was approaching, the structures were available and budgeted for and could be installed without delay.

32. The interim relief ordered were:

6. "Pending the finalisation of the main and review applications:

6.1 The City shall:

6.1.1 At the written request of any of the 1316 beneficiaries of the Silvertown UISP (in the areas of Silvertown, Makhaza and Town 2), adequately enclose the individual toilets of such beneficiaries with a corrugated iron and timber structure, including a polyurethane door, suspended on a steel bar, and capable of being locked from both the inside and the outside, with an internal spacing of not less than 2,5metres in height, 1,5 metres in depth and 1,0 metres wide, alternatively such other structure or part thereof as may be agreed upon between the City and individual beneficiaries before 16 December 2010; and costing not more than R2800-00 per completed unit inclusive of installation costs and VAT at its own cost.

6.1.1.1 Any proposal as to an alternative enclosure or part thereof to the one described in paragraph 6.1.1 above, must be agreed on by no later than 16 December 2010, failing which the City shall be obliged to immediately proceed with the installation of the galvanised iron and wood structures described in that paragraph in respect of all residents of the affected erven who have by then requested same; and

6.1.1.2 the City shall immediately proceed to prepare and hand deliver by 9 December 2010, to each erf in the Silvertown UISP, in English and isiXhosa, a written notice:

(a) asking the residents on such erven to indicate, by means of a cross on the notice, that the occupants of that erf would like the City to install a galvanised iron and wooden structure around the individual toilet which has previously been installed on their erf or an alternative resolution within the prescribed budget as stated in paragraph 6.1.1 and 6.1.1.1 above.

(b) indicating that the residents have until 16 December 2010 to inform the City of their wish in this regard and shall furthermore indicate where such notices can be delivered back to the City, this being a physical location within the Silvertown UISP; and

(c) enquiring of the residents whether any particular circumstances exist that would make the implementation of the order in paragraph 6.1.1 above impractical or impossible as far as their particular circumstances are concerned; more particularly whether they are affected vulnerable beneficiaries in respect of disabilities; age, or health; and

(d) in the event of it being necessary to adapt the structure described in paragraph 6.1.1 above, to satisfy the needs of the beneficiaries in (c) above, the City is ordered to apply the National Norms and Standards applicable; and

(e) a copy of this order in both English and isiXhosa shall be attached to the said notice.

6.1.2 Immediately reinstall and reconnect the 65 individual toilets subject to paragraph 6.1.1.2. (c) and (d) above in Makhaza which were removed by the City, and shall at the same time enclose such toilets with a corrugated iron and timber

structure, including a polyurethane door, suspended on a steel bar, and capable of being locked from both the inside and the outside, with an internal spacing of not less than 2.5 metres in height, 1.5 metres in depth and 1.0 metres wide, costing of R2800-00 per unit, inclusive of VAT and installation costs at its own cost.

7. In the event of any circumstance that leads to the City being unable to execute this order, they are ordered to report back to this Court by Thursday 23 December 2010, on the steps taken with regard to the construction of adequate structures and any other relevant issues".

33. During December 2010, and whilst I was abroad on official duties, it came to my attention that the City was being frustrated in its attempts to comply with the interim order.

34. I issued an electronic order, to the following effect:

"Having regard to the order of this court on 29 November 2010 that set the date of 23 December 2010 on which the parties have to report back to the court to record compliance with the order and in the exercise of the court's duty to ensure the integrity of court processes and orders, the parties are ordered as following:

1. Affidavits are to be filed by all parties to the matter, which affidavits must include:

1.1 full particulars as to compliance or not with the order and the reasons for non compliance,

1.2 full reasons why any party should not be held in contempt of court for failing to comply with the order.

35. On 23 December 2010 the City informed the Court that they were unable to implement the interim order. It was alleged that the community and the ANCYL had vandalised the structures that the City were compelled to put up. Serious allegations were made against the second applicant and his role in the City's failure to comply with the Court's order. I did not deal with the contempt allegations and decided to amend the interim relief to have regard to the new time frames and additionally ordered as follows"

"...

7. The Registrar of this court is ordered to submit all the papers in the current file to the South African Police Services on or before 31 December 2010.

8. The South African Police Service is ordered to, without delay open and investigation into the conduct of any individual or groups that relate to the contempt of this court's order dated 29 November 2010.

9. The investigation must include the conduct of any party, in the public domain, in respect of the above order.

10. The South African Police Service must file a progress report with this court on or before 7 March 2011.

11. The Second Applicant is directed not to in any way, act in a manner that will frustrate the implementation of the court orders issued in this matter".

36. Section 165 (4) of the Constitution reads as follows: "*Organs of state, through legislative and other measures, must <u>assist</u> and protect the courts <u>to ensure the independence</u>, impartiality, dignity, accessibility and <u>effectiveness of the courts</u>".* it is important that the orders of Courts are respected and implemented. Courts have a duty to ensure full compliance with their orders. Organs of state, including the South African Police Services should do their constitutional duty in this regard, failing which one od the cornerstones of our democracy is threatened.

37. At the hearing of 8 March 2011 it transpired that the South African Police Service failed to fully comply with the above order at the enquiry in respect of heir failure, the SAPS conceded their ineptness. I thus have made an order for further investigation by the South African Police Services, which investigations are continuing and will be the subject of separate proceedings, should the Director of Public Prosecutions decide to prosecute individuals for the contempt of the Court's order.

The Legal Framework:

38. There has been a constant need to address the provision of adequate housing and the development of sustainable human settlements in South Africa. The number of persons who are in need of housing is ever increasing.

39. The right of access to adequate housing is not to be seen in isolation. It must be seen as a whole, in light of its close relationship with other socio-economic rights, all read together in the setting of the Constitution. It is unquestionable that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty and intolerably inadequate housing[9].

[9] *City of Johannesburg Metropolitan Municipality v Blue Moonlight* [2011] ZASCA 47; *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 23-24.

40. There are various pieces of legislation that needs consideration when one deals with the development of housing and the progressive realisation of the right to adequate housing. I shall attempt hereunder to refer to the applicable law.

The Constitution:

41. The Constitution has many sections that affect the development of housing, it is vital that these following sections are considered as it has a direct impact on the progressive realisation of housing in South Africa.

42. Section 1 (a) of the Constitution entrenches the respect for human dignity stating "*The republic of South Africa is one, sovereign, democratic state founded on ... (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms".*

43. Section 7(2) requires the State, that includes local government, to respect, protect, promote and fulfil all fundamental rights.

44. Section 10 is of significance to the case at hand in that it states: "Everyone has inherent dignity and the right to have their dignity respected and protected."

45. Section 14 provides:

> *"Everyone has the right to privacy"...*

46. Section 26 provides:

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

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

(3) ..."

47. All of the above rights are fundamental, however Section 36 states that *"the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose".*

48. Section 39(1) provides that *"when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".*

49. In terms of section 139 provincial government has a particular responsibility to ensure that local government performs in terms of their constitutional and legal obligations[10].

[10] Section 139 of the Constitution states: *"Provincial intervention in local government-*

(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislat.ion, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including -

(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to -

(i) maintain essential national standards or meet established minimum standards for rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step...

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-

(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial Commitments, which-

(i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and-

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

Subsection (7) states: *"If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (I)or (5) in the stead of the relevant provincial executive.*

(8) National legislation may regulate the implementation of this section, including the process established by this section".

50. Section 156(1)(b) provides that a municipality will have executive authority and the right to administer matters that have been assigned to them by national and/or provincial legislation. In this matter the applicable legislation is the Housing Act and the Western Cape Housing Development Act 6 of 1999[11].

The Housing Act[12]:

51. The Housing Act defines "housing development" as the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have

---

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

[11] The Western Cape Housing Development Act 6 of 1999.

[12] The Housing Act 107 of 1997.

access to-

(a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and

(b) potable water, adequate sanitary facilities and domestic energy supply.

52. It is clear that the requirements of privacy, protection against the elements and adequate sanitary facilities are central features of housing development in South Africa.

53. Section 2(1) sets out the general principles of the Housing Act, stating in short that the three spheres of government must prioritise the needs of the poor and must ensure that meaningful engagement is had with the communities affected by a housing development[13]. Government must also encourage and support individuals and

[13] Section 2(1) of the Housing Act sets out the general principles as follows: *1) National, provincial and local spheres of government must--*

a) give priority to the needs of the poor in respect of housing development;

b) consult meaningfully with individuals and communities affected by housing development;

c) ensure that housing development--

i) provides as wide a choice of housing and tenure options as is reasonably possible;

ii) is economically, fiscally, socially and financially affordable and sustainable;

iii) is based on integrated development planning; and

iv) is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance;

d) encourage and support individuals and communities, including, but not limited to, co-operatives, associations and other bodies which are community-based, in their efforts to fulfil their own housing needs by assisting them in accessing land, services and technical assistance in a way that leads to the transfer of skills to, and empowerment of, the community;

e) promote--

communities; they need to promote the socio economic needs of the community as well as take cognisance of the impact of housing development on the environment.

---

i) education and consumer protection in respect of housing development;

ii) conditions in which everyone meets their obligations in respect of housing development;

iii) the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions;

iv) the process of racial, social, economic and physical integration in urban and rural areas;

v) the effective functioning of the housing market while levelling the playing fields and taking steps to achieve equitable access for all to that market;

vi) measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process;

vii) higher density in respect of housing development to ensure the economical utilisation of land and services;

viii) the meeting of special housing needs, including, but not limited to, the needs of the disabled;

ix) the provision of community and recreational facilities in residential areas;

x) the housing needs of marginalised women and other groups disadvantaged by unfair discrimination; and

xi) the expression of cultural identity and diversity in housing development;

f) take due cognisance of the impact of housing development on the environment;

g) not inhibit housing development in rural or urban areas;...

i) strive to achieve consensus in regard to the policies of the respective spheres of government in respect of housing development;

j) observe and adhere to the principles in Chapter 1 of the Development Facilitation Act, 1995 (Act No. 67 of 1995), in respect of housing development;

k) use public money available for housing development in a manner which stimulates private investment in, and the contributions of individuals to, housing development;

l) facilitate active participation of all relevant stakeholders in housing development; and

m) observe and adhere to all principles for housing development prescribed under subsection (2).

54. It is important that the community be involved in the process as stipulated in section 2(1)(b) as the community is affected by the housing development.

Section 2(1)(h) states:

"*in the administration of any matter relating to housing development--*

i) respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution;

ii) observe and adhere to the principles of co-operative government and intergovernmental relations referred to in section 41(1) of the Constitution; and

iii) comply with all other applicable provisions of the Constitution;"

55. The national government, through the Minister, must determine the national policy including the norms and standards relating to the housing development in terms of section 3(2)(a) of the Housing Act. The administrative and procedural guidelines for the effective implementation and application of the national housing policy are found in the Code. The Code is binding on all provincial and local spheres of government and governs all matters reasonably incidental to the national housing policy.

56. Section 7(1) of the Housing Act obliges every provincial government to facilitate the provisions of housing within the framework of the national housing policy. Therefore provincial government must take reasonable steps to support the municipalities to exercise the powers and perform the functions in respect of housing development. Should a municipality not be able to fulfil the executive obligation to the housing

development then the provincial government may intervene in terms of section 139 of the Constitution to fulfil the obligation.

57. The Housing Act sets out the functions of the municipalities in section 9(1) in short as follows[14]: that the Municipality must take reasonable and necessary steps within the framework of the national and provincial housing legislation and policy to ensure that there is access to adequate housing on a progressive basis with conditions conducive to the rights in the bill of rights.

58. In terms of section 9(2) of the Housing Act, the municipality is entitled to participate by acting as a developer in the planning and execution of the housing project. Within the framework of the Housing Act, provinces receive funds from national government to finance any national or provincial housing programme which is in line with the national

[14] Section 9 (1) of the Housing Act: *"Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to--*

a) ensure that--

i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;

b) set housing delivery goals in respect of its area of jurisdiction;

c) identify and designate land for housing development;

d) create and maintain a public environment conducive to housing development which is financially and socially viable;

e) promote the resolution of conflicts arising in the housing development process;

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

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

h) plan and manage land use and development."

housing policy. The head of the Provincial Department of Human Settlements is responsible for the allocation of money from the national housing programme.

The UISP:

59. The UISP was instituted in terms of the Housing Act to make provision for the upgrading of informal settlements. The UISP is an important programme that seeks to assist to upgrade the living conditions within informal settlements for millions of poor people, by providing basic services and housing. It is a process of rapid urbanisation.

60. The Code outlines the objective of the UISP as *"The [UISP] directly encourages the development of social capital by supporting the active participation of communities in the design, implementation and evaluation of projects. This is indeed to reinforce a co-operative relationship between the local government and communities to directly support the upgrading process and to enhance the long-term sustainability of interventions. The process of engagement is also intended to build mutual trust, reciprocity and enhance networks, ultimately reducing household vulnerability, social crime and enhancing security."* (my underlining)

61. The USIP aims to address the social and economic integration of communities, and to bring about social cohesion, stability and security in integrated developments. The Programme may be undertaken in three phases, focusing on community participation, planning, emergency services, basic services and housing construction as part of a final phase.

62. Once a project has been approved and funds have been allocated by the Provincial Department of Housing, the municipality shall forthwith enter into a written agreement with the Provincial Department which agreement will address the basic municipal engineering services to be provided, with appropriate undertakings from the municipality in that regard.

63. Interim services will typically entail the provision of rudimentary water supply for communal use, communal and other temporary sanitation facilities refuse removal and certain access roads.

64. One of the responsibilities of the Municipality under this process is to provide materials, assistance and support where necessary to enable the *in situ* upgrading to proceed.

65. In terms of the Code community participation is of vital importance. It is stated that: *"To ensure that fragile community survival networks are not compromised and to empower communities to take charge of their own settlements, one of the basic tenets of the programme is that beneficiary communities must be involved throughout the project cycle. All members of the community, also those who do not qualify for subsidies, are included."*

66. The Programme is premised upon substantial and active community participation and funding is accordingly made available to underpin social processes. The following parameters are applicable:

    (a) Community participation is to be undertaken through the vehicle of Ward Committees or a similar structure.

(b) Ongoing effort must be made to promote and ensure the inclusion of all key stakeholders within the participatory process.

(c) The municipality must demonstrate that effective interactive community participation has taken place in the planning, implementation and evaluation of the project.

(d) Special steps may be required to ensure the ongoing involvement of vulnerable groups.

67. One of the fundamental principles of the programme is the empowerment of communities to enable them to assume ownership of their own development and improvement of life. The involvement of the target community from the outset must in all circumstances be pursued. "Community participation must preferably be undertaken within the context of a structured agreement between the municipality and the community. A framework for such an agreement is attached as Annexure A to the Guidelines."

68. A municipality may apply for funding for the appointment of external capacity to assist in the processes leading up to the conclusion of the participation agreement with the communities.

69. Once the project has been registered and the funding reservation confirmed by the MEC the municipality will proceed with the implementation of phase 2 of the project. During this phase of the upgrading process, municipalities will receive funding to and "must" undertake certain activities which includes the conclusion of the agreement between the municipality and the community that will regulate participation, the project approval

processes etc. and the installation of interim services.

70. In phase 3 the municipality shall submit a Final Business Plan including certain "minimum information" to the MEC for approval. That information includes details of the community participation structures established and contracted with.

71. Annexure A is entitled "Guidelines for the contents of an agreement between the municipality and the inhabitants of an informal settlement to be upgraded". It identifies certain issues which "should be addressed in a contract that is designed to bind the parties to the agreement regarding the development of the informal settlement." These include:

    (a) A clear indication on how the membership of the parties to the agreement is structured, who is represented by each party, and in terms of what mandate.

    (b) The responsibilities of each party to the agreement. This could include a list of functions to be performed in terms of the agreed development process, and "should be specific so that all members know what is required of them".

    (c) The processes and proceedings of the agreement including where, when and how often the parties will meet, the description of the quorum for the meeting etc.

    (d) The signatures of members to indicate acceptance of the terms of the contract.

72. National Housing Code sets out various principles for the UISP which includes[15]:

[15] See also:
• ***Grants to municipalities:*** *Funding under the programme will be made available to municipalities as grants for the undertaking of projects based on approved business plans for the upgrading of whole settlements;*
• ***Application of the programme:*** *The programme is first and foremost applicable to the in situ upgrading of informal settlements. It will also apply in cases where communities are to be relocated for a variety of reasons including dedensification of settlements. The provisions of this programme are equally applicable to both the upgraded settlement and the relocation site;*
• ***Relocation requirements:*** *In cases of relocation the approval of the community to relocate must be secured and the new location must be in an area designated in terms of an approved Integrated Development Plan (IDP);*
• ***Qualification for benefits:*** *the programme provides benefits for all the inhabitants of an informal settlement, in a variety of ways, including persons currently excluded from the benefits of the Housing Subsidy Scheme;*
• ***Programme Scope:*** *The programme will finance the development of serviced stands while housing consolidation, is facilitated through the housing development options of the National Housing Programme as separate projects;*
• ***Suitable land:*** *The programme will only provide funding in respect of informal settlements situated on land suitable for permanent residential development and within an approved IDP of the municipality concerned. The Programme also provides for marginal land to be rehabilitated in certain cases;*
• ***Norms and standards:*** *The National Norms and Standards in respect of the creation of serviced stands shall not apply to this Programme but could serve as a guideline;*
• ***Stand sizes:*** *The layout of informal settlements generally precludes the determination of uniform stand sizes. Accessible stand sizes should emerge through a process of dialogue between local authorities and residents;*
• ***Social and economic amenities:*** *The National Housing Programme: Social and Economic Amenities may be utilised to access funding for the construction of basic social and economic infrastructure. Note: Where funding is available from line functions departments this should be the first option.*
• ***Tenure:*** *The Programme promotes security of tenure as the foundation for future individual and public investment. The broad goal of secure tenure may be achieved through a variety of tenure arrangements and these are to be defined through a process of engagement between local authorities and residents;*
• ***Housing Consolidation:*** *Beneficiaries of this programme will only receive access to land, basic municipal engineering services and social amenities and services. To qualify for housing assistance benefits, such as registered ownership and a consolidation subsidy, beneficiaries need to comply to the requirements of the relevant programmes;*
• ***NHBRC project enrolment:*** *Municipalities must ensure that the project areas are enrolled with the National Home Builders Registration Council (NHBRC) at the earliest stage of planning. This ensures that enrolment of houses with the NHBRC is effectively facilitated and not compromised in any way;*
• ***Discounting of grants:*** *A grant approved under this Programme in respect of the cost of planning, township establishment and installation of municipal engineering services and project management will be discounted against subsequent Housing Consolidation subsidies only to the extent to which it might have contributed materially to the permanent housing solution. As a minimum, subsidies allocated to individuals for house construction must be equal to the value of the prevailing consolidation subsidy;*
• ***Project Management:*** *Municipalities should prepare a capacity building strategy to support the implementation of the upgrading project in order to establish capacity constraints and address these constraints efficiently;*
• ***Procurement:*** *Procurement procedures must be fair, equitable and transparent for the acquisition of housing goods and services and the guidelines of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), must be followed; and*

*"• **A holistic approach:** Entails an area and/or community wide focus, fostering holistic development of the settlement with minimum disruption of existing fragile community networks and support structures. To the greatest extent possible, settlements should be upgraded in a holistic, integrated and locally-appropriate manner. Engagement between community members and their local authorities is of the utmost importance to ensure locally appropriate solutions;*

*• **Public to public partnership:** This Programme is premised on the provisions of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005) that provides for the establishment of co-operative governance structures and systems, as well as alignment mechanisms. Local government is the main implementing agency. To counter the lack of capacity at local government level, a focused capacity building programme to support municipalities must be established by provincial housing authorities;*

*• **Service standards:** The Programme provides funding for the installation of interim and permanent municipal engineering services. Where interim services are to be provided it must always be undertaken on the basis that such interim services constitute the first phase of the provision of permanent services, the nature and level of permanent engineering infrastructure must be the subject of engagement between the local authority and residents. Community needs must be balanced with community preferences, affordability indicators and sound engineering practice;*

*• **Community Partnership:** The Programme is premised upon extensive and active community participation. Funding is accordingly made available to support the social*

---

*• **Demolition of shacks:** The municipality must table a comprehensive action plan for the management of projects specifically addressing measures to prevent re-invasion of land and the process of shack demolition in the event of persons accessing housing consolidation benefits.*

processes. Community participation should be undertaken through Ward Committees with ongoing effort in promoting and ensuring the inclusion of key stakeholders and vulnerable groups in the process. The municipality must demonstrate effective interactive community participation".

The Water Services Act:

73. The Water Services Act 108 of 1997[16] is the legislative framework relating to water services; it states the objectives of basic sanitation as follows:

"Basic Sanitation" – "the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal settlements."

"Sanitation services" – "the collection, removal, disposal or purification of human excreta, domestic waste-water, sewage and affluent resulting from the use of water for commercial purposes."

74. Section 3 of the Water Services Act, provides that everyone has a right of access to basic water supply and basic sanitation. Every water services authority that includes the City, is prompted to take reasonable measures to realise these rights, including in its water services development plan.

[16] The Water Services Act 108 of 1997

75. Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water in terms of Government notice R509 of 8 June 2001 states:

"The minimum standard for basic sanitation services is-

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

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

76. I now deal with the issues at hand, in terms of the legal framework set out above.

The issues:

There are four main issues that will be dealt with. They are:

The Agreement: whether a legally enforceable agreement was reached with the affected community.

The 1:5 ratio: whether the 1:5 ratio was applicable.

The Constitutional issues: whether any constitutional rights of the affected community was infringed.

The Counter Application: whether certain aspects of the Housing Code is unconstitutional, whether the application is competent.

The "Agreement":

77. The city alleges that the unenclosed toilets were provided pursuant to an agreement with the affected communities for its enclosure by the community themselves, at their own cost. This alleged agreement is denied by the applicants. It needs to be considered whether the agreement, if proven, is enforceable. Coupled to this issue must be the conduct of the second applicant herein.

78. The City submitted that individual toilets were unaffordable and therefore decided that the solution would be communal toilets, on a ratio of one toilet to every five erven (i.e.1:5). As this was resisted by the community it was proposed that an alternative of individual unenclosed toilets per erven be installed on condition that the community enclose such toilets themselves and at their own cost. According to the City this was an effort to go beyond the minimum required (i.e. 1:5), to meet the concerns of the community regarding the communal toilets which in itself were unsatisfactory. It was this decision that led to the alleged agreement with the community.

79. The Premier, who was the Mayor of the City at the relevant time, states that there was never a formal decision, at executive or council level, within the City to provide unenclosed toilets. The agreement reached was an *ad hoc* one between officials and community representatives to meet the demands of a specific project and further that the agreement was never conveyed to her either as Mayor or Premier. In fact, according to her, the provision of unenclosed toilets, absent an agreement for enclosure, would be an affront to human dignity.

80. I now turn to the meeting of 27 November 2007 where the agreement was allegedly concluded. The community were given a mere four days notice. This was done on the

Thursday preceding the meeting. The meeting was scheduled for the Sunday, upon an open field in the area. The proposed agenda of this meeting included only two items to be discussed, namely electricity and refuse removal. The topic of toilets and or sanitation was not on the agenda for this meeting. However, it was allegedly placed on the agenda, at the meeting, shortly before the start thereof.

81. It is alleged by the City that 60 members of the community, the ward councillor, the then project manager for the City and community leaders attended. None of the alleged attendees deposed to affidavits except for the community and development manager of a contractor. At this meeting the City "presented a proposal to the community based on what was affordable" and based on this proposal "it was agreed" between Mr Mzomba and "the community leaders" that the City would in addition to the communal toilets, build individual toilets on each of the 1316 erven in Silvertown. It is to be noted that in its answering affidavit, the City stated that it "admits that the community agreed and understood the installation of the toilets, which would be enclosed by the community, was only feasible and justifiable on the basis that such toilets would indeed be incorporated into the final top structures to be erected on the individual erven in due course." It is, alleged that the people who attended raised no objections to the proposal hence the City is of the view that the proposal was acceptable and that the attendees agreed thereto.

82. The City submitted from the outset that they took the need to consult with the community seriously and appointed independent contractors to undertake this task. A steering committee comprising relevant stakeholders was appointed. The appointment of paid community liaison officers (CLOs); who included the second applicant was done. The City's subcontractor conducted the process of the community participation through

the CLO's at site meetings to discuss the aspects of the development. It is however not alleged that any CLO and in particular the second applicant attended this meeting.

83. There are no minutes of the meeting; as they were allegedly not taken, and therefore there is no way of proving who all attended the meeting. According to Caso, this was because the meeting was called in the open and on a Sunday and attended by many people. He explains that the keeping of minutes was accordingly impractical. It is important to note that this meeting was held two years prior to the installation of the unenclosed toilets. The tender was only awarded on 2 April 2009. The question arises as to whether the 60 people of the community who attended the meeting in 2007 were still within the community in 2009 when the unenclosed toilets were installed.

84. There are minutes of other meetings that were held with the CLO's which included the second applicant, however these meetings were held to establish the site of the toilets. Nothing about the community enclosing their own individual toilet arises out of these minutes.

85. In terms of the 2004 version of the UISP (the prevailing framework at the time when the alleged agreement was concluded), the main objective was to facilitate the structured upgrading of informal settlements. The programme promoted the development of healthy secure living environments by facilitating the provision of a whole range of services, and the programme was not only to restore dignity to the urban poor but also to build human capital.

86. The Programme is premised upon substantial and active community participation and

funding is accordingly made available to strengthen social processes in order to ensure that true, proper and meaningful engagement is had with the community that will be affected. The following parameters are applicable:

(e) "Community participation is to be undertaken through the vehicle of Ward Committees or a similar structure.

(f) Ongoing effort must be made to promote and ensure the inclusion of all key stakeholders within the participatory process.

(g) The municipality must demonstrate that effective interactive community participation has taken place in the planning, implementation and evaluation of the project.

(h) Special steps may be required to ensure the ongoing involvement of vulnerable groups."[17]

87. Meaningful engagement was discussed in the case of *Occupiers of 51 Olivia Road*[18] Yacoob, J stated the following: "*Engagement is a two-way process in which the city and those ... would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement".*

88. Yacoob J went further elaborating upon this point: *'Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the*

[17] The National Housing Code of 2009

[18] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at para 14

importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. <u>It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side</u>."[19] (my underlining)

89. In the Joe Slovo[20] case, Ngcobo J (as he then was) state that meaningful engagement must be had with the people affected stating: *"In my view, the key requirement in the implementation of a programme is engagement. There must be meaningful engagement between the government and the residents. The requirement of engagement flows from the need to treat residents with respect and care for their human dignity."*

90. Community participation must preferably further be undertaken within the context of a structured agreement between the municipality and the community. A framework for such an agreement, is annexed to the guidelines as Annexure A to the Housing Code. It clarifies certain issues which "should be addressed in a contract that will bind the parties to the agreement regarding the development of the informal settlement." As quoted in para (71) above.

[19] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at para 15

[20] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on the Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC)

91. It is uncontentious that the State's housing policy, particularly as articulated in the Housing Code contemplates consultation with the affected community and, necessarily, arrangements and agreements for the implementation of whatever consensus is achieved. It is equally uncontentious that any agreement must reflect a proper consensus achieved with representatives and legitimate community leaders.

92. The parties proferred divergent views and reasons to support their contention as to whether the agreement would be enforceable or not.

93. The City argued that as they had collected "happy letters" from the majority of the community in the Silvertown area with only one negative comment, it constitutes evidence of the community's agreement. Furthermore, the second applicant raised no complaints about his own toilet. I shall revert to the second applicant later in this judgment.

94. In my view reference to a vague agreement is simply not good enough. The City is bound by the prescripts of the Code and the Consitution and accordingly must ensure that community participation and negotiated agreements that are entered into, are consistent with the prescripts of the Code. This is patently absent here.

95. We are dealing with a poor vulnerable community, who met with the City in order to reach agreement on important issues regarding their day to day existence. In the circumstances can it be said that the City has complied with the Code in concluding the agreement with the community? Poor people enclosed toilets which were open, it seems, in desperation to salvage some basic element of human dignity. They did not do so as evidence of an agreement.

96. The City further relies on the fact that no one raised any objections in the meeting and therefore accepted the proposal of unenclosed toilets to be enclosed by themselves. In my view, absent any information relating to the circumstances, means or any other relevant fact in relation to the present individuals, such inference cannot be supported[21].

97. In my view scant information is available as to what was considered when residents signed the so called “happy letters”, and for the reasons and findings I make elsewhere in this judgment it is in any event irrelevant.

98. The conclusion of agreements with communities for the purposes of giving effect to socio- economic rights is commendable. These agreements, to be enforceable, ought to at least satisfy four minimum requirements; (i) it must be concluded with duly authorised representatives of the community; (ii) it must be concluded at meetings held with adequate notice for those representatives to get a proper mandate from their constituencies, (iii) it must be properly minuted and publicised. (iv) it must be preceded by some process of information sharing and where necessary technical support so that the community is properly assisted in concluding such an agreement. None of these requirements were met in this matter.

99. Even if an agreement satisfies all four requirements, an agreement cannot be a vehicle through which a majority within a community approve arrangements in terms of which the fundamental rights of a vulnerable minority within that community will be violated.

100. In terms of the alleged agreement we have 60 people concluding an agreement that is going to govern the living circumstances of approximately 6 000 people, that is less than

[21] See footnote 17.

1%, and there is no evidence of any representative status. The ward councillor does not have a mandate to sign away the individual rights of members of the community.

101. A collective agreement of this nature, alleged by the City, cannot amount to a waiver of individual fundamental rights to dignity and privacy. These rights are of a fundamentally, individual nature, and in this regard the objects of the constitution would be subverted if a majority group within a community, even an overwhelming majority within a community, could agree to a program from which they stood to gain, even in circumstances where that program violated the fundamental rights to dignity and privacy of a small and vulnerable minority within that community.

102. The alleged agreement made no provision for those who were unemployed and poor and could not fund the enclosure of their own toilets. One of the requirements of reasonableness under section 26(2) of the Constitution is that a housing programme must be framed in a manner that takes account of the needs of the most vulnerable and desperate. The City ought to have come to the assistance of those who, due to poverty and their particular disadvantaged socio-economic status could not afford to enclose their toilets. Also no regard was had to persons with disabilities or to issues of safety for those most vulnerable to violence in terms of the structure. The City failed to take into consideration the gender impact on women and girls both in terms of different biological needs as well as their vulnerability to higher levels of gender-based violence. All of these are to be considered as a violation of fundamental rights of human beings and cannot be waived by the agreements, as alleged here.

103. The nature of the consent in this instance is problematic, as there is no proof of who was present, there is no proof of a representative capacity, there is no proof of a positive

agreement, and in particular there did not appear to be any consideration at the time the agreement was ostensibly concluded as to the costs of enclosing the toilets and whether the community could afford to do so, the City also did not state how they would deal with toilets for members of the community who could not afford to enclose the toilet themselves.

104. The conduct and involvement of the second applicant in this matter also needs to be discussed under this issue. The second applicant is a member of the community in Makhaza and he is one of the executive members of the ANC Youth League. The second applicant was one of the CLO's who interacted with the City in meetings regarding the project. What has become evident is that the second applicant had a core function of promoting the interests of the City's contractor[22]. In fact the second applicant was being paid by the contractor and the question arises if the second applicant was indeed a community representative who was taking the communities best interests to heart. Not only was the second applicant in the pocket of the contractor but his role undermined the principle of community participation.

105. I am of the view that the conduct of the second applicant is questionable.

106. Based on the above, I am of the view that the agreement relied upon is not a valid and enforceable between the City and the Community. This could not legitimise the installation of the unenclosed toilets.

[22] "*The primary task of a CLO is to be a link between the community and the Contractor. The CLO to be extension of the Contractor who is employed by the Contractor and has the Contractor's interest at heart".* Excerpt from the minutes of site meeting dated 1 June 2009.

The 1:5 issue:

107. Apart from its reliance on the agreement, the primary defence of the City is that it provided the open toilets in addition to the enclosed communal toilets that were already installed. The ratio of 1:5, the City contends, is what the Code identifies as a minimum for housing projects (thereby stating that they could not have violated the fundamental rights of residents unless that minimum is itself, unconstitutional). Furthermore the City contends that as the UISP in the Code contemplates that residents will build their own homes, it cannot be unconstitutional for the City to have required residents to build the structures to enclose their toilets, unless the Code is in itself unconstitutional.

108. The City expressed the view that they would prefer to construct individual toilets in projects funded under the UISP[23]. However, this was not possible in the Silvertown project for budgetary reasons. The construction of communal toilets was always considered a compromise.

109. The City maintained that the provision of communal toilets was left to the discretion of the municipality implementing the project and that there was no provision in the Code preventing communal toilets in the interim period on any particular ratio and does not require the construction of individual toilets on each erven.

110. The Minister of Human Settlements (the sixth respondent, hereinafter referred to as the "National Ministry") submitted that the City was incorrect that the Code prescribes a minimum of 1:5 in relation to the upgrading of informal settlements. They stated three

[23] For instance, in the Bardale area 6000 individual enclosed toilets could be constructed with pre-cast concrete surrounds. This was possible as the development was on a Greenfield site, and it would be many years until housing would follow.

things in relation to this, firstly that the City itself did not lay a proper basis for its interpretation of the Code; secondly the City took one clause out of the UISP, and it took one clause under the emergency housing programme, and says that the emergency housing programme ought therefore to be used to interpret the UISP.

111. The Housing Code envisages housing programmes governing different issues. The emergency housing programme is aimed at a temporary situation to respond to unpredictable or sudden situations. This programme was the result of the *Grootboom*[24] judgement. In *Grootboom*, the Constitutional Court found, that while government had a long-term housing programme, it was lacking in relation to the immediate provision of housing needs. The court specifically said in *Grootboom*, that what the programme needs to do is to make provision for housing needs that fall short of the definition of housing development under the Housing Act.

112. Paragraph 13.7.1 of the Code is based on section 9 (1) of the Housing Act which provides that every municipality, as part of its process of integrated development planning, must take reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis, that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed, and that services in respect of water and sanitation, electricity, roads, storm water drainage and transport are provided in a manner which is economically efficient.

113. As far as provincial government is obliged in terms of s 7(1) of the Housing Act to do

[24] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)

everything in its power to facilitate the provision of adequate housing within the framework of the national housing policy. Similarly, local authorities must act within the framework of the national and provincial housing legislation. In terms of s 9(2)(a) of the Housing Act, participation by a local authority in a national housing programme is to be in accordance with the rules applicable to that programme.

114. The standards that are applicable for emergency housing will be lower than those required for projects that are designed to be of a longer duration and that can be implemented after considered planning. The Silvertown UISP project falls into the latter category and is not a case of emergency housing.

115. The programme itself states that the national norms and standards do not apply to the UISP, but it could serve as a guideline. The norms and standards, serving as a guideline in this regard, they make provision for a toilet, a shower, a standard tap with washing facilities for clothes, and a hand basin and sink unit. Secondly, in terms of the UISP it must always be undertaken on the basis that such interim services will constitute the first phase of the permanent services to be provided.

116. The City has taken an interpretation in relation to the upgrading of informal settlements that is entirely inconsistent with the programme itself, in terms of which it seeks to cross-pollinate from the emergency housing programme which was adopted with a very different purpose and objective in mind. And notwithstanding that, the City at no stage sought any clarity from the National Department with regard to the interpretation of the programme.

117. Further there is no indication, in any event that by implementing 1:5 that any meaningful engagement with the community took place.

118. Consequently I find that the City cannot rely on the 1:5 ratio to justify, with reference to any legislative framework, the installation of unenclosed toilets as it did.

The Constitutional Issues:

119. Having found that the alleged agreement was not valid and enforceable and that the 1:5 is not a prescribed minimum that can be relied on, I now turn to the question whether the provision of unenclosed toilets infringed on any of the basic human rights of the beneficiaries.

120. Although the standing of the parties was not seriously challenged I need to comment on the standing of both the SAHRC and the applicants in this matter.

121. In terms of section 184(3) of the Constitution[25] the SAHRC is mandated to investigate violations of rights entrenched in the Bill of Rights as well as to monitor the measures taken by relevant organs of state towards the realisation of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment.

122. Section 38 of the Constitution states that any person with an interest in the matter may approach the court where they allege that a right contained in the Bill of Rights has been infringed or threatened. A declaration of rights can be appropriate relief in the

[25] The Constitution of the Republic of South Africa Act 108 of 1996, section 184(3)

circumstances of a particular case[26].

123. I was referred to a range of constitutional rights that might have been infringed in this instance by the provision of unenclosed toilets. This Court does not look upon these rights lightly. Our commitment to social justice and fundamental rights demand that when any fundamental rights are violated, it must be addressed.

124. It is the duty of this Court to promote the Constitution and the rights contained therein in order to *"heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nation.*" As stated in the preamble of our Constitution[27].

125. In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 329 the Constitutional Court reinforced the central place that human dignity occupies in our constitutional framework in these words:

> *"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans.*

[26]The Constitution of the Republic of South Africa Act 108 of 1996, section 38.

[27] The Constitution of the Republic of South Africa Act 108 of 1996, preamble.

Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."

126. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 35 the Constitutional Court said the following:

"The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."

127. In the more recent matter of *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) at paras 49-50. The Court once again pointed out that:

"A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity

occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom. . . . If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected . . . ."

128. The Constitutional Court also dealt with interrelationship between privacy and dignity and concluded that:[28]

> *"The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least - that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life."*

129. Specifically in relation to the right to privacy the Court in *S v Jordan* (*Sex Workers Education & Advocacy Task Force as Amici Curiae)* 2002 (6) SA 642 (CC)[29] held that "*the constitutional commitment to human dignity invests a significant value in the inviolability and worth of the human body and the right to privacy, therefore, serves to protect and foster that dignity"*.

---

[28] NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC) at para 131.

[29] *S v Jordan* (*Sex Workers Education & Advocacy Task Force as Amici Curiae)* 2002 (6) SA 642 (CC)at para 81.

130. In Investigating Directorate: *Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC)[30] the Court held:

> *"As we have seen, privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core."*

131. In *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC)[31] Ackermann J characterises the right to privacy as lying along a continuum, where the more a person inter-relates with the world, the more the right to privacy becomes attenuated. Moreover that:

> *"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation."*

[30] *Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 18.

[31] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at para 77.

132. In the case of *Joe Slovo*[32], Justice O'Reagan stated the following, dealing with the Section 26 matter: *"In considering this and similar cases courts need on the one hand to be aware of the enormity of the task that Governments perform in seeking to improve the quality of life of all citizens, and be astute not to impair the government's ability to perform this task. On the other hand courts must not permit government to treat citizens in a manner that is not consistent with human dignity of pursuing laudable programs."* This case also stressed that there is a primary responsibility on government to act reasonably when giving effect to constitutional rights, in particular socio-economic rights.

133. In the *Grootboom* case section 26 of the constitution was discussed[33]:

> *"'All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.*"

134. Yacoob J went on to state that the Constitution would be worth infinitely less than its paper if the reasonableness of State action concerned with housing was determined without regard to the fundamental constitutional value of human dignity, adding that:

> *"Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the*

[32] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on the Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at para 265.

[33] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 82.

[council] towards the [occupiers] must be seen."[34]

135. The City argued that the potential violation of dignity ought to be properly considered. They stated that no-one was ever expected or compelled to use the individual unenclosed toilets in Makhaza before they were enclosed. The communal toilets were installed before anyone moved into the Makhaza area of the Silvertown project. They submitted that the issue was not whether the City expected residents to waive their rights to dignity by using unenclosed toilets, or left them with no other alternative but to do so. That was not the intention of the City. They continued to argue that though the communal toilets were available to be used, no one was obliged to make use of an unenclosed toilet. Once the City became aware of the unenclosed toilets they attempted to enclose those toilets but to no avail.

136. This argument of the City loses sight of the uncontested evidence on behalf of the City before this Court. The City, in support of their counter application, filed a supporting affidavit by Thembisa Princess Sokabo, who is a resident in an area where communal toilets (1:5 ratio) were installed. I deem it necessary to quote from her affidavit:

" *The toilets we have in Nkanini (i.e. the one to five households toilets) are generally in an appalling state, notwithstanding the City's attempt to maintain same, to the extent that members of the community generally do not use them. They are always blocked and filthy, and are not appropriate for human use. Due to the fact that they are communally owned, people do not take responsibility and personal pride in them. Not only are the toilets filthy and unsafe, but they are a health hazard to people in*

[34] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 83.

general and to children in particular as they have burst pipes which are overflowing with faeces.

As a consequence of the above, other people have dug deep pits in their yards and enclosed them with enclosures made of timber and zinc material. Many people in my community prefer to now use these toilets instead of using the communal ones.

As a single female parent, I do not have a pit toilet. My three year old granddaughter relieves herself in plastic bags. In the past, people who have pit toilets have been of great help to their neighbours, but they have since complained that their pits will get full if neighbours continuously make use of them.

When it is time for me to relieve myself, I walk to my sister's house in the upgraded Makhaza section and the walk takes me twenty minutes. I can only embark on this walk when nature calls during the day. At night I have to make do with whatever is available whether it is a carrier bag or any other container to relieve myself.

I have friends and relatives who are staying in the area which is the subject of these proceedings. As this Honourable Court would know, these proceedings are a topical issue in Makhaza due to the significance of the upgrade project and the subsequent media attention this matter has received and which it continues to receive.

The general view is that, as a matter of principle, toilets should be enclosed. However, the community is divided on what materials should be used to enclose the toilets. Certain members of the community are of the view that toilets must be enclosed with concrete enclosures. Other members of the community are happy with the timber and zinc enclosures.

The general feeling within my community, it that individual toilets, enclosed with any material to a degree that allows for privacy when ablating, are better than the communal toilets, which have in the past been the norm". The content of this affidavit confirms my own observations. The question then arises whether in any event the communal toilets, as provided, complied with human dignity. I submit not.

137. The Constitution provides for the right to freedom and security of person. In section 12(2) "Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body".

138. The applicants submitted that the installation of unenclosed toilets to a poor community stigmatizes the residents in a manner that is both demeaning and degrading. They argued that the action of the City sent a message that the residents of Makhaza are not worthy of the privacy in terms of section 14 of the Constitution that an enclosed toilet provides and this is a violation of their rights to decent living conditions which include privacy.

139. The applicants argued that the demeaning use of people using unenclosed toilets could not be consistent with the values of our constitutional dispensation. They went further saying that the harm arising from the public notoriety associated with the use of unenclosed toilets was a form of state abuse.

140. The first applicant, I need to emphasize a 76 year old female, had to cover herself with a blanket to relieve herself. This is neither humane nor dignified. She was attacked as she was the unenclosed toilet in full view of the community.

141. The Courts have repeatedly held that the State, including municipalities, is obliged to treat vulnerable people with care and concern and to treat human beings as human beings.[35]

142. Also the objects of local government in the Constitution are, among other things, *"to ensure the provision of services to communities in a sustainable manner"*[36] and *"to promote a safe and healthy environment"*[37]. A municipality is obliged to try to achieve these objectives. Section 73(1)(c) of the Local Government: Municipal Systems Act 32 of 2000 echoes the constitutional precepts and obliges a municipality to provide all members of communities with "*the minimum level of basic municipal services"*.

143. Such minimum level would include the provision of sanitation and toilet services. Irrespective whether it is built individually on separate erven, or communally, it must provide for the safety and privacy of the users and be compliant with the fundamental rights guaranteed in the Constitution. Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with s 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity.

144. The facts showed that the City had failed to heed this injunction; it may be pursuing a laudable program, being the upgrading of the Silvertown informal settlement and the rolling out of individual household toilets, however, in the process, the City lost sight of the needs of the poorest of the poor and their human dignity.

---

[35] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on the Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at para 76.

[36] The Constitution of the Republic of South Africa Act 108 of 1996, Section 152(1)(b).

[37] The Constitution of the Republic of South Africa Act 108 of 1996 Section 152(1)(d).

145. The manner in which the City acted was not in line with the provisions of section 26 of the Constitution. No thought was given to the outcome of their decision and how it would affect the lives of the community.

146. The City's decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the local community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents "*with respect and care for their dignity*" was not taken into account when the City decided to Install the unenclosed toilets.[38], [39].

---

[38] The City is in further violation of **Section 152(1)(e) of the Constitution** which provides for public involvement in the sphere of local government', by requiring it to 'provide democratic and accountable government for local communities; and encourage the involvement of communities and community organizations in the matters of local government. In that regard we must refer to sections 2 and 5 of the Municipal Systems Act which requires community involvement in local development planning and budget processes, monitoring and performance review initiatives. The Municipal Systems Act imposes a duty on municipalities to create a conducive and accessible environment for implementing a continuous systematic process of involving citizens in taking decisions relating to their affairs. Section 4 in particular imposes a duty on municipalities to contribute towards building the capacity of local communities, to enable them to participate in the affairs in the municipality. According to this section, councillors and staff have the active duty to foster community participation through developing a culture of municipal governance that complements formal representative government with a system of participatory governance. Such constitutional and legislative provisions leave no doubt as to the existence of extraordinary political commitment to notions of participatory governance.

[39] The City violated its own policy approved by Council on **30 March 2009** called, *"Public Engagement Policy City of Cape Town",* (*"the Policy"*).

1. Section 4 deals with Mechanisms for Municipality Service Delivery Local Government Municipality Systems Act 32 of 2000 and Establishment of internal Municipal Services Districts.
2. Section 4 states that:
   - 2.1.1 a municipality must review and decide on the appropriate mechanism to provide a municipal service in the Municipality when requested by the local community through mechanisms, processes and procedures established in terms of Chapter 4 of the Local Government Municipality Systems Act 32 of 2000, ("the Act") (section 77 (e));
   - 2.1.2 if municipality decides in terms of sub section 2 (b) of the Act to explore the possibility of providing the municipal service through an external mechanism, it must –
     - 2.1.2.1 give notice to the local community of its intention to explore the provision of municipal service through an external mechanism;

147. The applicants argued that the Premier and Province would be similarly implicated in that Province entered into an agreement with the City to construct open toilets on the basis of an alleged agreement, which was based on a misrepresentation of the Code.

148. Whilst it is so that I cannot agree that the Premier and the Province had any direct involvement in the installation of the unenclosed toilets it needs to be pointed out that both the provincial government as well as the national department have an obligation to monitor and assist in the implementation of projects that are funded under the UISP. In this matter it is patently clear that both the provincial and national departments simply failed in their duty[40].

149. I am further of the view that the provision of unenclosed toilets is unlawful as it is inconsistent with Regulation 2 of the Regulations Relating to compulsory National Standards and Measures to Conserve Water.[41] An illegality cannot be cured by providing something lawful alongside that which is unlawful.

150. Based on the facts presented to this court, I find that there was a violation of the rights in terms section 10, 12,14,24,26 and 27, by the provision of unenclosed toile

---

2.1.2.2 assess the different service delivery options in terms of section 76 (b) of the Act, taking into account the views of the local community and the views of the organised labour. (Section 78 (3) of the Act).

3. Before a Municipality enters into a service delivery agreement with an external service provider, it must establish a program for community consultation and information dissemination regarding the appointment of external service provider and the contents of service delivery agreement must be communicated to the local community through the media (section 80 (2) of the Act).

[40] Part 3 of the National Housing Code of 2009, Incremental Interventions: Upgrading Informal Settlements.

[41] Published under Government Notice R509 of 8 June 2001.

The Counter Application:

The basis of the counter application:

151. The City submitted that if the Court finds that they acted unlawfully, then this flows directly from defects in the Housing Code. The City has accordingly brought a conditional counter application in which it challenges the lawfulness of the Housing Code on the following bases:

152. First, as the provisions of the Housing Code are unlawful to the extent that they do not require an individual toilet on each erf as a minimum.

153. Secondly, the Housing Code requires the City to consult with the community on every aspect. If the City cannot, as a matter of law, act on an agreement with the community, then there is no purpose to such consultation.

154. Thirdly, the UISP is premised on beneficiaries building their own informal settlements until funding is obtained for permanent housing. If it is unlawful to expect beneficiaries to construct enclosures around their toilets, then the expectation that they must build their own informal settlement must also be unlawful.

155. Fourthly, the Housing Code provides no guidance as to what constitutes an adequate enclosure for toilets and lastly, the formula for funding under the UISP does not cover the expenses reasonably incurred in providing services to an area, including the provision of individual, enclosed toilets.

156. The City also submits that they had taken into account those that were not able to enclose their own individual toilet and took into account to construct their toilet enclosures. They stated that should it be found that they acted unlawfully then in terms the Code too is unlawful on the basis that it too does not adequately take into account the genuinely poor, the aged, the infirm and the disabled.

157. The City argued that the provisions of the Code are rendered vague and provide no sensible guidance to implementing municipalities. As was held in *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529) at para 108:

> "*The doctrine of vagueness is founded on the rule of law, which . . . is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly*"[42].

158. Further they argued that the provisions of the Code fall foul of the requirement of the rule of law that "*where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised.*"[43] The

[42] See too *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) at para 27-28.

[43] *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) at para 24-25. See too, *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 42-48.

City submits that the national department should have indicated the type of factors which should have been considered in determining the number of communal toilets to supply in a particular project.[44]

159. The Premier submits that the Code itself is essentially inadequate. It is designed to provide basic services and for that reason does not go far enough to meet the need of people who are living in intolerable circumstances.

160. In order to address the problem of the nature and extent of basic services to be provided in the upgrade of informal settlements (phases 1 to 3 of the UISP) the Premier was of the opinion that this calls for a reconsideration and re-evaluation of housing policy as reflected in the Housing Code and in the UISP in particular. It is national government which is obliged, in terms of s 3(2)(a) of the Housing Act, to determine national policy, including national norms and standards in respect of housing development. National housing policy is contained in the Housing Code which contains the administrative and procedural guidelines in respect of the effective implementation and application of national housing policy.

161. The Premier argued that the Court ought to require it of any legislative programme that some attempt should be made to provide norms or standards and guidelines for the provision of the basic sanitation facilities for occupants of informal settlements who have no reasonable access to such facilities. Hence individuals who are living, in the words of Yacoob J, in intolerable circumstances. The programme appears to contemplate that

[44] This is not the type of case in which the number of factors is so broad that they could not be delineated (as in *Armbruster v Minister of Finance* 2007 (6) SA 550 (CC) at para 77-78). The main considerations would be the number of households, the number of people in each household and the expected period that the communal toilets will remain in place.

some form of communal facility will be provided to those in intolerable circumstances or in a position of emergency or acute need. The City has contended that if regard is had to the Code as a whole, incorporating all its provisions, and if due notice is taken of the purpose of interim facilities it is not unreasonable to draw assistance and guidance from the provision dealing with emergency situations because Yacoob J regarded an emergency as being when people are living in intolerable circumstances.

The basis of opposition:

Intergovernmental Relations Framework Act:

162. The applicants submit that the City and the Province have not exhausted the remedies available to them under Chapter 3 of the Constitution and the Intergovernmental Relations Framework Act (hereinafter referred to as "IGFRA")[45]. They argued that the constitutional challenge to the Housing Code by an organ of state against another organ of state is undesirable unless it is within the process established in Chapter 3 of the Constitution and dealt with in terms of IGFRA.

163. The National Minister argued that the constitutional challenge against the department of human settlements will inevitably result in possible amendments to the Housing Code; this would mean a legislative process that would involve the participation of the Province and the input of the City. Unless the City and the Province are able to show that there is a breakdown in the intergovernmental relations to warrant the route of litigation, they submit that the counter-application, and any dispute relating to the constitutionality of

[45] Intergovemental Relations Framework Act 13 of 2005

the Housing Code should first be dealt with in terms of the Intergovernmental Relations Framework Act.

164. Chapter 3 of the Constitution read together with the relevant provisions of the Intergovernmental Relations Framework Act is applicable to the counter-application. Section 40(2) of the Constitution provides a mandatory requirement for the resolution of intergovernmental disputes. It makes it mandatory for all spheres of government to observe and adhere to the principles in Chapter 3 and demands that all spheres of government conduct their activities within the parameters of Chapter 3. Section 41(4) provides a Court with a discretion: "*If the Court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved"*.

165. In terms of section 45 of IGFRA makes it clear that no government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute.

166. Section 41(1)(h) of the Constitution requires co-operation between organs of state in mutual trust and good faith, by fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-ordinating their actions and legislation with one another, adhering to agreed procedures and avoiding legal proceedings against one another[46].

[46] The Constitution of the Republic of South Africa Act 108 of 1996,section 41(1)(h)

167. It is common cause that the City has never, whether formally in structures between the national government, provincial and local, or by way of instituting litigation, sought to challenge the constitutionality of the housing code. Indeed on the City's version, they respected it and acted in compliance with the prescripts of the code. The City has not attempted to utilise the procedures and processes provided for in terms of Chapter 3 of the Constitution.

168. The National Ministry has explained that a task team was formed (comprising senior officials from the national department, nine provinces and the metropolitan municipalities) for the purposes of drafting and revising the Code. In that process, a draft national housing programme was produced by the Department and then subjected to scrutiny by the task team and finalised after intense discussion and debate. The National Ministry also explained that the Code could be revised pursuant to requests from MinMEC[47]. There is no conceivable reason as to why the City did not approach MinMEC or the National Ministry directly regarding revisions to the Code.

169. Furthermore, had the City been uncertain regarding any aspect of the interpretation of the Housing Code, it ought to have approached the National Department. Indeed one of the responsibilities of the National Department under the Code is to assist with the interpretation of policies and programmes. Instead of approaching the National Department to resolve the issues it now complains of, the City decided to embark on litigation instead in, disregard of the prescripts for co-operative governance under the Constitution.

[47] Minsters and Members of the Executive Council.

170. The City has not complied with the Intergovernmental Relations Framework Act No. 13 of 2005 or the constitutional prescripts of co-operative governance. The City has also not provided any proper explanation for its failure to have done so. In this regard, it should be noted that the UISP itself is "premised on the provisions of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005) that provides for the establishment of co-operative governance structures and systems, as well as alignment mechanisms. Local government is the main implementing agency."

171. The Code has a direct and material bearing on all municipalities and provincial governments in South Africa. All provinces, municipalities and sector partners are given an opportunity to participate in the revision of the Code. That notwithstanding, none of the other provinces or municipalities are party to these proceedings in which fundamental underpinnings of the Code are being challenged for their unconstitutionality.

172. I would therefore dismiss the counter application on the basis that there was non-compliance with section 3 of the Constitution and with IGFRA and therefore premature and incompetent, however in the event that I am wrong, I shall deal with the other arguments hereunder.

Grounds of the counter application:

173. I now turn to deal with the grounds of the counter application as set out above.

174. The central and important question raised in this matter is the extent to which national housing policy as contained in the Housing Code and the UISP is compliant with the obligations resting on the State in terms of s 26(2) of the Constitution. In this regard, one must keep in mind that in terms of s 3(2)(a) of the Housing Act 107 of 1997 national government is obliged to determine national housing policy, including national norms and standards in respect of housing development. National housing policy is contained in the National Housing Act which contains the administrative and procedural guidelines in respect of effective implementation and application of the policy. These important and complex questions of executive policy fall to be dealt with by appropriate consultation and co-operation between the national and provincial spheres of government, involving local government where appropriate.

175. The Housing Act makes provision for the adoption of a Housing Code, the National Ministry has explained the co-operative basis on which that Code is in fact adopted by them and it is also explained that that Code is not a static document and is amended and revised on a regular basis.

176. There are budgetary limits for any sphere of government; however the important considerations of a housing policy arise in relation to the policy followed by national government and Province of spreading available resources to as many people as possible, rather than delivering more to fewer people.

177. As to a Court's role, there is no doubt as to the justiciability of the socio-economic rights contained in the Bill of Rights, and in particular section 26 and 27, being the most visible of such socio-economic rights[48]. As to the positive protection of these rights[49], the

[48] *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa 1996* ('the First Certification judgment') 1996 (4) SA 744 (CC) paras 77-78

problems of separation of powers and the polycentricity of the decision-making process are said to explain much about the Constitutional Court's approach to reviewing government compliance with socio-economic rights[50].

178. In *Grootboom*[51], the Constitutional Court declined the invitation to set a core minimum obligation guideline for the right to housing. Establishing a core minimum standard raises the problem of the polycentricity of the decision. The determination would require a great deal of evidence and information, not ordinarily available to the court. It held as follows:

> *'It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The committee developed the concept of minimum core over many years of examining reports by reporting States. This Court does not have comparable information.'*[52]

---

[49] Negative protection from improper invasion appears to be less problematic – see the First Certification judgment at para 78 and *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 34.

[50] *The Bill of Rights Handbook* by Iain Currie and Johan de Waal (5ed, 2005) at 571.

[51] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

[52] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)At para 32.

179. *Grootboom*[53] emphasises the extent to which a court must exercise a degree of care and deference when faced with the invitation to involve itself in a necessary decision or question, to find that the State's housing programme is deficient[54]. The question will ultimately be whether the legislative and other measures taken by the state, are reasonable. Accordingly it was necessary to recognise that there is a wide range of possible measures that can be adopted to meet the state's obligations. Many of these would meet the requirement of reasonableness, and once it is shown that the measures do so, the requirement under Section 26 (2) has been met[55].

180. The nature of the enclosures are an inherently fact dependent enquiry. These are issues that are unique to the development in question. It depends on the circumstances, and enclosures could conceivably be with brick and mortar or with alternative materials such as precast concrete panels or with corrugated iron or galvanised iron and timber. These are decisions best left to implementing structures, given that the appropriateness of materials is entirely dependent on the prevailing conditions at a particular development. And it is for that reason that the Code is not prescriptive in that regard.

181. In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC)[56] the Constitutional Court held that in dealing with the issue of reasonableness in the context of socio-

[53] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

[54] See also *Soobramoney v Minister of Health (Kwazulu Natal)* 1998 (1) SA 765 (CC).

[55] See also *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 (CC).

[56] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) at para 49.

economic rights, context is all-important. Reasonableness ought to be understood in the context of the Bill of Rights as a whole[57].

182. In *Mazibuko and Others v City of Jhb and Others* 2010 (4) SA 1 (CC) the Constitutional Court held:

(a) *"At the time the Constitution was adopted millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the State continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the State would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the State that it act reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights."*[58]

(b) *"Moreover, what the right requires will vary over time and context. Fixing a quantified content might in a rigid and counter-productive manner prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government*

[57] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 44.

[58] *Mazibuko and Others v City of Jhb and Others* 2010 (4) SA 1 (CC) at para 59.

programme is indeed reasonable."[59]

183. It should be borne in mind that in dealing with such matters, the Courts are not institutionally equipped to make wide ranging factual and political enquiries regarding the determination of core standards. Although it recognised that there are pressing demands on the public purse and that the Courts are ill suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.

184. This Court cannot be called upon to determine firstly, whether the housing code provides the best possible policy framework that can be expected of government; secondly whether the housing code could have been better drafted by the National Ministry; thirdly whether the housing code could provide more detail than it presently does; fourthly whether there are loopholes in the code, as the City stated in their argument; and fifthly whether the housing code could be less rigid. Unless it can be demonstrated that any of these grounds would impugn the threshold requirement of reasonableness under the code.

185. As to the alleged vagueness of the code, both the National Housing Act and the Western Cape Housing Development Act[60], make provision for provincial legislation, for provincial policies, and indeed for a provincial code on such issues. Therefore it cannot be a situation where the national code needs to be prescriptive in relation to every single issue at a provincial level.

[59] *Mazibuko and Others v City of Jhb and Others* 2010 (4) SA 1 (CC) at para 60.

[60] Western Cape Housing Development Act 6 of 1999.

186. In so far as the agreement that the City purported to have entered into, was unlawful, the City submits that its unlawfulness was occasioned by the unconstitutionality of the Code. In this matter I found that the agreement was unlawful by the City's failure to have complied with the peremptory requirements of the Code dealing with agreements and particularly the failure to recognise the basic human rights of the community. Therefore it simply does not follow that the counter-application arises for determination.

187. Finally, what the City further seeks to do is to declare certain aspects of the 2009 code unconstitutional, however at the time when the agreement in this matter was concluded, in other words 2007 November, the 2009 Code was not in operation. It was the 2004 Code that was in operation.

188. It is accordingly my view that the counter application should be dismissed.

Costs:

189. It was argued on behalf of the City that should the applicants be successful their costs be limited to only two counsel alternatively two thirds of their total costs.

190. I am of the view that due to the complexity and voluminous nature of this matter that there is no reason to limit the normal costs order that would follow.

Conclusion:

191. I am indebted to counsel for the manner in which they conducted themselves throughout the proceedings and for the assistance to the Court. I am particularly indebted to Ms Nikki Ramages-Hanafey, law researcher of this Court, for her assistance and dedication given to the Court in researching and transcribing this judgment.

192. For the reasons stated above the following order is made.

Order:

1. It is declared that the conduct of the second and third respondents in providing unenclosed toilets to the applicants and the community of the Makhaza informal settlement, to be in violation of their constitutional rights more particularly, section 10,12,14,24,26 and 27 contemplated in the Constitution for the Republic of South Africa.

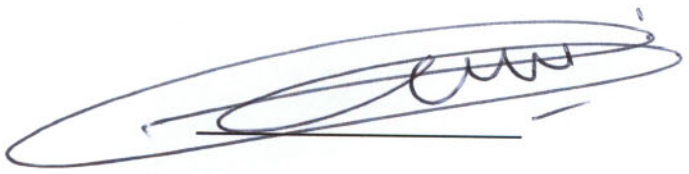
2. It is declared that any purported agreement entered into between the second and third respondents and individual members of the community of Makhaza in respect of the provision of unenclosed toilets, to be unlawful, and inconsistent with constitutional duties of the second and third respondent as contemplated by the Constitution of the Republic of South Africa as well as with other laws.

3. The second and third respondents is ordered to enclose all 1316 toilets which form part of the Silvertown Project, Khayelitsha (which includes those erected in the Makhaza

informal settlement), in accordance with the Upgrading of Informal Settlement Programme ("UISP") which was evaluated and approved, in principle, by the fourth respondent on 12 July 2005 in terms of a memorandum of understanding concluded between the third and fourth respondents on 21 November 2005, as governed by Part 3 of the National Housing Code ("the Code"), 2009 read together with the National Housing Act ("the Act") No 107 of 1997, as amended, and in addition to comply with Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (GN R509 in GG 22355 of 8 June 2001) promulgated in terms of the Water Services Act No 108 of 1997, as amended and in compliance with their duty in terms of section 7(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

4. The counter application is dismissed.

5. The second and third respondents are to pay the applicants costs which shall include the cost of three counsel.



Erasmus,J

Judge of the Western Cape High Court