IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. 157/20

High Court Case No: 39602 / 2015

In the matter between:

THUPETJI ALEXANDER THUBAKGALE	First Applicant
EKURHULENI CONCERNED RESIDENTS ASSOCIATION	Second Applicant
THE RESIDENTS OF THE WINNIE MANDELA INFORMAL SETTLEMENT	Third to 134th Applicants

and

EKURHULENI METROPOLITAN MUNICIPALITY	First Respondent
THE EXECUTIVE MAYOR, EKURHULENI MUNICIPALITY	Second Respondent
CITY MANAGER, EKURHULENI MUNICIPALITY	Third Respondent
HEAD OF DEPARTMENT: HUMAN SETTLEMENTS, EKURHULENI MUNICIPALITY	Fourth Respondent

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NOTICE OF APPLICATION

PLEASE TAKE NOTICE THAT the applicants intend to apply, on a date to be determined by the Chief Justice, for an order -

1 Granting the applicants leave to file the accompanying supplementary replying affidavit of **NOMZAMO ZONDO**.

2 Directing that costs in this application will be costs in the appeal.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **NOMZAMO ZONDO**, and the annexures thereto, will be used in support of this application.

DATED AT BRAAMFONTEIN ON THIS THE 10th DAY OF JANUARY 2021.

SERI LAW CLINIC
Appellants' Attorneys
6th Floor, Aspern House
54 De Korte Street
Braamfontein, 2001
Tel: 011 356 5860
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Email: nomzamo@seri-sa.org
nerishka@seri-sa.org
REF: ZONDO/Winnie Mandela

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT,**
BRAAMFONTEIN

AND TO: **NOZUKO NXUSANI INCORPORATED**
Respondents' Attorneys
69 Jan Smuts Avenue
Westcliff, Johannesburg
Tel: 011 975 5666
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Ref: Mr TG Chavalala/KP32-2020
Email: given@nozukonxusaniinc.co.za

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HEAD OF DEPARTMENT: HUMAN SETTLEMENTS, EKURHULENI MUNICIPALITY	Fourth Respondent

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SUPPLEMENTARY REPLYING AFFIDAVIT

I, the undersigned –

NOMZAMO ZONDO

make oath and say that -

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1 I am an adult woman. I am the Executive Director of the Socio-Economic Rights Institute of South Africa (SERI). My address is 6th Floor, Aspern House, 54 De Korte Street, Braamfontein, Johannesburg.

2 Unless the context indicates otherwise, the facts and allegations contained in this affidavit are all within my personal knowledge. They are, to the best of my knowledge and belief, true and correct in all respects.

3 I am the applicants' attorney. I am authorised to depose to this affidavit on their behalf.

4 I respectfully request this Court's leave to file this affidavit in reply to the supplementary opposing affidavit of **SELWYN DAVEY FRANK**, dated 8 January 2021.

A MR. FRANK'S AFFIDAVIT SHOULD BE DISREGARDED

5 The respondents' written submissions were due to be filed in this Court on 8 January 2021. These submissions were not filed. There is no explanation in Mr. Frank's affidavit of why the submissions have not been filed.

6 Instead of filing the required written submissions, the respondents filed an affidavit.

7 That affidavit -

7.1 relies upon material that is subject to the without prejudice rule, and is, indeed, marked "without prejudice";

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7.2 constitutes the introduction of new evidence without a substantive application to do so; and

7.3 seeks to adduce evidence that is not relevant to the issues before the Court.

8 The affidavit contends that there is an "in principle" agreement that will cure the respondents' breach of the order of Teffo J, dated 15 December 2017 ("the court order").

9 This is not true. There is no agreement "in principle", or at all. This is because the respondents have made no clear or unconditional proposals.

No agreement about compliance with the court order

10 Mr. Frank states that the respondents will remedy their breach of the court order on 30 June 2022, when houses at Esselen Park will be provided.

11 Those houses do not presently exist. They will have to be constructed. The project is currently at the bulk infrastructure and earthworks stage.

12 The undertaking to construct the houses is subject to two conditions -

12.1 The first is that no "unforeseen delays" are experienced. This is apparent from paragraph 10 of the respondents' attorney's letter of 7 January 2020.

12.2 The second is that funding is procured and set aside for the project. This has not yet been done. That is clear from page six

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of the "Project Overview" of the Esselen Park project, which is annexure "SDF2" to Mr. Frank's affidavit. There, the respondents state that "[i]t must be noted that the [the first respondent] is financially constrained at present and completing the process in the indicated timeframe will depend on the availability of funding. The City will however motivate for the budget . . .". It is not said to whom the first respondent will motivate, or what the chances are that the "motivation" will succeed.

13 Because there is currently no money for the project, the timetable provided at page 6 is merely "indicative". It is not actually a timetable to which the respondents will bind themselves.

14 In substance, this leaves the applicants no better off than they were before. They have a conditional promise of housing far into the future. This has been the situation from the outset.

15 The respondents continue to fail to appreciate that they are in breach of a court order. This requires a more serious response than has been given.

16 Accordingly, the applicants have not agreed to the proposal that they be housed at Esselen Park, because there is currently no credible and enforceable proposal to agree to.

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No temporary accommodation agreed upon

17 Mr. Frank submits that an agreement has been reached that the applicants will be housed in flats pending the completion of the houses at Esselen Park.

18 This, too, is untrue. There is no such agreement.

19 I emphasise that the flats Mr. Frank refers to do not presently exist. They still need to be constructed. Although the respondents have made promises about when this will happen, that is all the applicants have: promises.

20 Furthermore, the applicants do not know whether the respondents wish to tender flats as temporary accommodation at Clayville or at Tembisa Extension 27. I have no specifications for the flats in either location to show to the applicants. I have no definite timetable on which these flats will be provided. My instructions are not to agree to anything until those specifications and timetables are provided.

21 Finally, whether the applicants ultimately accept temporary accommodation in flats will depend on whether and when the City will make any firm and unconditional undertakings to cure their breach of the court order. If the applicants accept flats pending the provision of houses on the terms now proposed, the "temporary" accommodation in the flats

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will likely become permanent, because the respondents have not presented any real or enforceable plan to comply with the court order.

22 As Basson J held, a block of flats simply does not constitute compliance with the court order, but that is what the applicants will be stuck with if they accept "temporary" accommodation in flats while there is no credible plan to comply with the court order.

23 In any event, I emphasise that –

23.1 none of the accommodation the respondents refer to actually exists. It has yet to be constructed;

23.2 as of today, the applicants have nothing;

23.3 on the respondents' own version, when this matter comes to be heard, the applicants will still have nothing; and

23.4 given the respondents' past conduct, it is likely that the applicants will remain in their shacks for the foreseeable future.

Necessity of constitutional damages

24 The basis for the claim for constitutional damages is that the respondents have, time and again, shown themselves incapable of keeping any of their promises, or of acting under the appreciation that they are in breach of a court order.

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25 It has not mattered whether these promises have been made to the applicants, to the High Court or to the Supreme Court of Appeal. They have all been broken. The court order remains unfulfilled.

26 In light of this reality, which Mr. Frank's affidavit does nothing to change, the purpose of the constitutional damages claimed in this case is two-fold -

26.1 First, it is to compensate the applicants for the period that they have already been left without houses, even though they each have a vested right to one in terms of the court order.

26.2 Second, it is to free the applicants from having to depend on the respondents' empty promises in future. Until the respondents cure their breach of the court order, the payment of damages will enable the applicants to house themselves.

27 In light of what I have set out above, there is nothing in Mr. Frank's affidavit that suggests that the award of constitutional damages is no longer necessary.

28 Below I will address -

28.1 the content and privileged nature of the negotiations which have taken place between the parties below, and why it was improper of the respondents to disclose them.

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28.2 the reasons why Mr. Frank's affidavit underscores the urgency and the necessity of an award of constitutional damages.

B THE CONTENT OF THE PRIVILEGED NEGOTIATIONS BETWEEN THE PARTIES

29 On receipt of the respondents' main opposing affidavit in the application for leave to appeal, I noted the possibility alluded to in paragraph 63.6 (see the Record, vol 10, p 935, para 63.6). That possibility was that temporary accommodation will be made available in flats pending compliance with the court order.

30 I sought to engage with the respondents on that possibility. The idea was to negotiate a firm and enforceable timetable for compliance with the court order, and to obtain some sort of interim benefit for the applicants, in the event that constitutional damages are not awarded and lengthy contempt of court proceedings become necessary to enforce the court order.

31 These negotiations were pursued without prejudice to the applicants' claims for constitutional damages. This is consistent with the general rule that negotiations in good faith to settle a matter, or any part of it, are privileged, and may not be disclosed to third parties, or to the court seized with the matter.

32 For this reason, it is inappropriate and inadmissible for the respondents to rely on my letter of 1 December 2020, in which I indicated that the

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applicants were amenable in principle to being housed temporarily in flats pending compliance with the court order on a definite and enforceable timetable. That was a *bona fide* attempt to explore settlement. It was never a final acceptance of the proposal. Nor was it an agreement in principle.

33 This is clear from what happened next. The respondents sought to make their proposal conditional upon the applicants agreeing to the destruction of their shacks before moving into the temporary accommodation. That could not be agreed to because the flats proposed do not appear to be big enough to accommodate everyone currently housed in each of the applicants' shacks.

34 The respondents then abandoned that condition in their attorney's letter of 7 January 2021. That letter is marked "without prejudice" (page 1 of annexure "**SDF 6**" to Mr. Frank's affidavit). Paragraph 4 of that letter specifically states that the proposals under discussion are made "independently" from the applicants' application for constitutional damages and that our clients' "rights in this respect will remain reserved".

35 Nonetheless, a day after it was written, this letter was annexed to an affidavit placed before this Court. That, I respectfully submit, is plainly improper and wholly unacceptable.

36 I ask the Court to note that this is not the first time that the respondents have disclosed without prejudice material in order to procure a perceived litigious advantage. Early on in the litigation in the High Court, the

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respondents disclosed without prejudice material as evidence that it was doing what it could to house the applicants.

37 In that instance, unlike this one, an agreement was reached. It was embodied in a "without prejudice" memorandum of understanding (see the Record at volume 2, pp 183 and 184).

38 The respondents disclosed that agreement, and then failed to abide by it, which is what necessitated the application that was brought before Teffo J.

39 I repeat: the agreement claimed by the respondents in Mr. Frank's affidavit was simply never concluded, whether "in principle" or otherwise. But, even if it had been, the applicants would have no assurance whatsoever that the respondents will not simply disregard it when it suits them to do so.

40 My answer to the respondent's attorney's letter is annexed and marked "**A**".

41 It is clear from my letter that there is presently no agreement between the parties about what can be done for the applicants – whether on a temporary or permanent basis. The reasons for this are as follows –

41.1 The houses at Esselen Park do not presently exist. They are offered to the applicants by 30 June 2022, but only in the event that "unforeseen delays" are not experienced, on an indicative timetable and only if funding can be procured. The applicants

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cannot accept these conditions. It would be as if the court order was never made at all. The point of the court order was to obtain and enforce an unconditional mandate that the applicants get their houses by 30 June 2019. I could not in good conscience advise the applicants to bargain this away for houses in 18 months' time that the respondents could refuse to provide if it turned out that "unforeseen delays" made the provision of those houses inconvenient, or the funding for the houses failed to materialise.

41.2 The temporary accommodation in flats proposed by the respondents does not presently exist. It has not yet been constructed. It is not clear where the temporary accommodation proposed will be provided, when it will be provided or what it will look like. I have asked the respondents to provide the necessary specificity.

42 The respondents suggest that their preference is that the applicants be given flats at Clayville as temporary accommodation. The respondents also suggest that the applicants have refused this accommodation in bad faith.

43 But the respondents fail to acknowledge that their own record of the meeting at which the proposal of temporary accommodation in flats was made states that the Clayville flats were offered only as "permanent"

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accommodation and "not temporary" accommodation. The respondents also fail to acknowledge that the proposal made in their letter dated 7 December 2020 was for flats to be provided at Tembisa Extension 27. Although Mr. Frank asserts that there is "agreement in principle" on the provision of flats at Tembisa Extension 27, the correspondence is ambiguous about whether the proposal is to provide flats at Tembisa or Clayville, what will be provided, and when it will be provided. In circumstances where the flats have not even been built yet, there is simply nothing to agree to.

44 In sum, the parties have engaged in without prejudice discussions. These discussions ought not to have been disclosed to this Court. They have not reached any definite outcome. None of the accommodation that the respondents say is available to the applicants has been constructed.

45 In these circumstances, no agreement – whether in principle or otherwise – has been reached.

46 What the applicants currently have as a result of the negotiations is what they have always had: vague undertakings to do something for the applicants in future, if it is convenient for the respondents to do so, provided that there are no "unforeseen delays", without any guarantee that they have procured the funds to do so.

47 This is not compliance with the court order. It does not cure the breach of the applicants' constitutional rights.

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C CONSTITUTIONAL DAMAGES REMAIN URGENT AND NECESSARY

48 It in fact creates a well-ground fear amongst the applicants that the respondents are not seriously attempting to cure their clear and ongoing breach of the court order. They are instead attempting to create the impression that relief is in the offing, when in fact it is not.

49 The applicants have, respectfully, been here before.

49.1 The respondents first offered a timetable for the construction of houses as early as 2015. Neither the houses nor the timetable materialised.

49.2 The respondents then undertook to Teffo J that houses would be provided by 2021. It soon became clear that this was not even what the respondents genuinely planned to do, because they had changed their plans to provide for flats rather than houses. Even the flats have never materialised, but would not in any event have constituted compliance with the court order.

49.3 The respondents then undertook to the Supreme Court of Appeal that houses would be provided by July 2019. That did not happen.

49.4 The respondents then asked Basson J to extend that deadline to July 2020. Even though that application was dismissed, the extended deadline was not met.

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50 Throughout these proceedings the respondents have attempted to stereotype the applicants as undeserving, demanding, unreasonable, and prone to the pursuit of motives in bad faith.

51 In these circumstances, the applicants simply cannot accept that the respondents mean what they say. What they say constantly changes, has historically been punctuated by long periods of silence, is internally contradictory, is hemmed in by conditions, and is accompanied by baseless accusations of bad faith. The respondents have simply disregarded every single undertaking that they have made to house the applicants, whether the applicants have agreed to it or not.

52 This, in my respectful submission, makes the award of constitutional damages both urgent and necessary. The payment of constitutional damages will compensate the applicants for the period during which the respondents have failed to give effect to the court order, and will insulate the applicants against the period during which respondents are bound to remain in breach of the court order in future.

53 The applicants respectfully persist in their application for leave to appeal.

NOMZAMO ZONDO

Signed and sworn before me on this 10th day of January 2021 at TURFFONTEIN

after the Deponent acknowledged that he is fully cognisant of the contents of this affidavit, that he understands it, that he has no objection to taking the prescribed oath and that he considers the oath binding on his conscience. In administering this oath the requirements of Regulation R2477 dated 16 November 1984, as amended, have been fulfilled.

COMMISSIONER OF OATHS

LULEKA FLATELA
COMMISSIONER OF OATHS
ATTORNEY - RSA
190 PARK CRESCENT STR
TURFFONTEIN
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SERI

socio-economic rights institute
of south africa

Mr TG Chavalala
Nozuko Nxusani Inc
Your Ref: Mr. TG Chavalala/KP030
Per Email: given@nozukonxusaniinc.co.za

10 January 2021

Dear Mr. Chavalala

THUPETJI ALEXANDER THUBAKGALE AND OTHERS // EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS

1 We refer to your letter of 7 January 2021, which we note is marked "without prejudice". We have taken instructions on the contents of that letter, and we advise as set out below.

Information requested in our letter of 17 December 2020 remains outstanding

2 We draw your clients' attention to paragraphs 21.2 and 2.13 of our letter of 17 December 2020. We request that you furnish the information sought in those paragraphs. To be clear, that information is:

2.1 Specifications of the flats your client intends to build, pending delivery of the houses that your client proposes to build at Esselen Park;

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2.2 The specifications of the houses your client intends to build at Esselen Park, including the sizes of the stands on which these houses will be constructed.

2.3 A timetable for the delivery of both the flats and the houses. To be clear, this does not merely entail a date for completion, but a series of construction milestones, a date of completion and a date on which our clients will be able to take occupation. The timetable must be clear, unconditional and enforceable.

3 Once this information, which we emphasise was clearly specified and requested in our letter of 17 December 2020, is provided, we will take instructions from our clients and revert.

4 We also note that your letter does not explicitly provide the undertakings requested in paragraphs 21.1 and 21.4 of our letter. Nor do the undertakings that are made in your letter carry any legal force, because they are made "without prejudice". Nor is it acceptable that your clients' undertaking to provide houses at Esselen Park by 30 June 2022 is conditional upon no "unforeseen delays" being experienced. We also understand from annexure SDF2 of your clients' affidavit of 8 January 2021 that the undertaking to house our clients at Esselen Park is dependent on funding that has not yet been procured.

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5 That takes the parties back to the position that we were in before the litigation commenced. It appears that the proposal to house our clients at Esselen Park is neither unconditional nor enforceable.

6 In light of your clients' decision, in paragraph 5 of your letter, to call our clients' good faith into question, and your clients' failure to abide by any previous undertakings they have made to our clients – whether on or off the record – our clients will require the undertakings to be made on the record and unconditionally.

Flats at Clayville

7 We draw your attention to paragraph 8 of your clients' draft minutes of the meeting held on 2 December 2020. The draft was annexed to your letter of 7 December 2020. Paragraph 8 of those draft minutes states that "Clayville walk ups are for permanent housing and not temporary".

8 Paragraph 8.1 of that letter asks us to confirm that our clients will accept temporary accommodation in flats at Tembisa Extension 27, not at Clayville.

9 Had you simply contacted us to discuss the issue, this could have clarified matters. Instead you chose to write a letter in which you suggest that our clients are acting in bad faith. In these circumstances, the allegation that we have shown bad faith in assuming that the flats on offer are in Tembisa Extension 27 and not Clayville is wholly without foundation. Based on the

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contents of the minutes and your letter, our clients' assumption was clearly reasonable.

10 Our clients furthermore understand that there is another community that expects to be accommodated in the flats at Clayville that your clients have offered as temporary accommodation to our clients, and that units previously constructed at Clayville have been unlawfully occupied.

11 We request that you –

11.1 Immediately withdraw the allegation that our clients have acted in bad faith; and

11.2 Comment on the information about the Clayville flats that has come to our clients' attention.

Palm Ridge Houses

12 To be clear, our clients have previously considered the possibility of houses at Palm Ridge, and for the reasons we have already given, they will not agree to move over 60km to Palm Ridge.

13 We furthermore note that your client asserts that these houses "<u>are</u> presently available". This again contradicts the position adopted in your clients' draft minutes of the 2 December 2020 meeting. We draw your attention to paragraph 8 of those minutes, which states that the Palm Ridge houses will be "completed by end of February 2021".

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14 We have been clear in our papers and in our previous correspondence that houses in Palm Ridge have not previously been offered "from November 2020", or at all. But the mere existence of the offer does not constitute compliance with the court order of Teffo J. The houses are clearly not yet constructed, and they do not comply with the condition in the court order that the location be "agreed".

15 Be that as it may, your client is welcome to provide us with the exact location and specifications of the houses at Palm Ridge, together with a timetable for their completion, and a firm, unconditional undertaking that they will be available by a definite date. We will put that information to our clients and take their instructions for a second time. We emphasise, however, that our clients have already expressed their position, and we presently have no reason to believe that it will change.

Stand and flat sizes

16 Your client expresses disbelief that our clients say they can accommodate their households in houses built on open land, but not in units in blocks of flats. We respectfully contend that the basis for this assertion is obvious.

17 Be that as it may, our clients cannot decide whether they will take up the offer of flats as temporary accommodation pending the provision of houses at Esselen Park until the undertaking to provide those flats is made

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unconditionally and on the record, and the specifications of those flats are made available to them.

Disclosure of your letter to the Constitutional Court

18 Your clients' heads of argument were due to be filed in the Constitutional Court on 8 January 2021. Instead of filing the required heads, you filed an affidavit. That affidavit contends that an "in principle" agreement has been reached that cure your clients' breach of the court order of Teffo J.

19 As must be abundantly clear to you by now, neither of these things is true. There is no agreement "in principle" because your clients have not made any clear and unconditional proposals. Neither flats nor houses have actually been constructed. We do not know whether your client wishes to tender flats as temporary accommodation at Clayville or at Tembisa Extension 27. We do not know when the flats or houses at Esselen Park will be ready. We have no specifications for either the flats or the houses to show to our clients. The provision of houses at Esselen Park is subject to your clients not experiencing "unforeseen delays", and funding being provided.

20 None of this is acceptable to our clients. None of it constitutes compliance with the court order.

21 Nor were contents of your letter of 7 January 2020 disclosed to us on the record. They were instead encapsulated in a "without prejudice" letter. That letter was then immediately disclosed to the Constitutional Court. The

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disclosure to the Constitutional Court is also at odds with your clients' assurance that the proposals made in it are "made independently from [our] clients' application for constitutional damages".

22 For all of these reasons, our clients object to the introduction of the affidavit, and they dispute its contents. This will be made clear in the further affidavit to be filed shortly.

23 Your clients' manner of proceeding is in any event inappropriate. It creates a well-grounded fear amongst our clients that your clients are not seriously attempting to cure their clear and ongoing breach of the court order of Teffo J. They are instead attempting to create the impression that compliance is in the offing, when in fact it is not.

24 Our clients have, respectfully, been here before. Your clients first offered a timetable for the construction of houses, as early as 2015. That did not materialise. Your clients then undertook to Teffo J that houses would be provided by 2021. It soon became clear that this was not even what your client genuinely planned to do. Your client then undertook to the Supreme Court of Appeal that houses would be provided by July 2019. That did not happen. Your client then asked Basson J to extend that deadline to July 2020. Even though that application was dismissed, the extended deadline was not met.

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25 Throughout these proceedings your clients have attempted to stereotype our clients as undeserving, demanding, unreasonable, and prone to the pursuit of motives in bad faith.

26 Our clients' patience in these circumstances has been extraordinary. But we trust you will understand that they are no longer in a position to simply accept that your clients mean what they say – especially when what is said constantly changes, has historically been punctuated by long periods of silence, is internally contradictory, is hemmed in by conditions, and is accompanied by baseless accusations of bad faith.

27 This, in our respectful view, makes the award of constitutional damages both urgent and necessary.

28 In the circumstances, the requests for unconditional undertakings and further information our clients have made are reasonable. We implore you to accede to these requests forthwith, to engage with us to reach a resolution of this matter and to withdraw your clients' allegations of unreasonable conduct and bad faith.

29 We trust your client will address any queries it has to us, whether by telephone or in writing, resist the temptation to place further privileged or misleading information before the Constitutional Court, and will file their heads of argument forthwith.

30 All our clients' rights remain strictly reserved.

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Yours faithfully

Nomzamo Zondo
Executive Director

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Nomzamo Zondo

From: Nomzamo Zondo
Sent: Sunday, 10 January 2021 10:47
To: Given Chavalala
Cc: Nerishka Singh; Khululiwe Bhengu
Subject: THUPETJI ALEXANDER THUBAKGALE AND OTHERS // EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS
Attachments: 10 01 2021 Letter to Nozuko Nxusani.pdf

Tracking:

Recipient	Read
Given Chavalala	
Nerishka Singh	
Khululiwe Bhengu	Read: 2021/01/10 12:15

Dear Sir

Kindly find attached a letter for your attention.

Kind regards,

NOMZAMO ZONDO
Executive Director

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