IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 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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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 opposing affidavit of **SELWYN DAVEY FRANK**, dated 28 September 2020.

5 Although this Court's rules do not provide for the filing of a replying affidavit as of right, I respectfully submit that the inordinate lateness and the substantial new matter contained in Mr. Frank's affidavit militate in favour of allowing the applicants an opportunity to reply.

6 Mr. Frank's affidavit was filed six weeks late, without a formal application for condonation.

7 Mr. Frank says that the respondents do not oppose the application for leave to appeal directly to this Court

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8 Mr. Frank nonetheless finds himself able to introduce a substantial quantity of new matter, running to 45 pages of factual allegations and legal submissions.

9 This includes –

9.1 A lengthy attempt to re-litigate the issues before Teffo J, by advancing a long list of excuses for the respondents' failure to deliver housing to the residents of the Winnie Mandela Informal Settlement over period of many years. These excuses were considered and rejected by both Teffo J, when ordering the respondents to provide the applicants with houses, and again by Basson J, when refusing to extend the deadline by which those houses were to be provided. Given that there is no appeal against Teffo J's order to provide houses, or Basson J's refusal to extend the deadline, these excuses serve no legally recognisable purpose. They are wholly irrelevant to any live issue between the parties.

9.2 A grossly misleading attempt to blame the applicants for the respondents' refusal to comply with the order of Teffo J. The applicants are inappropriately blamed for their "back and forth on what they want" (para 24). There has been no "back and forth". The respondents know this. The respondents seek to create the impression that the applicants have been offered houses in

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compliance with Teffo J's order, but the fact is that no such houses have been made available. Today, as a fact, the respondents have provided nothing.

9.3 An entirely novel budgetary defence, which was never advanced before the High Court. The respondents say they lack the resources to comply with the order of Teffo J, despite the fact that at least two full budgetary cycles have passed since it was made. No evidence is set out to support the respondents' new defence.

10 The contents of Mr. Frank's affidavit are irrelevant to whether the application for leave to appeal should be granted. Mr. Frank says that the affidavit "serves as opposition to the [applicants'] appeal on the merits" (para 6). Even if that were true (there is in fact little in the affidavit that bears on the merits of the applicants' prospective appeal), the respondents are simply not entitled to file such an affidavit. Opposition "on the merits" must be confined to the appeal record and the respondents' written submissions (if this Court calls for them). In exceptional circumstances, new evidence may be introduced with the Court's leave, and with the applicants having been given a reasonable opportunity to respond to it.

11 But there is no basis whatsoever for the respondents to embark on the lengthy presentation of evidence intended to buttress their position "on the merits" in an affidavit answering an application for leave to appeal that the respondents do not oppose.

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12 Mr. Frank's attempt to introduce this new material is wholly abusive. It is also unfortunately typical of the respondents' conduct throughout the lengthy litigation before the High Court and the Supreme Court of Appeal. Instead of applying themselves to the questions raised in each case, the respondents take every opportunity to repeat excuses for their failure to provide the respondents with the houses to which the applicants have been legally and constitutionally entitled for many, many years. These excuses have now been rejected by no less than seven judges in three courts.

13 In these circumstances, Mr. Frank's suggestion at paragraph 59.3 – that the applicants' rights have already been vindicated by a court order that the respondents have done nothing to implement – is truly extraordinary. It falls to be rejected.

14 The content of Mr. Frank's affidavit reinforces the applicants' submission that constitutional damages are the appropriate remedy in this case. The respondents' sheer delinquency, even in the face of a court order that has now stood unfulfilled for 16 months, demonstrates that there can be no other appropriate relief.

15 In my respectful submission, other than the respondents' statement of non-opposition to the application for leave to appeal, the entirety of Mr. Frank's affidavit should be disregarded as irrelevant and an abuse of this Court's process.

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16 In the event, and only in the event, that this Court chooses to have regard to the answering affidavit, I set out the applicants' response to its contents below. In doing so, I will address the affidavit thematically, and avoid an *ad seriatim* response. However, I do not admit any allegation left unaddressed.

The respondents' attempts to excuse their failure to deliver houses to the residents of the Winnie Mandela informal settlement

17 Mr. Frank spends a great deal of time attempting to excuse the respondents' failure to provide housing to the residents of Winnie Mandela. But Mr. Frank forgets: that part of the case is over. The respondents have been ordered to provide the applicants with houses. The excuses that were advanced before Teffo J no longer count. This question before this Court now is whether the respondents' disobedience of a court order designed to give effect to constitutional rights renders them liable to pay constitutional damages.

18 In any event, even if they were relevant, Mr. Frank's excuses would be completely misdirected. As both Teffo J (at paras 62 and 69 of her judgment) and Basson J (at para 35 of her judgment) found, this case is not – and has never been – about the difficulties the respondents face in meeting their general obligations to provide adequate housing to the public at large in the Winnie Mandela informal settlement. It is about taking the

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necessary steps to provide houses to the applicants in this matter, to replace the houses of which they were deprived twenty years ago.

19 Mr. Frank contends that the respondents now accept that that the applicants are "a special class of people" (para 82.2). But he gives the lie to this contention when he argues that the applicants should only be accommodated in the respondents' existing housing projects – none of which are presently capable of providing the applicants with anything.

20 Mr. Frank strenuously contends that this means that the applicants are just plain out of luck.

21 Mr. Frank furthermore emphasises the respondents' position that the order of Teffo J definitely does not mean that the respondents ought to implement a special project for the applicants, or that they ought to purchase 133 houses for the applicants on the open market (paras 26).

22 But that is exactly what Teffo J's order means, if 16 months after it came into effect, the respondents' existing housing projects provide no means for the respondents to fulfil its terms now.

23 Stripped to its essence, Mr. Frank's position is that the applicants must wait their turn like everyone else, and that the High Court order requiring the provision of houses to the applicants by 30 June 2019 makes no difference.

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24 If that position is accepted, then the rule of law means nothing. The applicants' rights of access to adequate housing mean nothing. The order of Teffo J directing that the applicants be given houses, and the order of Basson J dismissing the respondents' attempt to delay the implementation of their obligations, also mean nothing.

25 I respectfully submit that, if the respondents cannot presently provide houses within their existing projects, and will not purchase houses on the open market or implement another project for the benefit of the applicants, then the only way left to vindicate the applicants' constitutional rights is the award of constitutional damages.

The applicants are not to blame for the respondents' failure to provide houses

26 The basic fact is that, there is not a single house, anywhere within the respondents' area of jurisdiction, that the respondents are prepared to make available to the applicants now. The respondents were required to provide houses 16 months ago. They have still not done so.

27 In order to obscure this fundamental truth, Mr. Frank embarks upon a wholly misleading attempt to blame the applicants for what he calls their "back and forth on what they want" (para 24).

28 This is plainly disingenuous. The applicants are absolutely clear on what they want: serviced land, with a house on it at Tembisa Extension 25 or at

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another agreed location. This is what their housing subsidies entitled them to. This is what the respondents' officials either stole from them, or allowed to be stolen from them, when the houses to which they were originally entitled were illegally allocated to other people.

Tembisa Extension 25

29 Mr. Frank concedes that plans were presented to Teffo J that set out the respondents' intention to provide 133 houses to the applicants at Tembisa Extension 25. Argument before Teffo J, and Teffo J's judgment, proceeded on that basis (para 17). Teffo J ordered that houses – not flats – be provided.

30 Mr. Frank then admits that, having made the promise to provide houses to the applicants before Teffo J, the respondents then "amended" their plans to provide flats. They did this without consulting with the applicants or explicitly informing them of the change.

31 In light of these admitted facts it is clear that the applicants did not refuse "to relinquish housing options in the Tembisa 25 apartments and simultaneously insist on free-standing houses somewhere else yet to be agreed upon". They asked for houses – either at Tembisa Extension 25 or at another agreed location, which is exactly what the order of Teffo J entitled them to.

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32 As I said in my letter, which Mr. Frank quotes at paragraph 24.3 of his affidavit, the applicants have never refused houses at Tembisa Extension 25. The respondents simply decided not to provide them, and to build flats instead. This was in breach of the undertakings made to Teffo J about the nature and location of the houses to be provided in fulfilment of any order she might make.

33 I emphasise, however, that the respondents have, to date, provided nothing at Tembisa Extension 25 – whether by way of flats or houses.

Palm Ridge

34 The respondents have not provided houses at Palm Ridge.

35 Mr. Frank's allegation that "[t]he Municipality has previously orally offered Palm Ridge [houses] to the Residents in a meeting" is incorrect.

36 I was present in meeting to which Mr. Frank refers. Mr. Frank was not. The applicants were not offered houses at Palm Ridge. The Palm Ridge development was mentioned as a "possibility" on which the respondents would revert to me. They never did. Given the respondents' history of making promises and then doing nothing to fulfil them, this did not surprise me.

37 In any event, I have made clear on the applicants' behalf that the provision of houses over 60 kilometres away from the houses of which they were initially unlawfully deprived twenty years ago would not match like with like.

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The applicants' jobs, homes, families, schools, clinics, social services, cultural life – in other words all the social networks on which they, as poor and vulnerable people, depend – are in Tembisa. So are the houses that were originally intended for the applicants, and which the respondents allowed to be illegally occupied by others.

38 The order of Teffo J requires the respondents to provide houses to the applicants at Tembisa Extension 25 or at another agreed location. The applicants do not agree to move to Palm Ridge. Having, by its own admission, made it impossible for the applicants to move to Tembisa Extension 25, the respondents are attempting to fob the applicants off with houses that they know the applicants cannot accept. This is grossly cynical.

39 In any event – and this bears repeated emphasis – there are, as a fact, no houses currently available in Palm Ridge.

Esselen Park

40 Nor have the respondents provided anything at Esselen Park.

41 Mr. Frank's casual assertion that houses at Esselen Park will take 2 or 3 years to provide is astonishing, in light of the fact that the order of Teffo J has gone unfulfilled for 16 months.

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Clayville

42 Mr. Frank berates the applicants for insisting on free-standing house at Clayville (para 50).

43 But it should by now be clear that the reason that the applicants suggested that they be accommodated at Clayville, is that this is the only development where houses are actually available now.

44 Mr. Frank says that houses at Clayville are "not an option" (heading before para 50) because they cost more than the respondents are willing to pay to house the applicants (para 51). This, once more, demonstrates a brazen disregard for the fact that the respondents are in breach of a court order.

45 Mr. Frank now says that all the houses at Clayville have been allocated to others (paragraph 52.1). Assuming that this is true, this was only allowed to happen because the respondents chose not to obey Teffo J's order by providing houses at Clayville when there were houses available to be allocated to the applicants there.

In situ upgrade

46 It is true that I have at various times raised the possibility of an *in situ* upgrade. But this is only because the respondents have steadfastly failed or refused to provide anything else.

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47 Mr. Frank accuses the applicants of "going back and forth". In reality, though, the applicants have tried to engage with the respondents to find a solution. Instead of responding to this engagement in good faith, Mr. Frank self-servingly alleges that the applicants' good faith proposals are in fact demands that keep changing. This is dishonest and, of course, wholly wrong.

48 The bottom line is this. Each of the applicants is entitled to a house in terms of a court order that came into effect 16 month ago. The respondents have, to date, provided the applicants with nothing – not land, not a house, not a flat.

49 In these circumstances, constitutional damages are the only appropriate relief.

The novel budgetary defence

50 Finally, Mr. Frank says that the respondents do not have "spare funding for additional projects" (para 10).

51 This is the first time at any stage in any of the litigation between the parties that this particular excuse has been raised.

52 It should be rejected, for at least two reasons.

53 The first is that there is absolutely no evidence to support it. Had the respondents genuinely been short on funds, I would have expected them

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to provide evidence of this. They have not. This Court has repeatedly held that the mere assertion that an organ of state lacks resources will never be a defence to the performance of a constitutional obligation – much less a defence to the enforcement of a court order.

54 The second reason is that there is no evidence that the respondents have planned and budgeted to give effect to the court order. At least two full budgetary cycles have passed since Teffo J made her order. During those cycles, funding could have been set aside for the fulfilment of the order. It is clear that no funding was in fact set aside, because the respondents' position remains that the applicants must just be squeezed into whatever housing the respondents already had planned – whether or not that housing meets the requirements of Teffo J's order.

55 In these circumstances, the suggestion that the respondents do not have "spare funding" is plainly unacceptable.

56 The applicants persist in their application for leave to appeal.

NOMZAMO ZONDO

Signed and sworn before me on this 6th day of October 2020 at

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

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