Mshengu v Msunduzi Local Municipality [2019] JOL 45319 (KZP)

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 11340/2017P

In the matter between:

ZABALAZA MSHENGU	FIRST APPLICANT
THABISILE NTOMBIFUTHI NGEMA	SECOND APPLICANT
ASSOCIATION FOR RURAL ADVANCEMENT	THIRD APPLICANT

and

MSUNDUZI LOCAL MUNICIPALITY	FIRST RESPONDENT
UMSHWATHI LOCAL MUNICIPALITY	SECOND RESPONDENT
UMGUNGUNDLOVU DISTRICT MUNICIPALITY	THIRD RESPONDENT
SHOCK PROOF INVESTMENTS 71 (PTY) LTD	FOURTH RESPONDENT
VARGAPATH PROPRIETARY LIMITED	FIFTH RESPONDENT
MINISTER OF WATER AND SANITATION	SIXTH RESPONDENT
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	SEVENTH RESPONDENT
MEC: CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KZN	EIGHTH RESPONDENT

ORDER

The order I grant is the following:

(I) Declaration and Mandamus

1. Declaring that the first, second and third respondents ongoing and persistent failure to provide the farm occupiers and labour tenants who are residing within areas of their jurisdiction with access to basic sanitation, sufficient water and collection of refuse is inconsistent with the Constitution of the Republic of South Africa, 1996, particularly ss 9, 10, 24, 27(1)*(b)*, 33, 152, 153, 195 and 237;

2. Directing the first, second and third respondents, subject to the structural relief, to comply with reg 3 of the Regulations relating to compulsory national standards and measures to conserve water, GN R509, *GG* 22355, 8 June 2001 by:
   2.1 Installing a sufficient number of water user connections to supply a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month to farm occupiers and labour tenants residing within areas of their jurisdiction;
   2.2 Ensuring that the water user connections supply water at a minimum flow rate of not less than 10 litres per minute; and
   2.3 Ensuring that the water user connections supplied are within 200 metres of the farm occupier's households;

3. Directing the first, second and third respondents to provide farm occupiers and/or labour tenants with access to basic sanitation by:-
   3.1 Installing Ventilation Improved Pit toilets per each household. (The VIP toilets should conform to SANS 10365-1: 2003 specifications);

4. Directing the first and second respondents to provide the farm occupiers and/or labour tenants with refuse collection services;

5. Directing the first, second and third respondents to ensure that the farm occupiers and labour tenants have access to basic municipal services, more specifically water, sanitation and refuse removal; and

6. Directing the first, second and third respondents to prioritise the rights of farm occupiers and labour tenants in their Integrated Development Plans.

(II) Structural Relief

7. Within six (6) months of the date of the order, the first, second and third respondents are directed to file the reports under oath and the plans with this court.

8. The reports shall identify all the farm occupiers and labour tenants who are residing within the areas of their jurisdiction.

9. For each farm occupier and labour tenants, indicate whether he/she has access to water, sanitation and collection of refuse.

   9.1 If he/she has access to water, sanitation and collection of refuse:

      (i) indicate the type of water source, type of sanitation and collection of refuse.

      (ii) indicate the quality and the quantity of water, sanitation and collection of refuse.

      (iii) indicate the distance from the water source, sanitation and collection of refuse, to each farm occupier and labour tenant's house.

   9.2 If he/she does not have access to water, indicate how long he/she does not have access to water, sanitation and collection of refuse.

10. The Plan shall:

   10.1 Explain the steps the first, second and third respondents will take in order to provide farm occupiers and labour tenants with access to water, sanitation and the collection of refuse.

   10.2 Explain the steps and criterion the first, second and third respondents will take in order to ensure that all farm occupiers, labour tenants and farm owners within their jurisdiction are aware of this case.

   10.3 Set measurable, periodic deadlines for progress.

11. The reports and the plans will be served on the applicants and be made available on the first, second and third respondents' website.

12. The applicants, and any other interested parties, will be entitled to comment on the reports and the plans within one (1) month of the date on which they are filed.

13. The first, second and third respondent will file to this court, and serve on the applicants, monthly reports indicating their progress with regard to provision of access to water, sanitation and the collection of refuse to farm occupiers and labour tenants living within the areas of their jurisdiction.

14. The applicants, and any other interested parties, will be entitled to comment on these monthly reports within thirty (30) days after the date on which they are filed.

15. The court may, at any stage and of its own accord, after having heard submission by the parties, make any further directions or orders it deems fit.

16. Thereafter, the matter is to be enrolled on a date to be fixed by the registrar in consultation with the presiding judge for consideration and determination of the aforesaid reports, plans, commentary and replies.

III) Costs

17. The first and second respondents are directed to pay the costs of this application which costs shall include costs of two counsel.

JUDGMENT

Delivered on: 29 July 2019

Mnguni J

Introduction

[1] "Zabalaza" is the isizulu word for 'stand firm or plant oneself firmly on the ground or refuse to give way'.[1] In the context of this application it is the first name of the first applicant Mr Mshengu, a centenarian who has since sadly passed away. He refused to give up the struggle for access to sufficient water, basic sanitation and collection of refuse for farm occupiers and labour tenants until he was called to rest

[1] C M Doke and B W Vilakazi *Zulu-English Dictionary* 2 ed (1964).

on 13 August 2018 at the age of 104. In this judgment I shall refer to him by his first name not as a sign of disrespect, but because of its synonymity with his contribution to the struggle to ensure that the most vulnerable of farm residents have access to these aforementioned basic services.

[2] Zabalaza resided with his family on Edmore Farm which is within the area of jurisdiction of the first respondent. Edmore Farm is currently owned by the fourth respondent. Zabalaza shared his home with his son and two grandsons all of whom are adults. His family still lives on the farm. His father provided labour on the farm for the Hardman family in exchange for residing, growing crops and grazing livestock on the farm. Zabalaza was born and lived on the farm his entire life. As was the case with his father, he also provided labour for the Hardman family in similar circumstances.

[3] Zabalaza lived with his family in the old, dilapidated, hand-built mud structures on the farm. The nearest water source, being isolated, shallow pools in a dried-up stream, is situated 100 metres from his home. The water is stagnant and not suitable for consumption or any other use. As such, his family relies on water sourced from a communal tap from a neighbouring farm in excess of 500 metres away from his home. The communal tap is at the bottom of a hill and Zabalaza's home is on the hilltop. In order to collect water, Zabalaza and other farm occupiers and labour tenants have to push 25 litre cans down the hill on wheelbarrows, through the bush and haul them back up a gruelling upward ascent on their return.

[4] Thabisile Ntombifuthi Ngema (Ms Ngema) resides on the settlement at the Greenbranch Farm within the area of jurisdiction of the second respondent. She is a farm occupier and the second applicant in these proceedings. The fifth respondent owns Greenbranch Farm. The settlement on Greenbranch Farm consists of 12 households and most of the occupiers are poor. Their homes comprise mainly of five room structures built with blocks and asbestos. The houses are old and dilapidated and the rooves leak when it rains. The homes do not have any ablutions or communal toilets. The closest health facilities and high school are between 10 and 11 kilometres away from the settlement. Children have to walk that distance to school as the State does not provide transportation for the children to school.

[5] When the Greenbranch Farm settlement occupiers attempted to create some form of sanitation by digging pit toilets, Eddie Meyer (Mr Meyer) of the fifth respondent stopped them. Mr Meyer advised them that they were not allowed to construct pit toilets on the settlement and were to use the sugarcane plantation as their toilets. Mr Meyer told them that human waste is a form of manure that assists with fertilizing his crop. There are no lights installed in the sugarcane plantation and the places that the occupiers are currently using as toilets are unhygienic, smelly and attract flies and other vermin. Women in particular suffer great hardship, humiliation and impairment of their dignity as they do not have a proper place to dispose of their used sanitary towels when they undergo their menstrual cycle.

[6] There are only two water taps on the Greenbranch Farm settlement which service a population of more than 60 people. As such, the occupiers have to queue to collect water. Some days they are unable to access water because Mr Meyer of the fifth respondent has switched off the water supply without giving them notice. Refuse is also not collected and it litters the area around the settlement.

[7] The occupiers of Greenbranch Farm approached the second respondent's ward councillor to ask him to provide these basic services. The ward councillor however informed them that the landowners prevent the second respondent from providing these basic services to the occupiers.

[8] The third applicant is a non-governmental organisation working on land rights and agrarian reform, primarily in KwaZulu-Natal and was founded in 1979. Its objective is to redress past injustices and to improve the quality of life and livelihood of poor rural communities. Its work focuses on black people who require access to land or security of tenure on the land.

[9] In July 2015 the applicants' attorneys addressed letters to the first, second, third, sixth, seventh and eighth respondents demanding from these respondents a detailed written report setting out what steps had been taken and will in future be taken to provide basic sanitation, sufficient water, refuse removal and electricity to the farm occupiers and labour tenants residing within their jurisdictions, and when those steps will be finalised. The letters only elicited a response from the second respondent and even that response did not deal issuably with the points raised

therein. The applicants' attorneys sent a follow up letter to the second respondent dated 20 August 2015 which was not responded to.

[10] On 13 and 19 April 2016 the applicants' attorneys addressed further letters to the first and second respondents respectively demanding to know whether these two respondents accepted their obligation to:

(a) provide the farm occupiers and labour tenants with sufficient water, basic sanitation and refuse removal services;

(b) what plan, if any, these two respondents have to improve the farm occupiers and labour tenants' access to basic municipal services as they are obliged to do, and what steps they have taken and intend to take to implement that plan; and

(c) in the absence of such steps or plans, to know why these two respondents have not taken steps or planned to take steps to provide them with basic municipal services.

[11] The letters further invited the two respondents to consult with the farm occupiers and labour tenants through their legal representatives in order to formulate a plan to:

(a) provide emergency services to the farm occupiers and labour tenants; and

(b) provide the farm occupiers and the labour tenants with the legally requisite access to municipal services.

[12] As was the case with the previous correspondence, these letters did not yield any response from the two respondents. There being no response to the letters, on 5 May 2017 the applicants brought this application against the respondents seeking relief consisting of two parts. In the first part the applicants seek declaration and mandamus in the following terms:

(a) declaring that the first, second and third respondents' ongoing and persistent failure to provide the farm occupiers and labour tenants who are residing within areas of their jurisdiction with access to basic sanitation, sufficient water and refuse collection, is inconsistent with the Constitution,[2] particularly ss 9, 10, 24, 27(1)*(b)*, 33, 152, 153, 193 and 237;

[2] Constitution of the Republic of South Africa, 1996.

(b) directing the first, second and third respondents, forthwith, to comply with reg 3 of the Regulations relating to compulsory national standards and measures to conserve water, GN R509, *GG* 22355, 8 June 2001 (the Regulations) by installing a sufficient number of water user connections to supply a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month to farm occupiers and labour tenants residing within areas of their jurisdiction, at a minimum flow rate of not less than 10 litres per minute, within 200 metres of the farm dwellers' households;

(c) directing the first, second and third respondents to provide farm occupiers and labour tenants with access to basic sanitation by installing Ventilation Improved Pit (VIP) toilets per each household conforming to SANS 10365-1: 2003 specifications;

(d) directing the first, second and third respondents to provide the farm occupiers and labour tenants with refuse collection services;

(e) directing the first, second and third respondents to ensure that the farm occupiers and labour tenants have access to basic municipal services, more specifically water, sanitation and refuse removal; and

(f) directing the first, second and third respondents to prioritise the rights of farm occupiers and labour tenants in their Integrated Development Plans (the IDPs).

[13] In the second part the applicants seek a structural relief directing the first, second and third respondents to deliver the reports (the reports) under oath and the plans (the plans) with this court, containing the following details:

(a) identifying all the farm occupiers and labour tenants who are residing within the areas of their jurisdiction; and

(b) stipulating whether such farm occupiers and labour tenants have access to the essential services forming the basis of this application. If answered in the affirmative, to provide the nature, quality and distance travelled to gain such access to those services. In the event of an answer in the negative, to indicate the period or duration such farm occupier or labour tenant has been without such essential municipal services.

The first, second and third respondents to further be directed to deliver monthly updates or progress reports and all interested parties to be provided with an

opportunity to comment on the report. Lastly, calling upon this court to enrol this application for consideration and determination of the reports, plans and submissions made thereto.

[14] As an alternative to the main relief the applicants seek to review and set aside the first, second and third respondents':

(a) arbitrary, irrational and unreasonable action of persistent failure to provide the farm occupiers and labour tenants who are residing within areas of their jurisdiction with access to basic sanitation, sufficient water and collection of refuse;

(b) decision not to provide farm occupiers and labour tenants residing within the areas of their jurisdiction with access to sufficient water, sanitation and collection of refuse;

(c) directing the first, second and third respondents to comply with reg 3 of the Regulations, s 27(1)*(b)* of the Constitution, s 3 of the Water Services Act 108 of 1997 (the WSA), s 4(2)*(d)* of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act); the White Paper on Water Supply and Sanitation Policy (white paper); and Free Basic Sanitation Implementation Strategy, by providing farm occupiers and labour tenants residing within the areas of their jurisdiction with access to sufficient water, sanitation and refuse collection; and

(d) directing the first, second and third respondents to develop a plan for the provision of sufficient water, sanitation and refuse collection to farm occupiers and labour tenants residing within areas of their jurisdiction.

The first, second and third respondents shall engage meaningfully with the applicants and the farm owners residing within the areas of their jurisdiction in order to reach an agreement about the provision of access to sufficient water, sanitation and the collection of refuse to farm occupiers and labour tenants.

[15] No relief is sought against the fourth to eighth respondents. These respondents have been joined as parties to the litigation merely because of their interest in it. Instead the targets are the first to third respondents. Costs are only sought in the event of any of the fourth to eighth respondents opposing the application.

Applicants' claim

[16] The applicants' claim is essentially based on s 27(1)*(b)* of the Constitution. The main thrust of their complaint is that farm occupiers and labour tenants, particularly those represented in the present application, do not have access to sufficient water, basic sanitation, refuse collection services and a clean environment in general on the farms where they reside. There is no formal sanitation nor sufficient water supply on the farms where they live. They also do not have decent toilets. Some farm occupiers and labour tenants have dug pit latrines next to their homes, but these makeshift toilets are smelly and attract flies and vermin. Others have to go to the nearest bush in order to relieve themselves. The surroundings of their homesteads are dirty with rubbish everywhere due to the absence of refuse collection services.

[17] The applicants contend that they and those farm occupiers and labour tenants within the jurisdictions of the first, second and third respondents possess the same rights as other residents of the respondents to have access to sufficient water, basic sanitation and refuse removal in terms of s 27 of the Constitution and the provisions of the WSA and the Regulations related thereto. The applicants contend that these three respondents have a constitutional obligation to take reasonable legislative and other measures progressively to realise the achievement of the rights within available resources.

[18] The applicants have launched this application in the following capacities:

(a) in their own interest;

(b) as members of a class of farm occupiers and labour tenants who do not have access to basic services such as sufficient water, basic sanitation and refuse removal in areas where they reside;

(c) on behalf of farm occupiers and labour tenants who do not have access to basic services such as sufficient water, basic sanitation and refuse collection in the areas where they reside who cannot act in their own names; and

(d) in the public interest.

[19] The first and second respondents opposed the application. In its answering affidavit, the first respondent raised two points in limine, namely that the third

applicant does not have locus standi to represent unidentified farm occupiers and labour tenants whose area of residence is not disclosed, and, that the third applicant was required to join all the landowners who have farm occupiers and labour tenants residing on farms within the first respondent's area of jurisdiction.

[20] I now turn to deal with these two points in limine in the sequence in which they were raised.

Certification

[21] The first respondent contends that the case advanced by the third applicant on behalf of the farm occupiers and labour tenants is on all fours with a class action suit. In casu the third applicant should have approached the court for a certification of the class action before bringing this application. Mr *Pillay SC* on behalf of the first respondent submitted that the unnamed class/farm occupiers and labour tenants which the third applicant purports to represent obtain contractual rights with the landowners of the property on which they live and their claims will of necessity impact upon the contractual relationship with the landowners. He submitted that the interests of justice in this instance require that the current claims be certified by the high court to determine the following:

(a) the existence of that class which is identifiable by objective criteria;
(b) a cause of action raising a triable issue;
(c) that the right to relief depends on the determination of issues of fact, or law, or both, common to all members of the class;
(d) that the relief sought flows from the cause of action and is capable of determination;
(e) that the proposed representation is suitable to the conduct of the action and to represent the class; and
(f) whether a class action is the most appropriate in the circumstances.

[22] Not so, argued Mr *Ngcukaitobi* on behalf of the applicants. He argued that the applicants have made it clear in the founding affidavit that they are bringing this application in their capacities as foreshadowed in para 18 above. He submitted that the third applicant seeks, amongst others, to enforce rights entrenched in the Bill of Rights against the three respondents who are organs of State in the public interest. He correctly submitted that the requirement relating to the certification of class

actions does not apply to matters wherein members of a class seek to enforce rights entrenched in the Bill of Rights against the State, and, that the contention that all cases brought in terms of s 38*(c)* of the Constitution require certification by the high court is misplaced.

[23] Section 38 of the Constitution states:

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

Section 38*(c)* provides that 'anyone acting as a member of, or in the interest of, a group or class of persons' may approach a court.

[24] In *Lawyers for Human Rights & another v Minister of Home Affairs & another*[3] the Constitutional Court observed that 'section 38 introduces far-reaching changes to our approach to standing which takes account of, among other things, the vulnerability of the people previously disadvantaged by apartheid, their socio-economic plight and a concomitant desire to correct the wrongs perpetrated against them over a long period of time'. In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others*[4] the Constitutional Court held that 'it is important to emphasise that the broad ambit of constitutional standing must be preserved even for own-interest challenges'. The Constitutional Court further stated that this approach was necessary:

'. . ."to facilitate the protection of the Constitution" because: "constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights".'[5] (Footnotes omitted.)

[25] As was observed by the Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd & others*:[6]

'Class actions in those circumstances are regulated by s 38 which confers, as of right, the authority to institute a class action on certain persons, defined in the section. Moreover,

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[3] *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC) para 74.
[4] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC) para 47.
[5] Ibid para 39. See also *Kruger v President of Republic of South Africa & others* 2009 (1) SA 417 (CC) para 23.
[6] *Mukaddam v Pioneer Foods (Pty) Ltd & others* 2013 (5) SA 89 (CC) para 40.

claims for enforcing rights in the Bill of Rights may even be brought in the wider public interest without certification.'

[26] It is common cause that this case concerns an enforcement of the rights in the Bill of Rights against the organs of State for ordinary constitutional claims brought on behalf of a class in terms of s 38*(c)*. In the circumstances, certification proceedings are not necessary.

Non-joinder

[27] Under this point in limine the first respondent asserts the following: the installation of VIP toilets, water supply infrastructure and refuse removal will require an interference with the landowners' property and will result in a consequential increase in rates and taxes for the landowners. There are at present about 127 working farms within its jurisdiction which house the farm occupiers and labour tenants and most of these farms have existing water and sanitation facilities including boreholes and piped water systems. In addition to these farms, there are some 139 pieces of vacant land which have been zoned agricultural land but which do not appear to be actively farmed but which may however house informal housing. Mr *Pillay* submitted that the persons who reside on the farm land do so either with the consent of the landowner or in terms of some other right in law. He submitted that on these basis, the landowners of the affected farms ought to have been joined in this application.

[28] To counter this argument Mr *Ngcukaitobi* submitted that at this stage no farm owner will be required to take any immediate action as a result of the order, nor will the order authorise the three respondents to immediately enter the private land to provide water or sanitation services.

[29] Further, the right to demand joinder is limited to specified categories of parties who have a direct and substantial interest in an order that is sought in the proceedings if the order would directly affect such a person's rights or interest. In the present context the question is whether the individual landowners within the jurisdiction of the first respondent can be said to have "a direct and substantial

interest" in the outcome of the proceedings? In *Judicial Service Commission & another v Cape Bar Council & another*[7] the Supreme Court of Appeal held:

'It has now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. . . .'

The mere fact that a party may have an interest in the outcome of the litigation, so says the Supreme Court of Appeal, does not warrant a non-joinder plea.

[30] As concisely held in *Mukaddam*:[8]

'Proceedings against the state assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation.' (Footnote omitted.)

[31] Whilst accepting that at some point the first respondent may have to enter the private land to provide water and sanitation infrastructure, the remedy will require the first respondent to develop a reasonable plan. Obviously the implementation of that plan will require engagement with the farm owners about how to provide services. In the result I find that that is not the type of interest that requires individual landowners to be joined to the application presently.

[32] Having carefully considered the two points in limine, I am persuaded to conclude that these points in limine are without substance.

The first respondent's case

[33] The first respondent recognises the important role it plays in fostering the right to have access to sufficient water as enshrined in s 27 of the Constitution. It asserts that it has committed to long standing objective policies and strategic plans to provide such services as would facilitate access to water to its residents. It applied for and was designated by the eighth respondent as the water services authority under the WSA to perform the functions and to exercise the powers referred to in s 84(1)*(b)* of the Local Government: Municipal Structures Act 117 of 1998. In order to

[7] *Judicial Service Commission & another v Cape Bar Council & another* 2013 (1) SA 170 (SCA) para 12.
[8] Ibid footnote 6.

perform its duties as a water services authority, the first respondent has passed water services by-laws which have been adopted in terms of s 21 of the WSA.

[34] By reference to the 2011 census, the first respondent has a total population in excess of 618 536 consisting of 163 993 households. Of those, more than 48 per cent have access to piped water inside their dwelling. The first respondent regards this as a significant increase from the 2001 census when 38 per cent of households had pipes inside their dwellings. The first respondent states that 51.6 per cent of these households have connected flush toilets and 53.2 per cent are serviced by weekly refuse removal. According to the first respondent the 2011 census indicated that only 3.9 per cent of all households within the first respondent's area of jurisdiction have no access to piped (tap) water and of these only 3.9 percent of households are between 200 to 1000 metres from piped (tap) water.

[35] It asserts that these numbers would have decreased since 2011 in line with the first respondent's Water Services Development Plan (the WSDP), a strategy devised under the WSA to implement water services development within the region. It has developed the WSDP in accordance with its IDP objectives and is undertaking in large-scale basic water supply projects for each of its 37 wards which include new water and sanitation projects and the rehabilitation of existing water and sanitation infrastructure. The budgets have been approved for these projects and these projects once fulfilled, will bring water and sanitation to all its residents. It states that the consumers within its jurisdiction, in particular those that are indigent, are entitled to a free basic water supply in a predetermined amount but contends that water over and above a predetermined amount when consumed is to be paid for.

[36] The farm occupiers and labour tenants reside on private land. As a result, it will not be permissible for the first respondent to provide farm occupiers and labour tenants with sufficient water, basic sanitation and refuse removal services without the consent of the private landowners. It does not have sufficient resources to provide all farm occupiers and labour tenants with access to sufficient water, basic sanitation and collection. The first respondent complained about the cost of piping water over the private land and contends that if the order that the applicants are seeking is granted, it will interfere with the doctrine of separation of powers.

The second respondent's case

[37] The second respondent contends that the third respondent is the water services authority which has the power to provide bulk water and sanitation services to the affected communities in its area of jurisdiction, which coincides with the area of jurisdiction of the third respondent. Section 41*(f)* of the Constitution prevents it from assuming any power or function other than those entrusted to it by the Constitution. Whilst the second respondent accepts its responsibility for refuse removal within its area of jurisdiction, it asserts that it currently does not provide this service to landowners. It says that this is informed by the arrangement it has with the landowners in terms of which the landowners pay a lower value of rates than urban dwellers and receive a lower level of service. The landowners dispose of solid waste either on their farms or drop it off at pick up points designated by the second respondent. It asserts that it does not have financial resources to assist the landowners by going out to each farm collecting the solid waste. According to the second respondent the farm occupiers and labour tenants did not raise concerns regarding the refuse removal services from the settlement so that it could be prioritised in the IDP. The second respondent undertakes to attend to the refuse removal needs of the farm occupiers and labour tenants provided that the affected farm occupiers and labour tenants first report these needs to it for inclusion in the IDP.

[38] As an alternative, the second respondent suggests that the affected farm occupiers and labour tenants can approach the landowners and ask them to deposit their solid waste together with that of the landowners. The applicants have not alleged that they have approached the landowners in this regard. The second respondent asserts that the second applicant and others in her situation have a right each year to make submissions to the second respondent in terms of the latter's IDP. In terms of chapters 4 and 5 of the Systems Act, the second respondent has a duty to provide for public participation in its processes, including its IDP. Neither the second nor third applicants aver in their founding affidavit that the second respondent has failed to act in accordance with the provisions of the Systems Act. The second applicant has not made any representations to the second respondent in respect of the provision of refuse removal services. Neither the second applicant nor anyone else living under the same conditions within its jurisdiction has claimed that

they have approached the ward councillor with the complaint related to refuse removal services.

Legislative framework

[39] Having recorded the defence(s) advanced by the first and second respondents, it becomes necessary to determine what resources the farm occupiers and labour tenants are entitled to, and the State's obligations in terms of providing these resources in relation to the Constitution, the WSA and the Systems Act.

[40] The Constitution, as part of its long-term project to transform South Africa from a segregated, unequal society to a society founded on human dignity, equality and human rights and freedoms, includes justiciable socio-economic rights.[9] These rights entitle persons to certain material conditions that are necessary for human survival and individual self-actualisation. As stated above, the applicants base their claim on s 27(1)*(b)* of the Constitution which provides that everyone has the right to have access to sufficient food and water. They contend that the aforesaid rights further find expression in the provisions of the WSA. The right to have access to sufficient water in s 27(1)*(b)* is limited by s 27(2) which requires the State to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

[41] Amongst the objects of local government listed in s 152(1)*(b)* of the Constitution is 'to ensure the provision of services to communities in a sustainable manner'. Section 153*(a)* provides that '[a] municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community'.

[42] Section 155(7) gives the national government, subject to s 44 of the Constitution, the legislative and executive authority to ensure effective performance by municipalities of their functions in respect of matters listed in schedules 4 and 5 of the Constitution. Schedule 4 Part B of the Constitution lists water and sanitation services limited to potable water supply systems and domestic waste-water and

[9] See ss 1, 26, 27, 28(1)*(c)*, 29 and 35(2)*(e)* of the Constitution.

sewage disposal systems as one of the municipal functions that are subject to national government's legislative and executive authority.

[43] The sixth respondent, the Minister of Water and Sanitation (the Minister), is the authority entrusted in terms of s 155(7) of the Constitution with the authority to ensure that municipalities effectively perform the functions listed in schedules 4 and 5 of the Constitution, in particular, functions in respect of water services. The Minister plays an active role as the custodian of the country's water resources and as an overall policy maker and regulator. To this end, the Minister oversees the activities of all water sector institutions, is responsible for national resource planning and allocation, licenses water uses, and ultimately manages water resources infrastructure. The WSA was promulgated to give content to the Minister's executive authority contemplated in s 155(7) of the Constitution. The WSA provides a detailed account of the legislative and executive authority of the Minister to regulate the entire water value chain.

[44] The main objects of the WSA are to provide for inter alia:

(a) rights of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or wellbeing;
(b) the setting of national standards and norms and standards in respect of water services;
(c) the preparation and adoption of water services development plans by water services authorities;
(d) a regulatory framework for water services institutions and water services intermediaries;
(e) the establishment and disestablishment of water boards and water services committees and their duties and powers;
(f) the monitoring of water services and intervention by the Minister or by the relevant Province; and
(g) financial assistance to water services institutions.

[45] There is interplay between s 27(1)*(b)* and (2) of the Constitution and s 3 of the WSA. Section 3 provides:

'**Right of access to basic water supply and basic sanitation**

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

[46] A water services authority[10] is defined to mean 'any municipality, including a district or rural council as defined in the Local Government Transition Act, 1993 (Act 209 of 1993), responsible for ensuring access to water services'. Basic sanitation[11] is defined to mean 'the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households'. Basic water supply[12] is defined to mean 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.

[47] Section 9(1)*(a)* of the WSA empowers the Minister to prescribe compulsory national standards for the provision of water services. On 8 June 2001 the Minister published in terms of this section Regulations relating to compulsory national standards and measures to convene water.[13] Regulation 2 provides that '[t]he minimum standard for basic sanitation service is (a) the provision of appropriate health and hygiene education; and (b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests'. In reg 3(b) the Minister determined the minimum standard for basic water supply services as:

'a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month -

(i) at a minimum flow rate of not less than 10 litres per minute;

(ii) within 200 metres of a household; and

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[10] Section 1 of Water Services Act 108 of 1997.
[11] Ibid.
[12] Ibid.
[13] Regulations relating to compulsory national standards and measures to conserve water, GN R509, *GG* 22355, 8 June 2001.

(iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.'

[48] Section 11(1) of the WSA provides that '[e]very water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services'. Section 11(2) lists the factors to which an authority's duty is subject to, namely:

'*(a)* the availability of resources;

(b) the need for an equitable allocation of resources to all consumers and potential consumers within the authority's area of jurisdiction;

(c) the need to regulate access to water services in an equitable way;

(d) the duty of consumers to pay reasonable charges, which must be in accordance with any prescribed norms and standards for tariffs for water services;

(e) the duty to conserve water resources;

(f) the nature, topography, zoning and situation of the land in question; and

(g) the right of the relevant water services authority to limit or discontinue the provision of water services if there is a failure to comply with reasonable conditions set for the provision of such services.'

[49] In terms of s 11(3), (4), (5):

'(3) In ensuring access to water services, a water services authority must take into account, among other factors-

(a) alternative ways of providing access to water services;

(b) the need for regional efficiency;

(c) the need to achieve benefit of scale;

. . .

(f) the availability of resources from neighbouring water services authorities.

(4) A water services authority may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction.

(5) In emergency situations a water services authority must take reasonable steps to provide basic water supply and basic sanitation services to any person within its area of jurisdiction and may do so at the cost of that authority.'

[50] Section 12(1)*(a)* and *(b)* requires those municipalities designated as water service authorities to develop water service development plans (WSDPs) which must form part of the IDP required under the Systems Act. Section 13 sets out in some

detail what a WSDP must contain. Section 14 requires the authority to take reasonable steps to bring its draft WSDP to the notice of its consumers, potential consumers, industrial users and water services institutions within its area of jurisdiction and to invite comments thereon to be submitted within a reasonable time. Section 15(1) of the WSA requires a water services authority to adopt a water services development plan.

[51] Section 4(2)*(c)* and *(e)* of the Systems Act require a municipal council to involve, engage and consult with members of a local community. In s 5(1), the Systems Act expressly guarantees communities the correlative right to meaningful engagement, involvement and communication. Section 4(2)*(j)* of the Systems Act provides that the municipality has a duty to 'contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution'. Section 4(2)*(f)* provides that the municipality has a duty to 'give members of the local community equitable access to the municipal services to which they are entitled'. Section 4(2)*(d)* provides that the municipality has a duty to 'strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner'. In essence, the duty imposed by the Systems Act mirrors the duty imposed on the State by the Constitution and the WSA.

[52] Section 73(1) of the Systems Act provides that '[a] municipality must give effect to the provisions of the Constitution and *(a)* give priority to the basic needs of the local community' and '*(c)* ensure that all members of the local community have access to at least the minimum level of basic municipal services'. Section 1 of the Systems Act defines basic municipal services as 'a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment'. Consequently, municipalities have a constitutional obligation to focus on the provision of these basic services and may not prioritise other services at the expense of basic services.

[53] Section 6(2)*(e)*-*(f)* of the Extension of Security of Tenure Act 62 of 1997 (the ESTA) grants occupiers the right 'not to be denied or deprived of access to water' and the right 'not to be denied or deprived of access to educational or health services'. It makes it untenable for a landowner to prevent the municipality from

taking steps to provide water, sanitation or refuse collection on their property and obliges the landowners to act reasonably in reaching agreements with the municipality regarding the provisions of services.

[54] Section 26 of the Systems Act states that IDPs must reflect inter alia 'an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services'[14] and 'the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs'.[15]

[55] It is not disputed by the two opposing respondents that many farm occupiers and labour tenants, including the first and second applicants and their communities, do not currently have access to water, sanitation or refuse collection. It is further not disputed by the two opposing respondents that providing water and sanitation to the farm occupiers and labour tenants poses particular difficulties. In the Free Basic Sanitation Implementation Strategy, the Department of Water Affairs and Forestry pointed out that farm occupiers 'are often marginalised and excluded from the mainstream service delivery support from local authorities'.[16] In light of this the applicants are demanding a specific approach or a plan as to how the first, second and third respondents would, within available resources, reasonably and progressively provide water, sanitation and refuse removal to farm occupiers and labour tenants.

[56] In *Minister of Health & others v Treatment Action Campaign & others (No 2)*[17] the Constitutional Court defined the obligations arising from ss 26 and 27 of the Constitution in the following terms:

'We therefore conclude that s 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in s 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to "respect, protect,

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[14] Section 26*(b).*
[15] Section 26*(c).*
[16] Free Basic Sanitation Implementation Strategy (2008) at 57 para 19.1.
[17] *Minister of Health & others v Treatment Action Campaign & others (No 2)* 2002 (5) SA 721 (CC) para 39.

promote and fulfil" such rights. The rights conferred by ss 26(1) and 27(1) are to have "access" to the services that the State is obliged to provide in terms of ss 26 (2) and 27(2).'

[57] It is common cause that the first, second and third respondents do not have plans which specifically address the issues raised by the farm occupiers and labour tenants in this application. Instead, the first respondent has general policy and legislative documents dealing with the provision of water and sanitation, and does not have a plan that focuses on farm occupiers and labour tenants. As already stated, the second respondent's contention is that because it is not a water service authority it has no plan and has taken no action at all. With regard to refuse removal, the two opposing respondents acknowledge their obligation, but seek to blame farm dwellers and the labour tenants for not coming up with a plan.

[58] Mr *Pillay* sought to overcome the problem by submitting that the first respondent's IDP recognises as strategic priority the provision of water and sanitation for all neighbourhoods, communities and centres of business and reflect the executive responsibilities which fall outside the powers of the courts. He submitted that the IDP, the policies and procedures, confirm a reasonable enactment of the first respondent's obligations under the WSA and s 27 of the Constitution and that those households which are only able to access water through taps located a distance from their home are given priority under the IDP. He submitted that the applications for the provisions of these services are fast tracked when received to ensure the first respondent's compliance with its positive obligation.

[59] He submitted that the first respondent has specifically identified the need to provide water and sanitation to peri-urban and rural communities and that the first respondent's tariff document provides for reduced charges for indigent persons/households. He submitted that the first respondent has promulgated the municipal by-laws which form an important component of the first respondent's plan to implement access to water in order to give effect to that obligation. He further submitted that since the applicants have not challenged the current IDP plan and the strategies which flow from that plan, this matter cannot be determined by the court because the constitutionality of the IDP plan is not at issue in this application.

[60] Mr *Pillay* also submitted that under the first respondent's by-laws, the landowner is obliged to make an application for the connection of water services. The first respondent cannot enter private property to install a connection. He further submitted to the court that the farm occupiers' and labour tenants' rights under the ESTA and the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA) lie against the landowners not the first respondent because the occupiers derive their rights of occupation primarily from contract with the landowners or through some other right in law. He submitted that the legislature must have recognised this, that an occupier would derive his right of access to water from a bundle of rights under the WSA and the ESTA. In his view, Mr *Pillay* found it peculiar to suggest that the occupiers cannot assert their rights of access to water against the landowners from whom they derive rights of occupation.

[61] Mr *Pillay* submitted that a landowner who is liable to provide the basic requirements of occupation to the occupier under the ESTA and the LTA may intend to provide access to water through a source other than a water supply system which would mean that the general provisions of the by-laws apply. He submitted that in that instance, it would be inconceivable that the farm occupiers and labour tenants can insist on the provision of water through a water supply system from the respondents where their contractual relationship with the landowner permits the supply of water from a borehole or other such domestic source, because that would be interfering in the contractual relationships without notice.

[62] As stated, the first respondent is the water services authority and as such the obligation to provide water and sanitation for farm occupiers and labour tenants rests on it, not on the landowners. The landowners have no direct statutory obligation to provide such services unless contracted to do so by the water services authority in terms of s 19 of the WSA. Even in instances where landowners are to provide water services to another in terms of a contract, s 26(3) of the WSA authorises the water services authority, if the intermediary fails to perform its obligations in terms of the agreement to 'take over the relevant functions of the water services intermediary'.

[63] The Free Basic Sanitation Implementation Strategy expressly provides that the final obligation to provide sanitation services remains with the water services authority. It follows that the first respondent has a duty to ensure the landowners or

other intermediaries provide access to a basic level of sanitation service to those living legally on their land. In some instances the first respondent may have to fulfil that obligation through the landowners by engaging with them to reach the agreement for these services on their land, but what the first respondent cannot do is shift that obligation to the landowners by requiring the landowners to make applications. Accepting that a landowner has a secondary obligation under ss 8 and 27 of the Constitution and the WSA, a landowner cannot unreasonably deny the municipality access to his farm in order to install necessary infrastructure to ensure the provision of the services.

[64] It is common cause that the first respondent has not approached either the fourth respondent or the landowners to obtain their co-operation or consent for the installation of water and sanitation services in an attempt to fulfil its constitutional and statutory obligation. As stated, in terms of s 6(2)*(e)* and *(f)* of the ESTA, the occupier shall have the right 'not to be denied or deprived of access to water', and 'not to be denied or deprived of access to educational or health services'. It seems clear to me that the first respondent must take reasonable steps to meet its obligations to all its residents and that the landowner has an obligation to co-operate.

[65] Mr *Moodley* on behalf of the second respondent, persisted in the second respondent's contention that it is not a water services authority and has no power to provide bulk water and sanitation to the affected communities within its area of jurisdiction. It seems to me that this contention overlooks the provisions of s 73(1)*(c)* of the Systems Act which obliges the second respondent to give effect to the provisions of the Constitution and to ensure that all members of the local community have access to at least the minimum level of basic municipal services. It follows therefore that the second respondent cannot absolve itself from its responsibilities by simply contending that it is not the water services authority. It seems to me that both the second and third respondents have a responsibility to give effect to the provisions of the Constitution in this regard.

Subsidiary

[66] The first respondent contends that the applicants in this instance have sought to rely on the Constitution without regard to municipal by-laws. The first respondent contends that, save for the applicants making a bold statement that they challenge

the municipal by-laws, the applicants do not make out a case for that challenge. The first respondent contends further that the applicants do not even mention the municipal by-laws in the notice of motion. Citing *Mazibuko & others v City of Johannesburg & others*,[18] Mr *Pillay* submitted that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution. He submitted that the applicants cannot invoke the constitutional entitlement without attacking the regulation and if necessary, the statue. He submitted that in terms of clause 5(1) of the by-laws adopted by the first respondent for water services, no services shall be provided save on written application. He also submitted that other than to address letters demanding reports and policies, the first applicant and any other such applicant has not made application for these services.

[67] All counsel are in agreement that it is primarily for the executive and the legislature to determine the content of socio-economic rights through the enactment of reasonable legislative and other measures. As stated, national legislation, regulation and policy have already determined what level of water or sanitation services the farm occupiers and labour tenants are entitled to. In *Mazibuko*[19] the court stated:

'By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.'

[68] Mr *Ngcukaitobi* correctly pointed out that while *Mazibuko* rightly constrains courts from interfering in the detail of legislative and executive policy, it does not proscribe judicial interference but merely identifies the type of claim that must be brought.

[69] Under the WSA and the Regulations, the water service authorities have an obligation to provide water and sanitation services to farm occupiers and labour tenants. The applicants are not asking the court to set the proper standard for the provision of water or sanitation. Regulation 3 has already determined the basic content of that obligation. What the applicants seek is to enforce the standard

[18] *Mazibuko & others v City of Johannesburg & others* 2010 (4) SA 1 (CC).
[19] Ibid para 66.

imposed by the legislative and executive branches. It is not disputed that a disproportionate percentage of farm occupiers and labour tenants do not currently have access to water and sanitation services. They are particularly poor and vulnerable and require special consideration. It is therefore important that the first respondent must adopt and implement a plan or policy that makes special provision for them and must provide a reasonable plan for progressively realising their rights as set out in reg 3 in order to comply with its obligation.

[70] In *Mazibuko* the Constitutional Court further laid down the standard applicable to enforcing social and economic rights by courts. It stated:

'Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standards of reasonableness. From *Grootboom* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions as described in *Treatment Action Campaign (No 2)*, the court may order that those be removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.'[20]

[71] Mr *Ngcukaitobi* argued that while the applicants seek general declarations and interdicts about the obligation to provide the regulated services, they do not envisage that those services must be provided overnight on pain of contempt. He submitted that the implementation of the first, second and third respondents' obligations is connected to a reporting and planning regime and the two water service authorities must set out how they plan to comply with their obligations within a reasonable time, and then report on whether they have done so.

[72] The first and second respondents concede an obligation to assist with the refuse removal services. However, the first respondent undertakes to do so subject to the farm occupiers and labour tenants participating in the scheme by using easily identifiable refuse plastic bags and depositing these bags on the side of a public road for collection. The applicants have indicated their willingness to participate in

[20] Ibid footnote 18 para 67.

this scheme but still insist that the first respondent must produce a plan and the schemes containing the dates, route and time for collection. The applicants also want the first respondent to provide them with plastic bags for this purpose.

The IDP

[73] The first respondent asserts that it has developed a WSDP in accordance with its IDP objectives. The first respondent is undertaking in large-scale basic water supply projects for each of its 37 wards. Included are new water and sanitation projects and the rehabilitation of existing water and sanitation infrastructure. The budgets have been approved and these projects once fulfilled will bring water and sanitation to all its residents. It claims that all these projects are geared towards the elimination of the 3.9 per cent of households that have no access to piped tap water by 2030.

[74] I find this argument fundamentally flawed. The flaw lies in the fact that the IDP envisaged that the WSDP would have been completed by July 2016 and no evidence was produced by the first respondent to indicate that this actually occurred. Second, the table appearing at pages 197 to 208 of the first respondent's IDP is not limited to water and sanitation projects but includes all capital projects of the first respondent. Also the table does not indicate which of these projects will assist the vulnerable and neglected farm occupiers and labour tenants. It seems apparent from the perusal of the IDP that the first respondent has not prioritised the farm occupiers and labour tenants that are particularly vulnerable and in need by providing an actual plan for how their rights will be realised. Having carefully considered the IDP, I am satisfied that the IDP provides no basis to conclude that the first respondent has a reasonable plan to progressively realise the rights of farm occupiers and labour tenants.

[75] With regard to the second respondent's defence relating to the inclusion of the farm occupiers and the labour tenants into its IDP, there seems to be no evidence to indicate that the farm occupiers and labour tenants were ever invited by the second respondent to participate in its programme. It needs to be emphasised that the farm occupiers and labour tenants are vulnerable and poor, the majority of them are ignorant of their rights enshrined in the Constitution. It therefore behoves of the first,

second and third respondents to be pro-active in ensuring that the farm occupiers and labour tenants have access to these services.

The by-laws

[76] As already stated, counsel for the first respondent contended that the applicants were required to review its water services by-laws instead of compelling it to comply with its statutory and constitutional obligations. He submitted that the by-laws were enacted to regulate the provision of water and sanitation within its jurisdiction. Consequently, so the submission goes, the applicants must declare them invalid if they wish to obtain any relief concerning the provision of water and sanitation.

[77] Mr *Ngcukaitobi* made two important submissions, the first being that the by-laws are not exhaustive of the first respondent's legal and constitutional obligation and do not supplant the first respondent's obligations under the WSA, the Constitution, the Systems Act or any other legislation. The passage of a by-law can never on its own constitute compliance with those other obligations but requires actual plans and action. The by-laws are part of the mechanism through which a municipality gives effect to its other statutory and constitutional obligations but the first respondent must still demonstrate actual compliance with those self-standing obligations. In his view, the problem is not the by-laws but the first respondent's plan to develop and implement plans and policies to provide water and sanitation to farm occupiers and labour tenants. The second was that the obligation on the landowner to apply for a water connection under by-laws does not excuse the first respondent from complying with its self-standing obligation to engage with the landowners, and if necessary, to conclude agreements with them as intermediaries to provide for water and sanitation services to the farm occupiers and labour tenants living on their land.

Budget

[78] It is common cause that the legal obligation to provide farm occupiers and labour tenants with access to water, sanitation and refuse removal arises from the Constitution and numerous statutes. The first and second respondents assert that the budgeting constraints for the resources necessary to provide farm occupiers and labour tenants with access to water, sanitation and collection of refuse has on occasion delayed these goals. In *City of Johannesburg Metropolitan Municipality v*

Blue Moonlight Properties 39 (Pty) Ltd & another[21] the Constitutional Court held that the 'determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations'.

[79] It is important to emphasise that this court will not be imposing new or unforeseen obligations on the first respondent but will be requiring the first respondent to implement duties imposed by the legislature on it. It follows therefore, that the first respondent's failure to budget for the resources necessary to provide farm occupiers and labour tenants with access to water, sanitation and refuse collection is of no moment. What the applicants are asking for is the development and implementation of a plan for the provision of those services which will take into account the first respondent's resources.

Separation of powers

[80] The Constitutional Court has repeatedly made it clear that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not others. All arms of government should be sensible to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.[22]

[81] The first respondent contends that if the order that the applicants are seeking is granted, the order will interfere with the doctrine of separation of powers. I do not agree with this proposition. As aptly observed by the Constitutional Court in *Treatment Action Campaign (No 2)*[23] '[w]hat must be made clear, however, is that when it is appropriate to do so, Courts may – and, if need be, must – use their wide powers to make orders that affect policy as well as legislation'. On the evidence before me I am persuaded that the first respondent has failed to comply with its statutory obligation within its available resources to provide water, sanitation and

[21] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) para 74.
[22] *Soobramoney v Minister of Health, KwaZulu-Natal 1*998 (1) SA 765 (CC) para 29.
[23] *Minister of Health & others v Treatment Action Campaign & others (No 2)* 2002 (5) SA 721 (CC) para 113.

refuse removal to the farm occupiers and labour tenants. In *Treatment Action Campaign (No 2)*[24] the Constitutional Court held that:

'Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself.'

Remedy

[82] I have referred to the correspondence which the applicants' attorneys addressed to the first, second and third respondents. It is common cause that a response was only received from the second respondent's erstwhile attorney and even that response did not engage issuably with any of the points raised in the letter by the applicants' attorneys. In the circumstances, it behoves of the court to ensure that the three respondents in fact comply with their constitutional obligations by preparing a reasonable plan, and reasonably implementing that plan. It seems to me that the first, second and third respondents' prior failures and current attitude justify supervision. As the defect lies in the omission by the three respondents, the just and equitable order is to direct them to cure the omissions.

[83] In *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others*[25] the Constitutional Court said:

'It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.'

[84] The remedy does not dictate what or how the municipalities must act but merely requires these three respondents to fulfil their constitutional obligations and to report to the court that they have done so in that regard.

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[24] Ibid para 99.
[25] *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) para 107.

[85] What remains to be considered is the question of costs. The general rule is that in the ordinary course costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule.

Order

[86] The order I grant is the following:

(I) Declaration and Mandamus

1. Declaring that the first, second and third respondents ongoing and persistent failure to provide the farm occupiers and labour tenants who are residing within areas of their jurisdiction with access to basic sanitation, sufficient water and collection of refuse is inconsistent with the Constitution of the Republic of South Africa, 1996, particularly ss 9, 10, 24, 27(1)*(b)*, 33, 152, 153, 195 and 237;

2. Directing the first, second and third respondents, subject to the structural relief, to comply with reg 3 of the Regulations relating to compulsory national standards and measures to conserve water, GN R509, *GG* 22355, 8 June 2001 by:-

   2.1 Installing a sufficient number of water user connections to supply a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month to farm occupiers and labour tenants residing within areas of their jurisdiction;

   2.2 Ensuring that the water user connections supply water at a minimum flow rate of not less than 10 litres per minute; and

   2.3 Ensuring that the water user connections supplied are within 200 metres of the farm occupier's households;

3. Directing the first, second and third respondents to provide farm occupiers and/or labour tenants with access to basic sanitation by:

   3.1 Installing Ventilation Improved Pit toilets per each household. (The VIP toilets should conform to SANS 10365-1: 2003 specifications);

4. Directing the first and second respondents to provide the farm occupiers and/or labour tenants with refuse collection services;

5. Directing the first, second and third respondents to ensure that the farm occupiers and labour tenants have access to basic municipal services, more specifically water, sanitation and refuse removal; and

6. Directing the first, second and third respondents to prioritise the rights of farm occupiers and labour tenants in their Integrated Development Plans.

(II) Structural Relief

7. Within six (6) months of the date of the order, the first, second and third respondents are directed to file the reports under oath and the plans with this court.

8. The reports shall identify all the farm occupiers and labour tenants who are residing within the areas of their jurisdiction.

9. For each farm occupier and labour tenants, indicate whether he/she has access to water, sanitation and collection of refuse.

   9.1 If he/she has access to water, sanitation and collection of refuse:

      (i) indicate the type of water source, type of sanitation and collection of refuse.

      (ii) indicate the quality and the quantity of water, sanitation and collection of refuse.

      (iii) indicate the distance from the water source, sanitation and collection of refuse, to each farm occupier and labour tenant's house.

   9.2 If he/she does not have access to water, indicate how long he/she does not have access to water, sanitation and collection of refuse.

10. The Plan shall:

   10.1 Explain the steps the first, second and third respondents will take in order to provide farm occupiers and labour tenants with access to water, sanitation and the collection of refuse.

10.2 Explain the steps and criterion the first, second and third respondents will take in order to ensure that all farm occupiers, labour tenants and farm owners within their jurisdiction are aware of this case.

10.3 Set measurable, periodic deadlines for progress.

11. The reports and the plans will be served on the applicants and be made available on the first, second and third respondents' website.

12. The applicants, and any other interested parties, will be entitled to comment on the reports and the plans within one (1) month of the date on which they are filed.

13. The first, second and third respondent will file to this court, and serve on the applicants, monthly reports indicating their progress with regard to provision of access to water, sanitation and the collection of refuse to farm occupiers and labour tenants living within the areas of their jurisdiction.

14. The applicants, and any other interested parties, will be entitled to comment on these monthly reports within thirty (30) days after the date on which they are filed.

15. The court may, at any stage and of its own accord, after having heard submission by the parties, make any further directions or orders it deems fit.

16. Thereafter, the matter is to be enrolled on a date to be fixed by the registrar in consultation with the presiding judge for consideration and determination of the aforesaid reports, plans, commentary and replies.

(III) Costs

17. The first and second respondents are directed to pay the costs of this application which costs shall include costs of two counsel.

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Mnguni J

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