

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN
SITTING AS AN EQUALITY COURT**

Case No. _____

In the matter between:

SOCIAL JUSTICE COALITION	First Applicant
THOBEKA EUNICE BOBOTYANA	Second Applicant
LINDELA BEBI	Third Applicant
NOSIPHELELE MSESIWE	Fourth Applicant
NOBATHEMBU SEPLANI	Fifth Applicant
NOLIZWE MANELI	Sixth Applicant

and

CITY OF CAPE TOWN	Respondent
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FOUNDING AFFIDAVIT

I, the undersigned,

PHUMEZA MLUNGWANA

hereby make oath and say:

- I live at L691 Gwabeni Crescent, Site B in Khayelitsha, Cape Town. I am the General Secretary of the Social Justice Coalition.

*MM
PM*

2. I am duly authorised by the Social Justice Coalition, the first applicant, to bring this application on its behalf. I attach (“PM1”) a resolution of the Executive Council of the Social Justice Coalition.
3. The facts stated herein are to the best of my knowledge and belief true and correct. They are within my personal knowledge unless the context indicates otherwise

INTRODUCTION

4. This is an application to compel the City of Cape Town (“the City”) to comply with its constitutional and statutory obligations, including under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”), to ensure that residents living in the informal settlements of Enkanini and CT Section in Khayelitsha, and in other informal settlements in Cape Town, are provided with equitable access to permanent sanitation facilities where this is reasonably practicable.
5. This application is instituted at the same time as an almost identical application to this Court (not sitting as an Equality Court), in which the applicants seek to compel the City to comply with its constitutional and statutory obligations other than those under the right to equality and the Equality Act. The applicants will seek to have the two applications heard at the same time.
6. Many of the informal settlements in Cape Town are not temporary in nature. The applicants contend that the City’s long-term use of temporary mechanisms such as chemical, container and portable flush toilets to provide

sanitation services to the residents of these informal settlements, without attempting to provide permanent sanitation facilities of an acceptable standard, is in breach of the City's constitutional and statutory obligations.

7. The applicants seek declaratory orders, and orders compelling the City to take reasonable steps towards bringing an end to the provision of sanitation services to residents of these areas by means of chemical, container and portable flush toilets, where this is reasonably practicable. The applicants also seek orders requiring the City to report to the Court and to the public regarding the measures it will take, and when and where it will take them.
8. In addition to their own affidavits, the applicants rely on the expert affidavits of Mr Conrad Barberton and Mr Christopher Jay Kruuse, which are attached to this affidavit as "PM2" and "PM3", respectively.
9. This founding affidavit is structured as follows:
 - 9.1. First, I describe the parties and the applicants' standing;
 - 9.2. Second, I describe the socio-economic context of informal settlements in Cape Town, and Khayelitsha in particular;
 - 9.3. Third, I describe the City's approach to the provision of sanitation services in informal settlements, and the types of sanitation facilities which it provides to the residents of informal settlement residents, both generally and in CT Section and Enkanini more specifically;
 - 9.4. Fourth, I set out the relevant constitutional and legislative framework;

- 9.5. Fifth, I submit that the City has failed to comply with its obligations to ensure that residents of its informal settlements have equitable access to decent, adequate and safe sanitation;
- 9.6. Sixth, I describe the Social Justice Coalition's campaign for "Clean and Safe Sanitation" and our efforts to engage with the City and its officials;
- 9.7. Finally, I address the relief sought in this application.

THE PARTIES

The Applicants

10. The first applicant is the **SOCIAL JUSTICE COALITION** ("the SJC").
11. The SJC is a Cape Town based community movement established in 2008 as a non-profit organisation. It is registered with the Department of Social Development as a non-profit organisation with registration number 067-689-NPO. A copy of the SJC's constitution is attached as "**PM4**". In terms of paragraph 2.1 of its constitution, the SJC has the capacity to sue and be sued in its own name.
12. The SJC is based at Isivivana Centre, Walter Sisulu Road, Khayelitsha.
13. The SJC is a democratic, membership-based social movement. It has approximately 2500 active members across its 14 branches, and over 80 partner organisations and many local, national and international supporters. The majority of its members are Black African working class and poor individuals, most of whom live in informal settlements in Khayelitsha.

14. The Executive Council is the highest decision making body of the SJC. It consists of elected Chairpersons and Deputy Chairpersons of each Branch, all of whom live in Khayelitsha, and the Secretariat. The Secretariat is made up of the elected office-bearers (the Chairperson, Deputy Chairperson, General Secretary, Deputy General Secretary, and Treasurer) and up to two additional persons who may be co-opted by the Executive Council.

15. The SJC's objectives, as set out in its constitution, are as follows:
 - 15.1. To organise people of all backgrounds to address crime, corruption, poor service delivery, unemployment, homelessness, ill-health, hate crimes, and unequal and poor education;
 - 15.2. To promote awareness of rights and the utilisation of these rights to hold government accountable;
 - 15.3. To build a grassroots movement which campaigns non-violently for government to design and implement policies that redress the imbalances of the past and reduce inequality and poverty;
 - 15.4. To build a movement of individuals united across the divisions of race, gender, class and nationality dedicated to building active citizenship;
 - 15.5. To uphold the rights in our Constitution that the courts have upheld since the advent of democracy in 1994;
 - 15.6. To use community organising, petitions, protest, education, litigation, partnership, media, parliament and the courts to advance the agenda of the SJC;

- 15.7. To campaign for improved access to basic services for everyone, particularly those living in poor and working class communities; and
- 15.8. To advocate for the delivery of services and infrastructure through meaningful engagement and cooperation between affected communities and government.
16. As a social movement, we are politically independent and open to members of all political parties. While we are critical of government, we recognise the need to work with government to achieve our objectives, and the importance of doing so.
17. The primary campaigns of the SJC are focused on:
- 17.1. The provision of safe, clean sanitation and water in informal settlements;
- 17.2. Building safe communities, free from violence and crime; and
- 17.3. Working for open, accountable, and ethical government based on the supremacy of the Constitution of the Republic of South Africa.
18. The second applicant is **THOBEKA EUNICE BOBOTYANA**. She resides at 744 LC Section, Enkanini, Khayelitsha. Her affidavit is attached as "**PM5**".
19. The third applicant is **LINDELA BEBI**. She resides at 441 SE Section, Zwe-Zwe, Enkanini, Khayelitsha, Cape Town. Her affidavit is attached as "**PM6**".
20. The fourth applicant is **NOSIPHELELE MSESIWE**. She resides at ST 545 Enkanini, Khayelitsha. Her affidavit is attached as "**PM7**".

21. The fifth applicant is **NOBATHEMBU SEPLANI**. She resides at CCT 61, Taiwan Avenue, CT Section, Khayelitsha. Her affidavit is attached as "**PM8**".
22. The sixth applicant is **NOLIZWE MANELI**. She resides at CCT 379, CT Section, Khayelitsha. Her affidavit is attached as "**PM9**".

The Respondent

23. The respondent is the **CITY OF CAPE TOWN**, a Category A Municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998, with its head office at the Civic Centre, 12 Hertzog Boulevard, Cape Town. The respondent is the local government authority with responsibility for the delivery of municipal services to its residents.

Standing

24. The applicants approach this Court in the following capacities:
 - 24.1. In terms of section 38(a) of the Constitution, acting in their own interests. The SJC acts in its own interest as an organisation which has, as one of its objectives, the improvement of access to basic services for everyone, particularly those living in poor and working class communities. The individual applicants act in their own interests as residents of the areas concerned;
 - 24.2. In terms of section 38(b) of the Constitution, on behalf of informal settlement residents living in the City who have been, and continue to be affected by a lack of access to adequate sanitation services, and who for lack of resources, their inability to access legal services,

or a lack of awareness of their constitutional and statutory rights, cannot individually bring these proceedings; and

24.3. In terms of section 38(d) of the Constitution, in the public interest.

INFORMAL SETTLEMENTS IN CAPE TOWN

25. Informal settlements are a long-term phenomenon in Cape Town generally, and specifically in Khayelitsha. They have their origin in an historic under-provision of housing for Africans in Cape Town, which led to residents creating their own housing. Overwhelmingly, the residents are black African people.
26. Informal settlements in Khayelitsha were established in response to this fact. The original plan for Khayelitsha was entirely inadequate to meet the need for housing, particularly after the repeal of the pass laws in 1986.
27. The 2011 Census reported that Khayelitsha's estimated population was just under 400 000 in 2011, and that the majority of households live in informal settlements, or informal structures in formal areas. The Census also reported that the median income of households in Khayelitsha was about R20 000 per annum, which is half that of households in Cape Town as a whole. This means that a substantial majority of people live below the poverty line and face food shortages or hunger every month.
28. Unemployment in Khayelitsha is structural, and less than half of the adult population is employed (including part-time, casual and informal employment). Youth have an unemployment rate of about 50%.

29. Residents' income is largely derived from sources which include employment including part-time work and casual labour; social assistance such as the child support and disability grants as well as old age pensions; and informal sector survival incomes. Employed people work largely in low-paid, semi-skilled jobs as shop assistants or cashiers. Unskilled work is concentrated in occupations such as domestic work or security guarding, at very low wages relative to the cost of living.
30. The 2001 and 2011 Population Census data for Cape Town imply a growth rate of just under 2% per annum between 2001 and 2011, making it possible and reasonable for the City of Cape Town to plan for the provision of adequate municipal services to Khayelitsha.
31. Whilst profoundly shaped by the legacy of apartheid-era urban planning, racial segregation and the enforcement of influx control, the character of Khayelitsha today reflects also post-apartheid urban policies to a greater extent than most apartheid-era townships. It is the product of post-apartheid policies in terms of housing, service provision and other socio-economic aspects. The positive developments in Khayelitsha are post-apartheid achievements, and conversely, the negative aspects of service delivery are post-apartheid failures.
32. Informal settlements have become for practical purposes the permanent form of housing for very many of Cape Town's and Khayelitsha's residents.
33. This is illustrated by the City's own statistics. According to the Informal Settlements Development Matrix of 2015, which is maintained by the City's Human Settlements Directorate ("the Matrix"), approximately two-thirds

(65.5%) of the City's informal settlements were established more than 15 years ago, with approximately 24% having been established more than 20 years ago. In Khayelitsha, approximately 83% of the informal settlement pockets are over 15 years old.

Enkanini and CT Section

34. According to the Matrix, Enkanini was established between 5 and 10 years ago, and CT Section was established more than 20 years ago. This is confirmed by the individual applicants, for example Ms Thobeka Bobotyana and Mrs Nolizwe Maneli, who have lived in Enkanini and CT respectively for 14 years.

SANITATION IN CAPE TOWN'S INFORMAL SETTLEMENTS

35. The City has an obligation to take reasonable measures to provide access to sanitation services to all residents within its jurisdiction, including residents living in informal settlements.
36. Pursuant to this obligation the City has, directly and through outsourced service providers, provided various types of toilet technologies to informal settlement residents. According to the City's Water and Sanitation Informal Settlements Unit Asset Register ("PM10"), by the end of the 2014/2015 financial year, the City had provided a total of 45 210 toilets to informal nt residents in Cape Town. The breakdown of the 45 210 toilets was as follows:
- 36.1. Full flush toilets – 14 001 (30,97%);

- 36.2. Chemical toilets – 5 899 (13,05%);
- 36.3. Container toilets – 6 199 (13,71%);
- 36.4. Portable flush toilets – 17 833 (39,44%);
- 36.5. 25L black buckets – 294 (0,65%);
- 36.6. Un-ventilated pitliners – 62 (0,14%);
- 36.7. Urine diversion (mobisan) – 14 (0,03%);
- 36.8. Pour flush toilets – 18 (0,04%);
- 36.9. Dehydration (enviroloo) 170 (0,38%);
- 36.10. Modified artisan toilets – 525 (1,16%);
- 36.11. Anaerobic toilets - 53 (0,12%); and
- 36.12. Ventilated pitliner – 142 (0,31%).

37. I now provide a brief description of chemical toilets, container toilets and portable flush toilets (“PFTs”), which are over 65% of the toilets provided to residents of informal settlements. I also describe the full flush toilet technology. Photographs of these toilet facilities in Khayelitsha’s informal settlements are annexed as “**PM11**”.

Chemical Toilets

38. The National Department of Human Settlements has described the chemical toilet technology as follows:

“A chemical toilet stores excreta in a holding tank that contains a

chemical mixture to prevent odours caused by bacterial action. The contents of the holding tank must be emptied periodically and conveyed to a sewage works for treatment and disposal. Some units have a flushing mechanism using some of the liquid in the holding tank to rinse the bowl after use. The chemical mixture usually contains a powerful perfume as well as a blue dye. The system can provide an instant solution and is particularly useful for sports events, construction sites or other temporary applications where the users are accustomed to the level of service provided by a waterborne sanitation system. The system can also be used where emergency sanitation for refugees is required, in which case it can give the planners the necessary breathing space to decide on the best permanent solution. It should not be considered as a permanent sanitation option.¹ (emphasis added)

39. The City has outsourced to private companies the provision of chemical toilets to informal settlements. These toilets are largely communal, and are shared by a variable number of households, depending on factors such as the area and placement of the chemical toilets, the condition of the toilets, and accessibility and availability of other sanitation facilities.
40. According to the Informal Settlements Unit Asset Register, chemical toilets were about 13% of the sanitation facilities provided to informal settlements by the City at the end of the 2014/2015 financial year. The number of municipally provided chemical toilets has increased. According to the City's

¹ Department of Human Settlements (2003) "Guideline for Human Settlements Planning and Design: Chapter 10 – Sanitation", page 10. Available at http://www.csir.co.za/Built_environment/RedBook/Vol_II/Chapter_010/Chapter_010_Vol_II.pdf.

data, 1049 had been provided by the end of 2006/2007, and 5 899 had been provided by the end of 2014/2015.

Container Toilets

41. A container toilet is a toilet without an outlet to soil or a sewer. Like chemical toilets, container toilets have high servicing and maintenance costs because of the frequent emptying required. Container toilets are also shared facilities. By the end of the 2014/2015 year, they were also just over 13% of the toilets provided by the City to informal settlements. The provision of this type of toilet has fluctuated over time, with a decrease from 7462 to 4223 between 2006 and 2012, and an increase to 6 199 by 2014/2015.

Portable Flush Toilets

42. Portable flush toilets (or PFTs), commonly known as “porta-potties”, are mobile non-permanent sanitation facilities. PFTs are largely utilised on a unit per household basis. PFTs consist of two detachable parts. The upper part is the seat, and the lower part is where the waste is stored. The toilet has a small lever that is pulled to flush. The waste is carried to the bottom section of the toilet. It is cleaned using chemicals. A typical PFT can hold 16 litres. Because of their size, the lower parts of PFTs need to be collected from informal settlements at least three times a week by an outsourced company, and cleaned at off-site locations.
43. According to the City’s Informal Settlement Unit Asset Register, the 17 833 PFTs provided to residents constituted 39,44% of the toilets delivered to informal settlements by the end of the 2014/2015. The number of PFTs

provided by the City has increased substantially from 520 units that had been provided by the end of 2006/2007.

Full Flush Toilets

44. The then Department of Water Affairs and Forestry described the full flush toilet technology as follows:

“Waste from the toilet is flushed, using between 6 and 13 litres of water per flush, into the sewer system for removal to a central treatment facility. A clean water seal is maintained in the toilet pan after each flush. Domestic wastewater is also drained into the sewers ... The operation of full or conventional waterborne sewerage requires a reliable and uninterrupted household water connection and spatially regular permanent settlements. Stringent design criteria must be applied throughout the sewerage network to ensure the uninterrupted flow of wastes to the treatment works. Skilled, organised and effective operation and maintenance capability is required for sewers and the full functioning of wastewater treatment facilities.”²

45. In the context of informal settlements “full-flush toilets” are largely communal toilets. According to City’s Informal Settlements Unit Asset Register, full flush toilets constituted approximately 30% of the toilets provided to informal settlement residents.

Lack of access to permanent sanitation facilities in informal settlements

46. According to the City’s Water and Sanitation Informal Settlement Unit Asset

² Department of Water and Forestry, “Sanitation Technology Options” page 24. Available At: <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110216sanitation.pdf>.

Registry, by the end of the 2014/2015 financial year, a substantial majority (66%) of the toilets provided by the City to residents of informal settlements, were by their nature temporary facilities - namely chemical toilets, container toilets and PFTs.

47. While the applicants acknowledge the challenges in the provision of sanitation services and facilities, we contend that the long-term provision of temporary technologies is detrimental to the full enjoyment of the right of access to sanitation in informal settlements.
48. The applicants contend that the City's provision of temporary, emergency service level facilities for use over extended periods in non-emergency settlements that are not subject to constraints which prohibit the installation of permanent infrastructure, has resulted in the provision of a service that falls short of the obligation to provide sanitation services.
49. Many of the municipally provided toilets, while they in theory provide residents with access to sanitation services, do not do this effectively or satisfactorily in practice because (particularly in the case of portable flush toilets and chemical toilets) they are not suitable for use; they pose health risks; and they are considered socially and culturally unacceptable and inappropriate by users.
50. The actual (as opposed to theoretical) situation is described in the affidavits of the individual applicants. For convenience I refer to some relevant parts of those affidavits here.
51. Mrs Nolizwe Maneli, the sixth applicant in this matter, lives in CT Section,

Khayelitsha. She has lived in CT Section since 2002. Mrs Maneli and her household have used a PFT since 2005. She states that PFTs are considered socially and culturally unacceptable and inappropriate by users:

"I do not feel good about using a PFT. In some ways, it is better to use the bush or the open space next to the N2. I feel like I do not belong in this country when I use this toilet. People from other areas are always shocked to see that we use this type of toilet. These toilets give us infections because of the chemicals that are used as well as the fact that the containers are rotated among so many people. The toilet itself is not in good condition - the lids are missing and there are leaks which attract flies. Sometimes, the toilet becomes full before the detachable part is collected. We carry the toilet to the collection area ourselves without gloves then go to the N2 to relieve ourselves until the toilets are returned. My children and others sometimes play with it and they get skin rashes, this is so prevalent in my community. My husband also feels that his dignity is diminished because he has to use the PFT like a child and that is frowned upon and is culturally unacceptable. The smell is also unbearable especially for people like myself who suffer from respiratory diseases.

There is no privacy when using the PFT. I have a makeshift structure for the PFT next to my home, however the material that I could afford does not provide for privacy.

I constantly worry for my children's health and safety. I also fear for my safety when I use the PFT at night. One can get shot or robbed while accessing a toilet at night. I have to ask my husband or children to accompany me at night.

There is no dignity in using these toilets. Everyone can see that I am poor or that I struggle as a woman when I use this toilet. I really do not want to use this toilet but, save for resorting to the bush, I do not have any other choice."

52. The fourth applicant in this matter, Ms Nosiphelele Msesiwe lives in Enkanini, Khayelitsha. She has lived in Enkanini since 2006. Ms Msesiwe and her minor son were provided with a PFT in 2008, and stopped using this toilet after three years because of sanitation- related illnesses that arise as a result of using PFTs and the humiliation of having to use this toilet in front of her young son. Today Ms Msesiwe and her son access a "Mshengu" chemical toilet. She expresses her dissatisfaction with the hygiene and acceptability of the chemical toilets:

"I am not happy with using the Mshengu toilet, but do not have another choice. It is used by many people but it is only cleaned twice a week. Since we do not have access to the chemicals that are needed to properly clean the toilets, we cannot clean the toilets ourselves. It is made out of plastic and does not have proper ventilation and therefore attracts a lot of flies. In my view, this toilet is unhygienic and unacceptable."

The attitude of the City

53. The City states that it cannot provide more permanent sanitation infrastructure in certain informal settlements because of various constraints which prevent this. The constraints include situations where informal settlements are located on privately owned land; are highly dense; or are situated on land that is under power lines, is in a road, road reserve or railway buffer, is in a flood plain, is outside the urban edge, is in an area with water bodies/retention ponds, or is in a high noise zone.
54. The applicants accept that there are such constraints. However, we contend that the City's statements and conduct demonstrate that it has not made any serious attempt to provide permanent sanitation facilities wherever this is possible. As I show below, the City has no plan to move from temporary, emergency and inadequate facilities toward equitable, sustainable sanitation facilities in informal settlements that are not temporary settlement areas and to provide permanent sanitation facilities in informal settlements where this is reasonably practicable.
55. On 27 May 2015, Councillor Sonnenberg (the Mayoral Committee Member for Utility Services) made a public commitment (on Cape Talk Radio) to release, within a week, evidence supporting his assertion that "up to 82% of informal settlements are either fully or partially affected by one or more of the above-mentioned constraints". On the basis of this assertion, Councillor Sonnenberg had said that "put simply, the City has already installed almost all the toilets and standpipes it is allowed to and can, meaning that large capital allocations for the forthcoming year are not necessary." A transcript

of his interview is attached as "PM12".

56. Councillor Sonnenberg's statement was consistent with what had previously been stated by Deputy Executive Mayor Ian Nielson as to why the City had not increased the capital budget allocation for informal settlements to provide for more permanent sanitation infrastructure, namely that "after careful consideration, we believe that the capital budget for informal settlement sanitation is sufficient for what can currently be achieved." His statement, published in a GroundUp article, is attached as "PM13".
57. The SJC expected that the information Councillor Sonnenberg released in terms of his undertaking would list all informal settlements and state the constraints preventing the City from installing more permanent sanitation infrastructure in each settlement. However, on 19 June 2015 Councillor Sonnenberg simply provided the SJC with a list of 156 informal settlements that are "to some degree, encumbered by at least one constraint (not including high density) that prevents the City from being able to install permanent sanitation infrastructure on the land at this point in time". The list includes CT Section and Enkanini. It does not identify either the specific constraints in relation to each informal settlement, or the extent to which each settlement is affected by such constraint.
58. It appears that the Councillor's approach is to identify one or more constraint in an area, and then contend that this prevents the City from installing permanent sanitation infrastructure anywhere in the area. The SJC contends that this approach is plainly flawed.
59. The SJC acknowledges the presence of constraints in certain informal

settlements, and that they can pose real serious challenges to the installation of permanent sanitation facilities. However, a “blanket” approach does not answer the question whether a constraint affects 7% of an area, or 70% of the area. A “blanket” approach also does not identify the nature of the constraint – in particular, whether it is a practical, environmental, legal or cost constraint, and whether it is surmountable.

60. The City’s data shows that by the end of the 2014/2015 financial year, 1 1537 full flush toilets had been installed in areas that were identified by Councillor Sonnenberg as having one or more constraints. This demonstrates that the mere existence of a constraint in an area does not necessarily make it impractical to install full flush toilets at all.
61. A brief analysis of CT Section and Enkanini exposes the flaw and inconsistency in a “blanket” approach.
62. CT Section was established approximately 20 years ago. The settlement is part of Ward 18 and includes Mxolisi Phetani and Thembokwezi. It is 26,433 hectares and has a structure count of 4759 households. The population estimate in this settlement was 17608 in 2011, with an average household size of 3.7. According to the City’s data, 8.5% of CT Section is constrained: 7.5% of the settlement is located in a flood plain, and 1% on a metro roads buffer. The City has categorised the area as “B2”, meaning that it is located on provincial or nationally owned land, that it can be upgraded, and that relocations are not required. About 90% of CT Section is not affected by a constraint preventing the installation of more permanent infrastructure.
63. Enkanini was established just over 10 years ago and is part of Ward 109.

The pockets of informal settlement in Enkanini include 37B Section Chris Hani, Newlands, Zweledinga, Lower Chris Hani, Stand(ini), Suka Section, Sgingqini, Arc Section, Zwelitsha Temporary and Zwelitsha Upgraded. The City's Matrix records Enkanini as being 81,597 hectares with a structure count of 7963. The average household size of this ward, as per the 2011 Census data is 4.26 with a population estimate of 33 922 residents. Less than 10% of Enkanini is constrained – 2% of the settlement is located on a metro road buffer and 7.7% of the settlement is on a railway buffer. The City has categorised Enkanini as "A2" and it is, according to the City, suitable for upgrading. Enkanini is categorised in the City's Built Environment Performance Plan, 2015 / 2016 as a potential site for upgrading.

64. Maps depicting Enkanini and CT Section are attached as "**PM14**" and "**PM15**", respectively.
65. These settlements do not appear on Councillor Sonnenberg's list of settlements affected by high density. This list of settlements, "**PM16**", was provided by Councillor Sonnenberg to the SJC on 19 June 2015.
66. Despite these facts:
 - 66.1. These settlements are largely serviced by temporary toilet technologies. In the third quarter of 2015, 25% of the toilets provided in CT Section were permanent full flush toilets and 75% were temporary toilets (chemical, container and PFTs); and

66.2. The installation and/or co-ordination of technologies by the City is not done in terms of a plan to provide permanent sanitation infrastructure toilets in these informal settlements or any part of them.

67. I have noted that more recently, on 15 May 2016, Councillor Sonnenberg stated in an article that the continued use of temporary sanitation options is due to residents' lack of co-operation in the installation of more permanent services: "In the absence of this necessary cooperation, the City has had to make alternative plans such as relying on hired Mshengu chemical toilets and portable flush toilets." Councillor Sonnenberg's article is attached as "PM17". We accept that there may be instances in which residents have been unwilling (for example) to move from their homes in order to facilitate the provision of permanent sanitation facilities. But it is inconceivable that all residents of all informal settlements would take such a position. Residents of informal settlements are no different from other people: They act in accordance with what they understand to be their best interests. Where it is shown (through a proper process of information-sharing and consultation) that a move would serve their best interests, people will generally agree to this.

Cost implications of the City's approach

68. The cost implications of the continued roll-out of temporary as opposed to permanent solutions are analysed by Conrad Barberton in his affidavit.

69. He demonstrates, using a variety of scenarios:

- 69.1. Over a ten-year period, the full-flush toilet solution is substantially more affordable than any of the other toilet solutions;
 - 69.2. The portable flush toilets provided on a 1:1 household ratio are the most expensive option over the ten-year period;
 - 69.3. Even when constraints to installing full-flush sanitation options are present, chemical toilets and PFTs are still the most expensive form of sanitation delivery;
 - 69.4. In the CT Section and Enkanini areas of Khayelitsha specifically, providing temporary toilet services is the most expensive way to deliver sanitation options over the next 5-10 years. This finding applies across all cost estimates that take into account a range of desirable household to toilet ratios and after taking into account the cost associated with various constraints to rolling out sanitation services in these areas;
 - 69.5. In both CT Section and Enkanini the costing scenarios indicate that the City could realise cost savings over the medium term if it were to roll-out full-flush toilets more rapidly. This is driven by the fact that the City would be replacing expensive chemical toilets and PFTs with lower cost full-flush toilets; and
 - 69.6. Based on the City's information relating to constraints, constraint factors do not represent insurmountable obstacles to the rollout of full-flush toilets in either CT Section or Enkanini.
70. For reasons which I set out below, I submit that the failure to provide long

term infrastructure in settlements (such as CT Section and Enkanini) which on the City's records are not substantially constrained, is in breach of the City's obligations under the Local Government: Municipal Systems Act ("the Systems Act). Further, it is not based on a reasonable policy or plan.

71. As I explain below, the City in fact has no plan to make provision for such areas. I submit that the failure to make a reasonable plan; to make the plan available to residents so that they can comment and know what they can reasonably expect, and when they can expect it; and to implement such a plan, is itself unlawful. It is in breach of the City's obligations in terms of sections 16, 17, 73(1) and (2) of the Systems Act.

THE LEGAL FRAMEWORK FOR THE CITY'S OBLIGATIONS

72. I submit that while the right to decent and effective sanitation is not explicitly referred to in the Constitution, it intersects with, or is directly or indirectly implied by, a number of rights in the Bill of Rights.
73. The City has a duty to act positively to respect, protect, promote and fulfil the rights contained in Bill of Rights in terms of section 7(2) of the Constitution. This is more than a negative obligation not to do anything that would infringe or restrict the enjoyment of rights in the Bill of Rights. In the context of the issues raised in this case, section 7(2) places a positive duty on the City to take reasonable, deliberate and effective steps to give effect to the fundamental constitutional rights which are implicated. The City has a duty under section 237 of the Constitution to perform its constitutional obligations diligently and without delay.

74. I submit that the denial of access to adequate sanitation to residents of informal settlements constitutes unfair discrimination in breach of section 9 of the Constitution and the Equality Act, specifically on the grounds of race, socio-economic status, and geographic location.

Racial discrimination

75. The vast majority of temporary technologies (including chemical and bucket toilets) are in informal settlements with populations that are overwhelmingly Black African. This is borne out by the 2011 Census Data, which reported that the residents living in Cape Town's informal settlements (and not as backyarders) who stated that these toilets were their primary sanitation facility were overwhelmingly Black African (84.4%).

76. More specifically, the Census Data also reported that residents living in informal settlements in CT Section and in Enkanini, are predominately Black African (99% and 91%, respectively).

77. The City provides sanitation services to the overwhelmingly Black African residents of Enkanini and CT Section, and informal settlements generally, which are inferior to the services provided to persons of other racial groups.

78. The City denies access to equitable, decent, adequate and safe sanitation services to the residents of informal settlements on the grounds of race, and fails to take steps to reasonably and equitably accommodate the needs of those persons for decent, adequate and safe sanitation services.

79. I submit that any programme or practice that disproportionately and adversely violates the right of a racial group to access services, or has that

effect, is an unacceptable perpetuation of apartheid patterns of racial inequality, and constitutes discrimination (whether direct or indirect) on the basis of race, which is presumptively unfair discrimination.

Discrimination on grounds of socio-economic condition and geographic location

80. Residents of informal settlements are poor people, many of whom live under conditions of extreme poverty. The affidavits of the individual applicants describe these conditions.
81. The City provides inferior sanitation services to the residents on the basis of their socio-economic status and location. This causes and perpetuates systemic disadvantage, undermines their human dignity, and adversely affects their equal enjoyment of rights in a serious manner;
82. It is well known and in fact trite that poverty in South Africa (including Cape Town) is racially distributed. In these circumstances, discrimination on the grounds of poverty inevitably leads also to indirect discrimination on the grounds of race.
83. Black African people living in conditions of poverty are disproportionately subjected to the denial of the right of access to decent and effective sanitation.
84. I submit that the disparity in the delivery and quality of sanitation services and facilities, particularly through the delivery of temporary services, violates the right of people living in informal settlements to substantive equality in terms of sections 9(1) and 9(2) of the Constitution, and to the elimination of

unfair discrimination based on race, socio-economic status and geographic location in terms of section 9(3) of the Constitution and the Equality Act.

85. At the heart of this systemic discrimination is the City's failure to adopt a reasonable policy, make a reasonable plan, provide a reasonable budget, and implement a reasonable programme to provide permanent sanitation facilities in informal settlements where this is reasonably practicable.
86. This unequal treatment impacts directly on a number of fundamental rights.
87. Section 10 of the Constitution provides that "*everyone has inherent dignity and the right to have their dignity respected and protected.*" I submit that the delivery of inadequate sanitation services directly impacts on the right to dignity. Access to decent and adequate and safe sanitation is one of the most basic requirements for a dignified life. Being forced to use unhygienic, unsafe, inadequate and temporary toilet facilities on a long-term basis, impairs one's dignity. This is demonstrated by the affidavits of the individual applicants.
88. Direct or indirect unfair discrimination based on race and socio-economic status, has a direct impact on human dignity. When unfair discrimination takes place on a long-term basis, such as through the failure by the City to provide adequate services to an overwhelmingly poor and working-class African racial group, this is a long term and institutionalised violation of the right of that racial group and class to decent and effective sanitation services.
89. Section 12(1)(e) of the Constitution provides that "everyone has the right to freedom and security of the person, which includes the right not be treated or

punished in a cruel, inhuman or degrading way.” Section 12(2) states that “everyone has the right to bodily and psychological integrity,” which includes the right to security in, and control over, their body.

90. The rights in section 12 and the right to sanitation are related, in that the absence of access to safe and healthy sanitation has a profound impact on one’s physical security and integrity. Particularly in informal settlements, where communal toilets are located at distant or inaccessible places, it makes residents more vulnerable to crime.
91. This is acknowledged by the City in its own Social Development Strategy, where the City recognises the relationship between crime, safety and the vulnerability of people living in informal, dense areas such as Khayelitsha. In this Strategy, the City identified the placement of communal toilets as an important aspect of its situational crime prevention strategy:

“People with low incomes often live in high densities on the periphery of the City in areas, which are vulnerable to flooding, fire and disease. These areas are often crime-ridden and, hence, more resources need to be allocated to these areas to make them safer, cleaner and prevent fires, flooding and disasters ... The causes of crime are complex and multifaceted. Traditional policing and law enforcement cannot solve these problems alone ... The placement of communal toilets, water pipes and other utilities will be cognisant of the need to prevent opportunities for crime.”³

92. Section 14 of the Constitution states that “everyone has the right to privacy”.

³ City of Cape Town, (2012) “Social Development Strategy”, pages 13 – 14. Available at <https://www.capetown.gov.za/en/IDP/Documents/SocialDevelopmentStrategy.pdf>.

It is inconsistent with the right to privacy to be required to relieve oneself in a bush or other public space because of a lack of access to private sanitation facilities.

93. Section 24 of the Constitution provides that “everyone has a right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation.” This implies a right to effective sanitation, as access to decent and effective sanitation is necessary to secure an environment that is not harmful to human health or well-being. This is recognised in the Preamble to the Water Services Act 107 of 1997 (“the Water Services Act”), to which I refer below.
94. Section 27(1)(b) of the Constitution provides that “everyone has the right to have access to sufficient water.” Section 27(2) obliges the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of everyone’s right of access to sufficient water.
95. I submit that the right of access to sufficient water is necessarily and inextricably related to the right of access to sanitation services, particularly with regard to the hygiene, disposal and purification of human excreta, waste-water and sewage components of sanitation.
96. I recognise that it has not been possible to provide access to decent and adequate and safe sanitation services overnight. For that reason, the Water Services Act has created an immediate standard of “basic sanitation” which

must be provided to all. However, I submit that the City's obligations under the Constitution and under the applicable statutes do not stop there. The City is obliged to take reasonable measures to give full effect to the rights in the Constitution.

97. I submit that the impact on fundamental rights of a lack of access to decent and adequate and safe sanitation places a duty on the City, in terms of section 7(2) of the Constitution, to adopt concrete and effective mechanisms to ensure that the residents of Cape Town, including those who live in informal settlements, have access to decent and adequate and safe sanitation.
98. I submit further that the temporary measures adopted by the City do not constitute decent and adequate and safe sanitation, and certainly not when they are provided on a long-term (and, for practical purposes, permanent) basis.
99. Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court must consider international law. I am advised that the content of the rights and obligations in the Bill of Rights is informed by both binding and non-binding provisions of international law.
100. Article 11 of the International Covenant on Economic, Social and Cultural Rights ("ICESR") establishes the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions." The ICESR came into force in South Africa on 12 April 2015 after it was ratified on 12 January 2015.

101. On 28 July 2010, the United Nations (“UN”) General Assembly adopted resolution 64/292 declaring “the right to safe and clean drinking water and sanitation as a human right that is essential to the realisation of all human rights.” South Africa voted in favour of this resolution.

102. In September 2010, the UN Human Rights Council reaffirmed this with resolution 15/9, confirming the right to water and sanitation as legally binding in international law, and affirmed that:

“[T]he human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”

103. The UN Human Rights Council further calls upon States:

“(a) To develop appropriate tools and mechanisms, which may encompass legislation, comprehensive plans and strategies for the sector, including financial ones, to achieve progressively the full realization of human rights obligations related to access to safe drinking water and sanitation, including in currently unserved and underserved areas; and

(b) To ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein.”

104. I submit that this supports the proposition that the right to decent and

adequate and safe sanitation must be understood as a fundamental human right.

105. The reasonable steps that are required to comply with the obligations in section 7(2) of the Constitution should be determined, in part, by international law. They require the development of appropriate tools and mechanisms, including comprehensive and detailed plans aimed at the progressive realisation of this right.
106. The City must have regard to this constitutional and human rights framework in the planning and implementation of processes required for the realisation of the right to sanitation.

The Water Services Act

107. The Water Services Act establishes the right to sanitation, and governs accessibility and the provision of water services by local government.
108. The Preamble to the Act recognises that “there is a duty on all spheres of Government to ensure that water supply services and sanitation services are provided in a manner which is efficient, equitable and sustainable” and that “although municipalities have authority to administer water supply services and sanitation services, all spheres of Government have a duty, within the limits of physical and financial feasibility, to work towards this object.”
109. The right to basic sanitation is set out in section 3 of the Act. It provides that:
- “(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."*

110. "Basic sanitation" is defined in the Water Services Act as:

"[T]he 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." (emphasis added)

111. "Sanitation services" are defined in the Act as:

"[T]he collection, removal, disposal or purification of human excreta, domestic wastewater, sewage and effluent resulting from the use of water for commercial purposes."

112. I am advised that the City is both a "water services authority" and a "water services institution" for the purposes of the Water Services Act.

113. The prescribed minimum standards for basic sanitation services are contained in regulation 2 of the Compulsory National Standards, made in terms of section 9 of the Act. The minimum standard for basic sanitation services is:

"(a) the provision of appropriate 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.”

114. Sections 12 and 13 of the Water Services Act place a duty on water service authorities to prepare and maintain a Water Services Development Plan .
115. A Water Services Development Plan must include a timeframe for the implementation of the plan, including an implementation programme for the next five years; the number and location of persons within the area of jurisdiction that are not being provided with a basic water service and basic sanitation; the number and location of persons that cannot be supplied with water in the next five years, the reasons for that, and a timeframe for when they can reasonably be expected to be provided with water and sanitation.
116. The City’s WSDP for 2012/13 – 2016/17⁴ does not contain a plan for the provision by the City of permanent sanitation infrastructure to the informal settlements of Khayelitsha.
117. The sanitation facilities provided by the City to residents of informal settlements in Khayelitsha fall far short of the standard of decent and adequate and safe sanitation. This is demonstrated by the affidavits of the individual applicants.

The City’s obligations

118. In terms of section 156 read with Part B of Schedule 4 of the Constitution, the City has the right to administer, and is responsible for “water and

⁴ The Water Services Development Plan for the City of Cape Town 2012/13 – 2016/17, 2014/2014 Review (Overview Plan), page 22. Available at http://www.capetown.gov.za/en/Water/Documents/WSDP_201415%20Review_%2020140214_Final%20Signed.pdf.

sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems” in its area of jurisdiction.

119. The City’s duty to provide municipal services is recognised in sections 152 and 153 of the Constitution read with the Systems Act.

120. In terms of section 152(1) of the Constitution, the objects of local government are to:

“(a) provide democratic and accountable government for local communities;

(b) ensure the provision of services to communities in a sustainable manner;

(c) promote social and economic development;

(d) promote a safe and healthy environment; and

(e) encourage the involvement of communities and community organisations in the matters of local government.”

121. Section 153(a) of the Constitution places an obligation on the City as a municipality to:

“[S]tructure 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.”

122. The Municipal Systems Act seeks to “provide for the core principles, mechanisms and processes that are necessary to enable municipalities to

move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all.”

123. The Municipal Systems Act defines a basic municipal service 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”. This necessarily includes sanitation services.

124. Section 73 of the Municipal Systems Act places the following obligations on municipalities in respect of basic municipal services:

“(1) A municipality must give effect to the provisions of the Constitution and:

(a) give priority to the basic needs of the local community;

(b) promote the development 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.

“(2) Municipal services must:

(a) be equitable and accessible;

(b) be provided in a manner that is conducive to:

(i) the prudent, economic, efficient and effective use of available resources; and

(ii) the improvement of standards of quality over time;

(iii) be financially sustainable;

(iv) be environmentally sustainable; and

(v) be regularly reviewed with a view to upgrading, extension and improvement.”

125. I submit that the municipal services referred to in section 73(1)(c) include sanitation and toilet services. Such services must be compliant with the fundamental rights guaranteed in the Constitution. Most fundamentally, they must be provided in a manner which is consistent with the right to equality under the Constitution and under the Equality Act.

THE CITY HAS FAILED TO MEET ITS OBLIGATIONS

126. The applicants challenge the City’s continued provision of sanitation services through emergency and temporary toilet technologies to informal settlement residents who are required to use them over extended periods.

127. The continued provision of temporary solutions on a long-term basis reflects a service that is not based on a reasonable long-term plan or policy to improve access to decent, adequate and safe sanitation in areas with long-term or permanent informal settlements, including CT Section and Enkanini, that are only partially constrained.

128. The City treats CT Section, Enkanini, and many other settlements as if they are temporary or emergency settlements, by making ‘emergency’ provision for them, despite evidence that a substantial portion of these affected areas

are not affected by constraints that limit or prohibit the provision of permanent sanitation infrastructure.

129. I submit that the provision of temporary technologies over extended periods is impermissible where these facilities are used in non-emergency places of long-term or permanent residence, and alternatives are reasonably practicable.

130. I submit that in order for the City's provision of sanitation services to meet the requirements of the Constitution and the Systems Act, it must include each of the following elements:

130.1. A reasonable policy for the provision of sanitation services, which must include the provision of permanent sanitation services to the residents of long-term informal settlements where this is reasonably practicable;

130.2. A reasonable plan or programme for the provision of services;

130.3. A reasonable budget for the provision of such services; and

130.4. The reasonable implementation of the plan.

131. I submit that the City has not met any of these requirements.

The policy

132. The WSDP is the City's guiding policy document for its provision of water and sanitation services to residents. In terms of the latest review of the WSDP (2015/2016), the City's strategy is to provide an improved level of service above the National Standard. The priority is to first provide an

emergency service level to all settlements:

“The City subscribes to “the water ladder” concept (as proposed in DWS’s “Strategic Framework for Water Services, September 2003”). Whereas the City’s priority is to first provide an emergency level of service to households in all settlements a[s] per “the water ladder” concept, it is also extending the coverage and density of services in each settlement beyond the basic level as funds allow.”

133. There is however a critical gap in the City’s policy in relation to the long-term provision of sanitation facilities in informal settlements. While the Water and Sanitation Department recognises the need to increase coverage and density of services beyond the basic level, and the desirability of an “improved service level”, the WSDP:

133.1. does not indicate how and when this is to be achieved;

133.2. does not say what “improved service level” is the goal of the policy in relation to Cape Town’s informal settlements, which accommodate 20% of the City’s households, including very many of those who are most in need;

133.3. contains no criteria at all for determining where permanent sanitation facilities will be provided in informal settlements;

133.4. contains no criteria at all for determining when this will be done;

133.5. does not state in terms that the policy is to provide such services to the residents of long-term informal settlements where this is reasonably practicable.

134. I submit that this is not a reasonable policy of the kind required by the Constitution and the Systems Act.
135. It appears that part of the basis for the decision to provide temporary toilets is that informal settlements are regarded as temporary urban features. A report from the Water Dialogues⁵ describes the City's position in 1997/8 as follows:
- "The decision to outsource dates back to 1997/1998, and was recommended by an engineer, Mr B. Wood (currently Manager: Catchment, Stormwater and River Management). One of the main reasons for the decision to outsource was the political instability within the townships at the time, which made it unsafe for council workers to go into the townships. **Secondly, there was a prevailing perception at the time that informal settlements were a temporary urban feature, as they would soon be replaced by formal housing. It thus did not make sense to invest in significant internal infrastructure.** The decision to outsource was ratified by Engineering Services Committee (See Appendix B)." [Emphasis added.]*
136. As I have stated, approximately 83% of the informal settlement pockets in Khayelitsha have been in existence for more than 15 years. Whilst the conditions under which people live in informal settlements require urgent attention, they cannot be described as temporary or emergency situations requiring emergency assistance in the form of temporary toilets.

⁵ In 2009, the Water Dialogues-South Africa (led by a Working Group consisting of members from organisations representative of the South African water sector, including national and local government, the private sector, civil society, trade unions, water boards, and academic/ research organisations) developed a case study investigating variations of the "bucket toilet"- namely the black bucket, container toilets, chemical toilets and Porta-Potti's. The full report "*The Water Dialogues, Cape Town Case Study*" is available at <http://www.waterdialogues.org/south-africa/documents/CapeTownCaseStudy-FullReport.pdf>.

A plan

137. The City is quite explicit that it has no plan and will make no plan for the provision of sanitation services to the residents of informal settlements, and in particular the provision of permanent facilities to the residents of long-term settlements.

138. Councillor Sonnenberg stated on 6 January 2016 that the City does not plan and will not plan for informal settlements beyond the current financial year:

“Due to the informality of the environment in which Water and Sanitation provides such services, a plan beyond the current financial year would be detrimental to service delivery as it would prevent the necessary flexibility, adaptability and identification of opportunity required. The plan, broadly speaking is to continually improve on the provision as far as possible for both installation and maintenance and constantly look at new and innovative ways of doing so.” **PM18**

139. This statement was made in response to the SJC’s demand for the “development of a plan for sanitation delivery in Cape Town’s informal settlements, with provisions for the monitoring and maintenance of existing facilities as well as the delivery of new services” following the SJC’s social audit on janitorial services in Khayelitsha in 2014.

140. In a meeting with Deputy Mayor Neilson on 2 December 2015, the SJC requested the City’s plan for long-term sanitation in informal settlements in Cape Town. The Deputy Mayor undertook to provide this by 11 December 2015. During January and February 2016, the SJC wrote twice to him, asking him to honour his commitment to provide this plan. He did not do so.

141. In a meeting with the Deputy Mayor on 22 April 2016, the SJC again

requested the plan. The Deputy Mayor failed to directly respond to this request and stated that the City was prevented from installing long-term sanitation in informal settlements due to the constraints to which I have referred above. I attach the minutes of that meeting as “**PM19**”.

142. In addressing the SJC’s submission on the 2015/2016 municipal budget in April 2015, the City’s Water and Sanitation Department stated that “unfortunately a long term strategy” for sanitation and water installations in informal settlements “is not possible” “**PM20**”.
143. I submit that the City’s refusal to plan beyond a current financial year is unreasonable and in violation of its constitutional and statutory obligations.
144. The SJC accepts that there are situations where an emergency service level is necessary, and that temporary facilities are suitable interim sanitation options in such conditions. However, the use of temporary technologies over extended periods, in what have become long-term places of residence, coupled with the absence of a plan as to how and when this service level is to be improved, has the result that the City’s approach of continuing to address historic backlogs with *emergency* services falls short of the obligation to provide decent and adequate and safe sanitation services, including to residents living in informal settlements.
145. Enkanini and CT Section, and many other informal settlements, have become permanent places of residence. Emergency services, guidelines and responses such as those contained in the Emergency Housing Programme are not applicable to them.

146. The “National Sanitation Strategy: Accelerating Sanitation Sector Delivery” of 2005 addresses the use of emergency sanitation programmes in long-term informal settlements, and warns against this:

“Emergency sanitation[s] programmes should be limited to very short term interventions that last a few days to a few weeks. Long term informal settlements must not be treated as emergency situations for the purpose of this strategy but should be provided with viable and sustainable solutions. Solutions such as communal facilities and chemical toilets should not be used where the system is expected to have a duration of more than one month.”

147. The use of emergency service level toilet technologies in non-emergency long-term informal settlements cannot be regarded as a reasonable measure in achieving the right of access to sanitation. Yet the City has no plan, and refuses to plan, to move from temporary, emergency and inadequate sanitation facilities toward permanent sanitation services in informal settlements.
148. The inadequacy of temporary or emergency services is described in the affidavits of the individual applicants.
149. I do not repeat here what each of them says. But for example, the third applicant, Ms Lindela Bebi - a 46 year-old mother of three minor children living in Enkanini - describes problems that have arisen as a result of using the same Portable Flush Toilet since 2002.

“When I was provided with a PFT in 2002, it came with a seat. The

detachable bottle, that is collected to be emptied, is attached to the seat. I still use the same seat that I was given in 2002 when I first received a PFT. This toilet seat is old and damaged because we have been using the same one for almost 13 years. The seat no longer has a lid. I am not able to secure it to the ground anymore because those attachments have broken. When the children and I try to sit down, the toilet shifts around and the contents leak and spill all over the ground. The shelter that I built to store the PFT is filled with maggots, flies and mosquitos because of the smell and waste from the leaking PFT.

I feel very bad about having to stay where I am, and living the way we do. When I first received a portable flush toilet in 2002, I was told that these types of toilets would be temporary and that I would only have to use it for three months. I have been using these portable flush toilets for almost 13 years now.”

150. I submit that any view that long-term informal settlements are “temporary”, and that the provision of services can be dealt with on this premise, is plainly unacceptable. Residents have been living in these settlements often for decades. Many children and young adults have lived all of their lives in these areas, and will continue to do so for the foreseeable future. The City is obliged to treat these settlements as permanent places of residence, and do whatever it reasonably can to provide the residents with permanent and proper services. The City has no plan to do so.

Budget

151. In order for permanent sanitation services to be provided, capital expenditure

has to be incurred for the provision of the necessary infrastructure.

152. An analysis of the City's budget for informal settlements shows that while it incurs significant current expenditure in paying external service providers of the temporary sanitation facilities which I have described, capital allocations for the provision of permanent infrastructure are extremely low.

153. In this regard, the applicants rely on the attached affidavit of Mr Kruuse which analyses of the City's budget. He shows that:

153.1. The 236,368 informal households constitute 20.08% of the City's estimated 1,134,925 total households in 2016/2017;

153.2. Direct capital allocations for sanitation to informal settlements are extremely low. The City's total capital allocation for water and sanitation in both formal and informal areas is R1,683,998,813 for the 2016/2017 financial year. Of this amount, R15 million, (representing less than 1%) has been allocated for informal settlement sanitation installations across the City;

153.3. The capital allocations for sanitation to informal settlements have decreased year on year, despite a steady increase in the Water and Sanitation Department's total capital budget over the same period; and

153.4. Given that 66% of the types of toilets provided by the City to informal settlement households, are temporary facilities (i.e. chemical toilets, container toilets and portable flush toilets), the users do not benefit from the City's bulk infrastructure projects.

154. I recognise that some of the capital allocations which are not directly allocated to informal settlements, will benefit some of the minority of residents of informal settlements who have access to full flush toilets.
155. I submit that what cannot be disputed, however, is that the City's budget and expenditure demonstrate that the City not only has no plan to provide permanent sanitation facilities in existing informal settlements, but also does not budget the funds which would be necessary in order to do this on any significant scale. The City does not provide a reasonable budget of the kind which would make it possible to implement a reasonable plan.

Implementation of a plan

156. I submit that even if it could somehow be found that the City has a reasonable plan, there is no reasonable implementation of any plan to provide permanent sanitation facilities in informal settlements.

Conclusion

157. The challenges in the provision of sanitation facilities in informal areas, coupled with the need for these facilities and the dire consequences of not having functional and safe toilets in informal areas, require the formulation and implementation of a strategic plan. Such a plan is necessary to move towards ensuring the progressive realisation of the right to sanitation for informal settlement residents, many of whom have lived in informal areas for extended periods, and will continue to do so for the foreseeable future.
158. The adoption and implementation of a reasonable long-term plan for sanitation delivery in informal areas is critical in ensuring that people have access to

sanitation that promotes dignity, and does not compromise safety, health and environmental well-being.

159. I submit that the City has a duty to plan and implement the provision of long-term or permanent services in informal settlements where this is feasible – and to do so in a manner which gives effect to the right to equality.
160. I submit that the City is in breach of its constitutional and statutory duties in this regard.

THE SJC'S ENGAGEMENT WITH THE CITY

161. The SJC has campaigned since 2010 for clean and safe sanitation and other basic municipal services that promote human dignity, freedom and security of the person, privacy, health, the best interests of children and equality. Research, education, advocacy, engaging organs of state, and activism have formed the foundation of our work in the SJC's "Clean and Safe Sanitation Campaign".
162. The SJC has repeatedly raised with the City its failure to plan and provide adequately for informal settlements, and the issues associated with the use of temporary technologies on a long term basis.
163. I do not recount this history in detail, but summarise it in order to demonstrate that the SJC has attempted over an extended period to engage the City in this regard.
164. As early as 2010, the SJC attempted to engage the City on the issue of sanitation in Cape Town's informal settlements. The City's main response

was deflection: "It is also not fair to single out Cape Town for a national protest by the SJC when Cape Town is performing better than other metros." This statement was made following the SJC's first public toilet queue for "Sanitation, Safety and Dignity" on Global Water Day, 20 March 2010. The City publicly criticised the toilet queue in a media release.

165. When the SJC continued to raise the issue, the City referred to 100% universal sanitation access in the City of Cape Town, and denied the extent of a sanitation crisis in certain areas and the lived experiences of residents. In Councillor Sonnenberg's media article of 1 October 2014 he wrote: *"Does the SJC recognise that the City has invested heavily in expanding access to decent sanitation, which sees Cape Town having 100% access, while most other cities have thousands of residents with no access to any sanitation at all?"* He said: *"The City of Cape Town is the only metro where residents have universal access to safe and reliable drinking water and where there is adequate sanitation in informal settlements."*
166. Following the results of social audits conducted by the SJC on the chemical toilets (provided by outsourced service provider, Imvusa Trading 700 CC, trading as Mshengu Services), the Mayor's office and Councillor Sonnenberg criticised the SJC's campaigns and stated that the SJC "grandstand" in order to "attract funding". The Mayor's former Chief of Staff demanded to know who SJC's funders are.
167. In August 2015, contrary to its previous practice, the City's Utility Services Directorate declined to attend or participate in a public hearing organised by the SJC following a community-led social audit concerning, *inter alia*, the

- provision of chemical toilets in Green Point, Khayelitsha.
168. In 2015, in trying to participate in the City's budget participation process, the SJC assisted residents to make submissions and brought further concrete evidence to the City's attention in regard to its prioritisation of temporary services and lack of planning for long-term sanitation.
169. On 22 April 2015, with assistance from the SJC, 502 residents of Khayelitsha, mostly from informal settlements, made written submissions on the City's draft budget for 2015/16. Many of the submissions addressed residents' daily personal experiences of using temporary sanitation services, and made proposals for improving the sanitation situation in informal settlements.
170. When the final budget is tabled in Council, it includes a report on public comments. The 2015-16 participation report listed 134 submissions from other parts of Cape Town that came from the public. All of these received individual responses from the City, as is required.
171. However, the 502 submissions made by Khayelitsha residents were not responded to in this manner. Instead, they were clustered as 'Category K' and labelled a 'focus group'. In fact, no such focus group with 502 residents took place. The individual submissions were thus misrepresented. Because they were misrepresented, they were not considered by Council and were effectively silenced.
172. After six months of attempts by the SJC to engage the City on the ignoring of the submissions, Deputy Mayor Ian Neilson agreed to meet the SJC on 2 December 2015. In that meeting, he acknowledged that the submissions had

- been misrepresented, and that no focus group had taken place.
173. On 22 April 2015, the SJC made its own submission on the City's draft budget for 2015/16 ("PM21"). In that submission, we provided detailed evidence on how the City was prioritising temporary sanitation services instead of planning for long-term, decent sanitation.
174. The submission was sent to all the City's ward councillors. It received the following responses via email: Councillor Simon Liell-Cock – Ward 61: *"Please don't talk rubbish - get your facts right"*; and Councillor Steven Vuba – Proportional Representative (PR) Subcouncil 21: *"MXMMMMMMMM. STUPID."* This correspondence is annexed as "PM22".
175. In her budget speech on 29 May 2015 at the full sitting of Council, Mayor de Lille stated: *"We also received numerous memorandums from a local interest group called the Social Justice Coalition (SJC)... Every day seems to bring a new SJC stunt to impress their international donors with false information...I will have to ask the puppet masters of the SJC to step back from their MacBooks for a second and answer a few questions themselves...All I can say is that the poor of this city are lucky that this government cares about their lives and their health and that their fate is not in the hands of a reckless bunch of media addicts."*
176. On 6 June 2015, after a Weekend Argus editorial called for more constructive engagement by the Mayor with civil society, she published an article stating: "I stand by every word I said in the council chamber about the SJC..." ("PM23").

177. On 29 April 2016, the SJC made a detailed submission on the City's draft budget for 2016/2017 and assisted 3000 residents of Khayelitsha and Gugulethu to make submissions, in an attempt to engage the City through its participation process and provide evidence to assist in improving sanitation in informal settlements. The submission process was followed by a mass petition (signed by 5000 residents from Khayelitsha) on 24 May 2016, requesting the Mayor to: (i) commit to implementing long-term sanitation infrastructure in informal settlements with the required increase to capital allocations for informal settlements in the 2016/17 budget; (ii) release a timeline for the eradication of undignified and unhygienic temporary toilets such as bucket, container chemical and portable flush toilets in informal settlements; and (iii) release a timeline for the development of a plan for the upgrading of Cape Town's informal settlements in terms of its obligations under the national Upgrading of Informal Settlements Programme.

THE RELIEF SOUGHT IN THIS APPLICATION

178. The applicants seek in the first instance, declaratory orders that the City has failed to take reasonable measures and to comply with its duties under the constitutional right to equality and the Equality Act.

179. The applicants understand and accept that these breaches cannot be remedied simply by the making of a declaratory order. The City will need, without delay, to make and implement reasonable plans in that regard. There will need to be proper public participation in that process. The applicants therefore seek structural relief in respect of

179.1. the provision of permanent sanitation facilities in those areas of Enkanini and CT Section where this is reasonably practicable; and

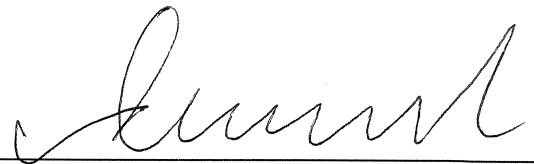
179.2. the provision of permanent sanitation facilities in other informal settlements in Cape Town.

180. The applicants pray for the relief sought in the notice of motion.



PHUMEZA MLUNGWANA

The Deponent has acknowledged to me that she knows and understands the contents of this affidavit, which affidavit was signed and sworn to or before me at Cape Town on this 1st day of July 2016, the regulations contained in Government Notice No. R1258 of 21 July 1972 having been complied with.



COMMISSIONER OF OATHS

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