



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

Case No: D11938/2022

In the matter between:

**ACTIONS**

**APPLICANT**

and

**THE MINISTER OF TOURISM OF THE  
REPUBLIC OF SOUTH AFRICA**

**FIRST RESPONDENT**

**THE MINISTER OF FORESTRY,  
FISHERIES AND ENVIRONMENT OF  
THE REPUBLIC OF SOUTH AFRICA**

**SECOND RESPONDENT**

**THE MINISTER OF WATER AND  
SANITATION OF THE REPUBLIC  
OF SOUTH AFRICA**

**THIRD RESPONDENT**

**MINISTER OF CO-OPERATIVE  
GOVERNANCE AND TRADITIONAL  
AFFAIRS OF THE REPUBLIC OF  
SOUTH AFRICA**

**FOURTH RESPONDENT**

**KWAZULU NATAL MEMBER OF THE  
EXECUTIVE COUNCIL FOR**

**CO-OPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS  
KWAZULU NATAL MEMBER OF THE  
EXECUTIVE COUNCIL FOR  
ECONOMIC DEVELOPMENT:  
TOURISM AND  
ENVIRONMENTAL AFFAIRS  
eTHEKWINI MUNICIPALITY  
THE EXECUTIVE MAYOR OF  
eTHEKWINI MUNICIPALITY**

**FIFTH RESPONDENT**

**SIXTH RESPONDENT**

**SEVENTH RESPONDENT**

**EIGHTH RESPONDENT**

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**ORDER**

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1. The application is dismissed with costs as against the first to sixth respondents.
2. The application is dismissed against the eighth respondent with each party to pay its own costs.
3. It is declared that the seventh respondent has defaulted in the performance of its Constitutional mandate and obligations by failing properly to maintain and/or repair and/or replace and/or to install the necessary infrastructure to prevent the release and/or flow and/or resettling of sewerage and/or untreated effluent into the environment in the seventh respondent's waterways and/or rivers and/or estuaries and/or ocean and/or beaches.
4. The seventh respondent is directed to implement the following measures:
  - 4.1 The publication weekly of E.Coli readings taken during the week preceding publication at the seventh respondents' beaches on its website, social media pages and public notice boards at all public swimming beaches within the seventh respondent's jurisdiction.



- 4.2 The adoption of a communication protocol to the affected public/communities/industries regarding E.Coli readings, with particular emphasis on reasonable measures to ensure effective and immediate notice of any water-related hazards and pollution affecting the swimming beaches and members of the public who live or work alongside beaches and rivers within the seventh respondent's jurisdiction.
- 4.3 The widest and most reasonably effective notification to members of the public of how to access the information available in consequence of the implementation of the measures required by paragraphs 4.1 and 4.2 of this order.
5. The seventh respondent is directed, within two months from 18 December 2025, this being a date upon which a similar order was made against the seventh respondent under case no.3036/2023, to prepare and file an amended Action Plan and any associated reports and substantiating documents under oath, with the person designated to issue notices by the sixth respondent, setting measurable periodic deadlines for progress for the repair of all the wastewater treatment works and related infrastructure.
6. The seventh respondent is ordered to pay the costs of ActionSA's application, save for such costs as were incurred by reason of the ActionSA's claim for substantive relief against any of the first to sixth respondents.

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## **JUDGMENT**

Delivered on: 9 February 2026

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**Poyo Dlwati JP (Olsen and Mathenjwa JJ concurring)**

- [1] This matter concerns the high levels of Escherichia Coli, commonly known

as E.Coli, at the beaches within eThekweni Metropolitan Municipality (eThekweni), cited herein as the seventh respondent, resulting in their closures from time to time. This is one of the two applications heard together, as they raise largely similar issues but sought different orders. A separate judgment has been handed down in respect of the other application, which had been brought by the Democratic Alliance.<sup>1</sup>

[2] The applicant, ActionSA, is a political party duly registered as such in terms of s 15 of the Electoral Commission Act 51 of 1996 and has its provincial offices in Durban. It is also represented in the eThekweni Municipal Council. It launched this application in its interest as well as in the public interest, seeking an order largely relating to water and sanitation infrastructure services in eThekweni. The orders were sought against all eight respondents.

[3] The first respondent is the Minister of Tourism of the Republic of South Africa. She is the member of the National Executive, charged with the responsibility of promoting and developing tourism within the Republic. The second respondent is the Minister of Forestry, Fisheries and Environment of the Republic of South Africa. He is the member responsible for giving effect to the rights of citizens to an environment which is not harmful to their health or well-being, and to ensure that the environment is protected for the benefit of present and future generations.

[4] The third respondent is the Minister of Water and Sanitation of the Republic of South Africa. She is the member responsible for ensuring that the country's water resources are protected, managed, used, developed, conserved, and controlled by regulating and supporting the delivery of effective water supply

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<sup>1</sup> This judgment is available on Safflii as *Democratic Alliance v Ethekewini Metropolitan Municipality and Others* [2025] ZAKZPHC 142.

and sanitation. The third respondent is also said to be responsible for ensuring the expedited delivery of services to the public, which have been mercilessly ravaged by years of mismanagement in the municipality, the riots and looting that occurred during 2021, and the floods in April 2022. The fourth respondent is the Minister of Co-Operative Governance and Traditional Affairs of the Republic of South Africa. He is said to be the person responsible in law for all acts or omissions of persons in the employ of the National Department of Co-Operative Governance and Traditional Affairs in the Republic of South Africa.

[5] The fifth respondent is the Member of the Executive Council for Co-Operative Governance and Traditional Affairs in the Province of KwaZulu-Natal (KZN COGTA). He is cited as a nominal respondent for the purposes of this application and is responsible in law for all acts or omissions of people in the employment of KZN COGTA. The sixth respondent is the Member of the Executive Council for Economic Development, Tourism and Environmental Affairs in the Province of KwaZulu-Natal. He is also sued in his nominal capacity for all acts and omissions of persons in the employ of his department. The eighth respondent is the mayor of eThekweni, in his representative capacity as the nominal respondent responsible for all acts and omissions in law of eThekweni.

[6] An extensive background was given about the water and sanitation issues being experienced by residents of eThekweni. This, according to ActionSA, demonstrated that the resources and infrastructure in the eThekweni were poor. This was exacerbated by the devastating floods that ravaged eThekweni in April 2022. The deadly floods resulted in the closure of several beaches for a few months in the latter part of 2022. The deteriorating infrastructure has affected the health of eThekweni residents, the livelihood of small businesses, the tourism industry and the environment at large in eThekweni region. All this would, in the end, cause an economic downturn which would affect the poorest communities



in eThekweni.

[7] In particular, it was averred that economic hardships in the tourism sector were caused by the closure of beaches, as some holiday makers cancelled their holiday bookings with eThekweni hotels. It was also stated that the fishing industry had been adversely affected, and this impacted heavily on small businesses. Even though the President of the Republic declared the floods as a national disaster, ActionSA did not know what happened to the funds that were allocated towards disaster management. This was so as some of the wastewater treatment stations and pumpstations were not operational in areas like the Ohlanga River.

[8] It was stated that this has caused untreated and raw sewage to flow into the rivers and eventually into the sea. According to ActionSA, the respondents have done nothing about this, and as a result, eThekweni lost its Blue Flag status. It was contended that the respondents have failed to enforce the applicable legislation to address their tourism, environmental, water and sanitation obligations. The respondents' approach was described as lackadaisical, leading to the cancellation of events because of the beach closures which affected employment and small businesses, especially in the tourism industry.

[9] In an online public participation run by ActionSA about the impact of the conditions of the rivers and ocean on the residents, it was stated that the effects were dire and alarming. Even lifesavers and cleaners in the coastal areas were said to be concerned about the threat of contracting illnesses. All recreational and sporting activities involving the beaches and rivers were apparently stopped due to health issues arising from the contaminated water.

[10] It was further stated that E.Coli levels on the beaches were in excess of



thousands, which was totally unacceptable and dangerous in terms of environmental standards. ActionSA sought that an independent body be appointed to test the water daily at the rivers, ocean and beaches to enable visitors to make informed decisions before entering the beaches and rivers. It did not trust the testing done by eThekweni. ActionSA wrote to eThekweni raising concerns about the effects of high E.Coli levels and how much that was affecting the tourism industry in the province. It also sought that eThekweni give a detailed intervention plan on how the municipality intended to ensure the reduction and ultimately the eradication of high E.Coli levels in the rivers and on the beaches. No response was forthcoming to this letter.

[11] Instead, it was announced in the media that various beaches in eThekweni would be open on 5 November 2022. This was also on eThekweni's social media platforms. It was contended that eThekweni had done very little, at least since the floods, to secure the appropriate remedial measures to remedy the dire situation of non-operational wastewater treatment plants and pump stations. All the respondents were accused of having failed to comply with various laws by failing to maintain or repair or replace or install the necessary infrastructure to prevent the release or flow or resettling of sewage or untreated effluent into the waterways, estuaries and ocean in eThekweni.

[12] The respondents were said to have contravened ss 10,<sup>2</sup> 24,<sup>3</sup> and 152(1)(b)

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<sup>2</sup> Section 10 provides as follows:

'Human dignity. —Everyone has inherent dignity and the right to have their dignity respected and protected.'

<sup>3</sup> Section 24 provides as follows:

'Environment. —Everyone has the right—

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

and (c)<sup>4</sup> of the Constitution, the National Water Act 36 of 1998 (the Water Act), the National Environmental Management: Waste Act 59 of 2008 (the Waste Act) and the provisions of by-laws, i.e. s 14(2)(a) and (i) of the eThekweni Beaches By-law, 2015, and the provisions of s 3(d) and 6 of the eThekweni Sewage Disposal By-law, 2015.

[13] ActionSA sought that a proper and independent investigation be conducted to determine the actual state of the water and sanitation crisis in eThekweni. A report would have to be made available to ActionSA and the court and only then would the proper cause of action be determined. ActionSA reiterated that the state of disrepair of the infrastructure had long been apparent. This was caused by mismanagement of funds and lack of proper procurement processes. Various orders, coupled with a costs order, were sought against all the respondents.

[14] All the respondents opposed the application. I will deal with the sixth respondent's basis of opposition first. This is so as the sixth respondent had issued various directives against eThekweni in accordance with its responsibility to oversee issues pertaining to the environment. The sixth respondent's answering affidavit was deposed to by Mr Bonginkosi Dlamini, a designated grade 1 environmental management inspector in terms of s 31C<sup>5</sup> of the National Environmental Management Act 107 of 1998 (NEMA). In the sixth respondent's

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<sup>4</sup> Section 152(1)(b) and (c) provides as follows:

'Objects of local government. —(1) The objects of local government are—

...

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

(c) to promote social and economic development...

<sup>5</sup> Section 31C provides as follows:

'31C. Designation of environmental management inspectors by MEC.—

(1) An MEC may—

(a) designate as an environmental management inspector, any staff member of—

(i) the department responsible for environmental management in the province;

(ii) any other provincial organ of state that executes a regulatory function; and

(iii) any municipality in the province; and

(b) at any time withdraw a designation made in terms of paragraph (a).

(2) A designation in terms of subsection (1) (a) (ii) or (iii) may only be made by agreement between the relevant MEC and the relevant provincial organ of state or municipality.'



view, ActionSA did not make out a case to prove that it had breached any constitutional or legislative provisions as mentioned in ActionSA's application.

[15] According to the sixth respondent, it had taken the reasonably required measures required of it under the applicable legislation to prevent eThekweni's pollution of the rivers, estuaries and the ocean. It contended that ActionSA could not prove, as required by s 24 of the Constitution, that the harm, if any, to the health or well-being of eThekweni residents was caused by the sixth respondent's violation of its obligations prescribed by the environmental laws. Furthermore, ActionSA also did not prove that the sixth respondent failed to enforce any environmental legislation against eThekweni relating to the prevention of the degradation of the environment.

[16] According to the sixth respondent, ActionSA failed to establish any scientific findings by any suitably qualified experts that any alleged non-compliance by the sixth respondent with the Constitution and legislation has caused the harm alleged. According to the sixth respondent, ActionSA failed to allege the factual and legal basis upon which it averred that the sixth respondent had breached the provisions of ss 10 and 24 of the Constitution. It was contended that had ActionSA made any inquiries from the sixth respondent about the issues raised in this application, the sixth respondent would have advised ActionSA that it had addressed eThekweni's non-compliance with the legislation and imposed sanctions for such noncompliance.

[17] According to the sixth respondent, s 152(1)(b) of the Constitution could only be contravened by eThekweni as it is the municipality responsible for the eThekweni region. If the sixth respondent were to interfere, it would offend the separation of powers principle, as it is eThekweni, as the local sphere of government, that has the right to administer local government matters as the



executive authority. Even with regard to the alleged contravention of by-laws, only eThekwini can administer them and not the provincial or national sphere of government. The sixth respondent could, therefore, not have failed to enforce or contravene any by-laws. Water and sanitation services, beaches and solid waste disposal fell under the domain and authority of eThekwini.

[18] The sixth respondent further averred that compliance with the Water Act fell under the national sphere of government, represented in this application by the third respondent, as well as eThekwini's Water and Sanitation Services Unit. The structural relief sought by ActionSA was the obligation of eThekwini and its mayor. Contrary to s 41(1)(h) of the Constitution which enjoins all spheres of government to co-operate with one another in mutual trust and good faith by enforcing friendly relations, assisting and supporting one another and avoiding conflicts, the joint relief sought would cause conflict and unnecessary interference by national and provincial spheres in respect of the functions of eThekwini.

[19] The sixth respondent had exhausted attempts to ensure good faith engagement with eThekwini in terms of the Intergovernmental Relations Framework Act 13 of 2005 (the Intergovernmental Act). As a result, the sixth respondent had to resort to issuing various notices and instituted criminal charges regarding non-compliance against eThekwini. Accordingly, the sixth respondent had complied with its constitutional obligations as defined in s 24 of the Constitution and as mandated by the legislation. The sixth respondent detailed all the pre-notice directives and directives it issued against eThekwini dating back to 2020.

[20] According to the sixth respondent, eThekwini failed to discharge its duty of care in terms of NEMA. It was on this basis that the sixth respondent had acted

against eThekwini. eThekwini had also contravened s 16 of the Waste Act, which imposes an overall duty on eThekwini in respect of its waste management. According to the Act, eThekwini is required to ensure, inter alia, that waste is treated and disposed of in an environmentally sound manner. It is also required to manage waste in such a manner that it does not endanger the health of the environment or cause nuisance through noise, odour or visual impact.

[21] In instances of breaches of NEMA's provisions, the sixth respondent, in terms of s 31L of NEMA, has powers through its inspectors to issue compliance notices. eThekwini, in terms of s 31L(4) of NEMA, has an obligation to comply with the notices, within the period stipulated therein. eThekwini failed to comply with the various notices. However, after the flash floods that occurred in April 2022, there had been constant good faith engagements with eThekwini and its Water and Sanitation Services Unit even though this did not last long, as the sixth respondent had to issue further notices.

[22] The sixth respondent had to issue further compliance notices and directives to ensure compliance with NEMA and the duty of care resting upon eThekwini. Various site inspections and meetings were held as there was continuous pollution of the environment due to the disposal of sewerage and the non-functioning of eThekwini's wastewater treatment works (WWTW) and pumpstations. Even though there was improvement before the flash floods of 2022, the situation got worse after the floods. Some of eThekwini's compliance was inadequate, unsatisfactory and in some instances, there was no compliance at all.

[23] One of the major concerns, and largely at the core of this application, was the general degradation along the rivers, beaches and estuaries. A pre-directive in terms of s 28(4) of NEMA was issued on 8 June 2022 as the sixth respondent was of the view that eThekwini and its Water Authority had failed to adhere to the

provisions of the law in respect of causing sewage to enter several rivers in the eThekweni region. Raw sewage was being discharged directly into the already polluted water sources due to malfunctioning WWTW and pump stations. The pre-directive directed eThekweni:

- (a) To immediately stop the pollution at the source to prevent pollution to the receiving environment;
- (b) To inform all the users that the rivers are polluted and that water should not be used;
- (c) To immediately close the beaches in close proximity to the following estuaries: Umgeni, Tongaat, Lamercy and Umhlanga;
- (d) To place notices on the beaches to inform the public of the beach closures;
- (e) To provide the sixth respondent with the assessment report of damages caused to the WWTW, pump stations and collapsed sewer lines and a plan of action how eThekweni intended to deal with the repairs;
- (f) To submit an assessment on the impact of sewage on the rivers and the aquatic organisms; and
- (g) That the beach closures remain in place until the department approved their reopening which must be based on the comments received from eThekweni Environmental Health Quality Control, and Water and Sanitation Services Units.

[24] On 9 June 2022, and in response to the pre-directive, eThekweni issued a public notice with a health alert, announcing the closure of all beaches. It also responded to the pre-directive on 13 June 2022 and advised that an assessment of the damages and an Action Plan would be made available to the sixth respondent. It was also recorded that the repairs to the damaged infrastructure would only be undertaken in the medium to long term.

[25] A meeting was also held on 8 July 2022 to address the lack of a substantive response to the pre-directive. Even though eThekweni further responded to the



pre-directive on 13 July 2022, the response was not satisfactory to the sixth respondent. Instead, eThekwini re-opened the beaches without consulting the sixth respondent. According to the sixth respondent, there was no compelling or substantial reason why a s 28(4) directive could not be issued. The directive was accordingly issued on 25 August 2022.

[26] It was only on 21 September 2022 that eThekwini responded to the directive. However, it failed to comply with the directive. Instead, it contended that the department did not have the authority to close the beaches but that its Park, Recreation and Culture Unit has such authority. Meetings held thereafter only culminated in eThekwini undertaking and promising to remedy the situation, but to no avail.

[27] Another pre-directive was issued by the sixth respondent on 17 October 2022 regarding the pollution of the Ohlanga river due to damaged infrastructure at the Ohlanga Pump station. eThekwini responded to this directive on 19 October 2022 indicating that the pump station would be repaired within five weeks from 18 October 2022. In a meeting held between eThekwini and the sixth respondent to discuss these directives, it became evident that the Northern WWTW had not been repaired and that the pollution into Umgeni River continued. No assessment of the impact of the sewage on the rivers and aquatic organisms was provided and no extension to providing same had been requested. No water test results were received by the sixth respondent in order to determine whether it was safe to open the beaches.

[28] After receiving a request from eThekwini for opening of the Mdloti Main, Mdloti Tidal and Casuarina beaches, the sixth respondent acceded to the request for the opening of the Casuarina beach. It was not satisfied with the water results for Umdlotti beaches as they indicated high levels of E.Coli. The sixth respondent

requested eThekwini to investigate the results further and provide feedback. On 9 December 2022, eThekwini provided sampling results of the beach from three different sources. All the results showed a reduction in E.Coli levels and the department approved the opening of the two Umdloti beaches on condition of continuous monitoring. After further representation, the sixth respondent agreed to the opening of Westbrook beach on 22 December 2022.

[29] The sixth respondent also laid criminal charges against eThekwini as provided for in NEMA and the Waste Act. These were because of various contraventions of NEMA and non-compliance with the directives issued to eThekwini. The charges related to the sewerage pollution at the Elderwood Close, discharging of sewage to Isipingo Lagoon; overflowing sewage into the Winkelspruit Lagoon; and discharge of untreated sewage into Umhlanga Lagoon. All this, according to the sixth respondent, was an indication that it had not been lackadaisical in ensuring compliance with applicable legislation by eThekwini.

[30] The sixth respondent denied that it had any obligations in terms of the Disaster Management Act 57 of 2002. It denied that it received any funding from the National or Provincial Treasury departments in order to address infrastructure damage after the floods. It stated that it was not involved in administering any funds relating to the disaster caused by the floods. After exhausting the mechanisms of exercising co-operative governance and the principles of good inter-governmental relations, the sixth respondent resorted to laying criminal charges against eThekwini. For these reasons, the sixth respondent contended that the relief sought against it by ActionSA was incompetent and inappropriate. The application against it ought to be dismissed with costs.

[31] The second respondent also filed an answering affidavit. It made common cause and supported the affidavit filed by the third respondent. Perhaps it is best



to deal with the third respondent's answering affidavit at this stage. The affidavit was deposed to by Ms Ashley Starkey on behalf of the first, second, third, fourth and fifth respondents. These respondents raised various points *in limine*. They further believed that the matter ought to be referred to mediation in order for the parties to agree on an expeditious and cost-effective manner of resolving the issues.

[32] The first point *in limine* raised was that ActionSA made no reference to the co-operative governance measures that were underway in eThekweni, yet it was aware of these as it was part of the eThekweni Municipal Council where reports of these measures were tabled. These measures were undertaken to assist eThekweni to resolve the challenges that are the subject of this application. The co-operative governance measures were undertaken by the second, third, fourth, fifth and sixth respondents.

[33] The second point *in limine* was that ActionSA was seeking extra ordinary relief, which if granted, would be in violation of the Constitution as it would contravene and offend the separation of powers framework. This was so as it did not take into account the distinct allocation of powers amongst the three spheres of government as stipulated in the Constitution, those being the national, provincial and local spheres of government, and their specific allocated powers and functions. For instance, it was stated that it was incorrect for ActionSA to contend that all the respondents had breached the objects of local government as set out in s 152 of the Constitution. Section 41(1)(g) of the Constitution also requires the various spheres of government to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

[34] The third point *in limine* was that ActionSA failed to follow the rule 53



procedure, despite it stating that it intended to rely on the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It ought, therefore, to have followed the rule 53 procedure for judicial review. As a result, the respondents had to furnish proof of their monitoring, enforcement and compliance actions undertaken against eThekweni. Furthermore, the failure by ActionSA to follow PAJA has resulted in it not identifying with any measure of precision each of the administrative decisions it was challenging. ActionSA had not even identified which specific respondent had breached what specific constitutional or statutory obligation.

[35] The respondents contended that it was impermissible in motion proceedings for ActionSA to simply refer generally to various pieces of legislation without identifying the specific sections which are said to have been breached by which respondent or respondents. The notice of motion had also left out some of the relevant legislation like NEMA, National Environmental Management: Integrated Coastal Management Act 24 of 2008, the Water Services Act 108 of 1997 (the Water Services Act) and the Intergovernmental Act. It was submitted that the notice of motion and the founding affidavit were defective as none of the respondents knew what case they had to meet.

[36] The respondents further stated that the founding affidavit was replete with inadmissible evidence and that various issues and facts had changed since the application was launched in November 2022. The media reports, allegations supposedly from Councillor Allan Beesley, and sampling water results from Talbot were some of the averments made without any supporting affidavit from the relevant sources. Regarding the video supposedly taken by Mr Peter Graham and his comments on sanitation, it was submitted that there was no evidence to show that he was qualified to make such observations.

[37] The respondents contended that after the April 2022 flash floods, they acted immediately, within their constitutional and statutory powers, to ensure that emergency measures were taken by eThekweni to stop the pollution. They thereafter worked with the municipality to ensure that short-term actions were taken and that medium and long-term plans were formulated to remediate the pollution and infrastructure damage and to prevent such pollution events from recurring in the future. Some of the monitoring, compliance and enforcement measures were undertaken even prior to the April 2022 floods as they were required to do so in terms of the legislative framework.

[38] The third respondent dealt specifically with measures it undertook to ensure compliance with the Water Act, and the Water Services Act. On 13 May 2022, the third respondent issued a directive in terms of ss 19(3) and 20(4) of the Water Act. The directive was issued in order to compel eThekweni to deal with various emergency incidents arising as a result of the floods. They were pollution of water and the environment emanating from various WWTW and associated sewerage infrastructure due to malfunctioning after the flood. eThekweni responded to this directive by providing an assessment of the sewerage infrastructure including pipelines, WWTW and pump stations which had been detrimentally affected by the floods

[39] Despite various engagements between the third respondent and eThekweni, no positive and satisfactory response was forthcoming. Instead, eThekweni sought extensions in order to comply with the directives. Meanwhile, further complaints were noted and received. One complaint related to sewage overflow from a main trunk sewer line in Umlazi near the Mega City Shopping Complex into the Mlazi River. The complaint was received on 27 July 2022. On 17 October 2022, the third respondent also notified the municipality of a complaint regarding sewage entering the Ohlanga River system from the sewer manhole in Blackburn



Estate area, as well as the Blackburn Village pump station. All that eThekwini said was that these matters were receiving attention, and that some were submitted to the Bid Adjudication Committee.

[40] The respondents, however, continued to engage and assist eThekwini as part of the War Room established by the fourth respondent in order to recover from the devastating effects of the floods. The War Room was established to ensure a coordinated response to the flood damage and to allow monitoring of eThekwini's progress by both the national and provincial governments. The third respondent also directed eThekwini to deal with various pollution incidents and complaints received from members of the public on a day-to-day basis.

[41] According to the respondents, all these actions showed that the respondents were not lackadaisical in their approach. The respondents chose to provide all this information, despite ActionSA not making any reference to a particular provision of the legislation that was breached. Despite all this, the respondents acted immediately and within their constitutional and statutory powers to stop, reverse and remediate the pollution when they became aware of it. Accordingly, so went the contention, the application as against all these respondents ought to be dismissed with costs.

[42] The first respondent confirmed the contents and supported the third respondent's answering affidavit. She reiterated the co-operative governance measures that were being coordinated by the fourth respondent with the participation of the other respondents. The first respondent further stated that it ought not to have been cited or joined in these proceedings as the legislation referred to in the notice of motion did not fall within her mandate or jurisdiction. There was also no case made out about a breach of any of those legislative provisions. There was also no averment in the founding affidavit that the first



respondent breached the Tourism Act 3 of 2014 in any way.

[43] The first respondent contended that the founding affidavit did not present her mandate correctly, as she executes her constitutional and statutory obligations within a specific constitutional framework. According to her, eThekweni had executive and legislative powers over local tourism. National and provincial governments may assist eThekweni only to the extent provided for in subsections 155(6)(a) and (7) of the Constitution. She, therefore, denied that she was in breach of any legislative instrument or the Constitution. She sought that the application be dismissed with costs.

[44] Likewise, the fourth and fifth respondents also filed their answering affidavits in support of the third respondent's affidavit. The fifth respondent confirmed the cooperative governance efforts undertaken by the respondents. He confirmed that these efforts were made in line with Chapter 3 of the Constitution. He confirmed that subsequent to the floods, a State of Disaster in the KwaZulu-Natal Province was declared on 18 April 2022. He combined efforts with the fifth respondent in order to implement the Disaster Management Act which led to the creation of the War Room. They were able to obtain financial assistance from the National and Provincial Treasuries to assist with the repair to the infrastructural damage.

[45] These respondents contended that they continued to provide expert, technical and human resource assistance to eThekweni to repair the damaged infrastructure. This contention was supported by minutes of the War Room meetings held between the respondents and attached as an annexure to his affidavit. Financial support was also provided to eThekweni initially with an amount of R185 000 000 and later followed by R1 534 785 000. All these efforts were ongoing until such time that the challenges faced by eThekweni were

resolved. For these reasons, she also sought that the application be dismissed with costs.

[46] eThekweni and the eighth respondent also filed their answering affidavit. They simultaneously filed an application to have certain averments in ActionSA's founding affidavit struck out as they deemed them to be hearsay, and/or objectionable as they were opinions of persons not qualified to express such opinions. They also objected to the filing of annexures ZM13 and ZM14 as they were copies relied upon by ActionSA without specific reference to the provisions upon which reliance was placed. Some averments were deemed to be vexatious and scandalous whilst some were regarded as irrelevant.

[47] eThekweni also raised various points *in limine*. The first was that ActionSA relied on PAJA but failed to follow the procedure prescribed by rule 53 of the Uniform Rules. It also raised the failure by ActionSA to advise of the co-operative governance measures that were currently underway involving various government departments. This included the creation of the War Room. The minutes of the War Room were provided to the eThekweni Municipal Council of which ActionSA was part, but it chose not to divulge such important information.

[48] eThekweni also, like other departments, objected to the wide-ranging relief against it and the other respondents. It accepted that in terms of sub paragraph 1, Part B of Schedule 4 to the Constitution, it had, as a municipality, executive authority in respect of, and the right to administer the following local government matters, namely:

- (a) stormwater management systems in built up areas;
- (b) water and sanitation services limited to potable water supply systems; and
- (c) domestic wastewater and sewage disposal systems.

[49] Part B of Schedule 5 of the Constitution vests eThekwini with executive authority in respect of the right to administer the following local government matters: beaches, cleansing and public spaces. According to eThekwini, both the national and provincial governments are obliged to assist the municipality in terms of s 155(6)(a) and (7) of the Constitution in fulfilling its obligations. Therefore, the relief sought by ActionSA ignored the different roles and obligations of the different spheres of government thereby transgressing upon the municipality's power and autonomy as a Local Government Authority.

[50] eThekwini further reiterated the points about reliance upon inadmissible and objectionable material by ActionSA as raised by the first to sixth respondents. eThekwini also provided a comprehensive background about the functioning and operations of its water and sanitation services. Prior to April 2022, a decision was taken to upgrade the water and sanitation infrastructure in the Berea area. The decision was based on the aging network but was constrained by availability of funding. Progress was made to implement the decision, but then the floods occurred.

[51] The floods had devastating consequences for the infrastructure. The damage was compounded by the fact that a significant proportion of the network was situated in low-lying areas and adjacent to rivers which were all flooded. Eighty-two of 263 wastewater pump stations (WWP) were damaged. Nine of the 27 WWTW were extremely damaged. As a result, a national state of disaster was declared and thereafter a War Room was established. Funding became an issue in addressing the assessments and thereafter repairs to the infrastructure. Funding had to be diverted from other programs of eThekwini to deal with the water and sanitation infrastructure. Initially an amount of R74 million was made available.

[52] A further amount of R49 million was made available for the water and



sanitation and another R136 million was for repairs to the water infrastructure. This funding, according to eThekweni, was inadequate to address the demand for repairs and replacement. With time, the full length of the pipes was progressively restored to functionality, starting from the lower-level pipes and progressing to the larger pipes. The eighth respondent had to issue directives prioritising the effects of the disaster, which included having contracts amended for this intent.

[53] As of 31 March 2023, eThekweni confirmed that the relevant infrastructure had been restored to a level of functionality. No raw sewage was discharging from any WWTW. All effluent was treated and in the damaged WWTW, the effluent was discharging at the required discharge levels. This, however, was limited to Umbilo and Northern WWTW. Some pump stations were not functional due to vandalism and/or normal maintenance and equipment breakdown. However, these were being dealt with even though delays were being experienced due to supply chain management processes.

[54] The details of the work done were summarised in a presentation made to the War Room on 23 February 2023 annexed to eThekweni's affidavit as D1 to D48. Additional funding was also made available in the sum of R228 million. According to eThekweni, even though this funding will go a long way towards expediting the necessary reconstruction and rehabilitation of the water and sanitation infrastructure, it was still significantly below the total amount required.

[55] eThekweni contended that no evidence was advanced by ActionSA that eThekweni residents had been mercilessly ravaged by years of mismanagement in the municipality. It was also stated that most beaches were open but that closures do take place from time to time, as and when circumstances necessitate it. A list of affected beaches gets published on a regular basis for the benefit of the members of the public. eThekweni explained that the grant funding of R1

billion was not only for the repair of the wastewater and sanitation infrastructure but was also intended to cover all consequences arising from the floods including basic water services.

[56] eThekweni denied that 80% of the wastewater and sanitation infrastructure was or is dysfunctional. It contended that the Ohlangu river's WWP, which had been submerged by the floods resulting in damage to all mechanical and electrical equipment, was fully operational as of December 2022. The beaches were closed in the interest of public safety. However, the situation had been regularised to the extent that water and sea related sporting activities were taking place. Regular testing of E.Coli levels was being undertaken by the Water and Sanitation Department through an accredited laboratory of eThekweni to ensure safety of all beaches.

[57] eThekweni, therefore, disputed that it had done very little since the floods to render the wastewater and sanitation infrastructure operational. It deemed the allegations as a gross distortion of the truth. eThekweni also decried ActionSA's references to various pieces of legislation without identifying the specific provisions on which reliance was placed. It disputed that a case was made out for the relief sought and that the application be dismissed with costs

[58] In its reply, ActionSA accepted that the sixth respondent had disclosed all steps it had taken in its attempts to address the sewage crisis in eThekweni and to ameliorate the situation in which the tourism industry, the environment and the residents of eThekweni found themselves in. It believed that the other respondents were playing the 'proverbial blame game', blaming other spheres of government for the crisis. With regards to the points *in limine* about non-compliance with rule 41A, ActionSA believed that the matter was not capable of mediation. This was so as eThekweni failed to respond to its letter of demand and this was an indication



that it was not prepared to engage. This was also evident as eThekweni and the other respondents filed their answering affidavits late.

[59] ActionSA contended that it could not hold the matter in abeyance as the Action Plan on how to deal with the crisis was not forthcoming from eThekweni. According to ActionSA, rule 41A would not work in this matter as eThekweni was still insistent that there was no crisis and that its water and sanitation infrastructure was operational. Regarding the failure to follow rule 53 and PAJA, ActionSA contended that it never sought to review any decision taken by any of the respondents. Instead, the nature of the relief it sought was declaratory and mandatory in nature. Therefore, PAJA would not have assisted it and neither did it require the record as provided in rule 53.

[60] With regards to the co-operative governance measures, ActionSA claimed that it was not aware of them until it received the answering affidavit. This was despite the fact that ActionSA has two councillors in the eThekweni Municipality Council. However, ActionSA, believed that those co-operative governance measures were a concession that there was severe infrastructural damage in eThekweni. According to ActionSA, the other respondents undertook co-operative measures as they were required to do so in terms of their constitutional obligations as national and provincial spheres of government. It, however, still maintained and reiterated that the sewage crisis must be remedied by all the respondents collectively.

[61] About the misjoinder of the first respondent, ActionSA believed that the sewage crisis had a devastating impact on tourism in the region, and it believed that the first respondent ought to have an interest. Regarding inadmissible and objectionable material, ActionSA stated that Mr Graham was going to attest to an affidavit, which he did, but whether he is an expert in sanitation matters remains



an issue. It also believed that no sufficient explanation was provided by any of the respondents as to why funds were only received in March 2023 and not prior to that.

[62] ActionSA was still not satisfied with the regular beach water testing as it believed that no details were provided as to who tests the water and how often the tests are conducted and where the results are published. It believed that its suggested method of testing ought to be accepted. After eThekweni and the eighth respondent had filed the Action Plan, ActionSA filed a supplementary affidavit to deal with the issues raised in the action plan. It stated that some of the deadlines imposed on the Action Plan had come and gone but nothing was done to provide the services. It was for this reason that it believed that the court's intervention was required so that there was compliance with what was promised in the Action Plan.

[63] ActionSA also stated that it became aware that an amount of R1 billion had been made available to eThekweni to attend to the sewage reticulation and infrastructure repairs and restoration, but it did not know who was in possession of the funds. ActionSA stated that after it issued a Rule 36 (6) notice on eThekweni and other respondents, the sixth respondent also attended the inspection through its legal representatives. The inspection was conducted on 1 September 2023. The following sites were visited, Ohlanga pump station along the Ohlanga river, as well as Umhlanga, Phoenix and Hambanathi WWTW.

[64] According to ActionSA, what was witnessed in those sites was diabolical. Most of the infrastructure in those sites was broken and in a state of disrepair. They were covered in stagnant sewerage. Even though few staff members were present at those sites, they were not working as the infrastructure was not operational. When another inspection was held on 8 September 2023, nothing

much was different. It was evident that eThekweni had failed to restore, repair, and maintain critical infrastructure notwithstanding what was contained in the Action Plan. It, therefore, disputed what was averred in eThekweni's answering affidavit that 98% of its infrastructure was operational. It gave an example of the Umhlanga WWTW which was offline and as a result effluent was bypassing Phoenix leading to the raw sewage pumping into the Ohlanga River.

[65] According to ActionSA, when it attempted to conduct another inspection in May 2024, it was denied access by members of the South African Police Services and eThekweni officials. It, therefore, inferred that the Action Plan had not been implemented. E.Coli levels also remained largely high, which was not acceptable. For all these reasons, ActionSA persisted with the relief sought in the draft order handed up during the argument of this matter.

[66] In ActionSA's practice note, it is submitted that the issues to be determined in this application are whether the respondents have breached their legislative and constitutional obligations by allowing the eThekweni crisis to persist, and what the appropriate relief to be granted ought to be now that the sixth respondent has caused that eThekweni and the eighth respondent be placed in funds to remedy the crisis.

[67] The heads of argument and practice note filed by ActionSA were not of assistance to the court. They fell short of what one would expect in heads of argument.<sup>6</sup> They failed to engage fairly with the evidence and advance submissions in relation to thereto. They were a mere regurgitation of what is in the founding and replying affidavits. It quoted a lot from the media articles and various other communiques, like the *Government Gazette* and National Treasury

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<sup>6</sup> *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) para 36-38; *S v Ntuli* 2003 (4) SA 258 (W) para 16.

memoranda without any supporting affidavit from the authors. Save for eThekweni, there was a generalisation of what was expected from the other respondents. It was submitted, on behalf of ActionSA, that not one of the respondents had demonstrated the will to enforce the applicable legislation or to attend to their constitutional obligations.

[68] Regarding almost all the pieces of legislation quoted by ActionSA in its papers, there was no mention of a specific provision that was breached by any of the respondents, nor was it stated in what way or manner any alleged breach occurred. It was merely stated that reference would be made to the various sections of the Constitution as well as to various laws without mention of applicable sections. This was to be done in order for the court to declare the conduct of the respondents, in failing to maintain and/or repair and/or replace and/or install the necessary infrastructure to prevent the release and/or flow and/or resettling of sewage and/or untreated effluent into the environment in the eThekweni Municipality's waterways and/or rivers and/or estuaries and/or beaches, to be in contravention of their obligations and duties owed to the residents and members of the public.

[69] ActionSA also submitted that independent reports were required in order to determine the actual situation in eThekweni. Such reports ought to be obtained within a limited time frame. It also required eThekweni to account for the funds received subsequent to the declaration of the State of Disaster. It sought that an accredited and independent water sanitation expert be appointed to test and report the daily readings of E.Coli levels in ocean water at all eThekweni beaches. Such daily readings ought to be made available on visible signage at all beaches and published daily on a suitable social media platform for the public interest.

[70] ActionSA also sought that all the respondents be directed within 30 days



of this order being granted, to prepare and make available to ActionSA and the court, a list of all current WWP and WWT and other water reticulation systems that were not operational and/or vandalized and/or in a state of despair in the eThekweni area so that an appropriate time frame could be ordered to fix them. The court ought to find that there was a constitutional breach and therefore a just and equitable order ought to be made. Reference in this regard was made to *Ex parte Minister of Home Affairs and Another*.<sup>7</sup>

[71] Perhaps it is apposite to state what relief was sought in the original notice of motion and the draft order suggested by ActionSA. ActionSA sought the following order:

‘1. Declaring the conduct of the first to eighth respondents, in failing to maintain and/or repair and/or replace and/or install the necessary infrastructure to prevent the release and/or flow and resettling of sewage and/or untreated effluent into the environment in the eThekweni Municipality’s waterways and/or rivers and/or estuaries and/or oceans and/or beaches, to be in contravention of the following legislation:

- (a) Sections 10 and 24 of Constitution of the Republic of South Africa Act 98 of 1993 (the Act<sup>8</sup>);
- (b) Section 152(1)(b) and (c) of the Act, read with Part B of Schedule 4;
- (c) The National Water Act No. 36 of 1998;
- (d) The National Environmental Management Waste Act No. 59 of 2008;
- (e) The provisions of Sections 14(2)(a) and (i) of the eThekweni By Law for beaches;
- (f) The provisions of sections 3(d) and 6 of the eThekweni By Laws for sewage Disposal 2015.’

[72] There were no factual averments or explanation about the accusations against the first to sixth respondents as well as the eighth respondent. It was not explained how these respondents contravened these particular statutes. It is therefore difficult to discern what the actual issues are against these respondents.

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<sup>7</sup> *Ex parte Minister of Home Affairs and Another* [2023] ZACC 34; 2024 (2) SA 58 (CC) para 39.

<sup>8</sup> The Constitution of the Republic of South Africa, 1996.

As a result, at the end of the arguments during the hearing of the application, we requested ActionSA to submit a draft order. I will, therefore, address the orders sought in the draft order submitted.

[73] The first order sought is:

‘(a) The first to eighth respondents are declared to be in contravention of s 10 and 24 of the Constitution of the Republic of South Africa Act No. 98 of 1993<sup>9</sup>’.

Section 10 of the Constitution states that ‘Everyone has inherent dignity and the right to have their own dignity respected and protected’. There were no factual allegations in the affidavits supporting this relief. I am therefore unable to discern how the first to the eight respondents have contravened the section and against who.

[74] Section 24 of the Constitution states that:

‘Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.’

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<sup>9</sup> See fn 10 above

[75] One of the prominent laws enacted to realise and enforce and protect the rights enshrined in s 24 of the Constitution is NEMA. ActionSA merely mentioned this Act in its notice of motion and never mentioned or dealt with it again in its papers. There was also no factual allegation explaining how s 24 of the Constitution was contravened. As correctly argued on behalf of the first to fifth respondents, the national and provincial governments must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions as provided for in s 154 of the Constitution.

[76] However, these government departments cannot be expected to usurp the authority of the municipalities, like eThekweni, in performing their functions<sup>10</sup>. Section 156 of the Constitution states that

- ‘(1) A municipality has executive authority in respect of, and has the right to administer-
- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
  - (b) any other matter assigned to it by national or provincial legislation.’

[77] The matters stated in those schedules include air pollution, local tourism, storm water management systems in built-up areas and water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems. Under Part B of Schedule 5, the matters include beaches and amusement facilities. It cannot, therefore, be said that the first to sixth respondents have breached any of these provisions nor was there a contravention of same. It can only be eThekweni that is in breach of these provisions. I will deal with this aspect later. Where there have been contraventions of any legislation by eThekweni, the second, third, and sixth respondents have issued the necessary compliance notices and directives. In some instances, criminal charges were even

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<sup>10</sup> See: *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 CC.



laid against eThekwini. An application to force compliance was also launched in the KwaZulu-Natal Local Division, Durban against eThekwini. There is therefore no basis for the allegation that the first to sixth respondents have acted unconstitutionally.

[78] The second order sought against the third, sixth and seventh respondents is that these respondents be directed, within 60 days from the date of this order, to communicate to ActionSA a written timeline indicating what interim measures will be implemented to render the WWPS and WWTW operational in eThekwini, as identified in eThekwini's Action Plan, dated 3 September 2024. Again, what is sought in this order is within the purview or scope of performance and responsibility of eThekwini and not the third and sixth respondents. There is also no factual basis established why these orders ought to be sought against the third and sixth respondents. There is also, therefore, no justification for the costs order against the first to sixth respondents as well as the eighth respondent.

[79] For completeness, it is important to mention that even in the initial notice of motion, the orders sought were against all the respondents. The key order sought was

'to declare the conduct of the first to eighth respondents, in failing to maintain and/or repair and/or replace and/or install the necessary infrastructure to prevent the release and/or flow and/or resettling of sewerage and/or untreated effluent into the environment in the eThekwini municipality's waterways and/or rivers and/or estuaries and/or oceans and/or beaches, to be in contravention of the following legislation:

- (a) Sections 10 and 24 of the Constitution of the Republic of South Africa Act No. 98 of 1993 (the Act)
- (b) Section 152(1)(b) and (c) of the Act read with Part B of Schedule 4;
- (c) The National Water Act no.36 of 1998
- (d) The National Environmental Management Waste Act No. 59 of 2008;
- (e) The provisions of section (14)(2)(a) and (i) of the eThekwini By Laws for Beaches;

(f) The provisions of sections 3(d) and 6 of the eThekweni By Laws for Sewage Disposal 2015.’

[80] On a careful perusal of the founding affidavit, there is a general averment that none of the respondents have demonstrated the will to enforce the applicable legislation or to attend to their constitutional obligations. This is a reference to the order sought. In my view, the sixth respondent in particular, being the relevant provincial executive as referred to in s 139 (1) of the Constitution<sup>11</sup>, did intervene through issuing the various pre- directives, directives and notices relating to the non- compliances with the relevant legislation. There is therefore no case made out against any of these respondents, even on the original order sought in the notice of motion, which these respondents have sufficiently addressed.

[81] I turn now to the orders sought against the seventh respondent, eThekweni. Even though the evidence is sketchy, a case has been made out with regard to the failure to maintain and/or repair and/or replace and/or to install the necessary infrastructure to prevent the release and/or flow and/or resettling of sewerage and/or untreated effluent into the environment in eThekweni’s waterways and/or rivers and/or estuaries and/or ocean and/or beaches. This was evident from the various compliance notices and directives issued by the third and sixth respondents as well as criminal charges laid against eThekweni. All this has resulted in high E.Coli levels in the beach water within eThekweni. Accordingly, I find that eThekweni has failed in performing its Constitutional mandate and obligations.

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<sup>11</sup> S 139 (1) of the Constitution provides that when a municipality cannot and does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking appropriate steps to ensure fulfilment of that obligation, including-

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



[82] With regards to the state of the WWTW and WWP, this has been covered by the Action Plan submitted by eThekweni. However, this needs further action as there has been non-compliance with the Action Plan in some instances. Some dates have come and gone and there is no update on what has happened to what was supposed to be achieved. An order, partly, in line with the order granted in the *Democratic Alliance v Ethekeweni Municipality*<sup>12</sup> matter will be issued in this matter. This, in my view, is what is just and equitable as required by s 172 of the Constitution.<sup>13</sup>

[83] I turn now briefly to the issue of costs concerning the first to sixth respondents. It is trite that unsuccessful litigants ought not to be mulcted with costs in constitutional litigation<sup>14</sup>. However, as stated in *Affordable Medicines*, this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate

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<sup>12</sup> See fn 1 above.

<sup>13</sup> Section 172 of the Constitution provides for the court's powers in constitutional matters, and reads:

'(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2)(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.'

<sup>14</sup> See: *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 CC at para 138; *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 CC.



goal is to do that which is just having regard to the facts and circumstances of the case.

[84] In *Biowatch*<sup>15</sup> the Constitutional Court, quoting with approval from *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others*<sup>16</sup> stated that if an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of cause will immunise it against an adverse costs award. In *Endangered Wildlife Trust and Another v Director-General (Acting) Department of Water and Sanitation and Another*<sup>17</sup> the court provided the description of a vexatious proceeding as formulated by Lord Bingham CJ as follows<sup>18</sup>: ‘The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process’.

[85] In my view, ActionSA’s litigation against the first to sixth respondents falls under the exception envisaged above. Firstly, no letter of demand was addressed to the first to sixth respondents prior to the commencement of the proceedings. This lack of precision by ActionSA spiralled through the application papers before us. A simple perusal of the Constitution would have enabled ActionSA to

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<sup>15</sup> See fn 14

<sup>16</sup> *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (E) at 144B-C.

<sup>17</sup> *Endangered Wildlife Trust and Another v Director-General (Acting) Department of Water and Sanitation and Another* 2025 (5) SA 343 SCA at para 117

<sup>18</sup> See: *Attorney-General v Barker*

see to whom to direct its complaints. There was clearly no cause of action against these respondents; even when this was brought to the attention of ActionSA, it just persisted with the orders sought. It is for these reasons that ActionSA must bear the costs of the first to sixth respondents.

[86] Therefore, the following order shall issue:

1. The application is dismissed with costs as against the first to sixth respondents.
2. The application is dismissed against the eighth respondent with each party to pay its own costs.
3. It is declared that the seventh respondent has defaulted in the performance of its Constitutional mandate and obligations by failing properly to maintain and/or repair and/or replace and/or to install the necessary infrastructure to prevent the release and/or flow and/or resettling of sewerage and/or untreated effluent into the environment in the seventh respondent's waterways and/or rivers and/or estuaries and/or ocean and/or beaches.
4. The seventh respondent is directed to implement the following measures:
  - 4.1 The publication weekly of E.Coli readings taken during the week preceding publication at the seventh respondents' beaches on its website, social media pages and public notice boards at all public swimming beaches within the seventh respondent's jurisdiction.
  - 4.2 The adoption of a communication protocol to the affected public/communities/industries regarding E.Coli readings, with particular emphasis on reasonable measures to ensure effective and immediate notice of any water-related hazards and pollution affecting the swimming beaches and members of the public who live or work alongside beaches and rivers within the seventh respondent's jurisdiction.

- 4.3 The widest and most reasonably effective notification to members of the public of how to access the information available in consequence of the implementation of the measures required by paragraphs 4.1 and 4.2 of this order.
5. The seventh respondent is directed, within two months from 19 December 2025, this being a date upon which a similar order was made against the seventh respondent under case No. 3036/2023, to prepare and file an amended Action Plan and any associated reports and substantiating documents under oath, with the person designated to issue notices by the sixth respondent, setting measurable periodic deadlines for progress for the repair of all the wastewater treatment works and related infrastructure.
6. The seventh respondent is ordered to pay the costs of ActionSA's application, save for such costs as were incurred by reason of ActionSA's claims for substantive relief against any of the first to sixth respondents.

  
**POYO DLWATI JP**  
**OLSEN J**  
**MATHENJWA J**



APPEARANCES

|                                                           |                                                         |
|-----------------------------------------------------------|---------------------------------------------------------|
| Date of Hearing                                           | : 24 & 25 July 2025                                     |
| Date of Judgment                                          | : 09 February 2026                                      |
| Counsel for Applicant                                     | : Ms G Y Benson                                         |
| Instructed by                                             | : MVMT Attorneys<br>c/o Tomlison Mnguni James Attorneys |
| Counsel for 1 <sup>st</sup> – 5 <sup>th</sup> Respondent  | : Ms A Gabriel SC                                       |
| Instructed by                                             | : State Attorney Durban                                 |
| Counsel for 6 <sup>th</sup> Respondent                    | : Ms E Roberts                                          |
| Instructed by                                             | : HSG Attorneys                                         |
| Counsel for 7 <sup>th</sup> & 8 <sup>th</sup> Respondents | : Mr V Gajoo SC with Mr I Veersamy and<br>Ms M Mtati    |
| Instructed by                                             | : Legator McKenna Inc.                                  |