



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MTHATHA)**

**CASE NO: 4018/2021**

**Reportable**

**JUDGMENT**

In the matter between:

**LULAMILE DAVEYTON KHETSHEMIYA**

**First Applicant**

**MENTANI MKALITSHI**

**Second Applicant**

**HARVEY NTSHOKO**

**Third Applicant**

**TRUSTEES OF THE MASIFUNDISE**

**Fourth Applicant**

**DEVELOPMENT TRUST**

**and**

**MINISTER OF WATER AND SANITATION**

**First Respondent**

**MINISTER OF COOPERATIVE GOVERNANCE**

**AND TRADITIONAL AFFAIRS**

**Second Respondent**

**PREMIER OF THE EASTERN CAPE PROVINCIAL**

**GOVERNMENT**

**AMATHOLE DISTRICT MUNICIPALITY**

**AMATOLA WATER BOARD**

**Third Respondent**

**Fourth Respondent**

**Fifth Respondent**

**Neutral citation:** *Khetsheziya And Others v Minister Of Water And Sanitation And Others* (Case no 4018/21) [2026] ZAECM (15 May 2026).

**Coram:** **NHLANGULELA, AJP**

**Heard (Virtually):** **25 NOVEMBER 2025**

**Delivered:** **15 MAY 2026**

**Summary:** *Constitutional Law, breach of Sections 3, 62, and 63 of the Water Services Act, 1997-Subsidiary legislation promulgated to enforce the right to supply of basic water in terms of s 27 of the Constitution- Application granted with costs- First, third and fourth respondents obliged to provide access to basic water supply to the applicants- Structural remedy in terms of s 38 of the Constitution applied.*

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## **ORDER**

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The first, third and fourth respondents have breached their constitutional and statutory obligations to the residents of Ward 28 as follows:

- 1.1 the fourth respondent has failed to provide the residents of Ward 28 with access to basic water supply in terms of section 3 of the Water Services Act, 1997;

- 1.2 the fourth respondent has failed to comply with the basic minimum standards for basic water supply services in terms of regulation 3 of the Regulations published in GNR 509 of 8 June 2001;
- 1.3 the first and third respondents have failed in their duty to intervene to remedy the failures of the fourth respondent in paragraphs 1.1 and 1.2;
- 1.4 the first, third and fourth respondents have failed to ensure that the residents of Ward 28 have adequate access to water, in terms of section 27 (1)(b) and (2), section 24 and section 10 of the Constitution of the Republic of South Africa, 1996;
2. The first respondent is ordered to convene a task team on his/her own direction(s), and including representatives of the second, third, fourth and fifth respondents, to devise and implement a long-term, sustainable plan to ensure that access to water and basic water supply services, in accordance with the Constitution and the Water Services Act and the regulations thereunder, are provided to the residents of Ward 28.
3. The first to fifth respondents are ordered to provide a copy of that plan to this Court and to the applicants within two months of the date of this order.
4. The first to fifth respondents are ordered to report on affidavit to this Court, with a copy to the Applicants, not later than three months after

the date of this order, and thereafter at periods of every three months, as to:

- 4.1 What they have done to give effect to paragraph 2 above;
  - 4.2 To what extent this has achieved or facilitated the outcome required by paragraph 2 above;
  - 4.3 What further steps they will take to achieve the outcome required by paragraph 2;
  - 4.4 When they will take each such further step; and to continue to file such reports until this order is discharged or varied by this Court, or by agreement of the applicants and the first to fifth respondents.
5. The applicants may approach the Court for further relief, on these papers as supplemented to the extent necessary.
  6. The costs of this application to be paid by the first, third and fourth respondents on Scale C, and to do so jointly and severally, the one paying and the others to be absolved from liability.
  7. The order in paragraph 6 above shall include the costs of Senior Counsel.
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## JUDGMENT

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NHLANGULELA, AJP

*Introduction:*

[1] The first applicant is Lulamile Daveyton Khetshehiya, an adult male residing in Nombanjana Village, in Ward 28 in the Mnquma Local Municipality ("MLM"). The MLM falls in the area of jurisdiction of the Amathole District Municipality ("ADM"). The second applicant is Mentani Mkalitshi, an adult female residing in Nxaxo Village, in Ward 28 in the MLM. The third applicant is Harvey Ntshoko, an adult male residing in Nombanjana Village, in Ward 28 in the MLM. The first to third applicants bring this application in their own interests in terms of section 38 (a) of the Constitution; in the interests of the group of persons consisting of the residents of the Ward 28 villages, in terms of section 38 (c) of the Constitution; and in the public interest in terms of section 38 (d) of the Constitution. The fourth applicant is The Masifundise Development Trust, a non-profit trust registered in terms of the Trust Property Control Act 57 of 1988, with its head office at [...] S[...] Road, Mowbray, Cape Town. It brings this application in its own interests in terms of section 38(a) of the Constitution; and in the public interest in terms of section 38(d) of the Constitution<sup>1</sup>.

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<sup>1</sup> Section 38 of the Constitution, 1996 reads: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the Court are-(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.'

[2] The first respondent is the Minister of Water and Sanitation, with her head office at Sedibeng Building, 1[...] F[...] B[...] Street, Pretoria. The second respondent is the Minister of Cooperative Governance and Traditional Affairs, with her head office at Union Buildings, G[...] Avenue, East Wing, [...] Floor, Arcadia, Pretoria. The third respondent is the Premier of the Province of the Eastern Cape with his head office at the Office of the Premier Building, [...] Floor, I[...] Avenue, Bhisho. The fourth respondent is the Amathole District Municipality, with its head office situated at [...] W[...] Office Park, 3[...] P[...] F[...], Chiselhurst, East London. When the applicants brought this application in 2021, the fourth respondent was under the administration of the Executive Council of the Eastern Cape Government in terms of section 139 (5) (a) of the Constitution of the Republic of South Africa, 1996, with its Head Office at Office of the Premier Building, [...] Floor, I[...] Avenue, Bhisho.

[3] On 1 October 2024, this court granted interim relief<sup>2</sup>, ordering the fourth and fifth respondents to grant the applicants access to basic water, and the first, second and third respondents to assist the fourth respondent in procuring, distributing, and providing a minimum quantity of potable water of 25 litres per person per day at a minimum flow rate of not less than 10 litres per minute; within 200 metres of a

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<sup>2</sup> The order in relevant part reads as follows: ‘1. It is declared that the [ADM] is under a duty to provide the residents of Ward 28 of the Mquma Local Municipality ("Ward 28") with access to sufficient water. 2. It is declared that the [Minister of Water], [the Minister of COGTA] and [the Premier] are under a duty to assist the [ADM] to provide the residents of Ward 28 with access to sufficient water. 3. The [Minister of Water], [the Minister of COGTA], [the Premier], [the ADM] and [the Chief Executive Officer of Rand Water] are ordered, without delay, to engage with each other to discuss what interim steps they will take to ensure that the residents of Ward 28 are without delay provided with access to potable water: 3.1. when they will take each such step; 3.2 in what manner this will ensure that the residents of Ward 28 are without delay provided with access to potable water, including the amount of water that will be provided, where it will be provided, when it will be provided and how frequently it will be provided’

household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.<sup>3</sup> However, the respondents did not comply with such orders; hence, the need to determine the order sought in Part B of the Notice of Motion, which reads as follows:

‘1. It is declared that the respondents listed below have breached their constitutional and statutory Obligations to the residents of Ward 28 as follows:

- 1.1 The fourth respondent has failed to provide the residents of Ward 28 with access to basic water supply in terms of section 3 of the Water Services Act, 1997;
- 1.2 The fourth respondent has failed to comply with the basic minimum standards for basic water supply services in terms of Regulation 3 of the Regulations published in GNR 509 of 8 June 2001;
- 1.3 the first, second and third respondents have failed in their duty to intervene to remedy the failures of the fourth respondent in paragraphs 1.1 and 1.2;
- 1.4 the first, second, third, fourth and fifth respondents have failed to ensure that the residents of Ward 28 have adequate access to water, in terms of section 27(1)(b) and (2), section 24 and section 10 of the Constitution of the Republic of South Africa, 1996.

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<sup>3</sup> The prescript is contained in Regulation 3 of GNR 509 of 8 June 2001, which stipulates the minimum standard for basic water supply services that must be progressively provided to everyone at a minimum quantity of portable water of 25 litres per person per day, or 6 kilolitres per household per month- (i) at a minimum flow of not less than 10 litres per minute; (ii) within 200 meters of a household; and (iii) with an effectiveness such that no consumer is without a supply for more than 7 full days in any year.

2. The first respondent, *alternatively* the second respondent, is ordered to convene a task team under the direction of the first respondent (*alternatively* the second respondent) or her representative, and including representatives of the second, third, fourth and fifth respondents, to devise and implement a long-term, sustainable plan to ensure that access to water and basic water supply services, in accordance with the Constitution and the Water Services Act and the regulations thereunder, are provided to the residents of Ward 28.
3. The first to fifth respondents are ordered to provide a copy of that plan to this Court and to the applicants within two months of the date of this order.
4. The first to fifth respondents are ordered to report on affidavit to this Court, with a copy to the Applicants, not later than three months after the date of this order, and thereafter at periods of every three months, as to:
  - 4.1 What they have done to give effect to paragraph 2 above;
  - 4.2 To what extent this has achieved or facilitated the outcome required by paragraph 2 above;
  - 4.3 What further steps will they take to achieve the outcome required by paragraph 2 above;
  - 4.4 When will they take each such further step, and to continue to file such reports until this Order is discharged or varied by this Court, or by agreement of the applicants and the first to fifth respondents.
5. The applicants may approach the Court for further relief, on these papers as supplemented to the extent necessary;
6. Any party that opposes this application is to pay the costs of the application, including the costs of two counsel, jointly and severally



with any other respondent that opposes, the one paying, the other to be absolved.

7. Granting the applicants further and/or alternative relief.’

*The facts:*

[4] The applicants’ affidavit traces a history of water delivery crises in Ward 28 Villages dating back to 2003, when ADM was formed, through 2021, when these proceedings were launched, and beyond. The ADM became a Water Services Authority in 2003 and a provider in 2006. It has not taken sufficient measures to supply basic water in a drought-affected, COVID-stricken Ward 28. Only one water tank was provided in May 2020, which ran out within a day. ADM’s Water Services Development Plan (2017 – 2022) shows that only 13% of households have piped water. The district is under administration due to financial crises, affecting service delivery. The ADM relies on the fifth respondent (AWB) for bulk water, which faces management issues and was placed under legal administration in 2020. The district’s infrastructure and management are inadequate, with rural areas being more affected. No villages have access to potable water within 200 meters of residences. Residents rely on distant rivers, taking 1.5 hours to fetch water. Daily water collection is limited to 2030 litres per person, often unsafe. Water tanks provided in 2020 were only filled once and then stopped. There has been no water in the tanks since that stoppage. The situation has been ongoing since at least 2017, with no effective intervention. COVID 19 increased health risks due to the inability to sanitise or wash hands.

[5] Community and NGO efforts to address water shortages have already largely failed. Attempts by the fourth applicant (the Trust) to engage the authorities have not been successful. Water tanks donated by NGOs were not collected or installed by the authorities. Community meetings with the local government resulted in promises that were not fulfilled. Letters of demand from legal representatives went unanswered. The community continues to rely on unsafe river water, risking health and dignity. COVID-19 response measures, such as water tanks, were ineffective or not sustained. The Eastern Cape was declared a drought disaster in August 2019. The AWB received R50 million for drought intervention, but no effective relief reached Ward 28. ADM received R64 million in 2018/2019 for drought-related projects, but residents still lack reliable water. ADM faces severe financial issues, is unable to pay salaries for four months, and relies on bank overdrafts. A R180 million bailout requested from Treasury did not help, as the ADM owes R173 million bailout to AWB and R50 million to the Department of Water and Sanitation. The drought and financial crises have hampered emergency water provision efforts.

[6] On 15 April 2020, the first respondent (Minister of Water) issued directions under the Disaster Management Act for the purpose of mobilising water authorities for emergency water and sanitation services, including emergency procurement of water tanks, tankers, and related goods to combat COVID-19. Despite these measures, the ADM and Rand Water have not fully implemented the directives. The governance and management of water services are inadequate. The AWB would later face management issues, which led to it being placed under legal administration. The Eastern Cape Provincial Government has struggled with intervention and recovery plans.

The ADM has not allocated sufficient resources or taken effective action. The legal and institutional framework assigns responsibility but is not effectively enforced. The failure to provide basic water services violates constitutional rights and statutory duties. The existing water and sanitation service data across the municipalities underscores ongoing service gaps, especially in rural areas, and the need for infrastructure upgrades and the reduction of service backlogs.

[7] Ms Amanda Sizani, the deponent to the answering affidavit filed on behalf of the Minister of Water, disputes the fact that she, the second respondent (Minister of Cogta) and third respondent (the Premier) have failed in their duty to intervene to remedy the failure of ADM to deliver potable water to the residents of Ward 28 as envisaged in terms of s 27 (1)(b) and (2), read with s 10 of the Constitution; and ss 3,62 and 63 of the Water Services Act No. 108 of 1997 (the Act). In amplification, she contends that the Minister of Water cannot intervene unless the Premier has unjustifiably failed to intervene, or has unsuccessfully intervened. In this case, such a failure was not brought to the attention of or made known to the first respondent. She alleges that, in this matter, the Department of Water never received any information that the ADM and the Province had failed in their constitutional and statutory duties to provide the residents of Ward 28 with access to water until the papers were served upon the Department in September 2021. She alleges further that, in any event, the Minister of Water did initiate some intervention by providing water tankers to ADM for the period from November 2021 to February 2022, with a long-term solution intended to be the supply of water through the Ngqamakwe Regional Water Supply Scheme. Further, a proposal was made to drill

boreholes at Thokazi Administrative Area for the supply of water to the residents of Ward 28, but this was thwarted by objections from the people of Thokazi.

[8] The Minister of Water also relies on the principle of subsidiarity, contending that insofar as the applicant's case stems directly from the provisions of s 27 of the Constitution, instead of the provisions of the Act, the application falls to be dismissed.

[9] Mr Thembisile Nkadimeng, deposed to an answering affidavit on behalf of the Minister of Cogta. He denies that the Minister has a statutory obligation to intervene on ADM's behalf to remedy ADM's failure to comply with the basic minimum standards for water supply. However, the Minister would not object to being part of a task team convened by the first respondent to devise and implement a long-term, sustainable plan for the supply of water in Ward 28. He contends that since the applicants rely on s 27 (1) of the Constitution, not the provisions of the subsidiary Water Services Act, none of the relief set out in Part B of the Notice of Motion can competently be granted against the Minister.

[10] The Premier states on affidavit that the applicants' reliance on s 27 of the Constitution violates the principle of subsidiarity and, for that reason, they are not entitled to any relief under the Act. By and large, the Premier joins hands with his co-respondents on the issues of denial of the duty to monitor and intervene to stop the water crisis in Ward 28, and each organ of state passes its obligation to comply with the other. The respondents also

allege resource constraints as the factor that should influence the court not to grant the relief sought.

*Disputed facts:*

[11] There are two disputed matters in this matter. The first is raised by the Minister of Water, which is that she could not intervene on behalf of ADM because she was informed at the time of service of the application papers in September 2021 that the people of Ward 28 were in need of a water supply intervention. The second is a dispute of law raised by all the respondents that the principle of subsidiarity prevents the granting of any of the relief sought by the applicants under Part B of the Notice of Motion.

[12] In application proceedings, where a dispute of fact has arisen from the papers, the court may nevertheless grant the relief sought. In terms of the rule formulated in *Plascon–Evans Paints (Pty) Ltd*<sup>4</sup>, the relief sought by the applicant may be granted if the facts stated by the applicant, which are not in dispute, and the facts stated by the respondent, justify such a relief. Further, in an instance where the facts stated by the respondent are so far-fetched or clearly untenable, the court may be justified in merely rejecting those facts and granting the relief sought by the applicant. In this case, allegation by the Minister of Water alleged that she had not been informed in 2020 that the residents of Ward 28 were in need of potable water, but did nothing after September 2021 to assist ADM in supplying water. In any event, the Minister's version may well be rejected because the founding affidavit contains evidence that the South African Caucus and the NGOs sent written

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<sup>4</sup> *Plascon–Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para 26.

notifications to the first respondent between April and December 2020, which is not controverted in the answering affidavits. Therefore, the case of *Plascon–Evans Paints (Pty) Ltd* is applicable, thereby paving the way for the consideration of a dispute of law.

*The arguments:*

[13] The submissions made by *Mr. Budlender SC*, appearing on behalf of the applicants, highlight the constitutional and statutory scheme for the establishment of the ADM, the ADM's accountability and responsibility as the services authority, and the respondents' legal obligations to provide the residents of Ward 28 with access to basic water supply, the failure by ADM to provide water, obligations of the first, second and third respondents to intervene on behalf of ADM when confronted with a difficulty in supplying basic water to the residents of Ward 28.

[14] *Mr Budlender* submitted that s (27) (1)(b) of the Constitution gives the residents of Ward 28 access rights to sufficient water, which, in terms of s 27 (2) of the Constitution, enjoins the state to make such rights realised through reasonable legislative and other measures. The case of *Mazibuko and Others v City of Johannesburg*<sup>5</sup> sets out the proper approach to the application of s 27 in the following terms:

‘Applying this approach to section 27(1)(b), the right of access to sufficient water coupled with s 27 (2), it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather, it requires the state to take reasonable legislative and other measures progressively to

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<sup>5</sup> *Mazibuko and others v City of Johannesburg* 2010 (4) SA 1 CC at para 50.

realise the achievement of the right of access to sufficient water, within available resources.’

[15] The Act is the legislative measure that is referred to in s 27 of the Constitution. The Act places obligations on the three spheres of government to implement the right to water. It guarantees minimum standards for water supply and incorporates protective measures against water deprivation.

[16] The Act contains provisions that regulate the monitoring and intervention powers of the provincial and national governments in relation to the provision of water services. Section 62 of the Act provides for the monitoring of water services by the Minister of Water, Provinces, and local organs of state, as follows:

‘(1) The Minister [of Water] and any relevant province must monitor the performance of every water services institution in order to ensure-

- (a) compliance with all applicable national standards prescribed under this Act;
- (b) compliance with all norms and standards for tariffs prescribed under this Act; and
- (c) compliance with every applicable development plan, policy statement or business plan adopted in terms of this Act.

(2) Every water services institution must-

- (a) furnish such information as may be required by the Minister after consultation with the Minister for Provincial Affairs and Constitutional Development; and
- (b) allow the Minister access to its books, records, and physical assets to the extent necessary for the Minister to carry out the monitoring functions contemplated in subsection.’

[17] In terms of s 63 of the Act, the Ministers and the Province are obliged to intervene<sup>6</sup> to remedy the ADM's failure. It provides as follows.

‘(1) If a water services Authority has not effectively performed any function imposed on it by or under this Act, the Minister [of Water] may, in consultation with the Minister [of COGTA], request the Premier to intervene in terms of section 139 of the Constitution.

(2) If within a reasonable time after the request, the province –

- (a) has unjustifiably failed to intervene; or
- (b) has intervened but has failed to do so effectively, the Minister [of Water] may assume responsibility for that function to the extent necessary-
  - (i) to maintain essential national standards;
  - (ii) to meet established minimum standards for providing services; or
  - (iii) to prevent that province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole.’

[18] On the consideration of the fact that the residents of Ward 28 have been without a supply of basic water since at least 2017, a remedy anchored in appropriate steps is sought that will ensure that the residents of Ward 28 obtain sufficient potable water, to which they have a right. Had the respondents discharged their legal obligations, Ward 28's situation would not have endured for eight years. In similar circumstances of non-interventions in breach of s 63 (1) of the Act, an order was made in *Mnquma Municipality*

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<sup>6</sup> Section 63 underscores the provisions of s 139 (1) of the Constitution, which reads: ‘When a municipality cannot or does not fulfill an executive obligation in terms of the constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation...’



*Local Municipality and Another v Premier of the Eastern Cape*<sup>7</sup>, where the following was said at para 72:

‘... appropriate steps are to be construed as steps that are such as would be suitable in the sense that it must fit the situation. The form of intervention must accordingly address the particular circumstances of the case. This can only be determined with due regard to the nature of the executive obligation that was not fulfilled, the interests of those affected by the failure to fulfill an executive obligation, and the interests of the community concerned with due regard to those features that arise from the constitutional scheme as embodied in Chapters 3, 5, 6 and 7 of the Constitution. It requires a balancing of the constitutional imperative to respect the integrity of local government as far as possible against the constitutional requirement of effective government. A further consideration is the purpose of the power. To intervene. It is clearly designed as a corrective measure to ensure that such steps are taken that would resolve the problems that may be experienced in a particular municipality. This necessitates the question whether the form of intervention that is contemplated would be effective and commensurate with the nature and/or the extent of the failure to fulfill the obligation concerned.’

Also see: *Fose v Minister of Safety and Security*<sup>8</sup>

[19] In dealing with the nature of the right infringed and the nature of the infringement, the Constitutional Court stated in *Minister of Health v Treatment Action Campaign*<sup>9</sup> that an appropriate remedy may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.

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<sup>7</sup> *Mnquma Municipality Local Municipality and Another v Premier of the Eastern Cape* [2009] ZAECHC 14 at para 72.

<sup>8</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 at paras 96 and 97.

<sup>9</sup> *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) para 106.

[20] The upshot of *Mr Budlender's* submissions is that the applicants have made up a case for the grant of declaratory orders that ADM has failed to give the residents of Ward 28 access to basic water supply in breach of s 3 of the Act; and the Minister of Water and Premier have failed to intervene in the failures of ADM to supply basic water to the residents of Ward 28. To that extent, the Minister of Water or Minister of Cogta, including the representatives of the Premier, ADM, and the fifth respondent, should be ordered to convene a task team to devise and implement a long-term sustainable plan to ensure access to water and basic water supply services. In the final analysis, a supervisory order may be issued requiring the first to fifth respondents to report to this Court on the steps they will take to achieve the outcome required under their plan.

[21] I agree that the breach by the ADM, the Ministers and Premier of the right to water of the residents of what, 28 is egregious, despite being aware since at least April 2020. Since ADM has failed to provide the residents of Ward 28 with sufficient portable water, the Premier and the Minister of Water have not intervened under section 139 of the Constitution and/or section 63 of the Act. The facts of this case show that neither the Premier nor the Minister intends to intervene to remedy the violation. The residents of Ward 28 are suffering.

[22] *Mr Matebese SC*, appearing for the Minister of Water, submitted that the declaratory and consequent orders sought by the applicants are not competent by reason that they are not consistent with the constitutionally and legislatively ordained and acceptable framework. The orders sought amount to interference with the affairs of separate organs of state, namely

the Premier and Cogta, which is not the intervention envisaged in ss 3 and 63 of the Act, read with s 139 of the Constitution. Further, the relief sought by the applicants circumvents the operation of the subsidiarity principle.

[23] Counsel contended that the water rights of the residents of Ward 28 are limited by unavailable financial resources, and, in turn, the power of the Minister of Water to intervene is circumscribed. These submissions are made with reliance on *Soobramoney v Minister of Health, (KwaZulu-Natal)*<sup>10</sup> where the following was stated at para 11:

“What is apparent from these provisions is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, health, care, food, water and social security, are dependent upon available resources by reason of the lack of resources.”

[24] Counsel argued that even if intervention was not restricted, the Minister would still not be able to intervene because ADM had not been shown to have failed to provide the water required by the residents of Ward 28. He contended that, in any event, the unchallenged evidence that the Minister had made arrangements for the supply under the Ngqamakwe Regional Water Supply Scheme, and made proposals for the delivery of water tankers and tanks for the residents of Ward 28 ought to excuse the Minister from making any further compliance.

[25] It was submitted by *Mr Moerane SC*, appearing for the Minister of Cogta and Premier, that the relief sought against the Minister is impermissible because the Act read with s 139 of the Court vests monitoring and intervention powers for water services in the Minister of Water and

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<sup>10</sup> *Soobramoney v Minister of Health, (KwaZulu-Natal)* 1988 (1) SA 756 (CC).

Premier, not in the Minister of Cogta; jurisdictional factors for intervention under s 63 of the Act and s 139 of the Constitution are absent; and, therefore, the relief sought against the Minister violates the separation of powers and municipal autonomy. However, the Minister abides by the relief that may be competently sought against the empowered functionaries.

[26] *Mr Moerane's* submissions that are relevant to the Minister for Cogta would be abbreviated by the consideration that s 63 of the Act reveal that the Minister has no primary duty to initiate the process of intervention at the instance of the Minister for Water; the concession made by the Minister of Cogta that he is willing to participate in a team that the Minister of Water may establish as well as the concession made on behalf of the applicants that a substantive relief sought by the applicants cannot competently be granted against the Minister for Cogta. I am in agreement with these submissions, which, at the national level, call for the court to focus attention on the breaches committed by the Minister of Water.

[27] In the final determination of the issues of this matter, the questions that have emerged call for answers. I list the questions below:

- (a) Does the applicants' case violate the principle of subsidiarity?
- (b) Do the applicants still experience shortage of water?
- (c) Are they entitled to access to basic water supply in terms of s 27 (1)(b) of the Constitution?
- (d) What are the statutory duties of the respondents towards the plight of the applicants?

- (e) If (b) is answered in the affirmative, what steps did those respondents plagued with statutory duty take to ensure that basic water is supplied to the applicants?
- (f) What relief are the applicants entitled to?

*The subsidiarity principle:*

[28] On the principle of subsidiarity, *Mr Matebese* placed reliance on the case of *Mazibuko v City of Johannesburg*<sup>11</sup>, where the following was stated at para 73:

“...This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.”

[29] As I understand the respondents’ argument on the subsidiary principle, since the Minister for Water has not been proved to have breached duties to monitor and intervene in terms of the Act, the direct reliance on s 27 (1)(b) of the Constitution, the provisions of which do not make reference to mentoring and intervention obligations, is legally impermissible. In my view, such a submission is unsustainable. Since water supply in Ward 28 has been cut off since 2017, and is ongoing, it is not open to the Minister of Water to say that he did not know that the provisions of s 62 and 63 of the Act place the monitoring and intervention obligations upon him. The Minister’s promises for the water scheme and to drill boreholes have as yet

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<sup>11</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 73

to come to fruition. Therefore, I reject the submission that the applicants' application is a violation of the subsidiary principle.

[30] It was submitted by *Mr. Moerane* that since the Minister of Cogta is not in an assigned sphere for water services, a declaratory order cannot be granted against her. For present purposes, and for the reasons already advanced on behalf of the Minister of Cogta, which are conceded by *Mr Budlender*, the Minister of Cogta ought to be exonerated from any declaratory order that may be granted in this matter. The same cannot be said about the role of the Premier under the Act, who, acting in conjunction with the Minister of Water, had to monitor and bring the situation in Ward 28 under control.

*Relief:*

[31] The summary of the proven facts of the matter are that the residents of Nombanjana and Nxaxo villages of MLM, Ward 28 have been plagued with water scarcity and a lack of supply of basic water for a considerable period of time spanning eight years. The drought and financial crises have hampered emergency water provision efforts. The promises of emergency procurement water and sanitation services by the Minister of Water have yet to be fulfilled. AWB and ADM are under legal administration. In the circumstances I accept the applicants' case that their constitutional right of access to potable water were breached. The respondents did not take appropriate steps to monitor and intervene as envisaged in ss 27 (1)(b) and 139 of the Constitution read with ss 3, 62 and 63 of the Act. The constitutional relief sought in terms of s 38 of the Constitution is necessary.

Therefore, the answer to the questions in paragraphs (b) and (c) is the affirmative. On paragraphs (d), the provisions of the Constitution and the Act alluded to were breached by the respondents. The Ministers, Premier and ADM did not take steps to end the water crises in Ward 28.

[32] The relief sought in the Notice of Motion, and appropriately amplified on affidavits, is a constitutional law remedy because constitutional rights have been violated. The power to grant such a remedy is from the provisions of s 38 of the Constitution. The power must be just and equitable as envisaged in s 172 (1)(b) of the Constitution. Such a power affords the Court the exercise of a wide discretion, because the purpose of the remedy should effectively vindicate the constitutional rights of the applicants that have been violated, and deter future infringements. The nature of the infringement and its impact on the applicants should be taken into account. The fact that the infringement of applicants' rights is egregious should provide guidance to determine the effectiveness of the relief that will be made. The structural relief to be granted should be an appropriate one for this case. The guidance for formulating such a relief may be sourced from *Agri Eastern Cape and others v MEC, Department of Roads and Public Works and others*<sup>12</sup>.

[33] I have examined the draft order that was filed of record together with the heads of argument for the applicants. In doing so, I am satisfied that not only does it reflect the relief prayed for in Part B of the Notice of Motion, but it buttresses the debates on the issues that I have ventilated in this

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<sup>12</sup> *Agri Eastern Cape and other v MEC, Department of Roads and Public Works and others* 2017 (3) SA 383 (ECG) at 331 – 4

judgment. Further, I am satisfied that the principles of a declaratory relief as applied in the cases of *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*<sup>13</sup>, and *Oakbay Investments and Others v Director of the Financial Services Intelligence Centre*<sup>14</sup> have been met by the applicants<sup>15</sup>.

*Costs:*

[34] *Mr Budlender* seeks an order of costs against the Minister of Water, Minister of Cogta and the Premier. *Mr Moerane* argued strenuously against the cost being visited the Minister of Cogta. The debate that arises from the divergent submissions need not to be engaged fully because *Mr Budlender* conceded that the Minister did not oppose the relief sought in Part A of the Notice of Motion. But, as the application progressed to Part B of the matter, the Minister happened to be dragged into the substantive issues relevant to breach of the applicants' constitutional rights, and on occasions being also included in the interlocutory orders. Save that the continued involvement of a party that did not oppose the relief sought cannot be erroneous in the case of this nature, mulcting the Minister with costs will be unjust in my view. As to what will happen in the future that is going to be regulated in terms of the structural order be issued, the involvement of the Minister of Cogta will be decided by the circumstances obtaining then. In brief, the costs of the

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<sup>13</sup> *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) (*Cordiant*)

<sup>14</sup> *Oakbay Investments and Others v Director of the Financial Services Intelligence Centre* [2017] ZAGPPHC 576; [2017] 4 All SA 150 (GP); 2018 (3) SA 515 (GP), para 56 to 63

<sup>15</sup> The principles are that the applicants must be interested parties on whom the declaratory order would be binding; and that the case must be a proper one for the exercise of discretion by the court.



application on Part B will be borne by ADM, the Minister of Water and Premier.

*The Order:*

[34] The first, third and fourth respondents have breached their constitutional and statutory obligations to the residents of Ward 28 as follows:

- 1.5 the fourth respondent has failed to provide the residents of Ward 28 with access to basic water supply in terms of section 3 of the Water Services Act, 1997;
- 1.6 the fourth respondent has failed to comply with the basic minimum standards for basic water supply services in terms of regulation 3 of the Regulations published in GNR 509 of 8 June 2001;
- 1.7 the first and third respondents have failed in their duty to intervene to remedy the failures of the fourth respondent in paragraphs 1.1 and 1.2;
- 1.8 the first third and fourth respondents have failed to ensure that the residents of Ward 28 have adequate access to water, in terms of section 27 (1)(b) and (2), section 24 and section 10 of the Constitution of the Republic of South Africa, 1996;
2. The first respondent is ordered to convene a task team on his/her own direction(s), and including representatives of the second, third, fourth and fifth respondents, to devise and implement a long-term,

sustainable plan to ensure that access to water and basic water supply services, in accordance with the Constitution and the Water Services Act and the regulations thereunder, are provided to the residents of Ward 28.

3. The first to fifth respondents are ordered to provide a copy of that plan to this Court and to the applicants within two months of the date of this order.
4. The first to fifth respondents are ordered to report on affidavit to this Court, with a copy to the Applicants, not later than three months after the date of this order, and thereafter at periods of every three months, as to:
  - 4.1 What they have done to give effect to paragraph 2 above;
  - 4.2 To what extent this has achieved or facilitated the outcome required by paragraph 2 above;
  - 4.3 What further steps they will take to achieve the outcome required by paragraph 2;
  - 4.4 When they will take each such further step; and to continue to file such reports until this order is discharged or varied by this Court, or by agreement of the applicants and the first to fifth respondents.
5. The applicants may approach the Court for further relief, on these papers as supplemented to the extent necessary.

6. The costs of this application to be paid by the first, third and fourth respondents on Scale C, and to do so jointly and severally, the one paying and the others to be absolved from liability.
7. The order in paragraph 6 above shall include the costs of Senior Counsel.

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Z. M. NHLANGULELA  
ACTING JUDGE PRESIDENT OF HIGH COURT  
EASTERN CAPE DIVISION

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