CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/11

In the matter between:

NTHABISENG PHEKO	First Applicant
OCCUPIERS OF BAPSFONTEIN INFORMAL SETTLEMENT	776 Further Applicants

and

EKURHULENI METROPOLITAN MUNICIPALITY	First Respondent
EXECUTIVE MAYOR OF EKURHULENI METROPOLITAN MUNICIPALITY	Second Respondent
MUNICIPAL MANAGER OF EKURHULENI METROPOLITAN MUNICIPALITY	Third Respondent
MEMBERS OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, GAUTENG	Fourth Respondent
HEAD OF THE DEPARTMENT OF HUMAN SETTLEMENTS FOR EKURHULENI METROPOLITAN MUNICIPALITY, DEVRAJ CHAINEE N.O.	Fifth Respondent

and

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA	Amicus Curiae

Neutral citation: *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others (No 3)* [2016] ZACC 20

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J, and Zondo J

Judgment: Nkabinde J (unanimous)

Decided on: 26 July 2016

Summary: Interlocutory application following *Pheko I* — disputed facts of technical nature — discharge of supervisory jurisdiction — referral to High Court — oral evidence — declaration of unlawfulness not discharged

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ORDER

Interlocutory application for referral of the matter to the High Court of South Africa, Gauteng Division, Pretoria:

1. Condonation is granted.
2. Paragraphs 6 to 8 of the order in *Pheko I* are discharged.
3. The matter is transferred to the High Court of South Africa, Gauteng Division, Pretoria to—
    3.1 determine issues relating to the identification of suitable alternative land in the vicinity of Bapsfontein for the Mayfield Community;
    3.2 supervise the relocation of the Mayfield Community; and
    3.3 supervise the housing project for the N12 Highway Park Community as described in the reports filed on 30 November 2014 by the Ekurhuleni Metropolitan Municipality.
4. The Judge President of the High Court of South Africa, Gauteng Division, Pretoria, is asked to allocate this matter to a Judge or Judges for the purposes of case management and its expedient hearing.

5. The Municipality is ordered to pay the applicants' costs including costs of two counsel and the qualifying fees of Professor Mark Oranje.

6. The Registrar of this Court is directed to send the copy of this judgment to the Registrar of the High Court of South Africa, Gauteng Division, Pretoria.

JUDGMENT

NKABINDE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nugent AJ, Van Der Westhuizen J and Zondo J concurring):

Introduction

[1] Supervisory orders arising from structural interdicts ensure that courts play an active monitoring role in the enforcement of orders. In an appropriate case, this guarantees commitment to the constitutional values of accountability, responsiveness and openness by all concerned, in a system of democratic governance. By granting the structural interdict a court secures a response in the form of reports and thereby prevents a failure to comply with the positive obligations imposed by its order. Generally, the court's role continues until the remedy it has ordered in a matter has been fulfilled.

[2] In this application for interlocutory relief the applicants ask this Court, among other things, to relinquish its supervisory jurisdiction. The issues include whether the matter should be referred to the Gauteng Division of the High Court, Pretoria (High Court) for that Court to deal with questions arising from the decision of this Court in *Pheko I*.[1] Should this Court favour referral, the questions are what the referral terms

[1] *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) (*Pheko I*).

will entail and whether it would be in the interests of justice to discharge the order of supervisory jurisdiction. The Municipal respondents do not oppose the referral but oppose the terms of the discharge and referral of the order of supervisory jurisdiction. The amicus curiae opposes the application for referral.

Parties

[3] The applicants are the former residents of the Bapsfontein Informal Settlement (Bapsfontein settlement). They have no secure land tenure. The first respondent is the Ekurhuleni Metropolitan Municipality (Municipality) in whose area the settlement is situated. The second, third and fifth respondents, the Executive Mayor, Municipal Manager, and Head of the Department for Human Settlements, respectively, were joined to these proceedings. Collectively, they are referred to as the Municipal respondents. The fourth respondent is the Member of the Executive Council for Human Settlements (MEC). The Socio-Economic Rights Institute of South Africa (SERI) continues to be a friend of the Court (amicus curiae). The parties were invited to make written submissions and the Court has decided the issues without oral hearing.

Background

[4] This matter has a long history. The applicants were removed forcibly from Bapsfontein settlement. Their properties were demolished and they were relocated by the Municipality to a far-off area. This happened after Bapsfontein settlement was declared a disaster area in terms of the Disaster Management Act.[2] Subsequently, the applicants unsuccessfully sought urgent interlocutory relief against the Municipality in the High Court. In a successful application for leave to appeal directly to this Court the applicants challenged the decision of the High Court. This Court granted the following order:

> "In the event, the following order is made:

[2] 57 of 2002.

1. Condonation is granted.
2. Leave to appeal directly to this Court is granted.
3. The appeal is upheld.
4. The order of the North Gauteng High Court, Pretoria under Case No 5394/11 is set aside.
5. It is declared that the removal of the applicants from their homes, the demolition of the homes, and their relocation by the Ekurhuleni Metropolitan Municipality were unlawful.
6. The Municipality must identify land in the immediate vicinity of Bapsfontein for the relocation of the applicants and engage meaningfully with them on the identification of the land.
7. The Municipality must ensure that the amenities provided to the applicants and people resettled in terms of this order are no less than the amenities and basic services provided to them as a result of the relocation of March 2011.
8. The Municipality must file a report in this Court confirmed on affidavit by no later than 1 December 2012 regarding steps taken in compliance with paragraph 6 of this order to provide access to adequate housing for the applicants."

[5] Several expert reports were filed by the parties after which further disputes arose. It is necessary to mention, in some detail, the contents of these reports to appreciate the alleged resultant dispute of facts between the parties.

[6] The first report, filed on 30 November 2012, was by the Municipality. It detailed the consultation the Municipality had with the members of the Bapsfontein settlement, and set out the land identified: namely, the Daveyton Farm (73 IR), portions of Putfontein Farm (26 IR) and certain erven within the Mayfield Extensions 9 and 10. One community, the Mayfield Community, agreed to occupy the identified land on condition that they were allocated permanent houses with running water and sewage but this was problematic for the Municipality because of land uses planning concerns.[3] The report indicated that the other group, the N12

[3] The report provides the following at paragraph 55:

> "The Mayfield Community Committee, however, expressed that they would be willing to occupy the land on condition that they were allocated permanent houses with running water

Highway Park Community, was willing to be relocated to the identified land. The land was to be tested and confirmed to be safe before relocation could take place. The identified land, which is privately owned, was not expected to have a high susceptibility to sinkhole formation.

[7] The Mayfield Community filed its own expert reports on 7 July 2014 (SA1 report and SA2 report). In the SA1 report of the Council for Geoscience (Council), Dr Stewart Foya did not comment on the Municipality's report about the suitability of any of the land close to Bapsfontein that could be considered safe to accommodate the Mayfield Community. The report recommended that a dolomite investigation in accordance with "SANS 1936" should be conducted.[4] In the SA2 report, Dr Foya identified three pockets of land that the Council considered suitable: land 2.5 km from the main crossing in Bapsfontein; the entire area north and east of the West Park Agricultural Holdings; and the area south of the R50 road (to Delmas) and east of the R51 road. These areas were to be proven suitable after a detailed dolomite investigation conducted in accordance with SANS 1936.

[8] The other report commissioned by the Mayfield Community was by Professor Mark Oranje. He could not comment on the Municipality's report regarding the impossibility of providing bulk services on the identified land by the Mayfield Community because the Municipality had not provided information on the identified land. He recommended that the Municipality should, (a) quantify the risk to the community should it choose to settle on the identified land; and (b) detail the costs of providing: (i) engineering services to the identified land; and (ii) services in relation to budget and administrative capacity of the Municipality.

> and sewage. This poses a problem for the Municipality since there are land use planning activities that are still outstanding and land acquisition process that need to be finalised (willing sellers). Further, there is a long list of persons that are awaiting permanent houses. The group cannot jump the queue."

[4] The investigation in accordance with SANS 1936 involved the drilling of percussions boreholes in order to determine the possibility of hazardous sinkholes forming.

[9] The Municipality filed another report concerning issues connected with the relocation of the N12 Community. It mentioned constraints in making full use of the surface on the land identified. It predicted that about 910 housing units could be placed on Portions 52-4 including the costs of bulk services installations[5] and providing internal services per unit.[6] The report also recommended a geotechnical evaluation in respect of Portions 52-4 and that further negotiations should be conducted with the registered owners of those Portions to purchase the land. Regarding Portions A to G,[7] a survey of the existing electricity transmission lines was to be completed and the borrow pits measuring 3ha in Portion B were to be assessed by a civil engineer for the viability of the backfill and compaction of the area. And the geotechnical assessment was to be completed for the areas.

[10] On 12 January 2015 the Municipality filed a report addressing issues raised by Professor Oranje regarding the quantification of risk, costs and impact of providing bulk and link engineering and impact on the budget and capacity. In that report the Municipality assessed the dolomite risk management and safety as high. It reported the closest bulk water and sewer link to be approximately 10 km and 15 km away, respectively. The costs in respect of both are estimated at R580 million and those in respect of the internal engineering were estimated at 60% of the cost necessary to provide bulk services.[8] The costs of the necessary dolomite stability investigation and compilation of the dolomite stability report are estimated at R1.8 million and the costs of undertaking a SANS 1936 feasibility stage dolomite stability investigation is estimated at R1.17 million. The report stated that the costs in respect of bulk and link engineering services and amenities would be enormous and that provision of bulk and internal services to one community may impact negatively on other communities.

[5] These costs amounted to approximately R2 687 000 for Portions 52-4.

[6] These costs amounted to about R32 550 000.

[7] Portions A to E being the remainder of farm Daveyton 73 IR and Portions F and G being Portions 266 and 103 of Putfontein 26 IR respectively.

[8] That is to say, approximately R348 million. The Municipality states that these costs are difficult to quantify.

[11] The Municipality's report does not support the Council's analysis in relation to the third area (south of the R50 road and east of the R51 road). It stated that the problem zone is below the groundwater rest level with the result that sub-areas may present a high susceptibility to sinkhole or subsidence formation[9] from a groundwater level. It mentioned that all the identified three areas are situated on privately owned agricultural land. The Municipality recommended that a dolomite stability investigation be conducted in respect of the first area and that if it is underlain at depth by dolomite, the inherent hazard class should be established in accordance with SANS 1936.

[12] Simultaneously with the filing of a further report on 21 April 2015, in response to both reports by the Municipality, the applicants filed this interlocutory application. They asked for an order—

(a) condoning the late filing of the report in relation to the portion of the Municipality's report dealing with the N12 Community;

(b) remitting the matter to the High Court for that Court to deal with—

(i) the implementation of the housing project for the N12 Community as per the report filed by the Municipality on 30 November 2014 and 12 January 2015; and

(ii) all issues relating to the identification of suitable alternative land in the vicinity of Bapsfontein and implementation of an appropriate relocation project for the Mayfield Community as described in the various reports on behalf of the parties; and

(c) directing the Municipality to pay all costs not already granted by this Court including costs of two counsel and the qualifying costs of Professor Oranje.

[13] In directions issued by the Chief Justice, the parties were directed to file written submissions on the terms of referral and whether the interests of justice favour a discharge of the order of supervisory jurisdiction.

[9] That is a sinking to low or lower level formations of the earth surface.

[14] The applicants' basis for the referral is that the implementation of the housing project would be best monitored by the High Court because it will be a multi-year project and also that there are disputes of fact and technical disputes in respect of the Bapsfontein relocation. The disputes were not identified in the affidavits. This prompted further directions by the Chief Justice in which the parties were asked to file submissions identifying the disputes. These disputes relate to whether the preferred site is suitable for development, whether the costs of developing the preferred site are proportionate to the benefit to the Mayfield Community and whether there has been sufficient engagement with the Mayfield Community and the broader Bapsfontein Community.

[15] The respondents did not oppose the referral back to the High Court. They accept that it will be in the interests of justice that the opposing standpoints adopted by the parties be fully ventilated in an open court. The respondents submitted that the most convenient forum is the High Court. They argued that, whilst the demand of the Mayfield Community is unreasonable in the circumstances and pursued for self-interest, oral evidence will address the applicants' belief that the respondents allegedly acted in bad faith.

[16] The parties' proposed terms of referral differ markedly. In their written submissions the applicants, in deviating from the prayers in their notice of motion, asked this Court to appoint a fact-finding commission or referee in terms of section 7(1) of the Constitutional Court Complementary Act[10] or section 38 of the Superior Courts Act[11] to address the factual disputes and report back to this Court.

[10] 13 of 1995. This Act has been repealed by the Superior Courts Act 10 of 2013.

[11] 10 of 2013. In relevant parts, section 38 of the Superior Courts Act reads:

> "(1) The Constitutional Court . . . may with the consent of the parties, refer—
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> (a) any matter which requires extensive examination of documents or a scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or
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> . . . .
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> (b) any other matter arising in such proceedings,

They submitted that it would be in the interests of justice to refer the matter "where the original terms of the supervisory order need to be reassessed or need to be underpinned by further evidence". The applicants stated that this is so because of the factual and technical disputes which have arisen. They said that this Court has already exercised its own supervisory jurisdiction to the point where it is no longer just and equitable to do so. The applicants proposed certain options open to this Court.[12]

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for enquiry and report to a referee appointed by the parties, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable."

[12] The two options are:

"Option A

28. The matter is referred back to the Gauteng Division of the High Court, Pretoria, for determination of the following issues:

28.1 whether the non-compliance with this [C]ourt's order dated 6 December 2011 can be sustained on the basis of a plea of impossibility or on the basis of being financially unfeasible;

28.2 the further implementation of the order of this [C]ourt in the event that the court a quo finds that compliance with the order of 6 December 2011 is possible and financially feasible;

28.3 in the event that the High Court should find that the implementation of that order is impossible or financially unfeasible, that such amendment to the order be made as is appropriate and that the further implementation and supervision of this [C]ourt's order take place in accordance with the judgments in *Pheko I* and *Pheko II*.

29. The further conduct of the matter shall be determined in terms of the rules, processes and practice directives of the High Court.

30. The Judge President of the Gauteng Division of the High Court, Pretoria, is requested to allocate the matter to a Judge for the purposes of case management and the expedient hearing of the matter.

31. The reporting requirements of this [C]ourt in the order of 6 December 2011 must be read to require the appropriate reporting periods before the High Court. All reports filed before the High Court must simultaneously be filed with this [C]ourt.

32. The first respondent is to pay the costs of the applicants not previously awarded in this [C]ourt, such costs to include the costs of two counsel as well as the qualifying fees of the expert evidence of Professor Oranje."

Option B entails the handing over of this Court's supervisory jurisdiction to the High Court, without retaining oversight. It reads:

"33. The contents of paragraph 5 to 8 of this Court's order of 6 December 2011 is discharged.

34. The order of the High Court is substituted with the following order:

[17] The respondents oppose the orders in the proposed options by the applicants. They submitted that the suggested options raise issues outside of what the applicants mentioned in the notice of motion and go beyond the case they were called to answer. The respondents suggested an order this Court may make.[13] They said that in light of

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34.1 [I]t is declared that the removal of the applicants from their homes, the demolition of their homes and their relocation by the Ekurhuleni Metropolitan Municipality were unlawful;

34.2 The [M]unicipality must identify land in the immediate vicinity of Bapsfontein for the relocation of the applicants and engage meaningfully with them on the identification of land;

34.3 [T]he Municipality must ensure that the amenities provided to the applicants and people resettled in terms of this order are no less than the amenities and basic services provided to them as a result of the relocation of March 2011.

34.4 The reports and expert evidence filed before this [C]ourt since the order of 6 December 2011 shall be deemed to form part of the High Court record.

35. The non-compliance by the Municipality with the order of 6 December 2011 must be further adjudicated by the High Court, considering the content of the judgments of this [C]ourt of 6 December 2011 and 7 May 2015.

36. The Judge President of the High Court is requested to allocate a Judge to this matter for further adjudication of the question whether the non-compliance with the order of 6 December 2011 can be legally justified.

37. The first respondent is to pay the costs of the applicants not previously awarded in this [C]ourt, such costs to include the costs of two counsel as well as the qualifying fees of the expert evidence of Professor Oranje."

[13] The order suggested by the respondents reads:

"1. The matter is referred back to the Gauteng Division of the High Court, Pretoria to resolve the following issues—

1.1 the identification of suitable alternative land in the vicinity of Bapsfontein for the relocation of the applicants;

1.2 the implementation of an appropriate relocation project for the Mayfield Community as described in the reports filed of record in this Court; and

1.3 the implementation of the housing project for the N12 Highway Park Community as described in the reports filed of record in this Court; and

1.4 the question of Costs which have not previously been awarded by this Court.

2. The municipal respondents are directed, within sixty days from the date of this order, to file in the High Court and in this Court, affidavits and such reports as they may deem necessary in support of the contents of such affidavits, in which they—

2.1 identify suitable alternative land in the vicinity of Bapsfontein for the relocation of the applicants;

2.2 set out the relocation plan for the relocation of the applicants to such identified land and the manner in which such plan shall be implemented and the time table for such implementation;

2.3 set out the implementation plan for the relocation project of the Mayfield Community and the N12 Highway Park Community;

the difficulties that have arisen with regard to the implementation of this Court's order of 6 December 2011, this Court should not relinquish its supervisory jurisdiction over the matter. They submitted that the supervisory order should not be discharged. They proposed an order that—

> "1. [a]ll affidavits which shall be filed in the High Court in terms of this order shall also be filed with the Registrar of this Court for purposes of supervision of compliance with this order.
> 2. This Court shall at any time issue such supervisory directives as it may deem necessary to ensure compliance with this order."

[18] The amicus curiae submitted that there are no disputes of fact that warrant remittal. It is opposed to this Court's relinquishment of its supervisory jurisdiction.

[19] To recap, in the order of 6 December 2011 this Court declared that the removal of the applicants from their homes, the demolition of the homes, and their relocation by the Municipality were unlawful.[14] The Court ordered the Municipality to "identify land in the immediate vicinity of Bapsfontein for the relocation of the applicants and engage meaningfully with them on the identification of the land".[15] Further, the Municipality was ordered to "file a report in this Court confirmed on affidavits . . . regarding steps taken in compliance with paragraph 6 of the order to provide access to

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> 2.4 [set out] the reasons why the costs which have not been previously awarded by this Court should not be paid by the municipal respondents.
> 3. The applicants are directed to file their responding affidavits to the municipal respondents' aforesaid affidavits within sixty days from the date on which such affidavits are delivered.
> 4. The municipal respondents shall, if so advised, file replying affidavits to the applicants' aforesaid responding affidavits within thirty days from the date on which the applicants' affidavits are delivered.
> 5. The [Judge President of the] High Court is directed to allocate this matter to a judge or judges for purposes of case management and its expedited hearing.
> 6. Once all the aforesaid affidavits have been filed, the Full [Court] of the High Court shall hear the matter on such dates as shall be arranged between the parties."

[14] Paragraph 5 of the order above [4].

[15] Paragraph 6 of the order above [4].

adequate housing for the applicants".[16] And the applicants were afforded an opportunity to file affidavits in response to the Municipality's report. Following the *Pheko I* order, several expert reports and affidavits have been filed by the parties.[17]

[20] On examination of the reports the dilemma is this: The Municipality has identified three portions of land that are dewatered dolomite. The portions are state owned, zoned residential and are within the municipal "urban edge". On the applicants' estimation, they are between 20 to 30 km away from Bapsfontein settlement, the original site. The Mayfield Community submitted that the distance is not in compliance with this Court's order because the pieces of land are not in the "immediate vicinity" of Bapsfontein. They view the Municipality's assertion that it is impossible to identify viable land in the "immediate vicinity" of Bapsfontein as a refusal to comply with the order in *Pheko I*.

[21] The applicants (Mayfield Community) have identified land in the "immediate vicinity" of Bapsfontein settlement. That land is zoned agricultural and is under a seven-year lease to a farmer. The Municipality has set out extensive evidence that the land identified by the applicants is likely to be found to be dolomitic and that the costs of providing services on the land will be prohibitive.

Issues

[22] Issues for determination are—

(a) whether this Court should discharge its supervisory jurisdiction;

(b) whether the matter should be referred to the High Court or whether a fact-finding commission should be appointed; if so,

(c) what the terms of referral should be; and

[16] Paragraph 8 of the order above [4].

[17] Three reports have been filed by the Municipality and six by the applicants.

(d) whether costs not previously awarded, including the qualifying costs of Professor Oranje, should be determined by the High Court.

Discharge of the order in Pheko I

[23] It needs to be stressed that the remedy in *Pheko I* had both declaratory and structural relief components. The applicants submitted that the orders in paragraphs 5 to 8[18] of the order in *Pheko I* should be discharged. In paragraph 5 of the order, this Court declared the removal of the applicants from their homes and the demolition of their homes and their relocations unlawful. This "softer"[19] relief was considered to be "appropriate"[20] because the Court found that the applicants' right under section 26 of the Constitution was violated. The Court held that the Municipality has an obligation[21] to provide the applicants with suitable temporary accommodation. In *Fose*[22] this Court said:

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[18] Orders 5 to 8 are set out in [4] above.

[19] See Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta & Co Ltd, Cape Town 2005) at 215 and Roach and Budlender *Mandatory Relief and Supervisory Jurisdiction* (2005) 122 *SALJ* 325 at 346.

[20] Section 38 of the Constitution provides in relevant part:

> "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."

[21] Section 8(1) of the Constitution provides:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

In terms of section 152(1) read with section 153(a) of the Constitution, a municipality must provide services in a sustainable manner to the communities within its area of jurisdiction including to the applicants. Section 153(a) enjoins a municipality to structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.

In addition, the Housing Act 107 of 1997 and the Housing Policy are legislative and policy instruments enacted to give effect to the housing obligations of the various organs of state, including municipalities. In particular, section 9(1) of the Housing Act provides, in relevant part, that a municipality—

> "must . . . take all reasonable and necessary steps within its framework of national and provincial housing legislation and policy to—
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> (a) ensure that—
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> (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
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> . . .
>
> (b) set housing delivery goals in respect of its area of jurisdiction;

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstance of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."[23]

[24] Evidently, paragraph 5 of the original order does not form part of the structural interdict. Its discharge will cause irreparable prejudice to the applicants because it will imperil the effectiveness of the relief that was granted to guarantee the protection of their right in terms of section 26(3) of the Constitution.[24] The declaratory relief benefitted the applicants as it obliged the Municipality to comply with its constitutional obligation of providing access to adequate housing for them.

[25] In *Treatment Action Campaign*[25] this Court remarked:

> "Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both a *mandamus* and the exercise of a supervisory jurisdiction."[26]

[26] The declaratory component of the order in *Pheko I* should thus not be discharged.

(c) identify and designate land for housing development."

[22] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

[23] Id at para 19.

[24] Section 26(3) of the Constitution provides that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[25] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Action Campaign*).

[26] Id at para 106.

[27] The structural interdict is, by its nature, a much more interventionist remedy than declaratory relief.[27] In relation to that component of the remedy, this Court ordered the Municipality, among other things, to—

> "identify land . . . for the relocation of the applicants and engage meaningfully with them on the identification of land; . . . ensure that amenities provided to the applicants . . . are no less than the amenities and basic services provided to them . . . ; [and to] file a report . . . regarding steps taken . . . to provide access to adequate housing for the applicants."

[28] The Municipal respondents' opposition to the discharge of the structural interdict is based on the difficulty in implementing the order in *Pheko I.* They urged this Court not to discharge the order of supervisory jurisdiction. The Municipal respondents submitted that this Court could refer the matter while retaining supervisory jurisdiction in respect of paragraphs 6 to 8 of *Pheko I.* The MEC was opposed to this bifurcated supervision.

[29] The bifurcated supervision is not pragmatic. It will result, impermissibly, in a piecemeal consideration of the issues.[28] Any attempt by this Court to supervise the implementation of the proposed housing scheme while the High Court exercises oversight over it may result in this Court being enmeshed in disputes on technical issues that are best suited to be determined by the High Court.

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[27] See Currie and De Waal above n 19 at 215 and *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) at 88E where the Court noted that a structural interdict was "something more" than a mere declaratory when it held:

> "I do not believe that a declaration, standing on its own, will suffice. There has already been such a declaration, made by the Constitutional Court. It has not induced the applicant to comply with its constitutional obligations. Something more is therefore necessary."

[28] This Court has expressed reluctance to determine matters in a piecemeal fashion. See *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) at para 42; *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at para 148; and *Director of Public Prosecutions, Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC); 2005 (2) BCLR 103 (CC) at para 61.

[30] As the terms of referral[29] are limited to the structural relief of the order in *Pheko I*, I think that that component of the order should be discharged. The discharge will give the High Court full authority to consider the technical evidence in the reports and hear oral evidence (a) pertaining to the implementation of the housing project for the N12 Community as per the reports filed by the Municipality on 30 November 2014 and 12 January 2015; (b) relating to the identification of suitable alternative land in the vicinity of Bapsfontein; and (c) regarding the implementation of an appropriate relocation project for the Mayfield Community as described in the various reports on behalf of the parties. This component of the relief in *Pheko I* should thus be discharged and this will be reflected in the order.

Referral to the High Court

[31] In the main application, this Court dealt with constitutional issues of importance concerning the unlawful removal of the applicants from, and demolition of, their homes. It granted the structural interdict requiring the Municipality to take certain steps under this Court's supervision. This Court still retains its jurisdiction.

[32] Section 172(1)(b)[30] of the Constitution confers upon this Court broad remedial powers. Section 38(1) of the Superior Courts Act also entitles this Court, with the consent of the parties, to refer any matter for enquiry and report to a referee.[31] This section also affords a court a wide discretion. A court exercising a discretion in terms of section 38(1) may adopt any of the courses provided for in the section.

[33] Although the applicants initially sought an order of referral to the High Court, in their written submissions they said that a referee or a fact-finding commission be

[29] Above [14]-[17].

[30] Section 172(1) reads in relevant part:

> "When deciding a constitutional matter within its power, a court—
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> . . .
>
> (b) may make any order that is just and equitable."

[31] Above n 11. This Act has repealed the whole of the Supreme Court Act 59 of 1959 which made provision, in section 19bis, that somewhat mirrors that in section 38(1).

appointed in terms of section 7(1) of the Constitutional Court Complementary Act or in terms of section 38 of the Superior Courts Act[32] to address the factual disputes that have arisen.[33] In their further submissions the applicants, asked for the establishment of a fact finding commission.[34] The volte-face is prejudicial to the respondent and is impermissible as the Municipality and further respondents were not called to meet this case.[35]

[34] The rules of Court make provision for a referral in order to hear oral evidence.[36] This procedure is often resorted to in practice. The circumstances of a particular case may on occasion not require the referral to oral evidence. A court may reach a conclusion on the papers.[37] Here, the parties have agreed that the matter should be referred to the High Court for it to deal with the factual dispute emerging from the expert reports that were filed following the order in *Pheko I*.[38]

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[32] Above n 11.

[33] Although the law does make provision for the appointment of a referee to investigate and report, this Court has not had occasion to utilise the relevant legislative provision in terms of the Superior Courts Act. This Court, in *Fose*, above n 22 at para 19, has however called for innovative thinking about constitutional remedies and the fashioning of new ones where necessary.

[34] The applicants submitted that in the remedial context, there is some similarity between a referee/commission and the American institution of a special master, often appointed by the US courts to manage the implementation of complex constitutional remedies. The courts in India have played an active role in the appointment of "fact-finding" commissions to make sure that they have sufficient information before them. In this regard see Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Columbia Journal of Transnational Law* 561 at 574-5 and authorities cited therein.

[35]See *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 28 and cases cited therein.

[36] Uniform rules 38(3)-(8) are incorporated into this Court's rules by rule 29. A commission can be appointed on the court's own accord and without the parties' agreement.

[37] In *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) at para 34, this Court was minded to refer the matter to the High Court, given the dearth of evidence. However the applicant discouraged remittal and strongly urged that the matter be decided on the papers, "do or die", on whether the 2008 notice's promise was enforceable. The Court, recognising that the applicant is master of the process it has initiated (*dominus litis*), decided to respect its wishes.

[38] Courts often make orders of referral for oral evidence where there are real disputes of fact. The proper approach where a real dispute of fact is alleged is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts succeed. In this regard see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I.

In *Road Accident Fund v Mdeyide* [2007] ZACC 7; 2008 (1) SA 535 (CC); 2007 (7) BCLR 805 (CC) at para 45, the Court emphasised the importance of the full ventilation of issues before the appropriate forum. Instances of an appeal court remitting matters to a High Court for oral evidence include *National Director of Public Prosecutions v Parker* [2005] ZASCA 124; 2006 (3) SA 198 (SCA). There, the NDPP made a forfeiture

[35] The disputed facts[39] are of a technical nature and require oral evidence of expert witnesses. Needless to say, the expert evidence in relation to the geotechnical evaluation and the civil engineer's assessment of the viability of the identified land is of a technical nature and will require extensive examination before any findings can be made on the implementation of the housing project for the applicants. The evidence of specialist expertise in relation, among other things, to the suitability of the land earmarked by the applicants and the budgetary consequences necessitates the ventilation of the issues in the High Court.

[36] It follows that the issues are incapable of being resolved on the papers by this Court. The referral will allow this Court to avoid sitting as a court of first and final instance in the resolution, at an interlocutory stage of litigation, of conflicting expert evidence on affidavits. It will ensure that evidence is brought before the High Court regarding the disputed facts.

[37] Accordingly, it is in the interests of justice to refer this matter to the High Court.

Terms of referral

[38] In the notice of motion the applicants sought referral to the High Court to enable it to deal with—

(a) the implementation of the housing project for the N12 Community as per the report filed by the Municipality on 30 November 2014 and 12 January 2015; and

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application in terms of the Prevention of Organised Crime Act 121 of 1998 (on notice of motion) in respect of Ms Parker's house as it was viewed as an instrumentality of an offence (drug-dealing). The High Court found that the house was not sufficiently closely related to the drug-dealing to be an instrumentality. The Supreme Court of Appeal overturned the High Court's finding. The Court held that the house was, on the papers, an instrumentality of the offence. However, on the question of whether Ms Parker had an "innocent owner" defence, the Supreme Court of Appeal held that there were disputes of fact in the papers. It referred the matter to the High Court for oral evidence on that question.

[39] See above [14].

(b) the issues relating to the identification of suitable alternative land in the vicinity of Bapsfontein and implementation of an appropriate relocation project for the Mayfield Community as described in the various reports on behalf of the parties.

[39] However, in the written submissions the applicants suggested different terms of referral.[40] These include whether non-compliance with this Court's order dated 6 December 2011 can be sustained on the basis of a plea of impossibility or on the basis of being financially unfeasible.[41] The applicants also asked for a bifurcated filing of reports both to this Court and the High Court. They proposed an order discharging not only the structural relief in paragraphs 6 to 8 of the order in *Pheko I* but also the order declaring the conduct of the Municipality unlawful.

[40] The respondents' suggested terms of referral[42] are generally in line with the relief sought in the notice of motion by the applicants. The terms include a referral to the High Court for the resolution of the issues including the identification of suitable alternative land in the vicinity of Bapsfontein for the relocation of the applicants and implementation of the housing project for the N12 Highway Park Community as described in the reports filed in this Court.

[41] In my view, the terms of referral should be limited to the structural relief granted in paragraphs 6 to 8 of the order in *Pheko I*.[43]

Costs

[42] The applicants urged this Court to determine costs not previously awarded by this Court. It is not clear from the affidavit which costs the applicants are referring to but one assumes that they are referring to the qualifying fees of the expert reports, the

[40] See the notice of motion and the applicants' suggested options in n 12 above.

[41] See Option A (para 28.1) above n 12.

[42] Set out above n 13.

[43] See above [4] for the order granted in *Pheko I*.

Council and Professor Oranje. There is no reason why the Municipality should not be ordered to pay these costs.

Condonation

[43] The applicants sought condonation for the delay in filing their expert report in relation to the portion of the Municipality's report of 30 November 2014 dealing with the N12 Community. The applicants explain that that report is comprehensive and provides for proper serviced stands with housing structures thereon. As a result, so it is contended, they do not take issue with that report and the Municipality's project in that regard. They maintain that the Municipality should timeously comply with its own plan. It is for these reasons that they did not file a report as envisaged in this Court's order of 28 August 2014.

[44] The applicants explained that, in relation to the Mayfield Community, they awaited the Municipality's second report on the more contentious and complicated issues regarding the relocation of the Mayfield Community. They received the second report on 12 January 2015 and forwarded it to Professor Oranje. The Court did not specify the date for any response to the second report. The applicants said that they therefore assumed that the response was to be made within a reasonable time. They accepted that there have been some delays in filing Professor Oranje's report. They explain that Professor Oranje was outside of the country for the first half of March 2015 and that they had further consultations with him in the third week of March 2015. His final report was sent on 30 March 2015.

[45] The respondents do not oppose the granting of condonation. The explanation for the delay is acceptable. The respondents have suffered no prejudice. I would condone the delay in filing Professor Oranje's report in response to the Municipality's report pertaining to the Mayfield Community.

Order

[46] The following order is made:

1. Condonation is granted.
2. Paragraphs 6 to 8 of the order in *Pheko I* are discharged.
3. The matter is transferred to the High Court of South Africa Gauteng Division, Pretoria to—

    3.1 determine issues relating to the identification of suitable alternative land in the vicinity of Bapsfontein for the Mayfield Community;

    3.2 supervise the relocation of the Mayfield Community; and

    3.3 supervise the housing project for the N12 Highway Park Community as described in the reports filed on 30 November 2014 by the Ekurhuleni Metropolitan Municipality.

4. The Judge President of the High Court of South Africa, Gauteng Division, Pretoria, is asked to allocate this matter to a Judge or Judges for the purposes of case management and its expedient hearing.
5. The Municipality is ordered to pay the applicants' costs including costs of two counsel and the qualifying fees of Professor Mark Oranje.
6. The Registrar of this Court is directed to send the copy of this judgment to the Registrar of the High Court of South Africa, Gauteng Division, Pretoria.

For the Applicants:	C R Jansen SC, M A Dewrance and M Bishop instructed by Gilfillan Du Plessis Inc
For the First, Second, Third and Fifth Respondents:	N Cassim SC, K Tsatsawane and M Sibanda instructed by Khoza and Associates Inc
For the Fourth Respondent:	S Kazee instructed by the State Attorney, Johannesburg
For the Amicus Curiae:	S Wilson and I De Vos instructed by SERI Law Clinic