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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

Case No: 109/2025

Reportable: YES

Of interest to other judges: YES

In the matter between:

BRENDA NOMBULELO NOSILELA N.O.	First Applicant
ZOLA WELCOM KOSINI N.O.	Second Applicant
VINCENT VUYANI SIZIBA N.O.	Third Applicant
THOBKILE WEIGHT LAWU N.O.	Fourth Applicant
MZIMKHULU GORDON DILIMA N.O.	Fifth Applicant

(in their capacities as the trustees for the time being of the Mzingisi Development Trust)

AND

NELSON MANDELA BAY MUNICIPALITY	First Respondent
MEC FOR HUMAN SETTLEMENTS, EASTERN CAPE	Second Respondent
MINISTER OF HUMAN SETTLEMENTS	Third Respondent

JUDGMENT

Summary: Constitutional law – Public procurement – Key question is whether a municipal land-availability and services agreement with a charitable trust for subsidised housing is a contract “for goods or services” under s 217(1) of the Constitution and s 10G(5)(a) of the Local Government Transition Act 209 of 1993 – Procurement standard applies where the state acquires goods or services from its counterparty for value – Municipality neither acquired services from nor remunerated the trust – Agreement therefore not subject to the procurement standard – Housing purpose neither determines nor exempts procurement – *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) distinguished.

Administrative law – Legality review – Municipality reactively challenging its own contract – Undue-delay rule applicable – Time runs from knowledge of the decision, not later appreciation of possible irregularity – Unexplained delay exceeding 27 years unreasonable – No record produced to establish invalidity – Section 172(1)(b) in any event favouring preservation of an agreement performed for nearly three decades. Appropriate remedy is a structural and supervisory interdict.

Contract – Novation – Onus on party alleging supersession – Later tripartite funding agreement incorporated the earlier agreement and limited supersession to its own subject matter – Earlier agreement neither superseded nor novated – Expiry affected only the time-limited funding agreement.

TSELE AJ:

INTRODUCTION

[1] The applicants are the trustees for the time being of the Mzingisi Development Trust, a charitable trust, and they sue in their representative capacities. Under a written agreement concluded in December 1997 with the first respondent’s predecessor, the Trust is the developer of a low-cost housing township at

Bethelsdorp North, Area C, in Gqeberha. The township was intended to house some 6 500 indigent families. The development has stood substantially still since 2017.

[2] The immediate cause is a length of bulk-sewer infrastructure, called in the papers “the (missing) link”, which was to connect the township to the existing municipal bulk sewer. The link has not been installed. Without it the internal services cannot be connected, and the houses cannot be built.

[3] The applicants seek a declarator that the first respondent, the Nelson Mandela Bay Municipality (“the Municipality”), is in default of the agreement. They also seek a structured order compelling identified steps towards the installation of the link, with reports under oath until the development can proceed.

[4] The Municipality opposed the application in its entirety. Its principal answer is not that it has performed. It is that the agreement on which the Trust relies, the Land Availability and Services Agreement of December 1997 (“the LAASA”), was superseded and extinguished by a Service Level Agreement of 19 January 2015 (“the SLA”), which itself expired on 19 January 2017.

[5] The Municipality also raises non-joinder as a point *in limine* (a preliminary point), relies on a council resolution of 12 October 2023 to undertake the project “in-house”, and challenges the competency of the relief. Conditionally, it counter-applies for an order reviewing and setting aside the LAASA as unlawful and invalid *ab initio* (from the outset). The ground is that the LAASA was concluded without a competitive procurement process, contrary to section 217(1) of the Constitution and section 10G(5) of the Local Government Transition Act 209 of 1993 (“the LGTA”).

[6] Three questions arise for decision. The first, raised by the conditional counter-application, appears not to have been decided before. It is whether an agreement by which a municipality makes its own land available to a charitable trust, at no charge, for the delivery of subsidised housing to the poor is a contract “for goods or services” to which the procurement standard in section 217(1) applies. Agreements of this kind are a common instrument of municipal housing delivery, and the answer determines the basis of their validity.

[7] The second question concerns the accountability of an organ of state for obligations which it has acknowledged and later disavowed. The performance sought bears on the delivery of water and sewerage infrastructure necessary for the development, and therefore forms part of the constitutional context in which the contractual remedy is considered.

[8] The third question, which is logically the threshold one, is a matter of contractual interpretation. Did the SLA of 2015 supersede and extinguish the LAASA of 1997, or did the LAASA endure, the SLA being a time-limited funding instrument operating within it? If the LAASA has been extinguished, the application fails and the counter-application is moot. If it survives, the questions of validity, breach and relief arise.

[9] The record spans 1996 to 2025. I heard argument from *Ms L Crouse SC* for the applicants and from *Mr O H Ronaasen SC*, with whom *Mr S Patel* appeared, for the first respondent. The second and third respondents abide the decision of this Court.

The parties

[10] As stated, the five applicants are the trustees for the time being of the Mzingisi Development Trust, Master's reference TM 3254. The first applicant, Ms Brenda Nombulelo Nosilela, is a registered nurse and the chairperson. She has been a trustee since 2013 and chairperson since 2019. She deposes on personal knowledge of events since 2013 and on the Trust's records for the earlier period.

[11] The third applicant is the vice-chairperson and the fourth applicant is the secretary. The second to fifth applicants filed confirmatory affidavits.

[12] The Trust was established by deed on 7 February 1992 and continued under an Amended Deed of Trust executed in 1999. It is a charitable trust. Its object, in clause 4, is to improve the standard of living of the Soweto-on-Sea community, and of any area to which it may move, by facilitating housing, services, community facilities and community development. The development area is Bethelsdorp North, also called Area C.

[13] The first respondent is the Nelson Mandela Bay Municipality, a metropolitan municipality, successor in title to the Transitional Local Council of Port Elizabeth, the registered owner of the land, the contracting authority under the LAASA, and the only respondent against which substantive relief is sought.

[14] The second respondent is the MEC for Human Settlements, Eastern Cape ("the MEC" or "the Province"). The third respondent is the national Minister of Human Settlements ("the Minister"). They are cited as interested parties, no relief being sought against them, and their relevance lies in the funding structure.

[15] The Province historically funded both internal services and top structures through the Human Settlements Development Grant (“the HSDG”) and now funds only top structures, internal services funding in metropolitan areas being channelled from the 2017/2018 financial year through the Urban Settlements Development Grant (“the USDG”), administered by the municipality.

[16] The point concerning the applicants’ standing and the trustees’ authority was raised when the first respondent called for the trust deed under Uniform Rule 35(12). The Amended Deed of Trust, produced in response, requires not fewer than five and not more than twenty trustees (clause 5.1), empowers the trustees to institute legal proceedings and to employ legal representatives (clause 11.11), and provides that a written resolution signed by all the trustees is valid (clause 10.9).

[17] Clause 19 provides that the trustees are reimbursed their expenses but receive no fees. The trustees’ authority is founded on a resolution of the trustees. The current trustees appear from the Master’s endorsement of 18 October 2022.

[18] One of the six named trustees, Mr Mabona, has since died, without affecting the authority of the five applicants, who satisfy the deed’s requirements. The deed’s arbitration clause (clause 18) is confined to internal disputes and has no application. I am satisfied that standing and authority are established.

THE RELIEF SOUGHT

[19] The application is for declaratory and structural relief to compel the Municipality to perform what the Trust says are its outstanding obligations under the LAASA. In summary the notice of motion seeks the following relief.

- (a) A declarator that the Municipality is in default of its LAASA obligations, specifically by failing to insert the link to the bulk sewer connecting the development to the existing bulk sewer (prayer 1).
- (b) In respect of the link, an order that the Municipality, within three months, furnish proof on affidavit that it has applied for USDG funding, commenced the environmental impact assessment process, applied for a water-use licence, advertised tenders for an engineer and a contractor, published the procurement time-frames, and introduced the contractor to the community, with an explanation on oath for any step not completed and six-monthly progress reports until the link is inserted (prayer 2).
- (c) Under the same prayer, an explanation on oath for any step not completed, and progress reports every six months until the link is inserted.
- (d) In respect of the Bloemendal Arterial Road, an action plan with estimated completion times and progress reports every six months until completion (prayer 3).
- (e) In respect of the internal services, proof that the Municipality has applied to the Minister to act as conduit for USDG funding of the internal services for the balance of 4 706 erven, and a determination of the rate and method of payment to the Trust (prayer 4).
- (f) In respect of the top structures, an order that the Municipality do all things necessary, including affording full access to the land and complying with all reasonable requests, to enable the Trust to seek top structure funding and to build the top structures (prayer 5).

(g) Costs against the first respondent, and further or alternative relief (prayers 6 and 7).

[20] Prayers 2 and 3 are in substance a *mandamus* reinforced by a supervisory interdict, and prayers 4 and 5 are mandatory orders to secure funding and access. The application is at once a private-law claim for specific performance and a public-law claim to compel an organ of state to perform its functions. No money judgment is sought, the pleaded loss being advanced as evidence of prejudice.

THE OPPOSITION AND THE COUNTER-APPLICATION

[21] The answering affidavit, deposed to by the acting City Manager, Mr D M Pillay, serves also as the founding affidavit in the counter-application. It advances these defences. The departments of human settlements have not been joined. The LAASA was superseded by the SLA, which itself expired on 19 January 2017, so that no contract survives. The internal services obligation lay with the Trust at its own cost.

[22] The relief is said to be incompetent, as intruding on executive and regulatory functions, unlawfully channelling public funds to a private entity and making the Trust a housing agency. The resolution of 12 October 2023 to proceed in-house is said to stand unchallenged, and disputes of fact are raised, including a denial that the Trust built any houses.

[23] The counter-application is expressly conditional and is pursued only if the LAASA is found still to exist. It seeks the review and setting aside of the LAASA as unlawful, invalid and unconstitutional *ab initio* under the principle of legality, on the

procurement ground already described. The applicants oppose the counter-application and seek its dismissal with costs.

LITIGATION HISTORY

[24] The application was issued in January 2025 and served on all three respondents on 23 January 2025. Only the first respondent opposed. It gave notice on 3 February 2025 and appointed McWilliams & Elliott Incorporated.

[25] On 3 April 2025 the first respondent called for the trust deed under Uniform Rule 35(12). The applicants complied on 4 April 2025. The matter was set down for 15 April 2025 and removed by agreement, with costs reserved. It was re-enrolled for 27 May 2025 and, before Majiki J, again removed with costs reserved.

[26] The answering affidavit and counter-application were commissioned at Gqeberha on 22 May 2025. The applicants gave notice of intention to oppose the counter-application on 12 June 2025 and delivered their replying affidavit, deposed to on 15 July 2025. The matter came before me on re-enrolment, to be decided on the full record.

FACTUAL BACKGROUND

[27] The narrative is drawn principally from the founding affidavit and its annexures, supplemented by the funding record, and qualified where appropriate by the answering version and the reply.

The 1997 agreements

[28] The development rests on two written instruments of December 1997. The first is a Project or Social Compact (Joint Venture) Agreement of 2 December 1997 between the community, represented by the Soweto-on-Sea Residents' Committee, the Trust as developer, and the Transitional Local Council ("the TLC"). Under it the TLC undertook to make the property available and to provide bulk services where required, and it records the community mandate for the development.

[29] The central instrument is the LAASA. It was concluded on 8 December 1997 between the TLC, described as "the Council", and the Trust, described as "the Developer". Its material terms are these.

- (a) The recitals record that some 7 500 families resident in Soweto-on-Sea did not own land. The area of approximately 352 hectares, portions of Erf 5[...] Bethelsdorp and Erf 9[...] KwaDwesi, would be developed as a residential township to house them and to de-densify Soweto-on-Sea.
- (b) The Council made the land, of which it was the owner, available (clause 2). The work was divided into two streams. "External services" (clause 1.10) means the services in Schedule 2, to be provided to the area by the Council, including the services necessary to link them with the internal services. "Internal services" (clause 1.13) means the services in Schedule 3, to be provided by the Developer.
- (c) The allocation of responsibility is express. The Council provides the external services (clause 4.2) and "shall be responsible for the installation of the external services as indicated in Schedule 2 at its own cost", excluding "the requirements as stipulated by the approved Traffic Impact

Assessment” (clauses 5.5.1 and 5.5.2). The Developer provides, installs and connects the internal services at its own cost (clauses 4.3 and 5.6.1).

- (d) Schedule 2 lists the external services and their completion dates. They are the access road (March 1997), the link sewer (December 1997), the water connection (October 1997), the stormwater outfall connection (October 1997) and electrification (as soon as possible).
- (e) Clause 8 contains an arbitration regime, and clause 8.15 provides that the arbitration provisions survive the cancellation or resolution of the agreement.
- (f) Clause 10.1 is an entire agreement and non-variation clause of the kind known as a *Shifren* clause. The LAASA, with its schedules, is the entire agreement. No variation, addition, consensual cancellation or novation is of any force unless reduced to writing and signed by the parties.
- (g) Although Schedule 4 records a land-price formula, the contemporaneous municipal documents record that no price was fixed, the Trust being treated as the Municipality’s delivery agent, and that no termination date was set save the target of housing some 7 500 families.

The phased development

[30] The township was developed in phases. Phase 1 was finalised in 1999 and yielded about 1 071 units. Phase 2, of 1 211 erven, was governed by a funding agreement of 8 February 2002, commenced in about 2003, saw internal services

completed in 2006 and houses built and distributed between 2007 and 2009, and received the Govan Mbeki Award.

The 2002 funding agreement and the addenda

[31] The funding record bears directly on the central dispute. The foundational instrument is the agreement of 8 February 2002 between the Provincial Housing Development Board and the Trust for Phase 2 under the Rapid Land Development Programme. It defines “external services” as the bulk and link services to be provided through a separate Services Agreement, the conclusion of which is a suspensive condition (clauses 1.5.9, 1.5.31 and 6).

[32] The provincial approval of 3 December 2001 made it a standing condition that the Developer “confirm the availability of Bulk Services”. Bulk services were therefore treated from the outset as lying outside the subsidised scope of the Trust’s funded works.

[33] Between 2009 and 2011 four addenda were concluded between the provincial department and the Trust. They provided for facilitation fees, for the increase from 1 200 to 6 500 units, for bush clearing and for indirect costs. Each addendum recites that it “forms part of the agreement” of 8 February 2002 and that the original agreement “is therefore amended accordingly”.

The 2010 attempted cancellation

[34] Phase 3 funding was initially approved for 1 200 erven, by a resolution of the Eastern Cape Department of Human Settlements (“ECDOHS”) of 26 June 2009 and

a funding agreement of 8 August 2009. On 25 February 2010 the Municipality resolved to cancel the 1997 agreement, and the Trust litigated.

[35] Before answering, the Municipality recorded by letter of 6 May 2010 that the cancellation would be rescinded and undertook to comply with all of its agreements with the Trust. A supplementary affidavit of the Acting Municipal Manager of 2 August 2010 confirmed the rescission and attached a report recording the opinion of Adv Buchanan SC that the LAASA “remains in full force and effect”.

[36] The obligations then outstanding under the LAASA included the rezoning and subdivision application, since finalised, the environmental authorisation for and construction of the Bloemendal Arterial Road, and the insertion of the link. The authorisation was obtained and extended in about February 2023 to 25 October 2027, but the road has not been constructed.

[37] The Municipality’s letter of 21 July 2022 refers to “the court order” in that litigation as having dealt with the LAASA. The order itself is not in the record, and nothing in this judgment turns on its terms.

The expansion to 6 500 erven and the 2015 SLA

[38] On 28 May 2010, about three weeks after the undertaking, the Province approved funding for an increased 6 500 erven. Subdivision was finalised by about September 2011 and bush clearing was funded and completed that year, although the bush has since regrown.

[39] On the basis of the existing LAASA the Province agreed in July 2014 to appoint the Trust as Implementing Agent. In September 2014 it issued a letter of appointment to manage civil infrastructure to 3 165 erven for R120 845 302.05. The approval of 21 July 2014 recorded that the Trust's application had been made "on the basis of the existing Land Availability and Services Agreement" and that, on signature of the prescribed form, "a Service Level Agreement will be drawn".

[40] The SLA was concluded on 19 January 2015 between the Province (ECDOHS), the Trust, now described as the Implementing Agent, and the Municipality. It provided for the installation of internal services to 3 165 sites in sub-phase 1 of Phase 3, at R117 336 045.00. Its material terms are these.

- (a) Its subject matter is the installation of internal services, the Scope of Work referring expressly to internal water, sewer, roads and stormwater reticulation. It does not allocate to any party the installation of bulk external sewer infrastructure.
- (b) Its parties (clause 1.11) are ECDOHS, the Municipality and the Trust. The Province is a party to the SLA but is not, and never was, a party to the LAASA.
- (c) Clause 2 records that the SLA is to be read and interpreted as a whole, consisting of the letter of appointment (Annexure A), the implementation plan (Annexure B), the scope of work (Annexure C) and the existing Land Availability Agreement (Annexure D). The SLA therefore incorporates the LAASA rather than purporting to displace it.

- (d) Clause 4 provides that the SLA “shall be valid for twenty four (24) calendar months” from signature.
- (e) The Municipality’s obligations (clause 9) are principally to release the land and to remain its owner, and clause 26 is a non-variation clause.
- (f) Clause 25, on which the supersession defence rests, provides that the SLA, together with its annexures, “represents the entire agreement between the parties and supersedes all other agreements or understandings, written or verbal, that the parties may have had **with respect to the subject matter of this Agreement**”. (The emphasis is mine).

[41] The SLA expired by effluxion of time, the Province extending it by letter of 5 June 2017 to 31 March 2018. Its funding covered only about 31.5 percent of the development and excluded the top structures altogether.

The halting of the project

[42] The project came to a halt in 2017. The Trust avers that, in order to enable the project to proceed, it constructed the access road at its own expense and without remuneration. The link sewer has, however, not been installed. Its present estimated cost is approximately R20 million, as against approximately R11.8 million in January 2018.

[43] In the absence of the link, the internal services cannot be connected and the top structures cannot be constructed, save in respect of the 113 sites capable of connection to the existing Joe Slovo bulk line. The Trust’s civil engineer, Mr Anthony

White, confirms that the link has never been installed. The Metroplan business plan further records that services valued at approximately R136 million remain unutilised by reason of its absence.

[44] The founding papers also candidly disclose matters adverse to the Trust. Its former chief executive officer was convicted of corruption and sentenced to imprisonment. Fraud resulted in a default judgment in excess of R9 million being granted against the Trust in favour of Dreams to Action Enterprises, and in the service upon the provincial department, during May 2018, of a garnishee order, which necessitated an application for rescission. These matters were disclosed by the applicants themselves.

The alteration of the funding model in 2017

[45] In 2017 the National Department introduced the USDG, which was subsequently gazetted in 2018. Funding for internal services, previously made available by the Province to the Trust under the HSDG, was thereafter to be channelled through the Municipality.

[46] The minutes of the meeting held on 16 May 2017 record a request that the Municipality fund both the infrastructure services and the bulk-link connector through the USDG. They further record the Municipality's response that an instruction to that effect was required, and the Province's undertaking to advance the process.

[47] In anticipation of the installation of the link, the Province, acting under the hand of the MEC, resolved on 22 March 2018 to fund the top structures for the 113 units

capable of completion without it. No written time frame for the installation of the link has at any stage been furnished.

The minutes of the Technical Task Team meeting of 2019

[48] The minutes of the Technical Task Team meeting held on 6 November 2019, attended by officials representing all three parties, record that the SLA was “concluded January 2015”, that the provincial contract came to an end after March 2018, and that the HSDG no longer provided funding for internal services.

[49] The minutes further record the view expressed at the meeting, which included officials of the Municipality, that the LAASA “is still regarded as legitimate and active” and that the responsibilities allocated thereunder “are still valid”. The agreement was referred to the Municipality’s legal division for vetting. The connection of the 113 completed sites to the bulk mainline remained recorded as an unresolved technical issue.

The 2022 assertions of supersession

[50] From 2022 the Municipality contended that the LAASA had been discharged or superseded. The correspondence is of significance both for what it asserts and for the inconsistency which it reveals.

- (a) By letter of 26 January 2022 the Municipality asserted that it had discharged its clause 5 obligations, refused USDG funds and said it was considering undertaking the development itself.

- (b) By letter of 6 April 2022 its attorneys repeated the refusal to provide the link, on the ground that the request “was without any legal basis”, and asserted that “the 2015 agreement supersedes all other agreements”.
- (c) By letter of 21 July 2022 the City Manager asserted that the Municipality had “installed a bulk sewer” and discharged its obligations, and stated that “events have overtaken that agreement and it has been superseded by subsequent agreements and in particular, the agreement concluded in 2015”. The letter invoked the MFMA and the supply-chain prescripts.
- (d) By letter of 10 October 2022 the Trust declared a dispute under clause 8.5 of the LAASA and called for arbitration within five days. Nothing was heard, and the applicants accepted the repudiation of the arbitration clause.

The 2023 acknowledgement and resolution

[51] The position adopted by the Municipality underwent a material change in 2023. At a meeting held on 1 September 2023, its officials acknowledged that, under the LAASA, the Municipality was obliged to afford access to the land and to install the external services at its own cost, subject to the availability of funding following council approval. Later that month, the Member of the Mayoral Committee stated that the relevant committees had approved the Trust’s continuation of the development pursuant to the 1997 contract and that the Municipality would install the external services.

[52] Of particular significance is the Executive Mayor's First Supplementary Report dated 12 October 2023. That report records, in the Municipality's own documentation, the same obligations and further records that the construction of the top structures is dependent upon the installation of a bulk connector or link pipe.

[53] The extract from the resolution bears the date 12 October 2023, being the date pleaded by the Municipality, whereas the applicants allege that the resolution was adopted by the council on 16 November 2023. Nothing material turns upon that discrepancy.

[54] The accompanying council resolution, which the Municipality itself also annexed to its answering papers, resolved as follows.

- (a) The Municipality is to conduct a thorough assessment of the status of the project.
- (b) It is to budget for a bulk connector or link-sewer pipeline under the USDG or the Informal Settlements Upgrading Partnership Grant ("the ISUPG"), implemented by itself.
- (c) It is to consider budgeting for internal services on the remaining unserviced sites, implemented by itself.
- (d) It is to take account of other USDG and ISUPG priorities.

[55] This is the resolution elsewhere characterised as a decision to proceed in-house. A letter of 18 November 2023 from the Trust to the Executive Director, proposing a meeting on the way forward, drew no response.

The events of 2024 and the pleaded loss

[56] In 2024 a corruption complaint was laid against the Member of the Mayoral Committee, and on 15 January the acting City Manager is said to have denied the validity of the 1997 contract. A newspaper report of 20 March 2024 records a protest by more than 200 Westville residents demanding sewer and water infrastructure, the burning of vehicles, and the complaint that the project had stalled since 2017.

[57] A series of inconclusive status requests and meetings followed. A press report of 21 February 2024 records that the Municipality faced the forfeiture of more than R500 million in conditional grants for severe underspending, its expenditure standing below 40 percent of allocation.

[58] The Trust met the then Executive Mayor on 9 September and 9 October 2024. The Mayor is said to have expressed support but to have awaited the City Manager's report. Thereafter, on the applicants' version, "nothing happened".

[59] The Trust pleads a loss of R39 104 395.79, set out in a schedule confirmed on affidavit by Mr Pienaar. It comprises lost profit on the incomplete sites, professional fees, and retention and contractor claims. The schedule records that, of the 3 165 sites funded under the SLA, internal services were completed on 1 220, leaving 1 945 incomplete.

The proper approach to assessing the evidence

[60] This is an application for final relief and it is governed by the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-

635C. Final relief is granted on the respondent's version together with the admitted facts, unless the denial is not real, genuine or *bona fide*, or far-fetched or untenable.

Corbett JA stated:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact ... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ..."

[61] It is trite that a respondent must engage seriously and unambiguously with the applicant's allegations, a bald denial not sufficing (*Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) paras 12-13). A genuine and material dispute of fact may be referred to oral evidence or to trial under Uniform Rule 6(5)(g).

[62] In this case, a notable feature of the record is that much of the evidence most adverse to the Municipality emanates from the Municipality itself. The 2010 rescission and the opinion of senior counsel appear from the Acting Municipal Manager's own affidavit.

[63] The acknowledgement of the unfulfilled link obligation, and the resolution to budget for and install it, appear from the Executive Mayor's report and the council resolution. The recognition that the LAASA remained "legitimate and active" appears

from the 2019 minutes. Admissions of that kind are not readily displaced by the bare denials of a deponent with no personal involvement in the events.

[64] The Trust's own letter of 5 April 2024, annexed to the answering papers, confirms the limited extent of its performance. Internal services were completed on only 1 220 of the 3 165 sites. The letter supports the Municipality's account of limited delivery, even as it confirms the shared understanding that the Municipality would install the link through the USDG.

[65] The newspaper reports and the political material are hearsay on the specific facts of this project and of limited evidential value. I have used them only as background to grant underspending and community frustration, which the documentary record in any event bears out. The description of underspending as "treason" in the replying affidavit is rhetoric and not evidence, and has played no part in my reasoning.

[66] The applicants do not ask that every issue be decided on the papers. In the alternative, they seek a referral to oral evidence on whether houses were built under the LAASA, on whether the failure to install the link and its alleged false denial caused the project to halt, and on whether the town planning was completed. At the same time they rely on *Plascon-Evans*. A party who seeks a referral on an issue accepts that it is genuinely disputed. I resolve the point when I deal with the relief.

THE ISSUES

[67] As I have already mentioned, three principal questions arise for decision. The first, which is logically anterior, is whether the LAASA was superseded or novated by

the SLA. If the LAASA survives, the second question, raised by the conditional counter-application, is whether an agreement of this kind engages section 217(1) of the Constitution and section 10G(5) of the LGTA as a contract for goods or services. The third question is whether the Municipality is in breach and, if so, what relief is competent. The remaining issues are jurisdiction and the arbitration clause, non-joinder, the effect of the resolution of 12 October 2023, and costs. Standing has been dealt with above.

JURISDICTION AND THE ARBITRATION CLAUSE

[68] The applicants declared a dispute under the arbitration clause and called for arbitration by letter of 10 October 2022. The Municipality did not respond, and the applicants accepted the repudiation, as a party faced with the repudiation of an arbitration clause may, and elected to litigate.

[69] In any event, the conditional counter-application is a legality review, which is not arbitrable, and the relief engages the constitutional housing duty. I conclude that this Court has jurisdiction to determine both the application and the counter-application.

THE NON-JOINDER POINT TAKEN BY THE MUNICIPALITY

[70] The Municipality contends that the provincial and national departments of human settlements, as distinct from the cited MEC and Minister, have a direct and substantial interest because the funding sought must come from those departments, with the Municipality acting only as a conduit. It says their non-joinder is fatal.

[71] A party must be joined only where it has a direct and substantial legal interest in the subject matter which may be prejudicially affected by the judgment, and not merely a financial or commercial interest (see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), *Absa Bank Ltd v Naude* NO 2016 (6) SA 540 (SCA), *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC)).

[72] Where that interest exists, the court will not proceed without the necessary party and may raise the issue *mero motu* (of its own accord). However, a good plea of non-joinder is dilatory in its effect and does not defeat the claim. The ordinary consequence is a stay pending joinder, unless the absent party has consented or waived joinder (*Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) para 11; *Peacock v Marley* 1934 AD 1).

[73] Where a complaint of non-joinder is raised the Court must be satisfied that the order or relief sought must be incapable of implementation without impinging the rights of the person who ought to have been joined. That is not the case in this matter. None of the relief sought in this application would per se be incapable of being implemented without impinging on the rights of the MEC and Minister. No relief is sought against these parties, and the relief sought by the applicant does not compel them to do anything that could reasonably prejudice them.

[74] In any event, section 2 of the State Liability Act 20 of 1957 requires proceedings against a department of state to cite its executive authority as the nominal respondent. The MEC and the Minister have been cited, and the departments' interests are represented through them.

[75] In the circumstances, I conclude that the point *in limine* must fail. The interest identified by the Municipality is nevertheless accommodated in the relief, which is framed so as not to direct organs of state not before this Court.

THE SUPERSESSION AND NOVATION ARGUMENT

[76] The applicants base every prayer on the proposition that the LAASA remains valid and binding. Once the Municipality asserts that the SLA superseded or novated the LAASA, however, it bears the onus of establishing the alleged novation. The central question is therefore whether the SLA, properly interpreted, shows a clear *animus novandi* (the intention to novate).

The principles of interpretation

[77] Whether the SLA extinguished the LAASA is in the first instance a question of interpretation. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, Wallis JA stated:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. ... The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

[78] Importantly, context and purpose are considered from the outset (see *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1

(CC) paras 65-68). Subsequent conduct may in an appropriate case illuminate the parties' bargain, although it cannot be used to rewrite the words they chose (see *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA), *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA)).

Novation is not to be presumed

[79] There is also a substantive rule. Supersession of one contract by another is in substance a novation, and in our law, novation is never presumed. The *animus novandi* must be clear, and the onus rests on the party asserting it, here the Municipality. Where the later agreement can stand with the earlier, the court leans against extinction and treats the second as supplementing or implementing the first (*Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 940-941).

[80] In *Electric Process Engraving and Stereo Co v Irwin* 1940 AD 220 at 226-227 the Appellate Division approved the formulation of De Villiers CJ in *Ewers v Resident Magistrate of Oudtshoorn* (1880) Foord 32:

“The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case.”

[81] Where the earlier agreement contains a *Shifren* clause requiring any novation to be in writing and signed by the parties, informal or implied novation is excluded (*SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A), *Brisley v Drotsky* 2002 (4) SA 1 (SCA)). Clause 10.1 of the LAASA is such a clause.

Application of the principles

[82] Applying these principles, I am of the view that the supersession defence must fail. In my view, at least five aspects of the record, taken together, stand against it.

[83] The first is the language of clause 25, which supersedes other agreements only “with respect to the subject matter of this Agreement”. The subject matter of the SLA is defined and narrow.

[84] It is the funded installation of internal civil engineering services, water, sanitation, B-grade roads and stormwater, to 3 165 of the 6 500 sites, over a fixed term of 24 months, with the Trust as the Province’s funded Implementing Agent.

[85] Furthermore, the LAASA’s subject matter is broader. It is the availability of the land and the allocation of all the services over the entire development, including the Municipality’s obligation to install the Schedule 2 external services at its own cost. Those obligations fall outside the SLA’s subject matter, and clause 25 cannot reach them.

[86] The second feature is incorporation. The SLA does not cancel the LAASA but annexes it as Annexure D, clause 2 requiring the whole to be read together. An instrument which annexes an earlier agreement, and could operate only by reference to it, is not naturally read as extinguishing it. The incorporation shows the opposite of an *animus novandi*.

[87] The third feature is the parties. The Province is a party to the SLA but not to the bilateral LAASA, and a bilateral contract is not novated by a differently constituted tripartite agreement whose supersession clause is confined to its own subject matter.

[88] The fourth feature is the *Shifren* clause. Even if an intention to novate could otherwise be inferred, clause 10.1 requires any novation to be in writing and signed by the parties to the LAASA. There is no such instrument.

[89] The fifth feature is the documentary pattern and the conduct of the parties. The funding history shows amendment and not replacement. The addenda of 2009 to 2011 each form part of and amend the 2002 agreement. The 2014 letter of appointment records that the Trust was appointed on the basis of the existing LAASA.

[90] The conduct after 2015 is equally inconsistent with extinction. The SLA was extended in 2017, to 31 March 2018, in the expectation that the Municipality would insert the link. The Technical Task Team of 2019, which included the Municipality's officials, recorded the LAASA as still legitimate and active. In 2023 the Executive Mayor's report and the council resolution acknowledged the external services obligations and resolved to perform them. Conduct of that kind is that of parties who operate within an agreement, and not of parties who regard it as extinguished.

[91] The contrary submissions advanced by the Municipality cannot be sustained. That the SLA expired in 2017 says nothing about extinction in 2015, and the proposition that a 24-month funding contract was intended to leave the entire development without any governing agreement two years later is commercially improbable and finds no support in clause 25.

[92] The character of the SLA as a true service level agreement does not assist the Municipality, since clause 25 reaches only its own subject matter. The submission that the SLA covered the construction of houses overstates its terms, the Scope of Work being confined to internal services.

[93] It is necessary to record what this conclusion is not based on. There is no rule that a funding agreement cannot supersede a land and services agreement. Parties are free to replace an earlier contract with a later one. The conclusion is the product of construing these documents in their own context.

[94] The conditional form of the counter-application is not itself an admission that the LAASA survived. It is simply a procedural mechanism. It does, however, confirm that the Municipality recognised that, if the supersession defence failed, the validity of the LAASA had to be confronted on its own merits.

[95] It follows that the Municipality has not discharged the onus which is borne by a party asserting novation. I find that the SLA did not supersede or novate the LAASA. Its expiry after its extension to 31 March 2018 meant only that a time-limited funding instrument lapsed. Internal services funding was thereafter channelled through the USDG administered by the Municipality.

THE RESOLUTION OF 12 OCTOBER 2023

[96] The Municipality contends in the alternative that the resolution of 12 October 2023 to proceed in-house terminated or overrode the LAASA. It relies on *Manana v King Sabata Dalindyebo Municipality* [2010] ZASCA 144 para 22, read with *Grace v McCulloch* 1908 TH 165, for the proposition that a resolution binds the officials of the

municipality until it is rescinded or set aside. It contends that the applicants' failure to challenge the resolution, of which they were informed in writing on 25 March 2024, is fatal.

[97] In my view, the argument fails for two reasons. First, *Manana* establishes the internal binding effect of a resolution on the officials of the body which adopted it. It says nothing about the capacity of a unilateral council resolution to extinguish the accrued contractual rights of a third party. A municipality cannot, by resolving to do something itself, divest a counterparty of rights vested under a binding agreement. If the position were otherwise, an organ of state would be able to escape its contractual obligations by mere resolution. There would not even be a need for a self-review in such circumstances.

[98] In essence, the principle invoked by the Municipality actually favours the applicants. The Municipality's standing resolution, taken in 2010 on the advice of senior counsel, was to honour the LAASA. An organ of state may not ignore its own decision or treat a binding agreement as a nullity. Both stand until set aside by a court (*MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC), *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC)). A decision to proceed in-house, implemented in breach of a subsisting contract, is a repudiation and not a lawful termination.

[99] Secondly, the resolution, read fairly and in full, does not bear the meaning which the Municipality attaches to it. It directs an assessment of the status of the project, budget provision for the bulk connector or link sewer under the USDG or the

ISUPG, and consideration of budget provision for the internal services, all to be implemented by the Municipality.

[100] Far from repudiating the LAASA, the resolution commits the Municipality to performing the very external services obligation which the Trust seeks to enforce, and it substantially mirrors prayers 2 and 4. What is more, the complaint of non-disclosure falls away, because the applicants themselves disclosed the resolution in the founding papers. In the circumstances, I find that properly read, the resolution supports the Trust's case.

THE CHALLENGE TO THE VALIDITY OF THE LAASA

[101] The LAASA having been found to remain valid and extant, the condition upon which the counter-application is predicated has been fulfilled, and the challenge to its validity accordingly falls to be determined. The Municipality seeks an order reviewing and setting aside the LAASA as unlawful, invalid and unconstitutional *ab initio*, under the principle of legality. The asserted basis for that relief is that, in December 1997, the Trust was appointed as developer of municipal land without recourse to any public tender or supply-chain process.

[102] The challenge is founded upon the two provisions governing municipal contracting at the relevant time. Section 217(1) of the Constitution, which came into operation on 4 February 1997, requires an organ of state, when contracting for goods or services, to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

[103] Section 10G(5) of the LGTA was introduced by Act 97 of 1996. The amending Act commenced upon its publication on 22 November 1996, having been assented to on 12 November 1996, which is the date relied upon in the first respondent's heads of argument. The subsection prescribed a materially identical standard and constituted, in 1997, the operative statutory provision governing local government contracting.

[104] In support of its contention, the Municipality relies upon *Metro Projects CC v Klerksdorp Local Municipality* [2003] ZASCA 91; 2004 (1) SA 16 (SCA) paras 11-13, in which the Supreme Court of Appeal held that the contracting process of a local authority is required to be fair, inter alia by virtue of section 10G(5)(a).

[105] The challenge is advanced reactively, in response to the Trust's invocation and attempted enforcement of the LAASA (see *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC)).

[106] It is established that a party against whom an ostensibly valid exercise of public power is sought to be enforced may, by way of a reactive challenge, impugn its validity (*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA)). Nor is an organ of state, as a matter of principle, precluded from advancing such a challenge (see *Merafong* para 55).

[107] Furthermore, an organ of state which seeks to have its own contract set aside must, however, proceed by counter-application under the principle of legality, and the rule against undue delay applies to that challenge, reactive or otherwise (*Kirland* para 82, *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) paras 38 to 41 and 48 to 50, *Tasima* para 160).

[108] The Municipality submitted that a reactive challenge is not constrained by time at all. In my view, that overstates the position. Where the impugned decision was addressed to the organ of state, was known to it and could have been challenged at once, the reactive challenge is of the category which necessitates scrutiny of the delay, although delay need not be conclusive (*Merafong* paras 72 and 77). A municipality's own contract falls squarely within that category. I return to delay below, after the question whether the procurement provisions were engaged at all.

[109] The Municipality's reliance on the MFMA is misplaced, for it commenced on 1 July 2004 and does not operate retrospectively. Section 217(1) and section 10G(5), both in force on 8 December 1997, are the strongest version of the attack and must be confronted directly.

THE QUESTION AS TO WHETHER THE LAASA IS A CONTRACT FOR GOODS OR SERVICES

[110] In relation to this question, the starting point is the language of the provisions. Section 217(1) applies only when an organ of state "contracts for goods or services", and its five principles govern the manner in which such contracting is to be conducted. Section 10G(5)(a) employed the same gateway and spoke of contracts "for goods and services".

[111] The first question is therefore whether, on this record and in its particular structure, the LAASA was a "contract for goods or services". If it was not, neither provision is engaged.

[112] Furthermore, purpose confirms but does not enlarge the text of the provision. It is in this regard apposite to note that section 217 appears among the finance provisions of the Constitution and is directed at the integrity of state contracting where the state acquires goods or services for value. In ordinary procurement, the organ of state is the purchaser, the counterparty provides goods or renders services, and public funds are committed. Although that paradigm is not exhaustive, since the substance rather than the form or label of the transaction is determinative, it identifies the threshold which the Municipality must establish on the papers.

[113] Moreover, that reading accords with the way in which the section has been understood. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 33, the Constitutional Court described section 217 as the source of the power of an organ of state to contract for goods and services on behalf of government, and of the tendering system which it must devise.

[114] In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) para 4, the Supreme Court of Appeal described the section as laying down minimum requirements for the tender process which precedes contracts for the supply of goods and services. Both passages were adopted in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) para 31. The section addresses the state as the acquirer of goods and services.

[115] In my view, the LAASA is not such a contract. It is a developmental land-availability arrangement, mandated by a community Social Compact, under which the Municipality made its own land available to a charitable trust for a subsidised

housing development. The characterisation is a matter of construction of the LAASA read with the funding instruments, all of which are before this Court.

[116] Indeed, the LAASA contains no undertaking by the Municipality to remunerate the Trust for services rendered to it, fixes no municipal price for such services, and is not a purchasing arrangement for municipal works. Each party provides its allocated services at its own cost, the Developer the internal services (clause 5.6.1) and the Council the external services (clause 5.5.1). To the extent that Schedule 4 contemplated any payment at all, it was a payment by the Trust to the Council for the land, which is the converse of procurement.

[117] The subsidy funding for the housing delivery was provided by the Province to the Trust directly, first under the funding agreement of 8 February 2002 with the Provincial Housing Development Board and later under the SLA, to which the Province was the funding party. Until the 2017 change in the funding model the Municipality neither held nor disbursed those funds. The record contains no evidence of any remuneration of the Trust by the Municipality outside these instruments, and the Municipality, which bears the onus, has placed none before this Court.

[118] As I understood his submission, *Mr Ronaasen SC*'s case was that the Trust was, in terms of the LAASA, to render services to the Municipality, so that the Municipality was contracting for services. That submission cannot, however, be accepted in the broad form advanced.

[119] The mere fact that the development would assist the Municipality in the discharge of its housing responsibilities does not, without more, establish that the Municipality thereby procured services from the Trust. On the evidence, the Trust

acted as a community-mandated developer within a subsidised housing scheme, and not as a remunerated service provider appointed by the Municipality pursuant to a procurement contract.

[120] Nor does the description of the Trust in contemporaneous municipal documents as the Municipality's delivery agent alter that conclusion. That description denotes the function performed by the Trust within the subsidised housing programme; it does not characterise the arrangement as a contract of service or one for the execution of work for reward. The works undertaken by the Trust were funded by way of provincial subsidy and not by remuneration from the Municipality.

[121] That conclusion accords with the constitutional and statutory setting, although it is not founded upon any exemption arising from the public purpose of the arrangement. Section 26(2) of the Constitution enjoins the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to adequate housing.

[122] Sections 152 and 153 of the Constitution further oblige municipalities to accord priority to the basic needs of their communities. The LAASA constituted one of the measures adopted within that constitutional framework. While its housing purpose forms part of the relevant context, the determinative enquiry remains whether the Municipality contracted for goods or services within the contemplation of the procurement provisions.

[123] It follows that the LAASA was not a contract for goods or services. The Municipality made its land available and assumed responsibility for its own external-services obligations, while the Trust pursued the subsidised development for the

benefit of the intended community. The juridical structure of the arrangement accordingly places the LAASA beyond the procurement gateway upon which the counter-application is predicated.

[124] In my view, *Metro Projects* does not militate against that conclusion. In that matter, the municipality held a provincial grant of R18 400 for the development of each of 1 333 stands and invited tenders from developers to provide developmental services and to construct and deliver a house on each stand, each tenderer being required to price the products and services offered (paras 1-2). The municipality was thus acquiring goods and services from the successful tenderer and paying for them from public funds under its control.

[125] That constitutes procurement in the ordinary sense, and the Supreme Court of Appeal accordingly applied section 10G(5)(a) to the award (para 11). By contrast, under the LAASA the Municipality neither acquired anything from the Trust nor made any payment to it. The housing purpose of a transaction neither renders it procurement nor exempts it from the applicable standard; the decisive consideration is the juridical structure of the arrangement.

[126] The criterion is structural and dependent upon the particular facts. The enquiry is whether, in *substance*, the organ of state acquires goods or services from its counterparty for value, or whether the arrangement bears a different juridical character.

[127] I do not hold that an agreement falls beyond the reach of section 217 merely because it advances housing, benefits a community, involves a non-profit entity, or serves a constitutional purpose. Where, upon its proper characterisation, the state

procures performance for value, section 217 applies notwithstanding the public purpose served. On the present record, however, the LAASA is not a procurement contract of that character.

[128] The non-profit character of the Trust lends support to that conclusion, but is not determinative; nor is the benefit conferred upon the community. What is decisive is the absence, on the evidence, of any acquisition by the Municipality of services from the Trust, whether for value or otherwise.

[129] Nor does the fact that the Municipality made its land available alter the position. Section 217 regulates the acquisition of goods or services; it does not extend to every transaction in which an asset of the state is implicated. No challenge was advanced under any prescript governing the disposal of municipal land.

[130] For these reasons, and on the narrow basis set out above, I conclude that the LAASA was not a contract for goods or services within the meaning of section 217(1) of the Constitution or section 10G(5) of the LGTA, and that the Municipality has failed to establish the contrary. The procurement standard upon which the Municipality relies was accordingly not engaged. That conclusion constitutes the principal basis upon which the reactive challenge falls to be dismissed.

The alternative grounds

[131] The dismissal of the counter-application is not based on that ground alone. In any event, the challenge must fail for four other reasons. For purposes of considering those reasons, I assume, without deciding otherwise, that the provisions were engaged.

The delay is unacceptable

[132] The first reason is delay. Delay is a threshold question, ordinarily to be decided before the merits of a review are reached (*Merafong* para 79, *Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality* [2023] ZASCA 126; [2023] 4 All SA 589 (SCA) para 28). I have nonetheless dealt first with the gateway question, for three reasons.

[133] It was the question fully argued. It is a question of law on the construction of the agreement and of the provisions, and not a finding that any irregularity occurred. It had, in any event, to be confronted in deciding whether the unlawfulness alleged is so clear that it must be declared notwithstanding the delay, a question to which I return below.

[134] An organ of state which seeks to set aside its own decision must do so under the principle of legality (*Gijima* paras 38 to 41, *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 45). The review must be brought without undue delay, and the enquiry has two stages. The first question is whether the delay is unreasonable, a factual enquiry on which a value judgment is made. If it is, the second is whether the court should nevertheless overlook the delay (*Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) paras 44 to 49, *Asla* para 48).

[135] The Municipality is not a private subject resisting coercive action by the state, in respect of whom a collateral challenge may be available without regard to delay (*Merafong* paras 69 to 71). It is itself the organ of state which concluded the impugned contract and now resists its enforcement at the instance of its

counterparty. That was, in substance, the position in *Gijima*, where the delay regime was held to apply (paras 42 to 50). In *Merafong* itself, the explanation for the delay attending the municipality's reactive challenge was required to be placed before the court upon remittal, and the issue of delay determined as a preliminary question (paras 75 and 79).

[136] Upon remittal, the High Court overlooked the delay and upheld the review. The Supreme Court of Appeal, however, held that the delay was unreasonable and incapable of being overlooked, confirmed that the reactive challenge was subject to the same regime, and declined to entertain it (*Golden Core* (SCA) paras 65, 66 and 77). The Constitutional Court thereafter upheld the dismissal of the review on the ground of delay (*Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality* [2025] ZACC 27; 2026 (2) BCLR 73 (CC) paras 55 and 56).

[137] *Gijima* is dispositive of the contention that a reactive challenge is subject to no temporal constraint. That very submission was advanced and rejected on the authority of *Kirland*, which requires an organ of state to challenge its own decision by way of a formal counter-application and to comply with the procedural requirements governing review proceedings (*Gijima* para 50, *Kirland* para 82). A court must accordingly exercise particular vigilance before overlooking delay in a review, "reactive or otherwise" (*Tasima* para 160, *Gijima* para 48).

[138] The period of delay commences when the organ of state became aware, or reasonably ought to have become aware, of the impugned decision (*Asla* para 49). The Municipality's predecessor was itself the contracting party to the LAASA in December 1997. It concluded that agreement without recourse to a public tender

process, upon its own account and with knowledge of the procedure, whatever its nature, which it had followed. The reasons underlying that decision were therefore within its knowledge from the outset, and the knowledge of its officials and committees is, in law, attributable to it (*City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) para 39).

[139] The counter-application was delivered on 22 May 2025, some 27 years and five months later. The period is not merely long. In 2010 the Municipality, having resolved to cancel the LAASA and having been taken to court, obtained the opinion of senior counsel that the agreement remained in full force and effect, rescinded the cancellation and undertook to comply with all of its agreements with the Trust.

[140] In 2019 its officials recorded the agreement as legitimate and active and referred it to its legal division for vetting. In July 2022 its City Manager asserted that the agreement had been superseded and invoked the MFMA and the supply-chain prescripts. In October 2023 its council resolved to budget for and to install the link. A review was brought at none of these junctures, nor in January 2024, when the acting City Manager is said to have denied the validity of the contract. It was brought only when the Trust sued.

[141] The explanation offered is a single sentence in the answering affidavit. The legality of the LAASA was raised for the first time in consultation with the Municipality's legal team in preparation for opposing this application, and the Municipality was not aware of its unlawfulness until then. An explanation in materially identical terms was rejected in *Gijima*. An organ of state which contracts as a matter of course cannot, without a cogent explanation, be heard to say that it was unaware

that it had strayed from procurement prescripts, still less that the ignorance endured for years (para 45).

[142] The explanation proceeds from an incorrect premise as to when the period of delay commences. Time begins to run when the organ of state acquires knowledge of the decision and the reasons underlying it, not when it first appreciates that the decision may be irregular. Were the position otherwise, an organ of state would enjoy an unfettered entitlement to review its own decisions whenever such appreciation arose, thereby rendering nugatory the public interest in finality (*Aurecon* paras 41 to 43, *Asla* para 49).

[143] The explanation is in any event irreconcilable with the record. The Municipality took senior counsel's opinion on the validity of the LAASA in 2010 and acted on it, and it invoked the supply-chain prescripts itself in 2022. Nor does the explanation account for any part of the period between 1997 and 2025. A full explanation for the whole period of the delay is required, and where there is none the delay is necessarily unreasonable (*Asla* paras 52 and 80, *Gijima* para 45, *Altech Radio Holdings (Pty) Ltd v City of Tshwane Metropolitan Municipality* 2021 (3) SA 25 (SCA) para 22).

[144] An organ of state is best placed to explain its own delay, and it is held to a rigorous standard. It must put forward all the facts at its disposal. Where an explanation is available it must be given, and where it is not the court must be taken into the organ of state's confidence as to why (*Asla* paras 59, 78 and 79, *Kirland* para 82). The Municipality has done neither. Nor could a change of officials or of

administration have assisted it, for a municipality is a single juristic entity and the knowledge of its officials is its own (*Altech* para 25, *Aurecon* para 39).

[145] In *Golden Core* (SCA) a delay of some 13 years was held to be unreasonable “and egregiously so”, not simply by reason of its length but because the municipality had failed to bring the review when it clearly understood that it was required to do so, and had then resorted to self-help (para 48, approved in *Golden Core* (CC) para 56).

[146] The delay in this matter is more than twice as long. In 2010 the Municipality, then in litigation with the Trust over the agreement, took the advice of senior counsel on it and elected to affirm it. It later repudiated the agreement by letter, then resolved to perform it, and only when sued sought to set it aside. I find that the delay is unreasonable, and inordinately so.

[147] It is so that an unreasonable delay may be overlooked, but there must be a basis for doing so, gleaned from the facts placed before the court or from objectively available factors (*Gijima* para 49, *Asla* para 53). The relevant factors include the nature of the impugned decision and the merits of the challenge, the prejudice which setting the decision aside would cause, and the conduct of the applicant (*Asla* paras 54 to 59). The merits are weighed at this stage not to decide the challenge but to ask whether it raises a serious question warranting the court’s attention (*Golden Core* (SCA) para 51).

[148] The Municipality sought no condonation. In a legality review that is not in itself fatal (*Asla* para 51), but the Municipality also placed no facts before this Court on which the discretion could be founded. On the authority of *Gijima* that is the end of

the enquiry (para 49). I nonetheless consider the factors, in case that conclusion is wrong.

[149]The nature of the impugned decision does not favour the Municipality. The gateway question is a serious question of law, but I have answered it against the Municipality. If the provisions were engaged, the challenge is bare, in the sense explained below, and the unlawfulness alleged is neither clear nor undisputed.

[150]No fraud, corruption or collusion is alleged in relation to the conclusion of the LAASA. Had evidence of such conduct emerged, the interests of clean governance might have weighed more strongly in favour of overlooking the delay (*Aurecon* para 50). No such evidence exists. By contrast, the prejudice that would result from setting the agreement aside is manifest, as addressed below in relation to the remedial discretion. For present purposes, it is sufficient to note that the agreement has been partly performed over nearly three decades, and that provincial funding, the servicing of erven and the construction of houses proceeded in reliance upon it.

[151]The length of the delay bears also on the capacity of this Court to decide the challenge. The passage of a considerable length of time weakens the ability of a court to assess an instance of unlawfulness on the facts, documents and evidence may be lost, and the purpose of a review is undermined where the court's ability to evaluate an allegation of illegality is impaired (*Khumalo* paras 47 and 48). In *Merafong*, Cameron J stated at para 73:

“The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.”

[152] The conduct of the Municipality weighs most heavily against it. Once it disputed the agreement and decided not to comply, its duty was to seek clarification from the courts, not to remain passive or to enforce its own view (*Merafong* paras 59 to 63). To disregard its own act on the basis that it is a nullity is self-help (*Golden Core* (CC) para 63, *Kirland* para 103). Instead, it cancelled the agreement, rescinded the cancellation on advice, disavowed the agreement, resolved to perform it and then, when sued, attacked its validity.

[153] An organ of state which presents a court with whatever view suits it at the time, vacillating between positions when convenient, cannot expect its delay to be overlooked (*Asla* paras 82 and 99). Nor is this a case of an organ of state seeking to put its house in order. The Municipality does not seek to undo a tainted bargain in the public interest. It seeks to escape an obligation which it acknowledged in 2010 and again in 2023, and that is not the purpose which state self-review serves (*Altech* paras 70 and 71, *Golden Core* (SCA) para 59). I decline to overlook the delay.

[154] There remains the principle, applied in *Gijima* and explained in *Asla*, that a court which declines to overlook a delay may nonetheless be compelled by section 172(1)(a) to declare invalid conduct which is clearly and indisputably unlawful (*Asla* paras 63, 66 and 71), a principle to be interpreted narrowly and restrictively. It is not engaged here. The unlawfulness alleged is disputed at every stage, from the gateway question to the process followed in 1997, and it is not clear, because the Municipality has placed no record before this Court from which it could be found. I deal with that deficiency next.

[155] It follows that the delay is unreasonable, that there is no basis on which to overlook it, and that the Municipality's challenge, whether characterised as a self-review or as a reactive challenge, falls to be refused on that ground alone. The Municipality cannot be permitted to rely, in a reactive challenge to the relief sought by the Trust, on the very grounds which it should have raised by way of review many years ago (*Golden Core* (SCA) para 77).

The absence of a record

[156] The second reason is that, even if the challenge were entertained, the invalidity is not established. The Municipality, which bears the onus, has placed no record before this Court. There is neither the procurement system or policy applicable to the Council in 1997, nor the process in fact followed, nor any resolution of the Council approving the LAASA, nor the reasons for the appointment of the Trust. The single allegation is that no public tender process was followed.

[157] A review cannot be decided in a vacuum, and a reactive challenge no less so. In *Merafong* the counter-challenge was described as bare, because it relied solely on the statutory and constitutional setting and the record of the impugned decision was not before the court (para 78). The matter was remitted so that the record could be placed before the court and the challenge decided on it (para 79).

[158] An organ of state which impugns its own decision has within its control the resources to establish the unlawfulness which it alleges (*Khumalo* para 51, cited in *Asla* para 59). The rigorous standard to which it is held applies as much to the evidence which it places before the court as to its explanation for delay.

[159] The deficiency was put squarely in issue. The replying affidavit alleged that the Municipality had not taken the Court into its confidence as to the supply chain management process followed in 1997, had placed no record of decisions before the Court to show how the decisions were taken then or thereafter, and had not explained why the agreement was concluded and honoured for so long. The Municipality delivered no reply in the counter-application, and those allegations stand unanswered.

[160] The records of the Municipality's own contracting are in its possession. Nothing was said about what steps, if any, were taken to locate them, or about why they could not be produced (*Altech* paras 22 and 23, *Asla* para 79). The deponent, who had no personal involvement in the events of 1997, disclaimed knowledge even of the funding agreement of 2002.

[161] The Municipality has not said that the records of 1997 no longer exist. If they exist, they should have been produced. If they do not, their loss is a consequence of the very delay which the rule against delay exists to prevent, and the Municipality cannot invite this Court to infer unlawfulness from a gap of its own making.

[162] Neither provision prescribes any particular procedure. Each requires contracts to be awarded pursuant to a system that is fair, equitable, transparent, competitive and cost-effective. Whether an award contravened that standard must be determined by reference to the system which the organ of state was obliged to apply and the steps in fact taken pursuant thereto.

[163] The standard is systemic in character. In the absence of the record, this Court is unable to determine whether there was non-compliance, to assess the materiality

of any departure, or to ascertain whether the purpose of the provisions was substantially achieved. In *AllPay*, Froneman J stated at para 30:

“Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between ‘mandatory’ or ‘peremptory’ provisions on the one hand and ‘directory’ ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O’Regan J succinctly put the question in *ACDP v Electoral Commission* as being ‘whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose’.”

[164] The applicants, for their part, describe a community mandate, a business plan and application to the Council and to the Provincial Housing Board, internal processes to identify developers, publication, approval at an open council meeting and the Housing Board’s project approval, a process bearing several of the hallmarks of the statutory standard. On the *Plascon-Evans* approach their version prevails. *Metro Projects* states the standard, but does not establish that the standard was breached in this matter. An invalidity which has not been proved cannot avail the Municipality.

[165] *Gijima* and *Asla* do not assist the Municipality on this score. In *Gijima* the absence of a competitive process was not in dispute, neither party put up evidence of any process, and non-compliance was inferred on that basis (para 41). In *Asla* the documents were of undisputed authenticity, both parties relied on them and the chronology of the abortive tenders was common cause (paras 93 to 95). Here the only evidence of the process followed in 1997 comes from the applicants, it is un rebutted, and the Municipality, on which the onus rests, has produced nothing.

The just and equitable discretion

[166] Thirdly, even were an irregularity assumed, the court retains the power under section 172(1)(b) to make a just and equitable order, including one preserving rights which have accrued under the impugned act (*Gijima* paras 53 and 54, *Asla* paras 104 and 105, *AllPay*).

[167] The discretionary factors weigh decisively against nullification of the LAASA. In *Gijima* the organ of state's unexplained delay and its false assurances counted heavily in fashioning the remedy, and in *Asla* justice and equity dictated that a municipality should not benefit from its own undue delay (*Gijima* paras 53 and 54, *Asla* para 105). The same considerations apply here.

[168] The LAASA has been performed for nearly three decades. Two phases were completed, thousands of erven were serviced and houses were delivered. The Trust has been held in breach and sued by its contractors in consequence of the Municipality's own default, and the community has waited for more than two decades. Considerations of delay, reliance and prejudice together point to the preservation of the agreement rather than to its setting aside.

The resolutions of 2010 and 2023

[169] Fourthly, the challenge is not directed at the resolutions of 2010 and of 12 October 2023, which stand until set aside (*Kirland*, *Tasima*). Those resolutions do not independently create every obligation enforced in this order, but they are material public-law acts and admissions which support the conclusion that the Municipality acknowledged and resolved to perform the link obligation.

[170]The counter-application was brought on the strength of a delegation to the acting City Manager. No resolution of the council reversing its decisions of 2010 and 2023 to honour and to perform the agreement was placed before this Court. Whether a general delegation to conduct litigation extends to impugning the council's own decisions was doubted, but left open, in *Manana* (paras 12 and 25). I need not decide it. It is enough that the challenge leaves those decisions standing.

[171]It follows that the counter-application falls to be dismissed. It fails on the principal ground that the procurement standard was not engaged. Should that holding be wrong, it fails in any event by reason of the Municipality's unreasonable and unexplained delay, which there is no basis to overlook, by reason of its failure to establish invalidity on the papers, in the exercise of the just and equitable discretion under section 172(1)(b), and because the resolutions of 2010 and 2023, which the Municipality has not challenged, stand until set aside.

THE MUNICIPALITY'S BREACH HAS BEEN ESTABLISHED

[172]Since the LAASA stands and is not to be set aside, the question of breach admits of a short answer. The applicants must show that the installation of the link is the Municipality's obligation and that the Municipality has not performed it. On the first question, the terms of the LAASA admit of no real doubt.

[173]The link sewer is item 2 of Schedule 2, an external service which clauses 1.10 and 4.2 place on the Council. Clause 5.5.1 provides that the Council "shall be responsible for the installation of the external services as indicated in Schedule 2 at

its own cost”. The obligation was due in December 1997. The report of the Executive Mayor of 12 October 2023 records the allocation in terms.

[174] On the second question, the Municipality’s denial raises no genuine dispute on the *Plascon-Evans* test. Mr White’s direct evidence that the link has never been installed is corroborated by the Metroplan business plan, by the 2019 minutes, and by the Municipality’s own report and resolution of 12 October 2023, which proceed on the basis that the link is absent.

[175] The only contrary assertion is the bald statement in the 2022 correspondence that the Municipality had “installed a bulk sewer”. That statement is not made on personal knowledge, is unsupported by engineering evidence, and is contradicted by the Municipality’s own later documents. A denial of that character is not a real, genuine or *bona fide* dispute within the meaning of *Plascon-Evans* and *Wightman* and falls to be rejected. I find that the link has not been installed and that the Municipality is in breach of its obligation to install it.

[176] The Trust’s own non-performance of the internal services (clause 5.6.1) is a different obligation and does not assist the Municipality. On the undisputed engineering evidence nothing can be completed until the link is in place, and the Trust’s incomplete performance is a consequence of the absent link, not an independent cause of the impasse.

[177] The competing causal weight of the absent link, the funding change and the Trust’s financial difficulties need not be resolved for relief directed at the Municipality’s own obligations. In the circumstances the applicants are entitled to the declarator in prayer 1, and no relief is required in respect of the access road.

[178] The Bloemendal Arterial Road is not among the Schedule 2 items, and clause 5.5.1 excludes from the Council's own-cost obligation the requirements stipulated by the approved Traffic Impact Assessment. The Municipality nonetheless obtained, and in 2023 extended, the environmental authorisation to construct the road. It acknowledged responsibility for the road on the rescission of 2010, and it does not dispute that the road remains uncompleted. On that narrower basis, an action plan with periodic reporting is competent.

[179] The disputed questions of house building, causation and town planning need not be referred to oral evidence, for the declarator rests on facts common cause on the Municipality's own documents and the structured relief on its own obligations. A referral would only add delay. I decline it, without prejudice to future proceedings in which relief dependent on those facts may be claimed.

THE COMPETENCY AND SCOPE OF THE RELIEF

[180] A party establishing breach is ordinarily entitled to specific performance, subject to the court's discretion (*Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782F-783C). Where the defaulter is an organ of state, that discretion must respect the separation of powers.

[181] However, supervisory relief remains competent under section 172(1)(b) where necessary to vindicate a right and framed with precision (*Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC), *Mwelase v Director-General, Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC)).

[182] In *Mwelase*, Cameron J stated at para 51:

“[T]he courts have never sought to supplant government in its task of implementing legislative and other programmes. They simply could not and cannot. They step in only when persuaded by argument and evidence that they have to correct erroneous interpretations of the law, or intervene to protect rights infringed by insufficient and unreasonable conduct in social and economic programmes. In this, the courts undertake no self-appointed role, but seek only to carry out their constitutionally mandated function with appropriate restraint.”

[183] The constitutional setting informs both the discretion and the remedy. Section 26 requires reasonable measures, within available resources, for the progressive realisation of access to adequate housing (*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)). The relief granted remains contractual and supervisory. It grants no separate constitutional declarator, prescribes no housing budget, and directs neither the second nor the third respondent.

[184] The remedy must nonetheless be effective. In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69, Ackermann J stated:

“In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”

[185] Prayers 2 and 3 are a restrained use of supervisory jurisdiction. They appoint no outsider and transfer no municipal function to this Court. They require the Municipality to take identified steps and account for them on oath until the link and the road are delivered. If a court-appointed special master may be constitutionally

permissible in an appropriate case, directing the defaulter to report on its own progress is less intrusive.

[186] Indeed, supervision is justified by persistent institutional failure and repeated vacillation. The Municipality acknowledged its obligation, resolved on 12 October 2023 to perform it, and more than a year later had not begun even the preliminary steps.

[187] It has, moreover, purportedly cancelled the agreement; rescinded that cancellation upon the advice of senior counsel; acknowledged the obligation; thereafter disavowed it; resolved to perform it; and ultimately denied the validity of the contract. Conduct of this nature falls within the class contemplated in *Mwelase* and *Black Sash* as capable of warranting judicial supervision, lest performance be made dependent upon the shifting position adopted from time to time by the defaulting authority.

[188] The qualification contained in section 26(2), and the caution properly to be observed in the socio-economic sphere, remain of importance (*Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC)). The order, however, does not purport to determine the Municipality's housing budget in general. It requires no more than that the Municipality account for the implementation of an obligation repeatedly acknowledged in its own records and embodied in its resolution of October 2023. The evidence of underspending serves as background only and is not necessary to the conclusion that supervisory relief is warranted.

[189] The remedial setting concerns housing, water and sanitation, and a measure must be reasonable both in its conception and in its implementation (*Grootboom*

para 42). The Municipality's protracted failure to discharge an acknowledged contractual obligation in the context of a housing development long delayed is material to the question whether supervision is necessary to render the contractual remedy effective. The constitutional context fortifies, but does not extend, the ambit of that remedy.

[190] In my judgment, the enforcement of the acknowledged obligation, coupled with a requirement that the Municipality account on oath, vindicates the community's interest in housing without trenching upon budgetary choices properly entrusted to the executive. The Trust asserts that interest in its capacity as the community's development partner under the Social Compact, and not for a purely commercial end. This conclusion likewise disposes of the contention that the relief would constitute the Trust as a housing agency.

[191] The permissible limits of the relief follow from the same principles. The first category is directed to the enforcement of the Municipality's own obligations, namely the link and the road. An order compelling performance and requiring progress reports in respect of identified and objectively verifiable steps neither usurps the functions of another branch of government nor amounts to an open-ended assumption of executive responsibility by this Court.

[192] The second category, which concerns the funding and facilitation of internal services and top structures, calls for greater circumspection. The funding of a private entity implicates the MFMA and the applicable supply-chain prescripts. Certain forms of relief would affect departments not before this Court, while formulations such as

“do all things necessary” lack the degree of precision required of coercive judicial orders.

[193] It follows that the appropriate course is to confine the relief rather than to refuse it. An order requiring the Municipality to apply for funding for the internal services, to afford access to the land, and to cooperate with reasonable requests holds it to obligations falling within its lawful competence. This Court will not compel the provision of funding otherwise than through a lawful process, determine any rate or method of payment, or issue directions to the second or third respondents. Prayers 4 and 5 will be limited accordingly.

THE CONDUCT OF THE FIRST RESPONDENT

[194] One further matter requires comment. The conduct of the first respondent, before and during this litigation, does not reflect well on it. To the vacillation already described was added, by 2022, the assertion that the agreement had been superseded and that a bulk sewer had been installed.

[195] By 2024 the acting City Manager was once more denying the validity of the 1997 contract, and in these proceedings the Municipality has advanced at the same time the inconsistent contentions that the LAASA was extinguished by the SLA and that it is void *ab initio*.

[196] It raised a point *in limine* which is bad in law, and its plea that the unlawfulness of the LAASA emerged only in consultation with its legal team cannot be reconciled with the opinion of Buchanan SC obtained and acted on in 2010.

[197] Conduct of this character is inconsistent with the good faith, candour and diligent performance required of an organ of state. In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA) para 15, Cameron JA stated of an organ of state which had broken its undertakings and resisted the claims of the most vulnerable:

“All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government’s decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that ‘people’s needs must be responded to’. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.”

[198] The conduct of the first respondent does not attain the degree of gravity of that censured in *Ngxuza*, and I do not equate the two. The admonition is nevertheless apposite. An organ of state is required to conduct itself as an exemplary litigant; in the respects described, the first respondent failed to meet that standard. Although I make no punitive costs order, its conduct fortifies the conclusion that it should bear the costs of both the application and the counter-application.

COSTS

[199] The ordinary rule that costs follow the result ought to apply. The applicants have successfully resisted both the point *in limine* and the counter-application, and have achieved substantial success in the principal application. The principle in *Biowatch* protects an unsuccessful private litigant who seeks to vindicate constitutional rights; it does not deprive a successful litigant of an award of costs, nor does an organ of state enjoy its protection (*Biowatch Trust v Registrar, Genetic*

Resources 2009 (6) SA 232 (CC), *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 138).

[200] The applicants sought costs on Scale B and were represented by one counsel. In their heads of argument they further sought the dismissal of the point *in limine* with costs on a punitive scale. The Municipality, for its part, sought costs on Scale C, including the costs of two counsel.

[201] In reply during oral argument, *Ms Crouse SC* enlarged upon the relief sought and contended for a general punitive costs order, on the basis that the Municipality had failed to conduct itself as a model constitutional litigant. I afforded *Mr Ronaasen SC* an opportunity to address that submission, which he opposed.

[202] I agree with *Mr Ronaasen SC* that the first respondent ought to have received prior notice that a general punitive costs order would be sought. Had such relief been sought upon due and timeous notice, I might have been disposed to consider it. It would, however, be procedurally unfair to entertain relief of that nature when advanced for the first time in reply.

[203] The claim, foreshadowed in the heads of argument, for punitive costs in respect of the point *in limine* stands on a different footing. Although that point was unsustainable in law, it was not so unreasonable as to warrant a punitive order. The applicants' success in that regard is adequately reflected in the general costs order. The Municipality's claim for costs on Scale C necessarily fails with the result.

[204] *Ms Crouse SC* submitted that, should a punitive costs order not be granted, costs should be awarded on Scale B. I am satisfied that the appropriate order is one

which reflects the manner in which the applicants conducted the proceedings, namely costs on Scale B, including the costs of one counsel.

[205] Three ancillary questions of costs remain. On the applicants' uncontroverted account, the wasted costs occasioned by the removal on 15 April 2025 resulted from the first respondent's late delivery of its answering papers. The first respondent must accordingly bear those costs.

[206] The costs reserved upon the removal of the matter on 27 May 2025, pursuant to the notice dated 22 May 2025 and the order of Majiki J, shall be costs in the cause.

[207] There is some substance in the complaint that the first respondent's annexures duplicated documents already before this Court. That matter is, however, adequately addressed by the general costs order. No costs were sought against the second and third respondents, and no order as to costs will be made against them.

OVERALL CONCLUSION

[208] For the reasons set forth above, I am satisfied that the LAASA remains of full force and effect and is binding upon the Municipality. It was neither superseded nor novated by the SLA, nor did the resolution of 12 October 2023 operate to terminate it. The point *in limine* founded upon non-joinder is without merit and cannot be

sustained. The link constitutes an external service which, by virtue of clause 5.5.1, the Municipality was obliged to install at its own cost. Its failure to do so constitutes a breach of the LAASA.

[209] It follows that the conditional counter-application must be dismissed. The LAASA was not a contract for goods or services as contemplated in section 217(1) of the Constitution or section 10G(5) of the LGTA; accordingly, the procurement standard upon which the Municipality relied was not engaged. Even were that conclusion to be incorrect, the challenge would nevertheless fail. The Municipality's delay of more than 27 years was unreasonable and remained unexplained; it placed no record before this Court upon which a finding of invalidity could properly be made; its resolutions of 2010 and 2023 remain operative; and the exercise of the just and equitable discretion would, in any event, favour the preservation of the agreement.

[210] The obligation to install the link fell due in December 1997. The indigent families for whose benefit the development was conceived have, in consequence, awaited performance for more than two decades, during which period the Municipality variously acknowledged the obligation, disavowed it, resolved to perform it, and thereafter impugned the validity of the agreement from which it arose.

[211] In those circumstances, the Municipality must be held to its contractual undertaking and required to account on oath for the steps taken in fulfilment thereof, while this Court remains astute not to trench upon budgetary choices properly reserved to the executive. Costs must follow the result.

ORDER

[212] In the result I make the following order.

1. The point *in limine* of non-joinder is dismissed.
2. It is declared that the Land Availability and Services Agreement concluded on 8 December 1997 between the first respondent's predecessor in title and the Mzingisi Development Trust remains valid and binding on the first respondent and was not superseded or novated by the Service Level Agreement of 19 January 2015.
3. It is declared that the first respondent is in default of the agreement in that it has failed to install the link connecting the Bethelsdorp North (Area C) development to the existing bulk sewer.
4. Within three months of this order the first respondent shall deliver to the applicants' attorney of record and file with this Court an affidavit setting out the steps taken in respect of the link, including whether it has taken the following steps.
 - 4.1 Applied for Urban Settlements Development Grant funding.
 - 4.2 Commenced the environmental impact assessment process.
 - 4.3 Applied for a water-use licence.
 - 4.4 Advertised tenders for an engineer and a contractor and published the procurement time-frames.
 - 4.5 Introduced the appointed contractor to the community.

5. The first respondent shall explain on oath any step in paragraph 4 not finalised, state the date for its completion, and thereafter report on oath every six months until the link is installed.
6. Within three months of this order the first respondent shall deliver to the applicants' attorney of record and file with this Court an action plan, with completion times, for the Bloemendal Arterial Road in so far as it serves the project area, and thereafter report on oath every six months until the road is completed.
7. The first respondent shall, as administrator of the Urban Settlements Development Grant, take the steps within its competence to apply for funding of the remaining internal services, afford the applicants full access to the land, and comply with reasonable requests by the applicants and the second respondent to enable the development to proceed.
8. Nothing in this order requires funding of the Trust otherwise than through a lawful process, determines any rate or method of payment, or directs the second or third respondents.
9. The conditional counter-application is dismissed.
10. The first respondent shall pay the costs of the application and of the counter-application on Scale B, including the costs of one counsel and the wasted costs of the removal of 15 April 2025.
11. The costs reserved on the removal of 27 May 2025 are costs in the cause.
12. There is no order as to costs against the second and third respondents.

M TSELE

ACTING JUDGE OF THE HIGH COURT

EASTERN CAPE DIVISION

This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 17 September 2026.

Appearances:

For the applicants: Ms L Crouse SC, instructed by Johanett Janse van Rensburg & Associates Inc, Gqeberha.

For the first respondent: Mr O H Ronaasen SC (with him Mr S Patel), instructed by McWilliams & Elliott Incorporated, Gqeberha.

For the second and third respondents: No appearance (abiding).

Hearing Date: 4 June 2026

Date of Judgment: 17 September 2026