

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

Case No: 7068/20D

In the matter between:

CLAIRWOOD RATEPAYERS & RESIDENTS ASSOCIATION	<i>Applicant</i>
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and

ETHEKWINI MUNICIPALITY	<i>First Respondent</i>
MUNICIPAL PLANNING TRIBUNAL	<i>Second Respondent</i>
EXECUTIVE MAYOR, ETHEKWINI MUNICIPALITY	<i>Third Respondent</i>
EXECUTIVE COMMITTEE APPEALS AUTHORITY	<i>Fourth Respondent</i>
ETHEKWINI TRANSPORT AUTHORITY	<i>Fifth Respondent</i>
AJAY SHAH	<i>Sixth Respondent</i>
URESHKA SHAH	<i>Seventh Respondent</i>

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COURT

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case Number: 7068/2020

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THE MUNICIPAL PLANNING TRIBUNAL

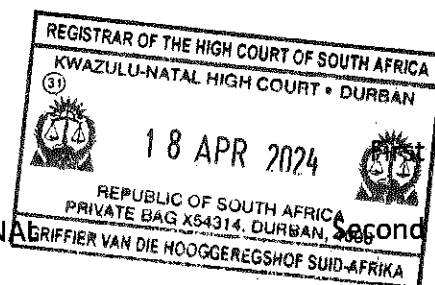
EXECUTIVE MAYOR, eTHEKWINI MUNICIPALITY

EXECUTIVE COMMITTEE APPEALS AUTHORITY

eTHEKWINI TRANSPORT AUTHORITY

AJAY SHAH

URESHKA SHAH



First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

FIRST - FIFTH RESPONDENTS' NOTICE IN TERMS OF UNIFORM RULE 6(5)(d)(iii)

TAKE NOTICE THAT the first – fifth respondents hereby give notice of their intention to raise a question of law.

AND TAKE NOTICE FURTHER THAT the question of law is as follows:-

**ACTING SHERIFF/BALJU
ISIKHONZI SE NKANTOLO**

22 APR 2024

DURBAN SOUTH
P.O. BOX 47407, GREYVILLE, 4023
TEL: 031 3097062/7420

1. The applicant seeks an order that:-
 - 1.1 the decision of the second respondent dated the 30th April 2019 granting the application for rezoning in respect of 140 Houghton Road, Clairwood is declared unlawful, unconstitutional and invalid, and reviewed and set aside;
 - 1.2 the decision of the fourth respondent of the 29th October 2019 dismissing the applicant's appeal against the rezoning of 140 Houghton Road be declared unlawful, unconstitutional and invalid, and be reviewed and set aside;
 - 1.3 the foregoing decisions be substituted by a decision that:-

"The application for the amendment of the Durban Scheme by rezoning of Erf 309 Dunn's Grant situated at 140 Houghton Road, Clairwood from Special Residential 400 to Light Industrial is rejected";
 - 1.4 the first respondent's decision not to conduct a traffic study in the Clairwood precinct in fulfilment of the requirements of the LAP alternatively their failure to do so is declared unlawful, unconstitutional and invalid, and reviewed and set aside;
 - 1.5 the first – fourth respondents be directed to suspend the processing of all rezoning applications and appeals in respect of properties zoned Special Residential 400 in Clairwood, Durban until they have conducted a traffic study as envisaged in the LAP;

1.6 declaratory orders be granted that the respondents have:-

1.6.1 a constitutional obligation to take reasonable and other measures to ensure that the environment generally, and the streets in particular, of Clairwood are safe for motorists and pedestrians; and

1.6.2 failed in fulfilling this obligation;

1.7 the respondents be directed to fulfil this obligation by taking reasonable and other measures to ensure that the environment generally and the streets in particular of Clairwood, Durban are safe for motorists and pedestrians;

1.8 the first respondent be directed in Clairwood:-

1.8.1 to ensure that the Special Residential 400 zoning is enforced in respect of those properties that are zoned as such;

1.8.2 to issue compliance notices to those businesses that are presently occupying properties that are presently zoned Special Residential 400 to cease their business activities;

- 1.8.3 to within thirty (30) days of the service of the order to inspect and report on certain properties which are listed in the proposed order and, if necessary, serve compliance notices or institute proceedings to enforce the provisions of the Scheme;
- 1.8.4 *inter alia* to photograph, establish the names and service addresses of the owners and prepare written inspection reports in respect of the 50 properties listed by the applicant;
- 1.8.5 to report on whether *"the use of the aforesaid properties is consistent with the Scheme inter alia whether ..."*¹;
- 1.8.6 to issue contravention notices or stop work notices or institute proceedings to enforce the provisions of the Scheme in respect of the aforesaid premises if any are found upon inspection to be used in contravention of the Scheme;
- 1.9 that the first – fourth respondents be directed:-
 - 1.9.1 within three months of the date of order to file a report under oath on the steps that will be taken to comply with their obligations;

¹ This is incomplete in the draft amended order

1.9.2 to “*meaningfully engage*” with the applicant and other interested parties before compiling the report;

1.10 the applicant may within one month file an affidavit in response to the report contemplated above.

2. The first – fifth respondents submit that the relief sought is not competent and is unlawful for the reasons that follow.
3. The Constitution of the Republic of South Africa, 1996 (the “*Constitution*”), provides under Part B of Schedule 4 that the first respondent has exclusive competence to administer matters pertaining to municipal planning.
4.
 - 4.1 The Spatial Planning Land Use Management Act, 2013 (“*SPLUMA*”) comprises framework legislation which *inter alia* authorises bylaws to regulate control and enforce municipal planning in land use schemes.
 - 4.2 *SPLUMA* expressly contemplates a broad multi-disciplinary approach to planning decisions and actions by municipalities.
5.
 - 5.1 Under the Local Government: Municipal Systems Act, 2000 (the “*Systems Act*”), a municipal council is required to adopt and

Integrated Development Plan ("IDP") and to give effect thereto in matters of land use management.²

5.2 Section 35(1)(a) of the Systems Act specifies that the IDP is *"the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality"*.

5.3 The Systems Act provides that a municipal council, in exercising the municipality's executive and legislative authority has a right *"to do so without improper interference"*.³ The Systems Act empowers municipalities *"to do anything reasonably possible for, and incidental to, the effective performance of its functions and the exercise of its powers"*.⁴

6. This comprehensive nature of the regulation of land use has two important features:-

6.1 in effect and by design it leaves little space for the intervention of a third party;

6.2 the constitutional scheme demands of municipalities that they adopt coordinated, broad and holistic measures to achieve their municipal planning objectives.

² Section 25.1

³ Section 4(1)(b)

⁴ Section 8(2)

7. The Constitutional Court has determined the issue of constitutionally invalid interference in municipal planning in judgements such as *Gauteng Development Tribunal*⁵, *Maccsand*⁶ and *Tronox*⁷ where it was held that the functional area of municipal planning is primarily located in the local government sphere.
8. The powers which the applicant seeks would impermissibly intrude upon the municipal planning process and usurp the first respondent's constitutionally ordained powers.
9. The enforcement of relevant laws may only be properly traversed on a case-by-case basis and must be undertaken exclusively by the first respondent.
10. The relief sought would be unconstitutional and offend against the separation of powers doctrine as the Courts are not empowered to grant to a third party powers such as that sought by the applicant, and nor may a Court assume powers for municipal planning which are constitutionally allocated to the first respondent.
11. The applicant has not joined the registered owners of the properties it cites, resulting in material non-joinder which in turn renders the application fatally defective.

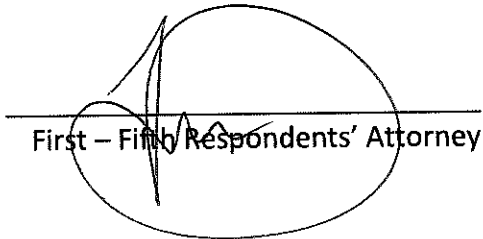
⁵ *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC)

⁶ *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) at [42]

⁷ *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Tribunal* 2016(3) SA 160 (CC)

12. For all the foregoing reasons, the application ought to be dismissed with costs, including the costs of two counsel.

DATED AT DURBAN THIS 17th DAY OF April 2024.


First - Fifth Respondents' Attorney

LEGATOR McKENNA INC.
Respondents' Attorneys
Unit 201, Building 1
34 Essex Terrace
Westville
Email: priyankag@legator.co.za
Ref.: MAT4840/MD/PG

TO: The Registrar of the above Honourable Court
DURBAN

AND TO: LEGAL RESOURCES CENTRE (DURBAN)
Applicant's Attorneys
11th Floor, Aqua Sky Towers
275 Anton Lembede Street
DURBAN
Email: sharita@lrc.org.za

RECEIVED COPY HEREOF
this 18th day of 04/ April
2024 at 11:03 M
Sharita
LEGAL RESOURCES CENTRE
WITHOUT PREJUDICE

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

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AJAY SHAH

Sixth Respondent

URESHKA SHAH

Seventh Respondent

FIRST – FIFTH RESPONDENTS' ANSWERING AFFIDAVIT

I,

ESHANA BAIJNATH

do hereby make oath and say that:-

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1. I am an adult female employed by the first respondent as a Principal Legal Advisor at the Legal Services and Compliance Unit, 18th Floor, Embassy Building, 199 Anton Lembede Street, Durban, KwaZulu-Natal.
2. The facts deposed to are not all within my personal knowledge. Where they are not or where the context indicates to the contrary, the facts are provided to me by the official whose supporting affidavit is annexed hereto and/or the facts are obtained from documents under the control of the first respondent. I believe the facts to which I depose to be true and correct.
3. Where I make legal submissions, I do so on the advice of the first – fifth respondents' legal representatives, which advice I accept as correct, and I rely on my experience as a Principal Legal Advisor for the municipality.
4. I am authorised to depose to this affidavit.

INTRODUCTION

5. For the sake of convenience, I apply the following references:-
 - 5.1 the applicant is intermittently referred to as the "*Association*";
 - 5.2 the first respondent as the "*municipality*";
 - 5.3 the second respondent as the "*Tribunal*";

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- 5.4 the fourth respondent as the "*Appeals Authority*";
 - 5.5 the fifth respondent as "*ETA*";
 - 5.6 the first – fifth respondents collectively as "*the respondents*";
 - 5.7 the Back of Port Concept, Framework Plans and Zoning Framework Report Plan as the "*LAP*" or the "*BOPLAP*"; and
 - 5.8 the Spatial Planning Land Use Management Act, 2013 as "*SPLUMA*".
6. This affidavit covers the following:-
- 6.1 what the application is about. This exercise demonstrates that the applicant's proposal to what is a complex and historical problem is, respectfully, simplistic and legally unsustainable. To be frank, multi-disciplinary, strategic and sustainable solution is required and not policing the municipality, as the applicant would have it;
 - 6.2 I analyse the relief sought in the founding affidavit and juxtapose that against the amended relief sought through the supplementary founding affidavit. I explain why the relief which the applicant seeks encroaches on the municipality's exclusive constitutionally ordained powers and would be invalid;
 - 6.3 the dispute is properly contextualised through a survey of the legal landscape and municipal planning tools and instruments (of which the LAP is one);

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- 6.4 the non-joinder of parties who have a direct interest in the relief which the applicant seeks and that this too renders the application lacking in merit and substance;
- 6.5 to the extent that the application is directed at appropriate redress in relation to the management of Clairwood, I advance submissions on the municipality's long-term planning for the management and development of Clairwood and the implementation of the LAP. The municipality has activated and followed processes which are intended to effect the transition to a logistics hub. The Clairwood upgrade project is incapable of being fast-tracked. Numerous matters fall outside the control of the municipality which affect the timing and the rollout of the plans. I am assured, however, that the process is at an advanced stage and is intended to benefit all concerned and not only the residents of Clairwood although their interests will certainly be catered for.
7. I refrain at this stage from advancing an *ad seriatim* response to specific allegations in the applicant's affidavits because: -
- 7.1 firstly, the respondents are compelled to exercise restraint as the general tone in the applicant's affidavits is accusatory and emotional but lacking in factual substance;
- 7.2 secondly, events have overtaken the matter since 2019, when the approval in respect of 140 Houghton Road was upheld by the Appeal Authority, and the situation is not and will not remain static. The municipality will accordingly seek leave to supplement this

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affidavit as soon as a pending application under SPLUMA has been finalised.

8. Those facts as are contained in the founding papers which are inconsistent with the matter advanced by the respondents are to be taken as denied and legal argument will, where relevant, be addressed at the hearing of the matter.

ANALYSIS OF THE APPLICATION

9. This application was launched in October 2020, seeking to review the approval of a rezoning application in respect of the sixth and seventh respondents' property at 140 Houghton Road, Clairwood. The Association went further in mounting attacks against the municipality's line departments and others joined as co-respondents in this matter. Ultimately, The Association accuses the municipality of deliberate acts and omissions with the intention of harming residents and undermining the residential component of the area. This narrative is false.
10. Originally, the application was presented as a review coupled with a *mandamus*. To summarise the relief sought in the founding papers:-

10.1 the review sought to challenge:-

10.1.1 the decision of the Tribunal to grant a rezoning application for 140 Houghton Road in order to permit its use for Light Industrial purposes;

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- 10.1.2 the decision of the Appeals Authority to dismiss the Association's appeal against the Tribunal's decision to rezone 140 Houghton Road;
- 10.1.3 that the foregoing decisions be substituted by a decision that *"the application for the amendment of the Durban Scheme by rezoning of Erf 309 Dunn's Grant situated at 140 Houghton Road, Clairwood from Special Residential 400 to Light Industrial is refused"*;
- 10.2 the Association sought a declaratory order that the decision not to conduct a traffic study in the Clairwood precinct in fulfilment of the LAP; alternatively that the failure to conduct the traffic study is unlawful, unconstitutional and invalid, and reviewed and set aside;
- 10.3 an interdict was sought directing the respondents to suspend the processing of all rezoning applications and appeals in respect of properties zoned Special Residential 400 in Clairwood until they have conducted a traffic study as envisaged in the LAP;
- 10.4 applied for were declaratory orders :-
- 10.4.1 pertaining to the municipality's constitutional obligations to take reasonable and other measures to ensure that the environment generally and the streets in particular of Clairwood, Durban are safe for motorists and pedestrians and has failed in fulfilling its obligation;

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10.4.2 seeking to direct the municipality to fulfil the foregoing obligation by taking reasonable and other measures to ensure that the environment generally and the streets in particular of Clairwood, Durban are safe for motorists and pedestrians;

10.5 further incidental to the *mandamus* is that the respondents be directed:-

10.5.1 within three (3) months of the date of the order to file a report on the steps to be taken to comply with their obligations set out above;

10.5.2 to “*meaningfully*” engage with the applicant and other interested parties before compiling the report;

10.5.3 that the applicant may within one (1) month file an affidavit in response to the report contemplated above.

11. The applicant’s deponent averred that the object of the application was to ensure a road upgrade and “*proper plan for the transition to the logistics hub*”.¹ This is not controversial at all – in fact, the municipality is itself committed to the same objective. However, the applicant sets out to achieve this through the review and setting aside of the rezoning of 140 Houghton Road and in seeking an order to prevent the municipality from permitting future industrial use in Clairwood unless and until it upgrades

¹ Founding affidavit: page 12, paragraph 11

the road². The municipality, on the other hand, is and has been for several years engaging in a comprehensive strategic planning process.

12. The supplementary founding affidavit was filed in about December 2022. Here, the Association has pivoted away from the review to focus almost exclusively on the interdictory relief aimed at compelling the municipality to enforce all relevant laws pertaining to the Clairwood area in general and specifically in respect of 50 identified properties. The Association additionally seeks through its amended order to advance itself as an arbiter and supervisory authority over the municipality.
13. The owners of the 50 properties that are cited have not been joined as parties to the proceedings. This is a material defect in the application and it ought to be dismissed on this basis.
14. To traverse the relief now sought by the Association through its draft amended order, it is in these terms:-
 - 14.1 that the decision of the Tribunal dated the 30th April 2019 granting the application for rezoning in respect of 140 Houghton Road, Clairwood is declared unlawful, unconstitutional and invalid, and reviewed and set aside;
 - 14.2 the decision of the Appeals Authority of the 29th October 2019 dismissing the Association's appeal against the rezoning of 140

² Founding affidavit: page 12, paragraph 12

Houghton Road be declared unlawful, unconstitutional and invalid, and be reviewed and set aside;

14.3 that the foregoing decisions be substituted by a decision that:-

"The application for the amendment of the Durban Scheme by rezoning of Erf 309 Dunn's Grant situated at 140 Houghton Road, Clairwood from Special Residential 400 to Light Industrial is rejected";

14.4 the respondent's decision not to conduct a traffic study in the Clairwood precinct in fulfilment of the requirements of the LAP alternatively their failure to do so is declared unlawful, unconstitutional and invalid, and reviewed and set aside;

14.5 the municipality, the Tribunal, the Mayor and the Appeals Authority be directed to suspend the processing of all rezoning applications and appeals in respect of properties zoned Special Residential 400 in Clairwood, Durban until they have conducted a traffic study as envisaged in the LAP;

14.6 declaratory orders that the respondents have:-

14.6.1 a constitutional obligation to take reasonable and other measures to ensure that the environment generally, and the streets in particular, of Clairwood are safe for motorists and pedestrians; and

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14.6.2 failed in fulfilling this obligation;

14.7 that the respondents be directed to fulfil this obligation by taking reasonable and other measures to ensure that the environment generally and the streets in particular of Clairwood, Durban are safe for motorists and pedestrians;

14.8 that the municipality be directed in Clairwood:-

14.8.1 to ensure that the Special Residential 400 zoning is enforced in respect of those properties that are zoned as such;

14.8.2 to issue compliance notices to those businesses that are presently occupying properties that are presently zoned Special Residential 400 to cease their business activities;

14.8.3 to within thirty (30) days of the service of the order to inspect and report on whether properties, which the Association goes on to list and, if necessary, serve compliance notices or institute proceedings to enforce the provisions of the Scheme;

14.8.4 *inter alia* to photograph, establish the names and service addresses of the owners and prepare written inspection reports in respect of 50 properties listed by the Association;

14.8.5 to report on whether *“the use of the aforesaid properties is consistent with the Scheme inter alia whether ...”*;³

14.8.6 to issue contravention notices or stop work notices or institute proceedings to enforce the provisions of the Scheme in respect of the aforesaid premises if any are found upon inspection to be used in contravention of the Scheme;

14.9 that the respondents be directed:-

14.9.1 within three months of the date of order to file a report under oath on the steps that will be taken to comply with their obligations;

14.9.2 to *“meaningfully engage”* with the Association and other interested parties before compiling the report;

14.10 the Association may within one month file an affidavit in response to the report contemplated above.

³ This is incomplete in the draft amended order

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THE MUNICIPALITY'S POSITION: AN OVERVIEW

15.

- 15.1 The municipality disputes that it has turned a blind eye to the challenges faced by the residents of Clairwood and to those created by irreversible economic developments through the port and surrounding businesses.
- 15.2 The plight of those who have continued to use their properties and the amenities in the area lawfully is evident in the planning process presently underway under the auspices of SPLUMA.
- 15.3 The applicant overlooks that in the 1990's the municipality inherited the responsibility of unraveling the entire South Durban Basin as an apartheid-era planning model. This is an enormous and complex task with broad socio-economic repercussions and systemic infrastructural challenges. For instance, a gas line runs through Clairwood and this is located close to residential and religious sites. A vigorous and creative process is required to accommodate such deep-rooted challenges on the ground.
- 15.4 Furthermore, according to our last survey, roughly 20% of the residential property owners in Clairwood actually reside there, meaning that the rest have been sold, abandoned or encumbered their properties in favour of third parties.
- 15.5 The scope of what is sought is inherently flawed in the applicant's endeavour to disrupt and interfere with the municipality's functions

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in regard to the management and planning for Clairwood. This is more so because the majority of residents and property owners in Clairwood have historically condoned and supported unlawful activities in the area.

15.6 Only a small number of occupants in the area comprise the applicant, which raises questions over its capacity and standing in the community to conduct the functions contemplated in the amended order.

16. The foregoing is crucial because legally and practically:-

16.1 in the review under Rule 53 and the Promotion of Administrative Justice Act, 2000 ("PAJA") pertaining to the decision of the Tribunal and the subsequent appeal in respect of the rezoning application for 140 Houghton Road, Clairwood, there appears little to no effort by the applicant to explain why that rezoning is used to springboard the complaints relating to 50 other properties;

16.2 it is also unclear how, with the passage of time - that is, since 2019 when the decision relating to one specific property, (140 Houghton Road), was upheld – the Court is capable of reversing or curing the applicant's complaints in relation to the entire Clairwood precinct as identified in the BOPLAP;

16.3 further unclear is under what power/s the Court would grant orders of the nature sought. The Court is not empowered to engage in municipal functions, and the applicant in its founding and

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supplementary founding papers pays no heed whatsoever to the separation of powers doctrine;

16.4 the amended relief does not derive from the review record and is consequently unsustainable on the facts and on the law;

16.5 the applicant advances an incorrect interpretation of the LAP and of planning laws and instruments to support conclusions on:-

16.5.1 an apparent failure by the municipality generally to enforce the relevant planning laws and bylaws applicable to Clairwood;

16.5.2 the rollout of the LAP;

16.5.3 the traffic study to give effect to the LAP;

16.5.4 a safe and effective road system;

16.5.5 its (flawed) analysis of the review record;

16.5.6 punitive costs against officials involved in the decision to oppose the review;

16.5.7 the enforcement of all relevant laws – particularly traffic and planning laws – against individuals and property owners singled out as in breach of the zoning laws pertaining to their properties;

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- 16.6 that the shift in the applicant's case on the affidavits read together rests substantially on emotive, malicious and scandalous allegations;
- 16.7 the remedy contended for is constitutionally invalid.
17. Despite the inherently flawed premise to the application as I have highlighted above, there is little to debate regarding the following:-
- 17.1 that the LAP proposed the amendment of the zoning of Clairwood in order to promote the use of the area as a logistics hub. The need to undertake and effect a significant change in strategic planning was motivated by two primary considerations: firstly, Clairwood's proximity to the Port of Durban and, secondly, to facilitate the movement of cargo freight in and out of the port;
- 17.2 the applicant complains that the recommendations in the LAP have not been implemented. This is untrue. The LAP comprises a report and a framework plan, with proposals and recommendations for the realignment and re-design of Clairwood as a whole and not just of the residential component, which is presently much smaller and more scattered than previously;
- 17.3 the applicant does not seek the setting aside of the LAP. It accepts the promotion of the use of the area as a logistics hub but where it misses the point is in the argument that the review in respect of one site is necessary to achieve the implementation of a safe and

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environmentally secure transition to the recommendations in the LAP;

17.4 the redevelopment of Clairwood as a site directly adjacent to a growing port and increased traffic activity to support the harbour is necessary. However, for the applicant to assume functions reserved exclusively for local government, as the applicant sets out to, undermines the integrity of the municipality and the constitutionally designed system of governance, and would be incorrect; and

17.5 devising a long term solution to the challenges presented in respect of roads which are no longer suitable and other matters such as the roads and the environment calls for an objective and multi-disciplinary assessment of Clairwood in its entirety. It falls on the municipality to do.

18. The applicant seeks to discredit individual municipal departments as follows:-

18.1 Development Planning:-

18.1.1 that planning decisions involving Clairwood have been dealt with in a haphazard and irrational manner and not in accordance with the LAP;⁴

⁴ Founding affidavit: paragraph 4

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18.1.2 that development planning is out of step with the road and safety needs and conditions in Clairwood;⁵

18.1.3 with a selective treatment of the facts pertaining to the introduction, meaning and impact of the LAP and of the zoning scheme, generally and specifically in relation to 140 Houghton Road, Clairwood;⁶

18.1.4 the impact of rezoning on existing amenities such as schools, pedestrian traffic and places of worship;⁷

18.1.5 the extent to which the Development Planning Department did not await or worked around the absence of comments from eThekweni Water and Sanitation, Coastal Stormwater and Catchment Management and Metro Waste Water in supporting the rezoning application for 140 Houghton Road, Clairwood;⁸

18.2 the Land Use Management and Enforcement departments:-

18.2.1 in rezoning applications:-

⁵ Paragraphs 7, 8, 10 – 12, 75 – 90, 96 – 123, 147 – 150, 194 – 212

⁶ Paragraphs 25 – 66

⁷ Paragraphs 25 – 34

⁸ Paragraph 75

18.2.1.1. general allegations pertaining to rezoning applications which were not approved;⁹

18.2.1.2. specific allegations in respect of 140 Houghton Road, Clairwood;¹⁰

18.2.2 On analysis of planning and use contraventions since 2014:-

18.2.2.1. generally;¹¹

18.2.2.2. specifically in respect of 140 Houghton Road, Clairwood;¹²

18.2.2.3. engagements between the Land Use Management Department and ETA regarding Clairwood;¹³

18.3 eThekweni Traffic Authority (ETA) in apparently failing to develop a road plan for Clairwood since 2014 and to manage traffic and implement safety measures such as traffic calming mechanisms since 2014;¹⁴

⁹ Founding affidavit: paragraphs 147 – 150

¹⁰ Founding affidavit: paragraphs 75, 83, 105 – 123

¹¹ Paragraphs 91, 101, 152 – 155, 165, 170 – 178, 181, 189

¹² Paragraphs 194 - 212

¹³ Paragraph 100

¹⁴ Paragraphs 107, 149, 157, 161, 167, 174, 186 – 188, 190, 191, 194, 199, 200

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18.4 the Biodiversity, Climate and Environmental Protection Department:-

18.4.1 that the approval of the application in respect of 140 Houghton Road is in breach of section 24 of the Constitution and other provisions of the National Environmental Management Act; and

18.4.2 that the application in respect of 140 Houghton Road, Clairwood and all similar applications ought to have been objected to by this department due to environmental impact;¹⁵

18.5 the Tribunal and the Appeal Authority:-

18.5.1 that these bodies failed to consider the impact of the LAP and existing (poor) road network in dismissing appeals;¹⁶

18.5.2 doubt regarding the extent to which the Tribunal and Appeal Authority considered, if at all, that comments from eThekweni Water Services, Coastal Stormwater and Catchment Management and Metro Waste Water did not feature in the decision taken by the Tribunal.

¹⁵ Paragraph 122

¹⁶ Paragraphs 92 – 94, 96, 98 – 104

19. However, the foregoing contentions lack merit when one considers:-

19.1 firstly, in relation to the property at 140 Houghton Road:-

19.1.1 that the purpose of referring to this property serves only to support the applicant's allegations of an alleged mismanagement of the transition of Clairwood from primarily a residential area (SR 400) to a logistics hub. However, the applicant conveniently side-steps the fact that by the time it set out to challenge the municipality's and Appeal Authority's decisions, the changed use of the property had become entrenched on the site over many years and that the property had lost its residential character;

19.1.2 the same applies to all the other properties where rezoning applications have been successful;

19.1.3 the deponent argues that development approvals such as that in respect of 140 Houghton Road, Clairwood to permit Light Industrial use, have become the norm. And, so the argument goes, this is notwithstanding that the existing road network and infrastructure do not support the developments and render unfit and dangerous the living conditions for the residents who remain in the area. However, the municipality has not granted approvals for rezoning applications in the past 2 – 3 years, appeals have been dismissed and such matters have ended there;

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19.1.4 the complaint that the municipality has failed to implement the LAP is factually incorrect;

19.2 that the founding and supplementary founding affidavits are replete with unfounded accusations that the municipality (at times with Transnet) are actively pursuing the degradation of Clairwood.¹⁷ This is emotive and unhelpful;

19.3 nowhere does the applicant's deponent qualify himself or any other member of the Association as an expert in any of the disciplines on which the multitude of opinions have been expressed in the founding papers;

19.4 the applicant's case is premised on the municipality failing to implement the LAP and enforce its bylaws, scheme provisions and relevant laws when this is factually incorrect.

20. In summary therefore:-

20.1 the application is out of time and/or events have taken over which render the application lacking in merit;

20.2 there is a material non-joinder in the applicant's failure to join the owners of the properties cited in the amended order prayed;

¹⁷ See, for instance, paragraph 183

- 20.3 the order sought in respect of 140 Houghton Road, Clairwood is not really the relief which the applicant is seeking. That relief is at best, academic and in any event not competent;
- 20.4 the remedy contended for in the amended notice of motion is unconstitutional and unenforceable;
- 20.5 the delays in this matter are to a degree that renders the application moot;
- 20.6 the applicant as a civic organisation is not entitled in law to assume a supervisory role over the municipality and nor is it in the public interest that it does so. Significantly, its deponent does not even begin to justify this part of the order sought;
- 20.7 the applicant seeks the preservation of residential components which are no longer compatible with the broad usages now in place and which are planned for Clairwood. This was not envisaged in the Back of Port LAP and nor is it sustainable for the area;
- 20.8 as alluded to earlier, the applicant has changed the relief it seeks through the supplementary affidavit. It now includes properties which are not related to the decision which it originally set out to review. The amended relief is not supported by the record or foreshadowed in the founding affidavits. It is unwarranted therefore for the applicant to use these proceedings to justify it assuming powers that are, by constitutional design, reserved for

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local government. It is this point to which I turn to analyse in the next section.

MUNICIPAL PLANNING: AN ORIGINAL MUNICIPAL FUNCTION

21. As pointed out, the premise from which the applicant proceeds is legally flawed.
22. An analysis of the law must commence from the Constitution of the Republic of South Africa, 1996 (the "*Constitution*"), which provides under Part B of Schedule 4 that the municipality has exclusive competence to administer matters pertaining to municipal planning.
23. Municipal planning defines the control and regulation of the use of land, including zoning and the establishment of townships, within the municipality's area of jurisdiction.
24. In order to execute their mandate in planning, municipalities are bound to ensure an efficient, economically viable, environmentally sustainable development within the framework of legislation and planning instruments.
25. The Spatial Planning Land Use Management Act, 2013 ("*SPLUMA*") comprises framework legislation which *inter alia* authorises bylaws to regulate control and enforce municipal planning in land use schemes. SPLUMA expressly contemplates a broad multi-disciplinary approach to planning decisions and actions.

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26. With regard to spatial planning, environment and land use management, in order to do its job, the municipality through its Development Planning Department undertakes various due diligence investigations. For instance, the Back of Port Local Area Plan was one such investigation. The BOP was commissioned in 2011 and adopted in 2014.
- 27.
- 27.1 Under the Local Government: Municipal Systems Act, 2000 (the “Systems Act”), a municipal council is required to adopt and Integrated Development Plan (“IDP”) and to give effect thereto in matters of land use management.¹⁸
- 27.2 Section 35(1)(a) of the Systems Act specifies that the IDP is “*the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality*”.
28. The comprehensive nature of the regulation of land use envisaged by the Constitution, the Systems Act and its regulations read with the SPLUMA Act, in effect and by design leave little space for the intervention of a third party, such as the applicant or even another organ of state.
- 29.
- 29.1 The aforementioned comprehensive land use regime demands of the municipality that it adopt coordinated and holistic measures to achieve its municipal planning objectives.

¹⁸

Section 25.1

29.2 The Systems Act itself empowers and recognises that municipalities exercise extensive control and regulation of land use within its municipal area: Chapter 2 recognises the purpose of schemes being *“to regulate land use and to promote orderly development in accordance with the municipality’s IDP (section 3), whilst section 4 places the responsibility for preparing schemes exclusively on municipalities and section 5 sets out the content of schemes. All of these require a localised and broad, municipal-wide approach”*.

29.3 Scheme amendments therefore involve a broad consideration by the municipality of all relevant factors which necessarily fall within its purview.

30. The Systems Act provides that a municipal council, in exercising the municipality’s executive and legislative authority has a right *“to do so without improper interference”*.¹⁹ The Systems Act empowers municipalities *“to do anything reasonably possible for, and incidental to, the effective performance of its functions and the exercise of its powers”*.²⁰

31. The comprehensive nature of the regulation of land use envisaged by the Constitution and other legislation have two important features:-

31.1 in effect and by design it leaves little space for the intervention of a third party;

¹⁹ Section 4(1)(b)

²⁰ Section 8(2)

- 31.2 the constitutional scheme demands of municipalities that they adopt coordinated broad and holistic measures to achieve their municipal planning objectives.
32. The Constitutional Court has made its stance clear as to the issue of constitutionally invalid interference in municipal planning in judgements such as *Gauteng Development Tribunal*²¹, *Maccsand*²² and *Tronox*²³ where it was held that the functional area of municipal planning is primarily located in the local government sphere.
33. The respondents contend that the applicant fails to recognise that municipalities exercise extensive control and regulation of land use within their municipal areas. It seeks to dilute that exclusive competence.
34. To properly give effect to the functions as defined above throughout Clairwood requires a localised and broad municipal-wide approach, not a fixation on site-specific considerations, as the applicant would have it.
35. The interference described by the municipality and the conflict presented by the difference between the broad perspective which the municipality is statutorily enjoined to adopt and with the narrow approach proposed by the applicant:-

²¹ *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC)

²² *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) at [42]

²³ *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Tribunal* 2016(3) SA 160 (CC)

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- 35.1 affirms that the applicant is non-suited as an unqualified third party seeking directly to involve itself within the realm of municipal functions;
- 35.2 evidences that the relief sought would be unconstitutional and offends against the separation of powers harm. And, with respect, the Courts are not empowered to grant to a third party powers such as that sought by the applicant;
- 35.3 illustrates why the municipality's solution to the planning and environmental problems in Clairwood must engage a basket of plans which will cure the challenges resulting from the changes in the character of the area over the past few decades;
- 35.4 highlights that the municipality alone is required to exercise control and regulation of the land use in Clairwood.
36. The municipality does not seek to escape its obligation to ensure that the challenges that exist in Clairwood are resolved. The concern is that the powers sought by the applicant would impermissibly intrude upon the municipal planning process in an impractical and myopic manner, and that the municipality's long-term objectives for and interests in Clairwood would be improperly sidelined and frustrated. Furthermore, the enforcement of existing laws can only be properly traversed on a case-by-case basis and not in the vague manner advanced by the applicant.

THE PLANS FOR CLAIRWOOD

37. I reminded the Court earlier that the municipality inherited a flawed and fraught apartheid-era planning model in the entire South Durban Basin. Due to the intersection of numerous extraneous factors, including the growth of the Port of Durban, the management of the Clairwood not always been viable. The municipality has long sought to remedy this.
38. The BOPLAP²⁴ was released in 2014 and its recommendations were adopted in December 2014 (see annexure “A” hereto, a copy of the relevant Council resolution). The LAP comprises a concept plan and framework, and its purpose was *inter alia* to report to the municipality on the influx and increase of the freight and logistics sector around the Port of Durban, and to present a vision for the BOP area and surrounding areas. The LAP cited the incompatible land uses such as that experienced in Clairwood.²⁵
39. In 2020, the Development Planning Department proposed a project to give effect to the resolution. In 2020, a tender was issued for the appointment of consultants to translate the adopted recommendations from the LAP for a new lay-out in Clairwood; annexed marked “B” is a copy of the Terms of Reference. The appointment of a consortium followed in 2021 with its work projected to take three years to complete.
40. The municipality and the consortium have been translating the adopted recommendations from the LAP into a new township lay-out in Clairwood

²⁴ Record: Volume 4, pages 1-397

²⁵ Record: Volume 4, paragraph 1.2, page 27

BSK

supported by an entirely new road alignment, infrastructure, urban design strategy and implementation plan. This accords with the conclusion expressed in the LAP in relation to Clairwood as follows:- ²⁶

"It is recommended that the Clairwood central residential core be rezoned from special residential to logistics uses. Logistics within this area would be permitted to have open storage. In order to work efficiently and effectively a totally new layout is required with wider roads and improved access from truck freight routes. Due to the land use changes in the area the movement structure would need to be upgraded to allow and accommodate a local logistics circulation system. This would require that some of the major through routes be widened, and other roads eliminated or downgraded to internal service roads within larger lots. On-site parking and handling should be accommodated in all developments in the precinct.

The precondition for this solution suggests that there is a complete redevelopment of the Clairwood residential core with consolidated lots as well as a larger sub-divisional layout to allow for a core better structured for the circulation of large trucks. The development of new infrastructure would need to be addressed to support the logistics uses within the core including the new local road network. In order to achieve this the Municipality would need to encourage and support the removal of all existing residential and non logistics related industrial uses from the core. The redevelopment of Fresh

Produce Market and the Transnet Deisel Depot is suggested as the site of the initial logistics platform.

Listed buildings, places of worship and cognate institutional uses would be retained. Redevelopment will enable the drainage and flooding problems in the north-west of the precinct to be addressed." (Emphasis added).

41. The project team is acutely aware of the challenges in Clairwood as addressed in the LAP, in particular that:-
- 41.1 certain sites are too small for industrial or logistics usage;
 - 41.2 certain blocks are too small;
 - 41.3 the roads are too narrow for commercial/logistics traffic;
 - 41.4 the roads system lacks clarity and convenient ingress and egress to and from the major access roads;
 - 41.5 a mix of residential and incompatible industrial/logistics uses currently exist; and
 - 41.6 a large number of worship sites and listed buildings need to be accommodated.

42. The final and legal submission, in the form of a SPLUMA application under the 2021 bylaws (a copy whereof is annexed marked "C" hereto), will include a proposed/possible scheme amendment, rezoning/township establishment/sub-division/consolidation and any other legal and statutory component as required by the proposal. Specialist studies will form part of the final submission of the SPLUMA application.
43. Regarding the present road layout and safety, the eThekweni Traffic Authority is responsible for the approval, planning and implementation of traffic management and traffic calming. The following process is undertaken when dealing with traffic calming requests:-
- 43.1 ETA assesses all traffic calming requests in terms of the Approved Traffic Calming Policy dated October 2012;
- 43.2 if the road meets the requirements for the implementation of a traffic calming mechanism as per the policy then the budget will have to be secured and approved by the Council. Once the budget is secured, traffic calming can be implemented;
- 43.3 if the road does not meet the requirement for the implementation of traffic calming as per the policy, traffic calming cannot be implemented. Unfortunately, this has been the position in relation to the Clairwood precinct.

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44.

44.1 The Land Use Department approached the ETA regarding the development of a road layout expansion plan and road restructure in the Clairwood precinct after the LAP was approved in 2014. Following internal investigations and interrogations within ETA, it was clear that a new road layout plan and road restructure is not possible without a new sub-divisional township layout plan.

44.2 Upon further discussions between ETA, the Land Use Management and Development Planning Departments, it was agreed that the BOP recommendations for the Clairwood precinct would be carried out to resolve the challenges and that a multi-disciplinary/sectoral scope of work was developed for the implementation of the LAP recommendations for the Clairwood precinct.

44.3 It is important to note that this must be carried out in a systematic manner; that is, the new sub-divisional township layout plan would need to be finalised or carried out concurrently with the required transportation planning to support the logistics zone implementation.

44.4 The ETA has been consistent in its comments to rezoning applications in the Clairwood precinct.

44.5 The revised road layout and restructure was the commencement point for the Clairwood Back of Port Design Framework.

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45. All of the foregoing considerations have culminated in the Clairwood Back of Port Design Framework which is designed to present the long-term solution to remedy the problems cited in the LAP, those complained of by the applicant and the economic and planning challenges presented by the growth and importance of the adjacent port.
46. The municipality is following the processes stipulated in its SPLUMA 2021 bylaws (a copy whereof is annexed marked "C" hereto) to realise the Clairwood Back of Port Design Framework through a combined application. This will soon be finalised and ready for public participation as contemplated under Chapter 9 of the bylaw. Once that occurs, it is anticipated that property prices in Clairwood will appreciate and that the applicant's concerns will dissipate.
47. It will be evident when the SPLUMA application is published and the public participation process is triggered that the municipality has confronted head-on the problems highlighted by the applicants and that a plan for the redevelopment of the precinct has been undertaken in a responsible manner. Obviously, the applicants and any other parties who have concerns or queries would be entitled during the course of the public participation process to engage in those matters at the appropriate stage.
48. At this point, it is uncertain when the public participation part of the application will be attended to but it is expected to occur in the coming months, and should be completed by the end of this year. As mentioned, the municipality will update the Court regarding the status and outcome of the SPLUMA application on leave being granted at the appropriate stage.

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CONCLUSION

49. It is evident in what I have set out that the municipality:-

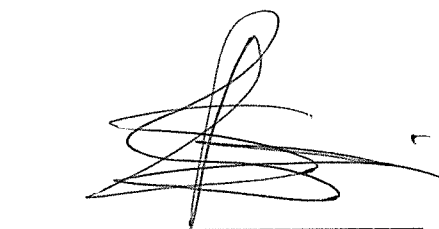
49.1 is sensitive to the challenges in Clairwood;

49.2 is aware of the problems faced by residents in the area;

49.3 is mindful of its constitutional duties, responsibilities and functions;

49.4 is in fact giving effect to its constitutional duties and functions.

50. In the circumstances, the application falls to be dismissed.



DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged to me that she knows and understands the contents of this affidavit, which was signed and sworn to before me at Durban on this 17th day of April 2024, and that the terms of Regulations R1258 and R1648 of 21 July 1972 and 19 August 1977, respectively, have been complied with.



COMMISSIONER OF OATHS

BONGUMENZI SANELE KUBHEKA
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
REPUBLIC OF S.A.
231-233 STAMFORD HILL ROAD
DURBAN, 4001

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case Number: 7068/2020

In the matter between:

CLAIRWOOD RATEPAYERS AND RESIDENTS ASSOCIATION

Applicant

and

eTHEKWINI MUNICIPALITY

First Respondent

THE MUNICIPAL PLANNING TRIBUNAL

Second Respondent

EXECUTIVE MAYOR, eTHEKWINI MUNICIPALITY

Third Respondent

EXECUTIVE COMMITTEE APPEALS AUTHORITY

Fourth Respondent

eTHEKWINI TRANSPORT AUTHORITY

Fifth Respondent

AJAY SHAH

Sixth Respondent

URESHKA SHAH

Seventh Respondent

CONFIRMATORY AFFIDAVIT

I,

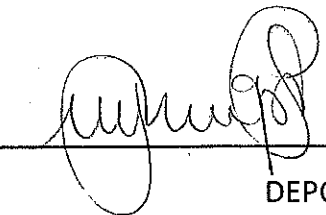
MRIDULEKHA ALLOPI

do hereby make oath and say that:-

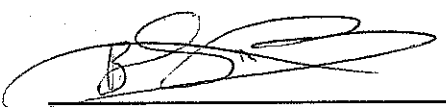
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1. I am an adult female, a Project Strategist employed by eThekweni Municipality in the Development Facilitation Unit.
2. The facts deposed to are within my personal knowledge and are to the best of my knowledge true and correct.
3. I have read the answering affidavit of Eshana Baignath.
4. I confirm the contents of Ms Baijnath's affidavit insofar as this relates to the Back of Port Local Area Plan, the steps taken by the municipality to implement the recommendations of the plan and the planning process that has been and is being undertaken in order to achieve a redevelopment of the Clairwood precinct. That process includes the application under the Spatial Planning and Land Use Management Act, 2013, the details of which the municipality is presently unable fully to disclose until the public participation process has commenced as to do so would conflict with the provisions under and intent of the Act.


DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged to me that she knows and understands the contents of this affidavit, which was signed and sworn to before me at Durban on this 09th day of may 2024, and that the terms of Regulations R1258 and R1648 of 21 July 1972 and 19 August 1977, respectively, have been complied with.


COMMISSIONER OF OATHS

BONGUMENZI SANELE KUBHEKA
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