

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

Case No: 7068/20D

In the matter between:

**CLAIRWOOD RATEPAYERS &
RESIDENTS ASSOCIATION**

Applicant

and

ETHEKWINI MUNICIPALITY

First Respondent

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

CORE BUNDLE INDEX: REPLYING

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24.	Applicant's Replying Affidavit: PRAGASEN REDDY (25 June 2024)	549 – 567 (V6)

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APPLICANT'S REPLYING AFFIDAVIT

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I, the undersigned

PRAGASEN REDDY

do hereby make oath and state:

I. INTRODUCTION

1. I am an adult male, procurement officer, and the chairperson of the Applicant, the **CLAIRWOOD RATEPAYERS & RESIDENTS ASSOCIATION** (the Association).
2. The facts deposed to herein are, unless otherwise stated or indicated by context, within my own personal knowledge and to the best of my belief both true and correct. Where I make submissions of law I do so on the advice of the Applicant's legal representatives, which submissions I believe to be true and correct.
3. I have deposed to the Applicant's founding and supplementary founding affidavits in these proceedings, and I depose to this affidavit on the same basis.
4. I have read the answering affidavit dated 17 April 2024, deposed to by Eshana Baijnath on behalf of the First to Fifth Respondents (the Respondents). The purpose of this affidavit is to reply to the answering affidavit filed almost 16 months later by the First to Fifth Respondents in this matter.
5. Where the allegations in the answering affidavit are in conflict with the allegations made by me in the founding affidavit and supplementary founding affidavit (collectively referred to as "**the founding papers**"), I stand by my earlier

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statements and deny the allegations in conflict therewith. I also deny any allegation not specifically traversed in this affidavit, save as is consistent with what is stated in this and the founding papers. I intend this affidavit to deal only with those matters that properly call for a reply. I adopt this approach in order to avoid endlessly recording that I dispute the allegations by the respondents, and to avoid unnecessary legal argument and repeating what is already said in the founding papers.

6. This replying affidavit is structured as follows:

- 6.1. First, in Part II I deal with preliminary issues and briefly summarise the reply to the Respondents' answering affidavit;
- 6.2. Second, in Part III I respond to specific allegations and paragraphs that necessitate a reply.

II SUMMARY OF REPLYING AFFIDAVIT

7. In this part, I will respond in summary to the following preliminary issues:

- 7.1. Separation of powers and the validity of the relief thereon;
- 7.2. Non-joinder of the owners of the 50 properties identified in the supplementary affidavit;
- 7.3. Future planning for the Clairwood precinct in terms of Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

The separation of powers doctrine

8. The Applicants do not seek for this court or itself to be placed in the shoes of the Municipality and usurp their constitutional powers. Instead, the aim of this



application is to hold the municipality accountable for its conduct and to direct that it takes steps in order to fulfil its constitutional obligations.

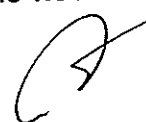
9. In any event, there is a distinction between administrative action, such as the determination of rezoning applications, and legislative or executive action. The reviews sought by the applicants are of administrative action. The contention by the municipality that the reviews sought encroach upon its exclusive constitutional powers is not correct.

10. Accordingly, I am advised that there are two instances where the separation of powers doctrine is engaged. The first is where there are constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes and the second are those provisions which impose the primary obligation on Parliament to determine what is required of it.

11. According to *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) there is no offence against the doctrine in the instance where we ask this Court to impose obligations that are readily ascertainable.

12. This is because, in this matter, there are constitutional obligations on the municipality that it has failed to fulfil and has done so on more than one occasion. It is this failure that caused the Applicants to seek the redress it relies on.

13. The Respondents submit in their answering affidavit that the Applicant seeks to police the Municipality into compliance with its obligations, paying no heed to the


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separation of powers doctrine. As is well known in South African law, structural remedies are commonplace when the government has failed to meet its statutory or constitutional obligations. This is demonstrated by several High Court, Supreme Court of Appeal and Constitutional Court orders. The intention is not to police the Municipality as the Respondents claim, but to ensure they comply with the order and to ensure that the relief proves effective. This is particularly within the context of the Municipality failing to fulfil its constitutional obligations.

14. In *Magidimisi v Premier of the Eastern Cape & Others* [2006] JOL 17274 (Ck), Froneman J stressed the importance of structural interdicts in creating... *"a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst it has also assisted the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties."*

15. In its answering affidavit, the Respondents acknowledge the dangerous environment that exists in Clairwood as a result of the industrial uses — and by extension, as a result of the acts and omissions of the Municipality. This means that by approving past zoning applications, like in respect of 140 Houghton Road, and by allowing current unlawful uses to persist, that the Municipality is driving out residents and neglecting the current Clairwood residents due to incompetence. The awareness of the problem coupled with the failure to remedy it, creates a need for a structural remedy that will monitor the Municipality's implementation.

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16. The Applicant does not seek a supervisory role over the Municipality as the Respondents have claimed. Members of the applicant are residents of the Clairwood precinct and as such, are entitled to live in a healthy environment, to be free from public and private violence, and have the right to life and to dignity. That includes the right to planning decisions that do not place their health, safety and lives in jeopardy. The failure of the Municipality to fulfil its obligations in respect of these rights is what entitles the Applicant to seek judicial intervention in accordance with section 38 of the Constitution.

Non-joinder

17. The Respondents aver that there is a material non-joinder in the Applicant's alleged failure to join the owners of the 50 properties cited in the amended order prayed. The relief sought with regard to the properties would require the Municipality to comply with its obligation of enforcing the Land Use Scheme by investigating whether the current use of the listed properties corresponds with the Scheme, and if need be, to issue compliance notices and institute proceedings to do so.

18. Accordingly, the owners of the 50 properties do not have a direct nor substantial interest in the relief sought against the Municipality in holding it accountable to its obligations.

19. This falls within the ambit of the Municipality's duties to enforce the Scheme and serves to illustrate instances of non-compliance. Sufficient evidence is provided in the Applicant's supplementary affidavit to warrant these investigations, and to direct the Municipality to where it is most urgent. It also serves to demonstrate a



pattern in the Municipality's behaviour that necessitates the structural relief sought. There is thus no reason for the owners of the properties to be joined in these proceedings.

20. Also thus not correct, it is submitted, is the contention that there is a non-joinder of parties who have a direct interest in the relief. The applicant asks in one subparagraph of the relief it seeks, that inspections or investigations be conducted at specific properties where there is direct evidence of a failure to comply with the Scheme: but compelling the municipality to inspect as it is lawfully obliged to do does not affect the rights of any other person, and even if it did the issue of joinder would affect only that subparagraph of the relief and not the balance nor the main relief sought by the applicant. The applicant wishes to compel the municipality to exercise its powers properly; it does not seek to usurp the municipality's powers nor does it seek to undermine the rights of any other person who might — after inspection by the municipality — subject to town planning enforcement or other proceedings.

Future planning

21. The Respondents aver that all issues highlighted by the Applicant and cited in the LAP have culminated in the Clairwood Back of Port Design Framework, which it claims will provide long-term solutions to these problems. The Respondents claim that the process will soon be finalised and ready for public participation, without an indication of the exact timeline of this Framework. It is also understood that the public participation process will require additional time to accommodate holding a public meeting, possible objections, and potential amendments — adding further

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delays. It is expected that this process should be finalised by the end of the year, but there is no commitment.

22. If the Municipality only intends on instituting its remedies at this indeterminate future date, there is an expectation that members of the Applicant are to continue enduring the dangers of their environment. There is also no guarantee that this process will in anyway address the Applicant's concerns, rather than serving as an additional plan that the Municipality can avoid complying with.

23. The argument that the future planning process for Clairwood provides any justification for these atrocities to persist is irrelevant and unpersuasive and yet another attempt by the Respondents to obfuscate these proceedings.

III AD SERIATIM RESPONSE

24. In this Part, I advance an *ad seriatim* response to specific allegations made in the Respondents' answering affidavit.

25. Before doing so, I respectfully point out that the Respondent has not raised any *bona fide* dispute of fact. It makes broad averments relating to factual conclusions, such as for example that the Applicant's narrative is false, or that the Houghton Road property cannot be reinstated to residential use but does not actually advance any factual evidence to support these sweeping conclusions. The suburb is being used for purposes contrary to its zoning and this is not disputed: the Respondent's argument is that LAP anticipates that the zoning will change, after


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traffic studies, road upgrades, public participation and SPLUMA approval, but the Respondent does not deny that properties are being used as if the zoning has already changed or in contravention of the present zoning.

26. It is accordingly submitted that there is no material dispute of fact with regard to the substantial averments of fact which the applicant relies on for the relief it seeks.

Ad paragraph 7.2

27. I note that no timeline is provided for the finalisation of the SPLUMA application.

However, to date, no update nor supplementary affidavit has been filed by the Municipality. The Applicant reserves the right to further reply to such supplementary affidavit delivered by the Municipality.

Ad paragraph 9

28. In the Respondents' answering affidavit they aver that 20% of the residential property owners reside there, with the rest of the properties being sold, abandoned, or encumbered in favour of third parties. It is also acknowledged that the planning process currently underway in terms of SPLUMA, recognise the struggles of the Clairwood residents who use their properties lawfully.

Ad paragraph 11

29. The Municipality commits that it is committed to the object of ensuring that the road upgrade and proper plan for the transition to the logistics hub. However, the strategic planning process that the Municipality is purportedly engaged in does not address its obligation to upgrade the road structure prior to permitting industrial use in Clairwood.

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30. It is the unreasonableness of the delay that necessitates this application and the constitutional relief sought against the Municipality.

Ad paragraph 12

31. The review has not been abandoned claims but has been supplemented with the interdictory relief against the Municipality to investigate the 50 properties.

Ad paragraph 13

32. The relief is sought against the Municipality to investigate usage, and issue compliance notices where necessary and institute proceedings to enforcement of its own Schemes. Consequently, no issue of joinder arises.

Ad paragraph 14

33. I admit that these are the terms of the relief sought by the Applicant.

34. The paragraphs which were erroneously omitted from the Applicant's supplementary affidavit were as follows:

- 8.3.2.1 *312 Flower Rd is being used for residential or permitted purposes and whether a warehouse is being built or has been built thereon;*
- 8.3.2.2 *145 Pine Rd is being used for residential or permitted purposes and whether a trucking depot is being conducted;*
- 8.3.2.3 *whether the properties opposite 43 Persadh Rd are being used for residential or permitted purposes and what activities are being conducted on the properties*

A handwritten signature, possibly 'P. A.', is written in black ink. Below the signature, the letter 'A' is written again.

Ad paragraphs 15.1

35. The Municipality has done nothing to circumvent the challenges faced by the Clairwood residents and has consistently ignored appeals by the Association to enforce special residential zoning.

36. I further note that the lawlessness in Clairwood is of its own making by refusing to strictly enforce zoning.

Ad paragraph 15.2

37. There is no evidence to substantiate that the issues of the Clairwood residents have been incorporated into the planning process.

Ad paragraph 15.3

38. These challenges are noted in the Applicant's founding affidavit.¹ Furthermore, I am advised that such a planning process already exists in the form of the LAP, which requires an upgrade of the road infrastructure in Clairwood for it to serve as a logistics hub.

Ad paragraph 15.4

39. The circumstances that the Municipality has fostered by failing to upgrade the road infrastructure in Clairwood has made it difficult and unsafe for the current residents

¹ Paragraphs 5, 11, and 25.

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Ad paragraph 15.5

40. The Municipality continues to jeopardise the health and safety of the Clairwood residents by failing to perform its statutory duties and is complicit with the unlawful activities currently conducted within Clairwood. The fact that an application is before the Honourable Court is proof that a number of residents do not condone the lawlessness and now have no other recourse but to approach the Court for relief.

41. The relief sought by the Applicant is clearly not an attempt to disrupt the Municipality's functions, but to enforce compliance with them, since, as evidenced by this paragraph, the Municipality does not deem it necessary. As highlighted in several parts of the record, owners repeatedly rely on the existing unlawful uses in Clairwood to justify their rezoning applications — which proves sufficient for these purposes. The Municipality uses this tactic to condone its noncompliance.

Ad paragraph 15.6

42. The members of the Applicant have the capacity to seek relief of the nature of what is sought on the basis that they are current residents of the Clairwood community who have been exposed to the failures of the Municipality in enforcing their constitutional rights.

43. Further, it does not matter that the Applicant comprises a minority within the area, which is denied. It may still bring this application in the interest of its members and the broader public.



Ad paragraph 16.1

44. Relying only on the facts in respect of 140 Houghton Road is insufficient when there is evidence that can be drawn on to demonstrate the Municipality's pattern of illegal conduct. The Applicant's supplementary affidavit explained at the outset how logistics businesses are comforted knowing their unlawful activities are accepted by the Municipality.²

45. Despite the prohibition of permitting rezoning applications to be made by those who are accused of contraventions, these applications are considered and regularly accepted. The current illegal users are thus given a sense of security knowing the Municipality either does not consider them to be in contravention or that they could at any point effortlessly apply for rezoning.

Ad paragraph 16.2

46. The review is not the only relief sought, which is why the Applicant has not suggested that it would cure all problems in the Clairwood precinct. It is also not within the Applicant's means to bring a review application for the many appeals that were incorrectly upheld.

Ad paragraph 16.3

47. I deny the contents of this paragraph. It cannot be unclear to the Respondents that the Court would have powers to grant relief of this nature when it is so clearly set out in the founding affidavit that in terms of section 172(1)(b) of the Constitution and section 8 of PAJA, this Court may grant any relief that is "*just and equitable*".

² Paragraphs 5 and 7.



In this instance, where there is a demonstrable failure by the Municipality to perform its statutory functions and previous attempts to convince the Municipality to meet its obligations have been unsuccessful, judicial intervention to grant such relief is required. I deny that there is a violation of the separation of powers.

Ad paragraph 16.4

48. I deny the contents of this paragraph. The supplementary affidavit is exhaustive in detailing the pattern of reprehensible behaviour of the Municipality and by referring to extracts of the record that demonstrate this.³

Ad paragraph 16.5

49. The contents are denied insofar as it avers that the Applicant has advanced an incorrect interpretation of the LAP and planning laws and instruments. The Respondents have also failed to provide examples of the Applicant's misinterpretations and corrections thereof.

Ad paragraph 17.1

50. The contents of this paragraph are noted.

Ad paragraph 17.2

51. I note that this exhibits that the Municipality is deliberately misconstruing the Applicant's complaints. The Applicant has pointed out specific instances of the Municipality failing to correctly implement the LAP with regard to permitting uses in contravention of the scheme and approving rezoning applications without

³ Paragraph 27.



upgrading the road network to make it fit for industrial use. The Respondent diverts attention to the instances of when it has purportedly implemented aspects of the LAP correctly.

Ad paragraph 17.3

52. The review serves to demonstrate the rezoning process that has been adopted in the Clairwood precinct for over a decade.

Ad paragraph 17.4

53. The order sought by the Applicant is routinely made by South African courts and is thus not incorrect.

Ad paragraph 17.5

54. The contents of this paragraph are accepted, we call on the Municipality to conduct a traffic study in the Clairwood Precinct in fulfilment of the requirements of the Back of Port Local Area Plan.

Ad paragraph 18

55. I deny the contents hereof. The Applicant does not seek to discredit municipal departments but to hold them accountable to their obligations in their duties and to that of the Clairwood residents.

Ad paragraphs 19.1.1 and 19.1.2

56. I do not deny that industrial uses have become entrenched in respect of properties where rezoning applications have been successful. I do however wish to reiterate that this has occurred at the hands of the Respondents who continued to process



the rezoning applications, aware of the harm and degradation of the Clairwood community.

Ad paragraph 19.1.3

57. This refusal to grant rezoning applications does not undo the effect of those properties rezoned to permit light industrial use are causing harm due to the incompatible road network and infrastructure. There is no clarity as to why rezoning applications are now being rejected, whether it is due to applicants being in contravention of the Scheme and what steps the Municipality has taken to ensure that these applicants abide by Scheme after not getting approval.

Ad paragraph 19.1.4

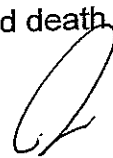
58. The content of this paragraph is denied. The Applicant has illustrated how the LAP is not implemented.

Ad paragraph 19.2

59. I deny that it is unhelpful. Until such time as the roads are upgraded, Clairwood is not suitable for logistic operations and the degradation continues.

Ad paragraph 19.3

60. While I deny that the Applicant's founding papers at any point required the skills of an expert for the interpretation of the Record, LAP and Scheme, and without knowing the exact opinions the deponent is referring to, I submit that even if required, it is the expertise of the eThekwin Transport Authority that is relied on to highlight the incompatibility of the road infrastructure for purposes of a logistics hub, which emphasised in its findings the resulting risk of injury and death



Ad paragraph 20.6

61. The Applicant seeks to be consulted in the implementation of the order, which is reflected in the request for the Respondents to "*meaningfully engage*" with the Applicant before filing its report. This is repeatedly justified by pointing out that that Municipality has failed to independently comply with its obligations, necessitating this sort of supervision.

Ad paragraph 21

62. I deny the content hereof. While municipal planning is a local government function, the Court is entitled to enforce compliance when the Municipality has not been performing this function.

Ad paragraph 28

63. I deny that the Applicant seeks to intervene in municipal planning. The intention of the relief sought is to ensure that the Municipality abides by its own planning process and does not infringe the rights of the Clairwood residents.

Ad paragraph 32

64. I admit that municipal planning includes the power to approve rezoning applications, but I must point out that the Municipality has been exercising this power inconsistently and irrationally and has thus failed to meet its statutory obligations. Section 76(3)(d) of the eThekweni Metropolitan Municipality Planning and Land Use Management By-law prohibits the Municipality from permitting a rezoning application to be made by those who are accused of a contravention,



however, as we have repeatedly showcased, approving such applications is routine for the MPT.

Ad paragraph 33

65. I deny that the relief sought would dilute the powers of the Municipality.

Ad paragraph 34

66. The municipal-wide approach that is required cannot dismiss the circumstances of a particular area, especially if it results if it impacts the rights of residents. The Applicant has a right to lawful action by the Municipality.

Ad paragraph 36

67. I note the contents of this paragraph. The Respondent admits that its concerns with the relief sought relate to the long-term objectives for Clairwood being "*improperly frustrated and sidelined*". The relief merely seeks compliance with the Municipality's statutory obligations, yet this is viewed as an obstacle to the planning process for Clairwood. The inference is then that this was the same attitude of the MPT when unlawfully approving rezoning applications, to not frustrate the plans for Clairwood, regardless of the impact it would have on residents.

68. It is clear then that the Municipality is intentionally avoiding its obligations to ensure that the challenges which exist in Clairwood are resolved.

Ad paragraph 41

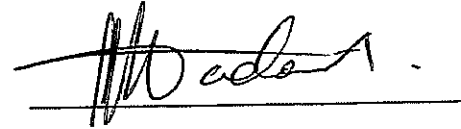
69. I note the admission that the Respondents are aware of the challenges in Clairwood.





DEPONENT

Thus signed and sworn to before me at Durban on this the 25 day of June 2024, the deponent having acknowledged that he knows and understands the contents of this affidavit, and the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, having been complied with.



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