

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 625/2023

In the matter between:

DRAKENSTEIN MUNICIPALITY	**APPELLANT**
and	
ERIC LOLO	**FIRST RESPONDENT**
BERRENICE FRANSMAN	**SECOND RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, WESTERN CAPE	**THIRD RESPONDENT**
THE MINISTER OF HUMAN SETTLEMENTS	**FOURTH RESPONDENT**
GREEN WILLOW PROPERTIES 2 (PTY) (LTD)	**FIFTH RESPONDENT**

Neutral citation:	*Drakenstein Municipality v Lolo and Others* (625/2023) [2026] ZASCA 145 (29 October 2026)
Coram:	DAMBUZA and SMITH JJA and KOEN, COPPIN and BLOEM AJJA
Heard:	15 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 29 October 2026.

Summary: Constitutional Law – whether the appellant (the Municipality of Drakenstein) had breached its statutory and constitutional obligations to take reasonable measures to provide emergency housing for residents, particularly, the first and second respondents, and to make reasonable provision from its own financial resources for that purpose – whether s 5.2.2 of the appellant's housing selection policy is constitutionally invalid – appeal upheld.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Martin AJ, sitting as the court of first instance):

1 The appeal is upheld.

2 The order of the high court is set aside and is replaced with the following order:

'The application is dismissed'

JUDGMENT

Dambuza JA (Smith JA and Koen, Coppin and Bloem AJJA concurring):

Introduction

[1] This appeal emanates from eviction proceedings brought by the fifth respondent (Green Willows Properties 2 (PTY) Ltd (Green Willows), in the Drakenstein Magistrates' Court (eviction proceedings), against the first respondent Mr Eric Lolo (Mr Lolo) and his daughter, the second respondent (Ms Bernice Fransman) (the respondents) from Farm Langkloof Roses in Wellington, Drakenstein (the farm). The eviction proceedings were brought in terms of the Extension of Security of Tenure Act 62 of 1997 (the Act). The eviction proceedings are still pending in the magistrate's court.

[2] The municipality was cited in the eviction proceedings as the authority charged with the responsibility of providing emergency housing which persons

evicted from their homes are entitled to access.[1] In its response, the municipality accepted its responsibility to provide housing and presented to the court evidence of its efforts and difficulties it experiences in relation to providing different types of housing in Drakenstein. It stated that it was unable to supply the respondents with an emergency house at that time and it was unable to say with certainty when emergency accommodation would be available. It however said arrangements could be made to provide such housing. It explained that the number of people looking for accommodation in Drakenstein at the time, at approximately 19 500, far exceeded availability. Meanwhile it had created between 400 and 800 formal 'housing opportunities' per year with the funding it had received from the Western Cape Provincial Government (the province).

[3] In response to the report filed by the municipality in the eviction proceedings, the respondents brought an application in the Western Cape Division of the High Court, Cape Town (high court) against the municipality, seeking ten declarators to the effect that the municipality had breached its obligations in relation to supplying emergency and formal housing to the community it serves, and in particular, in relation to evictees from farms within the municipal area. The high court granted the order sought and also granted leave to appeal to this Court.

[1]Extension of Security of Tenure Act 62 of 1997 (ESTA) does not, in itself, impose the obligation. Section 9(2)*(d)* (iii) of that Act provides: The Court may make an order for eviction of the occupier provided if the person in charge has, after the termination of the right of residence, given the municipality in whose area of jurisdiction the land in question is situated . . . not less than two calendar months written notice of the order of the intention to obtain an order of eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to the court has, after the termination of residence been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of commencement of the hearing of the application.' The obligation on the municipality arises from s 26(2) of the Constitution to the effect that: 'The state must take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of access to adequate housing.' Section 9 of the Housing Act 107 of 1997 places a duty on municipalities to promote access to emergency adequate housing within the national and provincial frameworks. Part 3 of the 2009 National Housing Code, Emergency Housing Programme regulates provision of temporary emergency housing assistance to people who become homeless or face exceptional housing need through circumstances beyond their control.

The background

[4] The factual basis on which the order of breach of constitutional obligations was sought is the following. Mr Lolo had been living and working on the farm since, at least, 1996.[2] He asserted that in 2006 he registered on the housing waiting list. There is no evidence on what happened to that registration. In the founding affidavit Mr Lolo only asserted that he, together with Ms Fransman live in rural areas and qualify for state-subsidised formal housing, and that they needed emergency housing. At the time of instituting the application to which this appeal relates, Mr Lolo lived at the farm with Ms Fransman and her son. In August 2015, Green Willows launched the eviction proceedings in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The reason was that Mr Lolo's right to occupy the premises he lived in was terminated when he was retrenched in 2013. Mr Lolo opposed the eviction application. The proceedings were ultimately stayed pending the high court application against the municipality, the third respondent (the Member of the Executive Council for Human Settlements, Western Cape – MEC), the fourth respondent (Minister of Human Settlements -Minister) and Green Willows (respondents).

The high court proceedings

[5] In the high court the respondents sought declarators to the effect that the municipality had failed to comply with its obligations to take reasonable measures to provide emergency and formal housing to its residents. They contended that the municipality had no emergency housing policy. They also sought a declarator that the municipality must use its resources to meet its obligations in relation to emergency housing instead of relying on allocations from the province. They contended that s 5.2.2 of the municipality's housing selection policy, dated 28 October 2014, is unconstitutional and invalid, to the extent that it 'precludes' farm

[2] Mr Lolo first worked on the farm from 1976 until 1983 and then again from 1996 until his retrenchment in 2013.

residents who had been registered on the housing database for a substantial period of time from benefiting from the 20 per cent quota set aside for farm workers and farm residents in municipal housing projects. I discuss the background to this clause in the municipal policy in the paragraphs that follow.

[6] The relief sought by the respondents in the high court was premised on the significant increase in the scale of evictions in Drakenstein. They described the increase as constituting a crisis. In contrast, there was a dire shortage of emergency housing for evictees. These facts align with the municipality's own description of the circumstances resulting from evictions in the Drakenstein area.

[7] According to the respondents, the municipality did not prioritise the provision of emergency housing. At the same time however, they acknowledged that the municipality had taken measures to address the disadvantages peculiar to its rural residents regarding provision of emergency housing by prescribing in s 5.2.2 of its housing selection policy, that 20 per cent in every new formal housing project must be reserved for residents from rural communities (farmworkers and farm residents) who have lived on farms for more than ten years.

[8] The respondents contended, both in the high court and in this Court, that these measures are insufficient because rural residents who had been registered on the housing database for a 'substantial period of time' will still not benefit from the 20 per cent quota. They asserted that the municipality had been unable to provide emergency housing since 2013. Relying on an extensive legal framework, including s 26, s 152, and s 153*(a)* of the Constitution, together with s 9 of the Housing Act 109 of 1997 (the Housing Act) and s 4(2)*(j)*, s 23 and s 73(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). They argued that they were in an emergency, that the municipality had failed to meet its obligation to provide housing, and was unable to say when

housing would be available for its communities. They maintained that an amount of R 1 million, set aside in the municipality's business plan for housing, was mere tokenism because no provision was made for such expenditure in its budget. In addition, none of the sites that the municipality had earmarked for emergency housing was readily available.

[9] In opposing the application, the municipality objected to the institution of new, 'premature' proceedings in the high court while the eviction proceedings remained pending in the magistrate's court. It argued that, in any event, the constitutional challenge was built on a 'hopelessly vague and baseless' foundation. It referred to Green Willow's answering affidavit in the same proceedings, explaining that, subsequent to Mr Lolo's retrenchment from the farm he approached the CCMA for relief and a financial settlement was reached with him, thus settling the contestation regarding compliance with the provisions of ESTA.

[10] The high court granted the order sought by the respondents. It however granted the municipality leave to appeal to this Court. In granting the declarators to the effect that the conduct of the municipality was in breach of its constitutional obligations,[3] the high court considered the reports prepared by the municipality

[3]The order of the high court reads:

'1 The First respondent is declared to be in breach of its constitutional and statutory obligations by failing to take reasonable measures to provide people living within its area of jurisdiction with emergency housing;

2 The First respondent's policy, alternatively, practice of relying primarily, on grants and other funding received from the Provincial Government in order to provide emergency housing is declared unlawful.

3 The First Respondent is declared legally obliged to make reasonable provision[s] from its own financial resources, excluding Funds received from the Provincial Government, or other external sources, for emergency housing;

4 The First Respondent is directed to make reasonable provision from its own financial resources, excluding housing grants received from Provincial Government, for emergency housing;

5 Section 5.2.2 of the first respondent's housing selection policy, dated 28 October 2014, is declared unconstitutional and invalid, to the extent that it precludes farm residents who have been registered on the Municipality database for a substantial period of time from benefitting from the 20 per cent quota set aside for farm workers and farm residents in future municipal projects;

6 The declaration of invalidity in part 5 of this order is suspended until 27 February 2023 pending the First Respondent complying with part 7 of this order by that date;

in 2013 and 2016 and filed in *Goosen v The Mont Chevaux Trust (Goosen)*.[4] In those reports, the municipality acknowledged that it had no approved land available for housing development, and had no readily available emergency accommodation. However, it expected that it would have emergency housing available in the period between June and December 2014 on a piece of land identified as erf 584 Dromedaris. In the meantime, the municipality undertook to make necessary arrangements to provide emergency housing when the need arose for allocation of emergency housing to particular individuals. Against this background, this Court in *Goosen*, in dismissing an appeal against an order of eviction made by the Land Court, granted a supervisory order that the municipality would report to it regarding its progress in providing homes to the homeless.[5]

[11] In its 2016 report, which the municipality also filed in the present proceedings (see paragraph 2 above), it disclosed that it had been cited in 340 other cases of evictions and it estimated that the number of families confronted with evictions would increase to approximately 1 500. By the time the 2016 report was filed, the municipality had identified three sites, in Gouda, Paarl and Simondium (areas within its jurisdiction) for housing developments. However, preparation of these sites was beset by difficulties. The Gouda site, which had already been declared, was invaded by members of the local community, who erected informal structures in protest of what they viewed as planned occupation of their community by 'outsiders' – the persons requiring emergency

7 The First Respondent is directed to remove and reformulate section 5.2.2 of its Housing Selection Policy so as to render it constitutionally compliant by 27 February 2023;
8 The First Respondent is directed to provide the court with a written report setting out the measures and or steps it has taken in compliance with this order on 27 February and 31 August each year.
9 The First Respondent is directed to make a copy of each report referred to in Part 6 of this order available to the Applicants and to publish the report on its website at least 21 days in advance of each of the dates prescribed in part 6 of this order;
10 The First Respondent shall pay the Applicants' costs, including the costs of two counsel.'

[4] *Goosen v Mont Chevaux Trust*[2017] ZASCA 89; 2017 JDR 1135 (SCA).
[5] *Goosen v The Mont Chevaux* Trust para 37..

accommodation. The municipality had instituted eviction proceedings against such land invaders, which were still pending in court at the time.

[12] The Paarl site, known as Vlakkeland, which would cater for 2 500 houses, of which 500 would be emergency housing units, was delayed because of the cost of the bulk services infrastructure (estimated at about R 40 million) and relocation of small-scale farmers that were occupying the site. The Department of Human Settlements had provided for the funds in its 2016/2017 financial year. However, as I discuss in more detail later, the project had to be abandoned at the instance of the Provincial Department of Human Settlements, a development also discussed later in this judgment.

[13] The Simondium site was under consideration for establishment of a formal housing development. However, the owner of the site which had been originally earmarked for emergency housing did not want to sell the targeted properties. The project failed for that reason. Talks were underway in relation to securing an alternative site for emergency housing. It was estimated that these difficulties could be resolved in a period of about 24 months.

[14] In this (2016) report, the municipality also intimated that although emergency housing is delegated to local government, the delegation was not accompanied by dedicated funding from national government. It stated that, although it accepted the constitutional responsibilities allocated to it ‘in terms of precedent’, it was not the custodian of ESTA and the engagement and facilitation processes attendant to ESTA, together with the budget allocations and other resources that enabled the realisation of the rights conferred through ESTA, were a function of the Department of Rural Development and Land Reform. For that

reason, its Framework engaged with the other spheres of government for financial assistance under the Intergovernmental Relations Framework Act 13 of 2005.

[15] The high court found that the municipality had failed to fund its emergency housing programme; and that instead of establishing 'well planned and executed measures' to progressively realise the constitutional right to access housing, it relied on 'ad hoc measures', which were 'no substitute'. It found that the failure of the municipality's efforts to develop Vlakkeland, because of a 'provincial government veto' and its choice of a site that lies within a 100-year flood plain exclusion area, were evidence of the unreasonableness of its general conduct and its reliance primarily on funding from the provincial or national government, while making minimal contribution from its own resources. The high court also found that the lack of funds was not a valid excuse for the municipality's failure to provide emergency housing. Having made the declaratory orders, the high court ordered the municipality to provide it with a written report on 27 February and 31 August in each year, regarding the measures it had taken to comply with its order.

Appeal Discussion

The arguments made in this appeal

[16] The municipality contended in the high court, and in this Court, that the respondents did not make out a proper case for the relief they sought. In particular, it contends this appeal, that, first, the facts upon which their case was founded were vague such that no proper case was made in their founding papers. Further, it contends that the high court misconstrued the approach to the inquiry as to whether the state had complied with its obligations or the approach to the inquiry into the reasonableness of its policies or their implementation. In this regard the high court found that unless the municipality could demonstrate that the respondents' claim was frivolous, 'it [bore] the onus of proof' to establish the

reasonableness of the measures taken. In other words, on the approach set by the high court, the respondents were entitled to only make bare allegations of unreasonableness or non-compliance on the part of the municipality, and the onus shifted to the municipality or the state to refute the claims, unless it could demonstrate that the claim is frivolous.

[17] The submission on behalf of the municipality is that the high court's approach when applying the law to the facts must have been guided by the incorrect approach, to reach the incorrect decision. In addition, the high court's failure to apply the correct test constitutes a fundamental misdirection which 'irredeemably colours all the findings it made'.

[18] The respondents argue that the municipality's description of the approach adopted by the high court is incorrect. Furthermore, the municipality failed to account openly to the Court. Additionally, the continued challenge to high court's order of constitutional invalidity of s 5.2.2 of the Housing Selection Policy is at odds with the concessions made by the municipality in the high court, that it needed to reformulate the policy, to give it more clarity. The respondents also defend the interdict and supervisory order made by the high court.

The Law

[19] The principal source of the responsibilities on the municipalities is s 9(1) of the Housing Act.[6] In terms of this section every municipality must take all

[6] Section 9(1) of the Housing Act 107 of 1997 states that;
'Functions of municipalities
(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to-
(a) ensure that-
(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;
(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;
(b) set housing delivery goals in respect of its area of jurisdiction;

reasonable steps within the framework of the national and provincial housing legislative framework, on a progressive basis, to ensure that its residents have adequate housing. It must: (1) set housing delivery goals for its area, (2) identify and designate land for housing development, (3) create and maintain an environment conducive to financially and socially viable housing development, (4) facilitate the resolution of conflicts arising in the housing development process, (5) provide bulk engineering services, and (6) manage land use and development. The determination of whether a municipality has complied with these responsibilities is viewed through the prism of s 26(2) of the Constitution – the obligation on the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right to access adequate housing].'[7]

[20] Generally, housing is a concurrent national and provincial competence.[8] The municipal responsibilities in relation to housing is an assigned rather than original competence. Section 156(4) of the Constitution provides:

'The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-

(a) that matter would most effectively be administered locally; and

(b) the municipality has the capacity to administer it.'

(c) identify and designate land for housing development;
(d) create and maintain a public environment conducive to housing development which is financially and socially viable;
(e) promote the resolution of conflicts arising in the housing development process;
(f) initiate plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;
(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and
(h) plan and manage land use and development.'

[7] Section 26(1) and s (2) of the Constitution.
[8] See Schedule 4 Part A to the Housing Act.

[21] Municipalities are required, as part of their Integrated Development Plans, to set out housing delivery goals and land designation planning obligations as required under s 9 of the Housing Act.[9] In *City of Johannesburg Metropolitan Municipality v Blue Moonlighting Properties 39 (Pty) Ltd and Another* [10](*Blue Moonlighting*) the Constitutional Court considered s 9 of the Housing Act together with the Housing Code and held that municipalities must plan and budget for emergency housing. They cannot escape responsibility for emergency housing by pointing at provincial and national government roles.

[22] With regard to the approach to determination of reasonableness of the measures put in place by a municipality, the basic principle that an applicant in motion proceedings must make out a proper case for the relief he or she seeks must apply. The applicant may not simply allege unreasonableness of conduct, failure to take reasonable measures or failure to implement without pleading, with reasonable clarity, the facts to ground such allegations. In cases of alleged unreasonableness of measures taken by the state to meet constitutional obligations this must entail identification of the right engaged and the applicant's entitlement to it, the identification of the measure taken by the state or the failure said to be unreasonable, an explanation of the purpose of the right and the impact of the failure on the person(s) affected.

[23] With regard to the approach to be adopted by courts in assessing the reasonableness of the measures taken, in *Mazibuko v City of Johannesburg* (*Mazibuko*) [11], the Constitutional Court held that when challenged on the policies on socio-economic rights, the state must 'explain why the policy [and implementation] is reasonable and disclose what it has done to formulate the

[9] Sections 9(1)*(b)* and *(c)* of the Housing Act.
[10] *City of Johannesburg Metropolitan Municipality v Blue Moonlighting Properties* 39 (Pty) Ltd and ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC).
[11] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

policy; its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected.' The Court cautioned however, that 'the Constitution does not require government to be held to an impossible standard of perfection,' and courts should not assume the task that, in a democracy, should properly be reserved for the democratic arms of governments.

[24] *Khosa and Others v Minister of Social Development and Others (Khosa)* [12] reaffirms that reasonableness is context specific. The inquiry in relation to socio-economic rights requires consideration of the nature and the purpose of the right in a specific context. The courts have not laid a principle that 'a degree of intervention [is required from courts] which has significant implications for pre-existing policy and resource distribution' as the high court found.

Determination of measures taken

[25] I agree with the submission on behalf of the municipality that the high court followed an incorrect approach. There is no onus on the state, when asserting vagueness and lack of the necessary averments, to prove that the applicant's claim is frivolous. The onus on the state is to set out the measures it has put in place in the discharge of its obligations as discussed in para 22 above.

[26] I also agree that in this case the respondents' founding affidavit fell short of the required standard. As stated, Mr Lolo's founding affidavit only goes as far as him having registered for formal housing in 2006. There is no explanation of what happened thereafter. Nor is there an asserted nexus between his registration on the municipal database and the alleged failure by the municipality to take reasonable steps to provide formal housing.

---

[12] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 49.

[27] The case relating to the failure to take reasonable steps to provide emergency housing emanates from the reports filed by the municipality. The application in the high court was launched without the respondents having approached the municipality to register on the database or apply for emergency housing. As stated, although the municipality said in the reports that it did not have readily available emergency housing and could not say when such housing could be available, it made an undertaking to make arrangements for emergency housing if and when the need arose.

[28] Evidently, when they launched the high court proceedings the respondents were unaware that the municipality does have an Emergency Housing Policy. Mr Lolo asserted that the municipality did not have an emergency housing policy. That this was incorrect was brought to the respondents' attention in the municipality's answering affidavit. As a result, the averments such as those made by the respondents that the municipality had failed to self-fund for emergency housing and had considered itself not responsible for funding emergency housing, were also wrong. The high court, it would appear, also proceeded on the assumption that the municipality did not have an emergency housing policy, and did not realise that the emergency housing policy in place provided for self-funding of emergency housing to supplement provincial funding.

[29] Once the Emergency Housing Policy was brought to their attention, the respondents' case in reply pivoted to the attack on the municipality's implementation of the emergency housing policy. Furthermore, the attack on the municipality's formal housing policy did not refer to specific aspects of that policy that were considered deficient.

[30] The shortcomings in the respondents' pleadings cannot be waved away on the basis that the municipality was able to plead to the case made by the respondents, as the high court did (in the judgment on the application for leave to appeal). As the Constitutional Court held in *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others (Ubogu),*[13] 'orders of constitutional invalidity have a reach that extends beyond the parties . . . holding the parties to the pleadings is not pedantry . . . [but rather an] integral part of the principle of legal certainty which is an element of the rule of law'.

[31] Although in its reports the municipality had confessed to not having ready emergency housing, it had undertaken to provide such housing in case of need. The high court found that the municipality did not have a plan and provided emergency housing on an ad hoc basis. There was a plan. The difficulty was implementation. The high court's finding does not take into account that the municipality had explained its plans in relation to the Dromedaris project and the challenges it had experienced with regard to implementing its housing projects. There was also the difficulty that funds could not be allocated without land having been secured.

[32] It was submitted on behalf of the municipality that the high court's view that the municipality had the onus to prove that the respondents' case has frivolously coloured all its findings. Indeed, there is ample reason for concern with the approach adopted by the high court, particularly its disregard of the substantial evidence tendered by the municipality in its 2016 report. Its finding that the municipality should have tendered the evidence of a budgeting expert

[13] Public Servants Association obo *Ubogu v Head of the Department of Health, Gauteng and Others*; *Gauteng and others: Head of the Department of Health, Gauteng and another v Public Servants Association v Public Servants Association obo Ubogu* 2018(2) SA 365 (CC) para 50.

adds to the apprehension that the disregard of the evidence tendered formed part of the misunderstanding of the relevant test.

[33] The high court concluded that:

'the factual material that the Municipality provided does not displace its admissions in both Housing Reports in revealing a dismal failure on its part to achieve a progressive realisation of the constitutional right of access to adequate housing. The Municipality's malperformance, particularly concerning emergency housing, is characterised by a failure to implement proactive planning measures, as well as those plans which it did formulate, being scuppered by its failure to self-fund'.

[34] This conclusion does not take into account the following evidence. The municipality explained that housing projects are approved on a five year 'housing pipeline'. Once approved, a project would take three years to get to implementation stage. Once there is budget approval, a project moves to business plan stage. However, land availability often becomes a problem because of issues such as litigation or resistance from local communities.

[35] Having acknowledged in the 2013 report, that farmworker evictions were reaching crisis proportions, the municipality listed the housing projects that it undertook thereafter, including:

(1) Dromedaris site – erf 584 - 1 567 formal housing opportunities and the related 'temporary emergency accommodation;'

(2) New Siyazama - 236 housing units at a cost of R 19 million;

(3) Gouda - 150 formal houses at a cost of R 18 million to which the municipality contributed 10 per cent plus the cost of a reservoir – about R 2,3 million;

(4) Project 59 – 975 formal housing completed in 2012 at a cost of R 57 million;

(5) Fairyland project – which won an award in the category of Western Cape Upgrade of Informal Settlement;
(6) Ongoing projects: Vlakkeland – 2 500 formal housing opportunities over 3 to 5 years with a budget of R 375 million (the project was later abandoned);
(7) Kingston upgrade of an informal settlement;
(8) Erf 6161, Paarl – 1200 GAP and social housing opportunities for about R400million;
(9) Fairlyland upgrade of an informal settlement – 259 top structures of which 179 were completed for total budget of R 31millon;
(10) Erf 557 formal housing for R 50 million; and
(11) Siyahlala 1 and 2 upgrade of informal settlements -243 top structures of which 150 were completed with a budget of R 29 160.000.

[36] With regard to the Simondium project, the municipality's evidence was that, because of the refusal of the owner of the adjacent land to sell his property, and the simmering tensions with the local community (in relation to both Simondium and Gouda), the municipality decided to allocate 'opportunities' that had been earmarked for emergency housing to formal housing only.

[37] By 2016 the bulk of the land allocated to the municipality for emergency housing was in the Vlakkeland project. The project had 2556 housing opportunities of which 500 were earmarked for an emergency accommodation project known as Temporary Relocation Area (TRA). The total budget for this project was R 375 million, with a further R 34 million required for installation of bulk sewage and stormwater infrastructure. The province contributed R 30 million to the cost of the engineering services and the balance was to be borne by the municipality.

[38] However on 27 September 2016, at a meeting of the Project Progress & Co-ordination Committee, the representatives from the province reversed the decision to reserve a portion of the Vlakkeland project for the TRA. The reason was that an emergency housing arrangement would allow 'queue jumping' ahead of applicants who had been on the formal housing list for longer. This sentiment was confirmed by the provincial administration in a letter from Ms Phila Mayisela, dated 29 June 2017, which forms part of the record. Thus, the TRA portion of the Vlakkeland project came to an end. The municipality refers to other ongoing efforts to secure land for housing development, including the Bio Delta Farm and Schoongezicht. The municipality was finally able to develop 344 emergency houses in Schoongezicht. This was achieved despite members of the 'backyard dwellers'[14] stopping construction, objecting to the land being used for emergency housing. The matter was settled by accommodating 67 of them in the TRA project and the remainder of the 344 sites were allocated to emergency housing. The high court makes no mention of these developments in its judgment.

[39] The high court found that the municipality should have overridden the decision of the provincial administration on the Vlakkeland project. It criticised the municipality for having secured land located on a 100 flood plain.[15] However, it was not in dispute that the municipality made all these efforts to secure land to develop emergency and formal housing. Regarding overriding the decision of the province, the municipality correctly contends that such view is impermissibly interventionist; it ignores settled principles with regard to co-operative governance and disregards polycentric decision making and implementation.

[14] 'Backyard dwellers' are households that occupy rooms or an informal structure in a property owned by someone else. People living in overcrowded formal conditions: 'Backyarders' in formal housing areas and people living in overcrowded conditions in formal structures in formal housing areas.
[15] The municipality's engineers rejected development on this site because it is located in a 100 year flood plain.

[40] The judgment of the high court also missed the evidence relating to the self-funding or contributions made by the municipality towards the provision of emergency housing. These efforts are far from negligible. The municipality contributed R 29 million of its funds to the Vlakkeland project which the provincial administration decided to scrap. Apart from the projects already referred to, it also contributed its own funds to the following projects: (1) Nieuwenhoop – R 1 440 000; (2) New Beginnings – R 1 350 000; and (3) Dietman Street – R 1 175 000. The conclusion that the municipality acted unreasonably when it failed to self-fund is therefore not supported by the evidence. It is informed by the erroneous impression that all that the municipality did was to provide R 1 million in its annual plan and there was no provision made for this amount in the municipal budget.

[41] There is no legal basis for the high court's finding that municipalities are compelled to primarily fund their emergency housing obligations from their own resources to the exclusion of funding received in terms of the Division of Revenue Act 6 of 2011 (DORA) or any other external source. There is also no legal basis for the finding that municipalities must self-fund before resorting to other sources. What the courts have said is that municipalities may not rely exclusively on provincial funds to meet their emergency housing obligations.[16] The municipality accepts this principle.

Constitutionality of s 5.2.2 of the Housing Selection Policy

[42] The high court granted an order that s 5.2.2 of the municipality's Housing Selection Policy was unconstitutional and invalid, to the extent that it precluded farm residents who had been on the data base for a substantial period of time, from benefitting from the 20 per cent quota set aside for them in future municipal

[16] *City of Johannesburg Metropolitan Municipality v Blue Moonlighting Properties 39 (Pty) Ltd* para 57.

housing projects. It ordered the municipality to reformulate the section. In its terms the section provides:

'5.2.2 *Quota for fam residents including farm workers*

A quota of 20% of opportunities in the project component will be set aside for farmworkers and farm residents who are ordinarily resident in the Municipal area in all projects, provided that they have in the past, or they continue to reside on farms outside of the towns in the Municipality for a continuous period of 10 years or more unless otherwise decided by the Mayoral Committee;

a) They are 55 years or older;
b) They have been up until recently not been registered on the database;
c) They have been (or are being) substantially excluded from housing opportunities, despite the use of registration data measures listed.'

[43] Indeed the section could have been framed more clearly. The municipality readily admitted that. However, it is capable of an interpretation which is consistent with the Constitution. 'Quota' is defined in the Housing Selection Policy as '[a] portion of the opportunities available in a project component reserved for households with particular characteristics.' This is self-explanatory. The purpose of prescribing the quota appears in section 3 of the policy which explains the 'overall policy principles.' One of the applicable principles is 'equity,' meaning 'all persons must have an equal opportunity in applying for housing assistance.'

[44] The purpose of clause s 5.2.2 is to ameliorate the disadvantage to residents and workers who live on farms located far from urban centres where, registration for accessing housing opportunities is provided. The aim is to achieve equity, not only between farm and urban residents, but also among the farm residents. The 10-year period is aimed at ensuring that rural residents who have been disadvantaged for longer by distance from town or city, get priority in accessing housing.

[45] The clause must be understood to operate on the assumption that the data of persons who were able to register on the municipal database, remains on that repository until the allocation of housing. In terms of clause s 5.1.3 of the policy, the allocation of households to housing opportunities is done according to registration date. Then under clause 5.2.2 b) provision is made for recent registrations; and under clause 5.2.2 c) for those who have been systemically excluded despite their attempts to register through the registration mechanism provided. There is no textual basis in clause 5.2.2 for the contention that the provision precludes residents who have been registered on the housing database for a substantial period from benefitting from the 20 per cent quota. Nowhere does Mr Lolo explain how this occurs.

[46] The municipality explained, in its answering affidavit, that the Provincial Policy Framework on Selection of Housing Beneficiaries (the PPF) issued in August 2009 prescribes a requirement that municipalities should ensure that their policies are implemented in a manner that includes households located outside of the towns in which housing projects are located. The PPF also directs that municipalities ensure that households living in close proximity to housing projects are not prioritised 'to the degree that those living further away from the projects are systematically excluded from receiving housing opportunities.' Clause 5.2.2 aligns with s 9 of the Constitution and the injunction contained in the PPF.

[47] In their Notice of Motion the respondents sought a declarator that the municipality had failed to take reasonable measures to ensure that the right of access to housing for people living on rural land is provided for.[17] This prayer

[17] Prayer 5 of the Notice of Motion;

was abandoned. Indeed clause 5.2.2 constitutes reasonable measures by the municipality to ensure that housing opportunities are provided, specifically, for rural residents and workers.

[48] Further facts peculiar to this matter bear mention. As stated, Mr Lolo never registered to access the emergency housing or housing provided for in the rural housing quota dispensation. Therefore, he could not have been excluded from the benefits available under these programmes. In addition, after considerable toing and froing, Mr Lolo accepted an emergency housing offer from the municipality but persisted with the high court application. Against this background the municipality raised the non-joinder of the Minister of Rural Development and Land Reform (Minister) on the basis that the housing policy was adopted in terms of a 'mandate' from the national department. I agree with the respondents' contention that the fact that the Minister 'mandated' the adoption of a policy does not necessitate his or her joinder in a dispute on the content of the adopted policy. Nevertheless, for the reasons that I have stated in the paragraphs above, the appeal must be upheld.

[49] On the *Biowatch* principle no costs order will be made against the respondents in this Court and in the high court.

[50] The following order is made:

1 The appeal is upheld.

2 The order of the high Court is set aside and is replaced with the following order:

'The application is dismissed.'

'Declaring that the first respondent has failed to take reasonable measures to ensure that the right of access to adequate housing of people living on rural land within its area of jurisdiction is progressively realised.'

N DAMBUZA

JUDGE OF APPEAL

Appearances

For the appellant:	N Greig with M Adhikari
Instructed by:	Van Der Spuy & Partners
	C/O Phatshoane Henney Attorneys
	Bloemfontein
For the respondents:	P Hathorn SC with S Khoza
Instructed by:	J D Van der Merwe Attorneys
	C/O Webbers Attorneys
	Bloemfontein.