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

Case Number: **3036/2023P**

In the matter between:

THE DEMOCRATIC ALLIANCE	Applicant
and	
ETHEKWINI METROPOLITAN MUNICIPALITY	First Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL OF WATER AND SANITATION KWAZULU-NATAL	Second Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL	Third Respondent
THE MINISTER OF WATER AND SANITATION	Fourth Respondent
THE MINSTER OF FOREST, FISHERIES AND THE ENVIRONMENT	Fifth Respondent
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Sixth Respondent

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APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned –

THABANI MTHETHWA

do hereby make oath and state that:

1. I deposed to all of the affidavits on behalf of the Applicant in these proceedings and remain so authorized. My details remain as set out in the founding affidavit.

2. The contents of this affidavit are within my personal knowledge, unless the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.

3. Insofar as this affidavit contains legal submissions, I do so on the advice of the Applicant's legal representatives, which advice I accept.

A. INTRODUCTION

4. eThekwini delivered its long-overdue answering affidavit in these proceedings, deposed to on 22 January 2024 by Ednick Msweli, opposing the Applicant's application. This affidavit is delivered in reply thereto.

5. I do not, in this affidavit, intend to set out the chronology between the delivery of the Applicant's supplementary founding affidavit and eThekwini's answering affidavit. Astonishingly, given the delays, the repeated refusal to meet deadlines or even a court-ordered directive to file, and the urgent nature of this litigation, eThekwini simply filed the affidavit – but with no apology, no condonation application, and no sense of its duties of accountability and respect for its opponent or the Court. eThekwini has thus been put on terms, by way of an order granted by the Judge President in a case management meeting on 23 January 2023, to deliver a condonation application by not later than 8 March 2024 to explain its failure to deliver its answering affidavit when directed to do so. I will, in my answering affidavit to that application, set out the detailed chronology of correspondence, orders and repeated requests the Applicant has had to make in order to have eThekwini deliver its answering affidavit, commit to a basis for its opposition and stop delaying the matter.

6. I attach as "**RA1**" a copy of the case management order.

7. In summary, it took over six months, after the Applicant filed its supplementary founding affidavit, for eThekwini to deliver its answering affidavit. The proceedings were instituted in March 2023. In the almost full year it took eThekwini to respond

to the Applicant's case, and facing the threat of litigation, it is now clear that nothing meaningful has been done to improve untreated, waste water entering the beaches as a result of the systematic breakdown of eThekwini's waste water infrastructure.

8. Despite claiming for itself nearly a year to get its house in order, eThekwini has been unable, in that time, to do what needed to be done to obviate the need for the relief the Applicant seeks or remedy the harm being done to the public and eThekwini on a daily basis.

9. However, the casual lateness of its filing, and the version eThekwini commits to in its answering affidavit, underlines why the relief the Applicant seeks must, with respect, be granted. The affidavit reveals eThekwini's glib approach to its legal obligations, and confirms that it has no sense of urgency to resolve the problem.

10. In fact, it does not believe or account to this Court or the public about there being a systematic problem. This approach is encapsulated in eThekwini's suggestion that spillages should simply be regarded as daily events (para 83). The public, according to eThekwini, must simply learn to live with sewerage on the beaches, dangerous levels of Ecoli in the water, and repeated *ad hoc* beach closures.

11. But the approach adopted by eThekwini is not acceptable given the rights in issue and multiple directives already directed at eThekwini by other arms of government. And it is not lawful and it is not what the Constitution demands of an organ of state. The approach confirms that eThekwini is unable to discharge the legal duties of a local authority in respect of waste water treatment, does not even seriously aim to do so in accordance with the applicable legal standards, and has no meaningful plan by which it seeks to put its house in order and repair the public's beaches

12. eThekwini adopts the defeatist position that spillages are just part of everyday life. But they are not – they are emergency, environmentally-ruinous, potentially life-threating events, which warrant the requisite urgency in being dealt with, and in the seriousness of the response.

13. eThekwini also accepts that its infrastructure required rehabilitation but that it is constrained by the inadequacy of necessary funds to repair and rehabilitate the ailing infrastructure. The Auditor-General's report on eThekwini Municipality for the 2022-2023 fiscal year provides valuable insights into eThekwini's financial situation and governance, and highlight the obvious failures by eThekwini in response to growing infrastructure inadequacies and aging infrastructure – eThekwini is regressing in almost every measurable metric. I annex as "**RA2**" relevant extracts of the Auditor-General's presentation on the audit outcomes which confirm this conclusion.

14. This individually and collectively has resulted in a sewerage crisis. The crisis relates to the recurring, severe, unpredictable effluent discharge from waste water treatment works since at least 2021, which eThekwini says it cannot and need not avoid. It occurs regularly, for extended periods of time and unpredictably. This continues to be the case – even on eThekwini's own version, as it appears from its answering affidavit.

15. The continued failure to remedy the crisis, constituted and still constitutes breaches by eThekwini as an organ of state to protect and promote the rights contained the Bill of Rights. These breaches constitute unjustified infringements of the following rights enshrined in the Constitution: the right to equality in section 9, to human dignity in section 10; the right to trade, occupation and profession in section 22; and the right to an environment that is not harmful to health and wellbeing contained in section 24(a) of the Constitution. eThekwini has failed also to respect, protect, promote and fulfil these rights in the Bill of Rights.

16. Plainly, eThekwini is obliged to take all reasonable steps to ensure that all spillages from waste water treatment works are prevented and to do so as soon as possible. The Action Plan does not presently provide for this to be done and as a result does not discharge eThekwini's legal duties in terms of the Constitution.

17. And eThekwini fails to respond meaningfully to significant parts of the Applicant's case, thus capitulating in relation to material aspects of the matter.

18. The approach confirms why the relief the Applicant seeks in these proceedings can and must be granted. The facts are now settled, and it follows from them that the following orders the Applicant seeks are urgently required, with respect.

18.1. It must be declared that eThekwini is in breach of notices and directives issued to it by the Department of Water and Sanitation ("**DWS**") and the Department of Economic Development, Tourism and Environmental Affairs ("**EDTEA**"), and that this breach is unconstitutional and unlawful,[1] This is the relief sought in paragraphs 1 and 2 of the notice of motion.

18.2. It must be declared that eThekwini is in breach of:

18.2.1. sections 24G, 30, 30A, 31L(4), 31N and 28(1) of the National Environmental Management Act 107 of 1998 ("**NEMA**");

18.2.2. section 19(1) of the National Water Act 36 of 1998 ("**Water Act**") (arising from eThekwini's designation as a "Water Services Authority");

18.2.3. section 69 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008;

18.2.4. section 16(1) of the National Environmental Management Waste Act 50 of 2008;

18.2.5. sections 9, 10, 22 and 24 of the Constitution; and

18.2.6. its obligations in terms of section 156 of the Constitution, as a local authority, and under international law.

(This is the relief in paragraph 3 of the notice of motion).

[1] These are attached as "TM7"- "TM16" to the founding affidavit, "SFA7" – "SFA8" to the supplementary affidavit and "FSA7" - "FSA11" to the further supplementary affidavit.

18.3. It must be declared that eThekwini has, on at least two occasions, unlawfully re-opened beaches without compliance with provincial directives (This is the relief in paragraph 4 of the notice of motion).

18.4. It must be declared that eThekwini's operation of its Wastewater Treatment Works and associated infrastructure, without proper licences, is unlawful (This is the relief in paragraph 5 of the notice of motion).

18.5. It must be declared that eThekwini's decisions not to report events as an 'Emergency Incident' or an 'Emergency Situation' or comply with the aforesaid notices, within the stipulated time frames, is irrational, unreasonable, unlawful and unconstitutional (This is the relief in paragraph 6.1-6.2 of the notice of motion).

18.6. It must be ordered that eThekwini file an amended Action Plan and associated reports and substantiating documents, with this Court, addressing non-compliance with the notices, explaining steps it will take to comply with the notices, and setting measurable periodic deadlines for progress; all with due regard to the need to give effect to the public's right to a safe and healthy environment and the need to enhanced monitoring of coastal emissions, along with an order that all parties, including any interested parties, are entitled to comment on the Action Plan within one month thereof and eThekwini is directed to file monthly reports indicating progress in implementing the Action Plan (This is the relief in paragraphs 7-11 of the notice of motion).

18.7. The Court must, after hearing submissions, make any further orders it deems fit, including through the appointment of a special master to assist and report back to the court on any matter which is the subject of this application and to do anything necessary or required of the special master by the Court (This is the relief in paragraph 12 of the notice of motion).

18.8. Finally, eThekwini is required to discharge its duty of care and remediation of environmental damage and report back to the Court on progress in doing so within six months (This is the relief sought in paragraphs 14-15 of the notice of motion).

19. eThekwini cannot escape the scrutiny of this Court or be permitted to escape its legal obligations based on its regrettably glib and half-baked response to its legal duties. It for years now has acted with impunity in relation to the failures that are highlighted in this application, and the Constitution demands that there are consequences for its repeated constitutional failures, under the norm of accountability. Such accountability is critical for the people of eThekwini, and ensures a critical role of this Court, particularly in the face of egregious and admitted unlawfulness on the part of an organ of state.

20. Moreover, as indicated earlier, section 7(2) of the Constitution provides that the State must respect the rights contained in the Bills of Rights. Accordingly, eThekwini (an organ of State) had (and still has) a duty not to conduct itself in a manner that would result in an infringement of those rights, and a duty to respect the rights in the Bill of Rights.

21. eThekwini's response to the crisis is inconsistent with the Constitution and its constitutional obligations. It is a response hinged on multiple iterations of an "Action Plan", which reflect neither action, nor planning; a "War Room" which reflects none of the urgency or seriousness of the crisis; and the pampered complaint that the billions of rands available to eThekwini are simply not enough to make due as a result of which fulfilment of eThekwini's legal obligations will only take place many, many years in the distant future without any deadline for completion.

22. The Applicant's declaratory relief and a mandamus and supervisory relief it seeks would recognise the statutory non-compliance which has already occurred, and supervise eThekwini to prepare a rational, lawful "Action Plan" which is cognisant of applicable legal standards and directives already issued and has input from interested parties. It would also see the Court supervise compliance with

eThekwini's commitments in such an Action Plan, with or without the assistance of a special master.

23. This is relief which is forward-looking, meaningful and within this Court's powers to grant in order to resolve the true dispute between the parties: that is, securing compliance with environmental legislation in the interests of eThekwini residents and putting an end to continuing violation of human rights in contravention of the Constitution.

B. SYNOPSIS OF ETHEKWINI'S OPPOSITION

24. In this affidavit, I deal thematically with eThekwini's grounds of opposition. I will then set out what eThekwini has not dealt with at all or concessions it has made, and which thus can be accepted as common cause. I will thereafter provide *ad seriatim* responses to the allegations in the answering affidavit. Before doing so, I summarize a few pertinent features of the applicant's case:

    24.1. Firstly, the Applicant approached the court seeking to uphold the law, and the right to an environment which is not harmful to health or well-being, through compelling compliance with applicable legal statutes.

    24.2. The Applicant had learned of multiple enforcement steps having been taken against eThekwini by the relevant environmental authority in terms of the applicable environmental statutes, which eThekwini either ignored or failed to address adequately. Those directives had been hidden from the public by eThekwini, and only disclosed in the course of these proceedings.

    24.3. One area of focus in the application – given the ongoing failure to remedy the situation meaningfully and to respond to the directives that have been issued – is on the preparation of a structured, rational plan to address short, medium and long-term remediation of the waste water infrastructure problem, as well as emergency measures in the event of an unplanned spillage, through directing eThekwini to formulate a proper Action Plan.

24.4. This the Applicant has sought to do through having eThekwini fix the presently defective one it has proposed – and which Action Plan is clearly an after-the-fact and ongoingly defective effort to respond to the Applicant's case.

25. eThekwini's answering affidavit opposes the application not by making out a case that eThekwini has not failed to comply with the law, directives and public law duties, but by providing bald denials coupled with a plethora of contrived reasons and weak excuses for why it has failed to comply with the law, directives and public law duties.

25.1. Firstly, eThekwini is stuck in history: it says that its infrastructure was significantly affected and impaired by the April and May 2022 floods in KwaZulu-Natal, and it will take years to rectify. But its answer – as I show below – confirms that it distorts that history, and refuses to learn from that history or plan appropriately in response to it.

25.2. Secondly, eThekwini suggests that it has been unable to secure adequate funding – which is not so, as I explain, but in any event is never a constitutionally-acceptable answer to violations of the public's rights.

25.3. Thirdly, eThekwini attempts to shield itself by suggesting that the Court need not supervise the correction of the current crisis, because DWS is overseeing the remedial works and because UMngeni Thukela ("**UMgeni**") is now helping eThekwini maintain its water treatment works.

25.4. Fourthly, eThekwini attempts to rely on the plainly inadequate Action Plan (albeit a new iteration of that Plan, put up for the first time in the answering affidavit) as a full answer to eThekwini's infrastructure problem.

25.5. Finally, eThekwini disputes the need for the relief for the appointment of a special master to oversee its function, on the basis that it would interfere with eThekwini's work – which is an oddity, given that eThekwini is already

welcoming of DSW and UMngeni's assistance, and further oversight is urgently and obviously required precisely because eThekwini's existing response to the crisis has not worked and is not working.

26. eThekwini's response is premised on defending its conduct and its failures, and doing so on the basis that it has "*neither ignored its obligations as a municipality … nor has it failed to address the damage*". In short, eThekwini says it has not done nothing. But that is not an answer to the Applicant's complaint. Not doing nothing is not the standard. The rule of law requires that the response is rational, and the law requires that legal obligations are observed, and that directives are complied with. This requires eThekwini to be proactive and to plan, and to demonstrate convincingly to the Court and the public that it is doing so.

27. eThekwini's response also demonstrates the remarkable selectiveness and the double standards it adopts. eThekwini is prepared to accept oversight from UMngeni and DWS, but not from the Court, in respect of its own Action Plan. eThekwini saw fit to prepare a belated Action Plan, but will not hear from affected stakeholders on its content or be held to the timelines in it by the Court. eThekwini says it has a plan, but in doing so never references or complies with the actual directives issued by Provincial regulatory bodies which ought to form the very backbone of its work.

28. eThekwini describes its task in addressing its admitted waste water infrastructure crisis as "unenviable". eThekwini's apparent appeal for the difficulty of its job is no basis for breaching the rule of law and ignoring directives. And its appeal for sympathy or leniency for doing the daily work of government is unavailing. Running a municipality is a serious job and eThekwini should not expect it to be easy or enviable, or that it be allowed to ignore the law when it does so. It should not expect it to be "without complications" (para 14 of the answering affidavit). On the contrary, complications and "periodical obstacles" are to be expected. Floods are to be expected and planned for (particularly given the well-recognized impact of Global Warming), not used as an excuse for continued poor planning and inaction. And directives and constitutional rights must be adhered to and respected, promoted,

and fulfilled, as the basic standard that governs eThekwini's response to flooding and other difficulties.

29. In short, this is the work of government, which eThekwini is bound to perform constitutionally. And it is precisely what eThekwini is well funded to do. It should be recalled that eThekwini is a Class A metropolitan municipality. It is the third biggest municipality in South Africa. It is not in the more challenging position in which many municipalities around South Africa find themselves in less established areas, with fewer resources, less developed industry, more poverty and less existing infrastructure.

30. The opposite is true: eThekwini has until recently been a coastal jewel, with enormous opportunity and potential. It has an urban population, universities and Technikons, and a once-thriving hospitality and tourism industry which offered jobs, opportunities for skills development and growth to its people. That opportunity has not only been squandered, but the jewel's shine has faded through years of neglect and failure to maintain existing infrastructure at a reasonable pace, until it has reached a point of collapse. Instead, there is little forward-planning and infrastructure is run to failure and maintenance (when it takes place) is done on a scrambled and incoherent reactive basis as opposed to through predictive or preventative maintenance.

31. The decline of eThekwini since 2000 bears similarities in many ways to the decline of Eskom. Both suffered from a failure to maintain infrastructure, failure to act with transparency, and both endangered and impacted the lives and well-being of the public who rely on them in a manner that constitutes an ongoing violation of the public's rights, which they have been unable to remedy since. Like Eskom, the decline has been systematic, ongoing and shows no sign of coming to an end. The opposite is true: it is worsening.

32. This is apparent from the fact that the infrastructure which eThekwini now handily blames for its historical inadequacy and advanced age in fact was the same infrastructure that enabled eThekwini to win two international awards from the United Nations (para 33). The question eThekwini studiously avoids is what

happened between 2007 and now, to take this award-winning system to its present state? Plainly the infrastructure did not age or break overnight.

33. The truth is that it was not adequately maintained and not upgraded over time, because no proper plans were put in place, people with the relevant expertise have not been employed by eThekwini, there was no sense of urgency to do the work of government, and – as this case has revealed – it has simply abjured its legal responsibilities in the teeth of directives issued against it by Province.

34. I turn now to address the themes arising from eThekwini's answering affidavit. Before I do so, however, I reiterate a central feature of eThekwini's answering affidavit: it has provided no response at all to critical features of the Applicant's case.

35. For the most part, eThekwini's answering affidavit attempts to explain away its challenges related to waste water infrastructure, but this is just one aspect of the case against eThekwini. The relief the Applicant seeks is much wider and is largely overlooked.

36. In particular, eThekwini has no answer to the following allegations against it:

    36.1. Firstly, that eThekwini breached notices and directives issued to it by the Department of Water and Sanitation ("**DSW**"), and the Department of Economic Development, Tourism and Environmental Affairs ("**EDTEA**"). The substance of the issue is entirely ignored by eThekwini, who instead makes the conclusory allegation that there is no breach and states that these directives are "historical" and "moot" and "90% resolved". No evidence or detail is provided and eThekwini has seen fit to keep the Court in the dark as to its alleged compliance and resolution.

    36.2. The denial is unavailing because the failure to ensure compliance by eThekwini is effectively conceded elsewhere in the affidavit, albeit that eThekwini seeks to excuse its failures because such non-compliance took place around the time of the April 2022 flooding. It is also clear from the

EDTEA notices which are contained in the founding affidavit and which are not disputed by eThekwini that no compliance was in place at the relevant time.

36.3. The allegations of compliance and remedial steps having been taken and achieved is also undercut by the situation which eThekwini faces daily, and is demonstrated by the continuing beach closures and dangerous e.Coli levels, which persist to this day, as demonstrated by the daily beach readings I attach to this affidavit, including from Talbot and eThekwini's own joint sampling results.

36.4. This was reported on Talbot,[2] which publishes water quality test results online. As at 26 February 2024, Point Beach and South Beach has dangerous levels of E.coli (I attach the reading as "**RA3(1)"**), as at 19 February 2024, Point, usHaka, South Beach, Battery Beach and Country Club Beach had dangerous levels of Ecoli (I attach this as "**RA3(2)"**); and as at 12 February 2024, Northern Works, King Fisher Canoe Club and Riverside had dangerous levels of E.coli (I attached this as "**RA3(3)"**). I also attach the water quality test results for 4 February 2024 ("**RA3(4)**"), 30 January 2024 ("**RA3(5)"**), 16 January 2024 ("**RA3(6)**"), 21 December 2023 ("**RA3(7)**"), 20 December 2023 ("**RA3(8)**") and 14 December 2023 ("**RA3(9)**").

36.5. If eThekwini disputes these readings, it is invited to put up an affidavit with evidence of readings to the contrary.

36.6. Not only does this failure properly to dispute this relief and the facts that underlie it confirm the relief sought by the Applicant as regards those failures, but it also underlines that eThekwini's "plans" are irrational and unlawful – since they do not show in any way that the breaches are being remedied and notices are being complied with or how they have been or

[2] https://www.talbot.co.za/water-testing/

will be complied with by eThekwini. Flighted plans are not enough, when they are not plans at all, and when they result in no improvement.

36.7. Secondly, there is no serious dispute that eThekwini has acted in breach of its legislative obligations under NEMA, the Water Act and the Constitution. These breaches arise from what are now the common cause facts, which eThekwini seeks to excuse due to the floods but which it does not deny.

36.8. Thirdly, eThekwini admits that a significant number of its Wastewater Treatment Works are presently operated without proper licences (which are lapsed or expired or in respect of which applications are pending) and that eThekwini has unlawfully agreed with the provincial department to turn a blind eye to this unlawfulness.

36.9. Fourthly, eThekwini fails to deal with eThekwini's decisions not to report events as an 'Emergency Incident' in terms of section 30 of NEMA, decisions not to report events as an 'Emergency Situation' in terms of section 30A of NEMA, and the fact that such failures are irrational, unreasonable, unlawful and unconstitutional. This relief is ignored by eThekwini, and the need for the relief is underscored by the Action Plan which does not contain any emergency measures at all in the event of waste spillages.

37. The relief dealing with these material aspects of the case can accordingly be granted without opposition. But eThekwini's failure to respond also underlines that it has not squared up to the reality of the constitutional failures perpetrated by it: it has acted willfuly in defiance of directives and notices that were aimed at remedying the state of affairs that underlie this application, it has no proper licence to act as it does, and it has put the public at risk by failing properly to report emergency incidents or product emergency action plans.

38. These failures show not only that eThekwini's plans or excuses now raised in answer are half-baked (for failing to properly consider, explain, and internalise the

notices and directives that ought to govern its response), they also underline the essential role for this Court to grant an order that ensures proper compliance with the rule of law by eThekwini.

39. This Court will thus be requested to grant remedial relief that compels eThekwini to protect the public and respect the rights in issue in this application, including through the reporting and supervisory relief sought.

C. FLOOD DAMAGE TO INFRASTRUCTURE

40. eThekwini alleges that waste water treatment works and infrastructure was "significantly impaired" by the April and May 2022 floods (para 8 and 103 of the answering affidavit), and that no complaints about water quality and infrastructure preceded the floods (para 22.1.3).

41. This is simply not true.

42. It has already been explained that the floods were not the beginning of eThekwini's waste water woes. I disclosed this in the founding affidavit, at paragraphs 74 – 102, where I dealt with the existence of EDTEA's first directive, issued on 9 April 2021, a year before the flooding, relating to environmental degradation at Eiderwood Close, Goodview and Phoenix. There is no answer to this case and it is not seriously disputed in these proceedings.

43. A large number of compliance steps were taken against eThekwini by the provincial authorities even before the floods. This is apparent from a written reply from the Directorate: Office of the Head of Department of EDTEA dated 14 October 2021, in response to a question to the applicant's HU de Boer in the Provincial Parliament, in which de Boer asked about the number of NEMA section 28 or section 30 directives issued by EDTEA. EDTEA confirmed that twelve directives had been issued to eThekwini for contraventions (most of which related to pump stations and sewerage waste water treatment works). I attach EDTEA's response as ""**RA4**".

44. As further proof of eThekwini's long-standing failure to attend to infrastructure concerns, I attach the contents page of the document titled "*Water and Sanitation Turnaround plan*", as "**RA5**". It is dated May 2021, before the April 2022 floods. It provides insight into eThekwini's pre-flood infrastructure. The document was presented one year before the floods. It confirms that already in May 2021, the waste water treatment works were in need of urgent intervention, and there was a "high overall risk of infrastructural failure". It confirms that eThekwini had been warned (and had accepted) that its infrastructure would reach breakpoint (as it did) and failed in the light thereof to remedy the situation.

45. There were also sporadic beach closures during this time due to dangerously high E.coli levels. I attach the relevant media reports confirming same, as "**RA6** and "**RA7**". This was all **before** the April 2022 floods.

46. A further concerning feature of pre-flood beach closures was that eThekwini, at that stage, had attempted to keep the public in the dark about the contraventions and waste spillages.

47. eThekwini failed to disclose the true reasons to the public for the beach closure, claiming in January 2022 that the visible dark discharge into the Umgeni water source was water hyacinth. This was discovered not to be true, when the Daily Maverick approached eThekwini with questions, in writing. eThekwini provided a written response, which exposed the truth and confirmed that the opposite was true, that the discharge was untreated sewerage, and that this had been the reason for the beach closures. eThekwini however, refused to disclose the readings in its response, while it defended its decision to open the beaches again to the public just two days after it had recorded dangerously high E.coli readings.

48. I attach a full copy of the article written by the Daily Maverick, as "**RA8**", which in turns references eThekwini's formal response to the enquiries.

49. It is accordingly wrong for eThekwini to suggest that its infrastructure was in order before the floods, and that the floods are the sole, or even main cause, of the waste water infrastructure disintegration and beach closures.

50. eThekwini's suggestion that the beaches were clean, prior to the flooding, is thus as inaccurate as it is misleading. As I have said previously, the floods may have exacerbated the problem, but did not cause the problem and eThekwini has sought to escape accountability by blaming the floods. eThekwini's legal failures do not arise from random instances of inclement weather - its performance was unacceptable well before those events took place. The flooding exposed its pitiful compliance record and laid bare its failures. And this litigation has now exposed its equally unacceptable conduct ongoingly to meaningfully respond to the crisis that had been brewing well before the floods, and now requires emergency action to remedy the situation after the floods – a situation that remains unremediated at this date, years after the event that eThekwini seeks to use as a scapegoat for its unconstitutional conduct.

51. It is also clear that eThekwini has not been candid and forthright with the public about the true state of the waste water works infrastructure and how serious the problem is. For as long as the true state of affairs was not disclosed by eThekwini, the public could take no preventative measures to protect their health and exposure to dangerous E.coli in the ocean, or take legal action – as the Applicant has been forced to do – in order to seek compliance. The public were oblivious to the danger. This is a complaint raised in the founding affidavit, because at that stage there was, and there remains, no daily Ecoli readings which are publicly available. (See in this regard paragraph 1151.7 of the founding affidavit, in which I explained the need for daily testing and the publication of results by eThekwini).

52. The public also did not know of the various contravention notices issued against eThekwini for such non-compliance by the provincial environmental authorities. The extent of these notices and directives became known through legal proceedings.

53. The need for transparency in the handling of matters of public importance is all the more reason why the publication of the Action Plan is critical for engaging the public and involving the people of eThekwini in the sewerage "rescue plan". Any interested party should be entitled to the opportunity, as stakeholders, to comment

on the Action Plan eThekwini intends embarking upon. That is acutely so where the public have to date been kept in the dark about the true state of affairs, affairs that affect their health, livelihoods, and the reputation of the City that they live and work in.

54. But in any event, the floods are a normal feature of life in a Global Warming era, not an “isolated extraordinary event” (para 22.1.4). eThekwini knows this – the Durban Climate Change Strategy, dated 14 March 2022, records that Durban is projected to experience more intense storms and flooding, increased frequency of floods and that the impact of this would include reduced water quality, including water and sanitation, which “impacts could be compounded by other drivers unrelated to climate change like inappropriate management of built and natural infrastructure and poor planning”.

55. The floods could thus be predicted to have happened, and to happen again: the question only is when and how frequently and what the impact will be. eThekwini needs a responsive plan to deal with unscheduled events. This plan needs not only to learn from the past, but to be forward-looking including ways to mitigate the damage which is caused by such inevitabilities likes floods, including the speedy removal of blockages through an emergency reactive set of measures that allow for urgent interim solutions while medium to longer term solutions are being debated and implemented.

56. Blockages cause flooding in times of deluge. This requires quick response time, educating the public, monitoring and checking blockage sights, regular maintenance, and public warnings. Thus while it is correct that blockages are caused by human error in many forms, much of this could be alleviated if the Municipality did more regular preventative maintenance such as jetting and clearing of the waste water systems. This has been procured recently, but has to date not been implemented.

57. This is precisely why the Action Plan needs to be “workshopped” and the Court needs to direct eThekwini about what needs to be considered when formulating the Action Plan. This is how inclusive and responsive government is facilitated.

D. ETHEKWINI HAS ACCESS TO ADEQUATE FUNDING

58. eThekwini complains that there is an absence of adequate funding. I am advised that lack of funds or inadequate resources is not an excuse for the state failing to comply with the law and the Constitution.

59. But in any event, I dispute that eThekwini is without adequate funds to discharge its legal duties promptly and fully. The flood was a Provincial disaster and this fact alone entitled eThekwini to gain access to funds from National treasury through Provincial government for the affected area. eThekwini's operational budget was re-prioritised in the light of the disaster relief funds and this re-prioritsation of the funds made available monies to be utilised for the waste water treatment works.

60. In any event, eThekwini has now confirmed that it has accessed the funds, including through various multibillion rand loans it has secured from undisclosed lenders. Yet eThekwini complains that it is not enough, without providing any evidence about the amounts it requested or motivated for. Obtaining funding requires properly motivated applications for funding to be made and substantiated, and for the funds provided to be properly spent and monitored. That, with respect, is where eThekwini fails.

61. eThekwini says it is under financial constraints, despite the figures telling a different story: it admits that R1,5 billion in funding is available to it for "reconstruction and rehabilitation".

62. eThekwini complains that only R228 million is for infrastructure (paras 121-123). But the complaints have no merit, because it is clear that government (national and provincial) are prepared to give eThekwini vast amounts of money and eThekwini itself can raise finance (which it has already done). How then can the amounts it has asked for and raised be wrong?

63. And why has eThekwini failed to provide any evidence of this glib assertion, in the form of a costing, forecasting or analysis? How is the Court to scrutinize the

assertion by eThekwini if no evidence in support is provided? eThekwini has again failed to discharge its duty as a litigant and as an organ of state to make the necessary evidence available to the Court including the financial costing. Plainly, if that costing was available, it would have been provided. It has not, and accordingly the inference is that what eThekwini has not asked funding to correct or repair damage arising from the floods, but funding to upgrade infrastructure in order to try and remedy the failure by it – for decades – to properly maintain and upgrade the infrastructure before the flooding.

64. I note eThekwini has failed to put up its past financials and failed to disclose what it has spent on infrastructure upgrades since the 2000 demarcation process. This is how it could have addressed the allegation, made squarely in the founding affidavit, that eThekwini has used the floods as an opportunity.

E. ACTION PLAN (AND REVISED ACTION PLAN)

65. eThekwini has put up multiple, ever-changing "Action Plans" since the April 2022 floods.

66. The first iteration of the Action Plan is contained in a report prepared immediately after the floods, when eThekwini undertook an assessment of the damage to the waste water infrastructure. That report is dated 12 April 2022 and is titled "*Storm Damage to eThekwini Water and Waste Water Infrastructure*". It is attached as "**RA9**". It contained, at the tail-end of the document, what is termed an "Action Plan", a cryptic and chaotic point-form list of action items. But it is clear that waste-water treatment works was entirely overlooked in that plan, and consideration was only given to securing water supply and water reticulation.

67. Thereafter, in the Rule 53 delivered in May 2023, an "Action Plan". It was attached as "SFA3" to the Applicant's supplementary affidavit, and was filed in respect of the proceedings instituted by Action SA under case number D11938/2022. This is apparent because the first page of the Action Plan is a filing sheet, where the Action Plan is delivered in the Action SÁ proceedings. I pointed this out in the Applicant's supplementary affidavit.

68. This Action Plan was dealt with in the Applicant's supplementary founding affidavit from paragraph 30. I explained that the Action Plan was reactive (created as a result of the litigation and complaints against eThekwini for failing to have a plan in place), unauthored and undated, deficient (as it fails to address non-compliance, failed to explain the steps eThekwini would take to comply with the notices, and did not set measurable periodic deadlines for progress); and failed to ensure accountability.

69. Most glaringly, the Action Plan failed to make any reference to the directives or deal with the content of the directives (which highlight specific areas of non-compliance by eThekwini with the environmental statutes). That remains the position in respect of the most recent Action Plan eThekwini relies on.

70. Instead, eThekwini is content to act as if such directives had never been made. That is precisely the approach it adopts in this application too – it glibly dismisses them as "historical", when they are critical evidence of eThekwini's continued unlawful and irrational approach, which it continues to adopt today.

71. In short, the Action Plan was anything but. Instead, it was a marketing document, put up for the benefit of this Court, containing a generalised bucket list of items which were at best aspirational. It lacks teeth and any enforcement potential. It was a glorified "to-do list". It was a plan so devoid of substance and logical structure or planning or clear timelines that it too confirmed the need for this Court's intervention. Little surprise DWS was not happy with it, as eThekwini has confirmed, and required its revision.

72. eThekwini, in its answering affidavit, has now sought to distance itself from that Action Plan. There is a new Action Plan, eThekwini says. The first new iteration of the Action Plan is annexed to eThekwini's answering affidavit as "AA10". A subsequent Action Plan is annexed as "AA11", prepared after the "involvement" of the DWS. And yet another Action Plan is annexed to the answering affidavit, allegedly dealing with the issues raised by the DWS, and annexed as "AA12".

73. No explanation as to the content of the Action Plan is provided in the affidavit and a reader is left to trawl the annexures to the answering affidavit to glean the supposed meaning and disparate and warbled content of the Action Plan(s). No explanation about the changes between the various iterations of the Action Plans is provided either. And there is no confirmation or evidence provided that DWS is satisfied with the plans.

74. The approach is revealing: eThekwini does not think the content of the Action Plan needs explanation at all because what it says does not matter, all that matters – according to eThekwini – is that it exists, as a shield against scrutiny. But this is not the approach the law calls for.

75. Despite not touching on its content at all or properly explaining its meaning or effect in the answering affidavit, the Action Plan is latched upon by eThekwini as some form of panacea. It should be recalled that until eThekwini was being taken to court, there was no action plan in place at all to deal with sewerage and treatment plans (and the first iteration of the Action Plan, mentioned above, contained In Annexure "RA7" from April 2022, did not deal with these aspects either, or the need to relieve sewerage being spilled onto eThekwini's beaches). This is precisely why the content of the Action Plan is not only deserving of scrutiny, but crucial to determining the lawfulness of eThekwini's response to the crisis.

76. eThekwini's belated delivery of a self-standing "Action Plan" was delivered as part of the record in these proceedings. It is put up by eThekwini as the first item in the Rule 53 record of proceedings.

77. But as I recorded in the supplementary founding affidavit, that "Action Plan" was inadequate and irrational, for reasons more fully set out in the supplementary affidavit, and which the Applicant stands by. These include the failure to address the defects at Johanna Road treatment plan and the alleged "vandalism" issue which it does not address. As I have said, eThekwini has sought to distance itself from the difficulties with its earlier iteration of the Action Plan by putting multiple subsequent versions of the Action Plan.

78. However, it ongoingly fails to address the core issues facing eThekwini with regard to waste water infrastructure. Vandalism is one such example. Despite vandalism being repeatedly raised by eThekwini, it has not mentioned this in its Action Plan and there are no measures in place, in the Action Plan, that address these security concerns. This is irrational, but it also confirms that eThekwini's gripes about vandalism are not borne out when regard is had to the absence of any reference thereto in the Action Plan, or alternatively, that the Action Plan is hopeless because it does not deal with a central excuse raised by eThekwini for why it has struggled to respond properly to the ongoing crisis.

79. eThekwini describes the document as a "living document" (para 17). By this it means, it has no firm deadlines. This is clearly eThekwini's preferred approach, because it will enable eThekwini to continue rolling over project deadlines, as it has repeatedly done in the past financial year. It has offered, and will continue to offer, no tangible improvement. The proof is in the pudding and the repeated, continuing beach closures and sewerage leaks.

80. Such a document is, however, not constitutionally rational (procedurally or substantively) or in fulfilment of the duties upon eThekwini under section 7 of the Bill of Rights (and the rights identified by the Applicant in its founding affidavit), for a number of reasons.

    80.1. Firstly, it is not one which has been prepared with any input from interested parties who are stakeholders and who are affected by the Action Plan.

    80.2. Secondly, despite appearing to celebrate how the Action Plan is responsive to "dynamics" and "exigencies" (para17), this is in fact what makes the plan not a plan at all, but an aspirational wish-list, the timelines for which are not deadlines, but mere suggestions, which will be revised and pushed back as they are ongoingly missed by eThekwini. They constitute no real commitment and are simply window-dressing. A further delay in execution of the Action Plan is inherent in the plan itself. That is apparent where eThekwini says therein that it seeks to "address the outcome of its

assessments of the damage caused to its infrastructure by the January 2024 floods", (para19) but with no indication of when or how this will happen. It will be recalled that when this application was instituted eThekwini had promised that the necessary remedial works would be complete by 3 December 2022 (para 15, founding affidavit), but on eThekwini's own evidence, it remains incomplete even now, a clear indication that eThekwini has little intention of honouring its own self-selected deadlines.

81. The Action Plan remains fatally defective, deficient and inadequate.

81.1. The irrationality of the plan is perhaps best exemplified in the absence of emergency measures to address what eThekwini now admits are "everyday" spills (para 83).

81.2. The Action Plan does not deal with the directives and notices issued against eThekwini by the Province, and hence irrationally overlooks material considerations which ought to have informed the Plan, including being responsive to the Directives, and determining timelines and workstreams that took seriously the emergency that the Directives demanded should be addressed as a matter of urgency.

81.3. The Action Plan does not, as I have said earlier, address the threat of vandalism.

82. So the publication of yet a further Action Plan does not obviate the need for the relief sought, it rather makes the case for it.

83. It is necessary that an Action Plan is published in which eThekwini explains the steps that it will take in order to comply with the notices, including setting measurable periodic deadlines for progress, and that in preparing the Action Plan eThekwini must be directed to pay due regard to the following considerations aside from the obviously critical directives issued against it by Province:

83.1. the need to give legal effect to the public's right to a safe and healthy environment (failing which the Action Plan will not and does not given effect to section 7 of the Constitution and does not constitute the discharge by eThekwini of its constitutional obligations); and

83.2. the need for enhanced monitoring of coastal emissions within the jurisdiction of eThekwini, including through the urgent improvement, management and maintenance of the Waste Water Treatment Works and related infrastructure, to ensure that verified, reliable data is produced, and that real-time data is made available to the public online. I have dealt above with the fact that eThekwini has failed to put in place any emergency measures and (as I will deal with below, insofar as section 30 and 30A of NEMA is concerned) does not even recognize such as emergencies warranting urgent attention or treatment under the NEMA emergency provisions or eThekwini's own policy on emergency environmental events.

84. There must be an opportunity for input. All parties to this application, and any other interested parties, must be entitled to comment on the Action Plan within one month of the date of which it is filed with this Court.

85. Adherence to the Action Plan must be checked. eThekwini must be directed to file to this Court, and serve on the other parties to this application, monthly reports indicating their progress with regard to the implementation of the Action Plan and any directives issued by EDTEA or other bodies, after the Action Plan is approved by the court.

86. The public and interested parties must know the state of compliance. All parties to this application, and any other interested parties, must be entitled to comment on these monthly reports within thirty (30) days after the date on which they are filed.

87. Within six (6) months of the date of the order, eThekwini must be directed to file a report, under oath, with this Court, on the progress of its discharge of the duty of care and remediation.

F. eTHEKWINI PREPARED TO ACCEPT HELP, OVERSIGHT, SUPPORT

88. eThekwini's reliance on "scrutiny" of the DSW" (para 16.3) is entirely self-serving. It is relied on to make a case for why scrutiny of the Court, of eThekwini's compliance with the Action Plan, is unnecessary or undesirable.

89. It should be recalled that the DWS has also instituted litigation against eThekwini for eThekwini's failure to comply with DWS directives. As DSW is itself an organ of state, it has cooperative governance obligations and the dispute between eThekwini and the DWS is therefore, I understand, the subject of mediation / alternative dispute resolution proceedings in accordance with its cooperative governance obligations. Those processes are taking place without the scrutiny of the Court and without the knowledge of the public, and it is accordingly entirely unclear whether eThekwini is still the subject of ongoing compliance complaints from those provincial environmental regulators. Again, eThekwini does not disclose this information to the Court or the status of its engagements with provincial regulators.

90. It however, became apparent during the course of this litigation, and in the six months it took eThekwini to answer this case, from media reports that 10 of eThekwini's 27 waste water treatment works were now being maintained by UMngeni (para 77).

91. It is clear that UMngeni has the expertise eThekwini does not, and that instead of 10 being handed over, the entire maintenance function should have been handed over to UMngeni. There is no reason why the 10 waste water treatment works identified in para 131 of the answering affidavit are different and more deserving of competent maintenance than the remaining 17.

92. UMngeni is also the obvious candidate to act as a special master, given its expertise and existing relationship with eThekwini. Yet eThekwini disputes that this relief should be granted, because it says that to do so would impinge on its

functions. But that does not apply to UMngeni, which is itself a provincial government entity and which eThekwini has itself enlisted to help it.

93. Such a special master would act on the direction of the Court and would, until otherwise directed by this court, monitor and evaluate the implementation of the Action Plan (once it was revised to be lawful), including for any competitive bidding process or processes aimed at the procurement of goods, services or other commodities and file reports on affidavit with this court setting out the steps he/she has taken to evaluate the matters, the result of their evaluations and any recommendations he/she considers necessary.

94. A special master is a mechanism available to this Court to mitigate the possibility of further and worse constitutional harm caused by the sewerage crisis. A special master will assist eThekwini, this Court, other arms of government, and the public in monitoring and implementing a plan to end the sewerage crisis.

G. *AD SERIATIM* RESPONSES TO THE ANSWERING AFFIDAVIT

95. I deal below with the answering affidavit on a paragraph-by-paragraph basis. Any allegations not specifically traversed are denied.

Ad paras 1 – 6

96. I do not dispute these introductory paragraphs but deny that the remainder of the affidavit is correct in all respects.

Ad para 7

97. While a significant portion of the application relates to failure to maintain waste water treatment works, eThekwini's narrow focus on only this aspect of the case is misplaced and eThekwini has failed to properly consider the remainder of the relief the Applicant seeks against it.

Ad paras 8 to 13

98. I have shown elsewhere that the infrastructure impairment was not as a result of the floods. It is also contradicted by eThekwini's own evidence, in para 209 of its answering affidavit, that it would have taken eThekwini at least 25 years to rehabilitate the ailing infrastructure that existed prior to the floods. Plainly, eThekwini's infrastructure had fallen into a state of disrepair, which seriously compromised the functionality of the infrastructure prior to the floods. This neglect did not happen overnight – it was a steady progression over decades of eThekwini's failure to conduct preventative maintenance, predictive maintenance, reasonable upgrading of infrastructure in terms of capacity; and failure to replace outdated infrastructure with up-to-date materials that would mitigate infrastructure failure.

99. I have explained above that what eThekwini seeks to demonstrate falls well short of its legal obligations. I dispute that eThekwini has adequately addressed the damage.

Ad para 14

100. I dispute that eThekwini is not adequately funded, and dispute the vague suggestion that "objections to the repair processes being implemented by other political parties" have stifled progress. There is no evidence of this and eThekwini does not elaborate or explain this contention.

101. There are no "competing interests within eThekwini". It is in every person's and political parties' interest not to have raw sewerage in water sources. eThekwini's antagonism and rejection of input from, or views of, affected parties is deeply worrying and confirms why the relief, which allows input from stakeholders on the Action Plan, is critical. Unless ordered by the Court, eThekwini has made it clear that it will not take account of input from anyone, including those affected stakeholders who can share insights and input to improve it.

102. The resistance to input from others is also markedly at odds with the position that eThekwini has agreed to in relation to the chemical spill at the UPL plant following the July riots. In that regard, eThekwini, alongside other interested parties, sits on the Multi-stakeholder Forum in order – precisely – to ensure that multiple voices are heard in responding to the chemical spill. I attach marked "**RA10**" the announcement of the Forum's creation, and as "**RA11**" its terms of reference which confirm eThekwini's involvement as a relevant authority.

103. eThekwini is invited to explain to the Court why it has not indicated its involvement in this forum as an example to be adopted under the relief sought by the Applicant – and to further explain why in this case, by contrast, eThekwini is antagonistic towards the inputs of affected parties.

Ad para 15

104. I submit that the affidavit demonstrate the opposite: that eThekwini is a constitutional delinquent.

Ad paras 16; 22.6

105. I dispute that the appointment of a special master would grossly infringe eThekwini's constitutional "right as an organ of state to carry out its obligations". eThekwini is an organ of state and exists to serve – it is not the bearer of constitutional rights.

106. eThekwini accepts that it has already transferred the function to DWS, and therefore there can be no remaining complaint that to grant relief appointing a special master seriously impacts eThekwini's constitutional competence at all.

107. In any event, the critical need for a speedy resolution to the issue, with the assistance of a special master, is required in the exceptional circumstances of this case where for years now (preceding the floods, then exposed by the floods, and

now ongoing despite the floods and risk of further floods) eThekwini has shown itself constitutionally delinquent in properly resolving the water and sewerage crisis that threatens rights and livelihoods.

Ad paras 17 – 21; and 22.5

108. I have dealt above with the Action Plan. I have explained how and why it is being used by eThekwini to evade accountability and that this should not be permitted by the Court.

109. eThekwini has sought to use the Action Plan revision process in an attempt to revise its way out of being held to account.

Ad para 22.1

110. I dispute that "prior to the floods impairing the infrastructure, there were no serious complaints raised by the Democratic Alliance".

111. The complaints raised did not relate to "daily operations".

112. The Applicant in particular has been outspoken about this. In addition to what I have attached earlier in this affidavit, I attach as "**RA12**" and "**RA13**" two articles which appeared on the DA's website, the first titled "DA considering legal action as eThekwini municipality continues to destroy Durban harbour" and "DA oversight reveals pump stations a health hazard in eThekwini", both published in November 2021, well before the floods.

Ad para 22.3

113. I dispute that the beach openings have been "calculated and reasonable and rational at the time they were made".

Ad para 23

114. The conclusion and invitation eThekwini proposes falls to be rejected.

Ad paras 24 – 34

115. I note these allegations. To the extent they are relied on to excuse eThekwini's legal obligations, I submit they are irrelevant. eThekwini has had 24 years since the municipal demarcation process to improve its infrastructure, and as at 2007 and 2011 the United Nations recognised its water and sanitation services as exemplary.

Ad paras 35- 41

116. The challenges eThekwini identifies in these paragraphs, including how to spend resources, face every single local authority, not only in South Africa but around the world. I dispute that this is "fundamentally complex" or that this must be done at the expense of other service delivery objectives.

Ad para 42

117. I dispute that the Applicant had had any hand in the funding issues to which eThekwini makes reference.

Ad paras 43 – 49

118. eThekwini's abortive efforts to commission a report to prepare a master plan are hopelessly inadequate. By 2021, as I have shown above, waste water was already flowing into the UMngeni River and beaches were already being closed.

119. Planning for large public infrastructure projects must take place years in advance. This confirms the absence of a properly commissioned Master Plan by eThekwini.

Ad para 50

120. I dispute that the increase in population is an unexpected event which posed the “greatest challenge” to eThekwini.

121. This is not only to be expected and provisioned for (as migration and settlements are part of eThekwini’s function as a local authority). eThekwini cannot rely on its failure properly to plan in respect of migration and settlement to excuse its failure to discharge its sanitation functions.

Ad para 51

122. The infrastructure did not age overnight. Aging is not only to be expected but it is a consequence and function of the passage of time. I dispute that the floods are responsible for the failing infrastructure.

Ad paras 52 – 58

123. eThekwini provides no factual basis for the figures it uses in these paragraphs and its statements are so vague as to be nearly meaningless. It is not clear which infrastructure this refers to. It is not clear what “rehabilitate” means (replace or repair, and how is it different to maintenance).

124. eThekwini fails to distinguish between the various forms of “funding received from Government”. It is unclear what the “deficient in any funding from Government” is or why it arose.

125. I dispute that revenue collection is more challenging than in other municipalities or that challenges associated with revenue collection and competing prioritization of resources are unexpected. eThekwini recognizes it is not unique in this regard.

Ad paras 59 – 60

126. I am unable to make sense of these paragraphs. Reference to two loans, of R1.5 billion and R10 billion, is made. I am not sure if these are the same loan, where the loans were secured from, on what basis they were obtained, and where the figure of R5.7 billion comes from. None of this is explained by eThekwini so these figures are meaningless and unhelpful.

Ad paras 61 – 62

127. I have explained above why eThekwini's complaint regarding vandalism does not stand up to scrutiny. While vandalism has been relied on since at least 2021 (see the response from eThekwini to the Daily Maverick journalist attached above), addressing the scourge is not even prioritized in the Action Plan, as I have explained.

128. There is no explanation for why deploying security to the 27 waste water treatment works would not be affordable.

129. No evidence of any "request for assistance" from SAPS is provided, and no explanation about the cooperative governance steps which have been taken by eThekwini in the face of SAPS' inability to respond are provided, so I am unable to respond more meaningfully.

Ad paras 63 – 83

130. I note these allegations.

Ad para 84

I dispute that prior to the flood damage, only 3% of the sanitation and wastewater network infrastructure required refurbishment, replacement, modification or upgrade. That is entirely implausible based on eThekwini's own evidence in this affidavit about the costs of refurbishment costs, which is self-servingly said to be exorbitant.

Ad para 85

131. I dispute that prior to the flood damage, only 3% of the sanitation and wastewater network infrastructure required refurbishment, replacement, modification or upgrade.

Ad para 86

132. I dispute eThekwini's apparent appeal for leniency or excusing of its legal obligations on the basis that it is "confronted with having to deal with all of the above issues while at the same time dealing with its other service delivery obligations". This is the ordinary work of government.

Ad paras 87 – 93

133. I have dealt with the reliance on the floods above. I dispute anything in these paragraphs not consistent with what is stated above.

134. I do not dispute:

134.1. that the floods took place;

134.2. that they were 1:100 year storm events and that they were extremely damaging;

134.3. that there were provincial disasters and classified as such. The reason for this classification is so that national government can come to the assistance of the affected area, *inter alia* through the provision of additional funding to resolve the challenges caused by the disaster in question. It is clear from eThekwini's affidavit that it has failed to properly utilize this assistance.

Ad paras 93-101

135. In paragraph 94 of the answering affidavit, eThekwini provides a figure, being the "total estimated budget repair costs", in the amount of R2.2. billion. Again no evidence is provided in the affidavit to substantiate the figure, or explain what it is intended to cover (it is clearly not all applicable to infrastructure, and presumably not all applicable to waste water infrastructure). I am unable to comment more meaningfully given the vagueness of the statements in this paragraph.

136. A figure of R5.6 billion is provided (again without any explanation as to where this figure has been calculated and how).

137. I dispute that "no resources have been substantially forthcoming from national and provincial government despite submissions". eThekwini's own evidence is that national government, through COGTA, has provided it with hundreds of millions of rands.

138. In any event, it is not for national and provincial government to step forward with a cheque in eThekwini's name, but for eThekwini to make the application for funding. It must be properly motivated and properly calculated. As the affidavit bears out, eThekwini's calculations are incoherent and if national government has refused funding it is because it has been unable to make head or tail of the amount eThekwini is asking for. The "submissions by eThekwini Municipality" allegedly made for such funding have not been disclosed by eThekwini.

139. Nor have the "claims" allegedly submitted to eThekwini's infrastructure insurer. No explanation for this is provided, no specificity is provided as to when, how much

and in respect of what such insurance claims were made, what efforts have been made to obtain a claim decision and why it is taking so long. This is eThekwini's job – once it makes a claim, it must follow up on it.

Ad paras 103 – 106

140. Funding has been dealt with above.

141. eThekwini confirms, after reprioritizing the budget, R74 million was made available (and ought to have been spent on infrastructure).

142. eThekwini confirms that R185 million was made available to it by COGTA, albeit only R49 million for "repairs to sanitation infrastructure" (the rest was for water infrastructure repairs). This is hardly surprising given that eThekwini failed to prioritize sanitation infrastructure in 2022, as I have demonstrated above.

143. The "total cost of the repairs" is stated to be R5.6 billion. No evidence of this is provided. Plainly this figure is exorbitant and eThekwini has used the floods as a premise to claim a complete overhaul of its long overdue replacement costs. I dispute this figure. The floods repair funding has been, it appears, used opportunistically by eThekwini to gain access to funding to items it has long neglected.

Ad paras 107 – 110

144. Prioritization of funding is the normal work of government. It should be prioritized according to a transparent and rational system and response. eThekwini plainly has no such system in place.

145. This is also apparent from the unstructured work process eThekwini describes in these paragraphs of the affidavit. Repairs generate more repairs "along the same pipeline". Plainly this is inefficient and can be put down to nothing but a lack of proper planning.

Ad paras 111 – 112

146. Lawful procurement is not a “challenge”, as eThekwini suggests. It ensures value for money and that the billions of rands of public money eThekwini has gained access to are spent efficiently and in accordance with the law. Repair works should, in any event, already be catered for through an emergency panel of providers, meaning that repair works should be a simple process of instructing an already appointed panel member to undertake the emergency work.

147. Emergency and deviation procedure is an area rife in corruption and exploitation of state resources. I am aware of media reporting that “tanker mafia” are exploiting eThekwini’s failures, or themselves responsible for the vandalism and sabotage. I cannot comment on the accuracy of these media reports, but eThekwini is no doubt aware of them and if there is any truth to them, eThekwini is required to respond to organized corruption in an organized way, rather than in a hopelessly haphazard, disjointed manner than would enable exploitation by criminals. I am advised that the Constitutional Court has confirmed, albeit in a different context, that the state is not a helpless, rudderless agent, but must act properly, appropriately and responsibly. There is no evidence of any appropriate response by eThekwini to the challenges it faces through what it calls “vandalism”.

148. A special master could assist eThekwini with these challenges.

Ad para 113

149. The allegations in this paragraph are so vague I am unable to meaningfully respond to them. “The relevant infrastructure has been restored after the floods” is meaningless. Which infrastructure? How was the work prioritized? Was the response rational? eThekwini says nothing of any assistance in demonstrating that it has responded appropriately.

Ad paras 114 – 115

150. eThekwini takes issue with the Applicant's complaint that there is "still effluent flowing into the sea".

151. Overflow of untreated discharge into rivers and sea is not what can or should lawfully happen with "all WWPS' when they overflow". This is an emergency event under NEMA and a plan should be in place for this to be remediated appropriately, not only and if a "vacuum tanker" is available or if the volume is appropriate.

152. The absence of a meaningful emergency response plan by eThekwini is glaring. Developing robust emergency response plans will allow eThekwini to handle spills swiftly and mitigate harm. These plans include procedures for containment, cleanup, and communication with affected communities.

153. As I explained in the supplementary founding affidavit, no 'emergency incident' was reported by eThekwini at any stage, despite its admitted spillages and contamination of water sources. Reporting, containment and reporting are all required in terms of eThekwini's own internal policies (see para 103 of supplementary founding affidavit) and under statute. If no such reporting occurs, there is no possible record for outside accountability or public warning, and no ability for eThekwini to monitor why the incident happened, or how to remediate the problem.

Ad para 16

154. Blockages are addressed above. It is clear that if there is a significant number of blockages (eThekwini cites 230 per day without any evidence at all or any indication how this is a realistic figure), then eThekwini's response should prioritize clearing those blockages because of the obvious and admitted impact they cause: they cause overflow and runoff into water sources.

Ad paras 117 – 118

155. It is not clear what “breakdowns“ refers to in this paragraph. It is unclear on what basis eThekwini is optimistic that “functionality of the network will be increased to “optimal level”. The general trend in eThekwini under the present administration is that waste water infrastructure has gone from award-winning to dysfunctional.

Ad paras 122 – 128

156. eThekwini confirms that funding the amount of R1.5 billion has been made available by COGTA. This is for reconstruction and rehabilitation of all flood-related infrastructure damage, of which R228 million is for sanitation infrastructure. eThekwini complains this is not enough but provides no costing or financial forecasting.

157. It is not clear if this is in addition to the loan obtained by eThekwini and if they are intended to pay for the same thing.

158. It is not clear what the relevance of the R29 million budget for the Berea sewerage pipe condition assessment is.

Ad paras 129 – 132

159. I do not dispute that UMngeni has been employed by eThekwini to “oversee the operations and maintenance of ten waste water treatment works”.

160. It is entirely misleading to say that this enables resources to be redirected “to repairing and upgrading the remaining seventeen treatment works”, as the appointment of UMngeni will come at undisclosed costs.

161. eThekwini does not put up a copy of the contract in place between it and UMngeni, and does not disclose what the cost of this is to the taxpayer. Ultimately

the fiscus pays for eThekwini's inability to perform the function of local government and to outsourcing it to UMngeni.

162. I do not dispute that UMngeni has significantly better expertise and capabilities than eThekwini in restoring the waste water treatment works to a functional state. It is for that reason that UMngeni would be the ideal special master to be appointed by this Court.

Ad paras 133 – 139

163. eThekwini's inability to act with any haste is on full display. It will take three years for it to simply assess the infrastructure, let alone actually fix it. It has not even been able to fix the minor damage from the floods (which took place nearly two years ago), it is only 65% complete with those minor works. Bearing in mind that, as para 93 of eThekwini's affidavit, 82 out of 273 pump stations, and 6 out of 27 treatment plans were damaged to such an extent that they were inoperative and in need of urgent repairs, a 65% success rate after two years renders multiple pump stations and treatment plans inoperative to date.

164. The deponent, despite saying that the work "would already have been finalized by December 2023" coyly does not say that the works have in fact been completed, despite this affidavit being deposed to in February the following year. eThekwini's careful pleading is revealing: if it had been candid it would have put up evidence confirming and expressly said that that the works have been finalized, and when.

165. I am unable to discern what is intended to be meant by the distinction between "functional" and "operational" capacity, but eThekwini has also clearly adopted a perverse meaning of the word "operational" and "operating standards" in these paragraphs. It appears simply to mean that "effluent is being treated there". But eThekwini confirms that six out of nine – nearly half – of the damaged WWTW only function at between 20%-90% capacity.

166. The suggestion that 98% of WWPW are “operational” is therefore a meaningless figure, and only confirms that 2% are totally inoperative. It is then little wonder that these are overwhelmed when there is rainfall and spillages result.

Ad paras 140 – 141

167. I confirm that DWS has a constitutional and legislative duty to assess eThekwini’s compliance with the law. This does not obviate the need for eThekwini to comply with the law, or be scrutinized for such compliance.

Ad para 142

168. The conclusion eThekwini seeks to make in this paragraph is divorced from the facts which have preceded it. The facts – now common cause – confirm that eThekwini has hopelessly failed to maintain, repair and remediate the necessary infrastructure to prevent the release or flow of effluent.

Ad para 143

169. eThekwini admits that water courses have been impacted, causing environmental and health damage. However, it fails to recognize that this is caused not by the “flood devastation”, as it suggests, but by its own constitutional delinquency which the floods have sorely exposed.

Ad para 144

170. eThekwini also acknowledges that it has “endeavored to address the issues raised” in the multiple directives, pre-directives and compliance notices. As I have shown above, the issuing of such directives was common place well before the 2022 floods. eThekwini concedes it has “had challenges in ensuring timeous resolution to the plethora of moving elements”. The truth is that it has failed to comply with them, and fails in its Action Plan to register them as requiring compliance or guiding its conduct. That is why the declarative orders should be

granted. I am advised that section 172(1)(a) of the Constitution states: a court considering a constitutional matter within its power must declare "any law or conduct that is inconsistent with the Constitution" to be invalid to the extent of its inconsistency.

Ad paras 145 – 157; 161- 163

171. eThekwini claims that "AA8" demonstrates approval to open all of the beaches closed in terms of the 8 August directive. Annexure AA8 provides no proof of authorization to open in respect of Blue Lagoon. The Applicant therefore persists in its order declaring the re-opening of Blue Lagoon without authorization. Nothing in the record demonstrates that re-opening of beaches located in proximity to the Umgeni River Estuary (impacted by Johanna Road pumpstation) was duly authorized.

172. Moreover, there is no response to the complaint raised in the further supplementary affidavit that eThekwini opened the beach on 7 January 2022 based on "visual observation" when E.coli levels were in fact dangerously high (para 37) and the following day, beaches were closed again.

173. There are accordingly two examples of illegal beach e-openings.

174. eThekwini confirms that beach closures take place as and when E.coli readings reach certain points (500). eThekwini's haphazard approach means that there is no forewarning – tourists who travel to KwaZulu-Natal for a beach holiday cannot enter the water because of unscheduled closing of beaches, with no forewarning. eThekwini describes this as "an ongoing event", and eThekwini recognizes that beaches are "frequently closed and reopened as and when".

175. I dispute that eThekwini is "vigilant as to the water quality". The beach closures were at the direction of provincial departments, not due to eThekwini's transparency and the media reports to which I have made reference below confirm

that eThekwini failed to adopt transparent risk mitigatory measures until it was outed.

176. I dispute what eThekwini has stated regarding water safety in December 2023. 11 out of 23 bathing beaches were closed after high E.coli levels were detected during a joint water sampling conducted on 7 December 2023, as the holiday season kicked off. I attach eThekwini's results as "RA12".

177. This is also clear from eThekwini's own joint sampling as at 7 December 2023. It is set out below.

178. In any event, the "closure" of beaches is not a full solution. Firstly, as the above example demonstrates, readings taken on 7 December are published on 11 December. For at least four days, beach users have been exposed to dangerously high levels. Secondly, as media reports confirm, E.coli warnings do not stop scores of people flocking to the Durban beaches, particularly during the festive season (and particularly with eThekwini's last minute beach closures). This media report is attached as "RA13".

179. While beach closures are one facet of the risk management programme, they are not a long term solution. They destroy the hospitality industry in eThekwini, which is dependent on the beaches. This is reported in the attached article, in which FEDHASA and SA Tourism Association called for eThekwini to address the

sewerage crisis immediately. This fact is also recorded in multiple news articles,[3] attached as "**RA14**", "**RA15**" and "**RA16"** as well as a tourism report for the 2023 festive season, which states that tourism numbers in the city are yet to recover to pre covid levels (attached as "**RA17**")

180. There has been a decline of about 200 000 tourists in 2023 as compared to 2021, and this can be blamed squarely on the negative press that eThekwini has been getting due to its broken infrastructure which led to many beaches being a health hazard for tourists. Tourists voted with their feet and chose other tourism destinations.

181. I annex as "**RA18**" a copy of an affidavit deposed to by Duncan Heafield, Chairman of Umhlanga Tourism Association, confirming the impact on the tourism sector and will rely on these facts in the argument on this matter.

182. It is accordingly clear that the crisis has reached the point where if it continues without successful intervention, the crisis will cause irreparable harm to South Africa, economically and socially.

Ad paras 158 - 160

183. I note that eThekwini has sought to "partner" with Adopt-A-River.

184. I note that Adopt-A-River publicly stated in a media report, attached as "**RA19**" that it did not guarantee the quality of water on eThekwini beaches, following comments made by Mayor Kaunda that beaches are safe. The efforts by Adopt-A -River to publicly distance itself from the Mayor's statements are revealing.

3 https://www.iol.co.za/business-report/economy/leading-tourism-industry-groups-calls-on-government-to-take-immediate-action-on-durban-beaches-b2fc2de5-ce63-4dbf-bbc7-790a690097ef; https://www.dailymaverick.co.za/article/2024-01-04-durban-tourism-still-limping-following-lacklustre-holiday-season-while-kzn-overall-sees-uptick/; https://businesstech.co.za/news/lifestyle/737823/health-warning-these-beaches-are-closed-for-december/

185. I dispute that daily E.coli readings are available from eThekwini's testing. I confirm that I have checked the eThekwini beaches website[4] on 29 February 2024, and the test date which is available and on which the reading is based is from 19 February 2024, 10 days ago. I do not know, and eThekwini has not disclosed, what today's E.coli reading for eThekwini beaches is. Had eThekwini any actual proof of daily E.coli readings and daily tests being done, it would have put them up as evidence. It did not do so.

186. I refer to the supporting affidavit of Yogis Govender, who is a DA councilor. She confirms that she has, on numerous occasions requested daily testing, but eThekwini, specifically Dr. Gumede (who is eThekwini's head of community services) has told her, emphatically, that it was not feasible or necessary to do daily testing because of how testing changes day to day. Accordingly, the public do not, in fact, know the true, real-time, water quality as results (where they exist) are always for a past date and not in real time.

Ad paras 163; 168-171

187. It is clear that eThekwini is using beach closures as a means to escape its obligations to resolve the root cause of the sewerage crisis.

Paras 165 - 167

188. eThekwini attempts to place the blame for certain beach closures on the July unrest. It references Ohlanga Estuary which were closed after the chemical spill from the UPL warehouse. I pointed out earlier that eThekwini has not explained why the Multi-party stakeholder forum – on which it sits – in response to the UPL spill, is not a suitable example for inclusion of input from affected stakeholders in relation to the beach spills crisis that is the focus of this application. I also attach a recent report which confirms that National Government also believes that a collaborative approach is required to addressing this crisis – as attached "**RA20**".

[4] https://beachwater.durban.gov.za/#

Paras 172 – 179; 188- 189

189. eThekwini denies that it has breached its statutory obligations. It relies on the fact it created a “War Room”. It is described as involving (national) Water and Sanitation, COGTA (national and provincial) and EDTEA, in order to coordinate “a state response”. No state response has been disclosed or presented to the public, and there is no evidence of the War Room’s input into the Action Plans – or that there is a timetable or battle plan adopted by the War Room itself to remedy the problems that led to its creation.

190. It is not clear at all what the value is in the “War Room”, apart from providing a talking shop to discuss eThekwini’s non-compliance with directives and to fig-leaf the continuing failures on the ground and experienced daily by the public in relation to affected beaches.

191. The proof is in the pudding. It has produced no tangible or public results, despite presumably being a way for government departments to try and move eThekwini along in the knowledge that it is a constitutional delinquent. It has been entirely ineffective and is no substitute for a court ordered process. In any event, if the War Room were to be a meaningful participant in the process, then it would be willing to engage with a special master and this Court by facilitating open discussion and planning to report to the Court and the public on any urgent and directed steps that the War Room is taking to assist and encourage eThekwini towards a solution.

192. To the extent eThekwini attempts to rely on what was discussed at the “War Room” (we are not told what was discussed) as an excuse for its non-compliance with directives, it is mistaken about the legal status of directives and the legal consequences of non-compliance (which is not excused because organs of state get in a (War) “room” together to discuss the crisis.

Paras 179 - 186

193. These allegations are repetitive of what has been said already and have been dealt with. I incorporate my responses above, as are applicable.

194. eThekwini's distinction between a "complete repair" and an "operational repair" or "interim repair" is difficult to follow and appears entirely duplicative and inefficient.

Para 191

195. I dispute that the Action Plan was delivered in response to the directives issued (which directives and when?). The Action Plan says no such thing and contains no reference to the directives. The Action Plan was put up in response to this litigation and the ActionSA litigation (which called for the publication of an Action Plan by eThekwini).

Paras 192 – 194; para 208

196. eThekwini says that "non-compliance notices will continue to be received … because at intervals, various sections of the sanitation infrastructure will fail. This is expected" and it blames "inclement weather or the day-to-day problems which the system encounters".

197. It is not clear why eThekwini is optimistic that "this will become less frequent". The Action Plan, and "the …general plan to upgrade" is relied on to instill this optimism. eThekwini undertakes to get the repair works done within "a couple of years" – the vagueness and lack of immediacy is profound.

Paras 195 - 196

198. This is repetitive. Funding has been dealt with.

Paras 201 - 208

199. eThekwini states that the Action Plan is a "live document". eThekwini confirms that dates are "subject to alteration". I have dealt with this above. eThekwini puts

up a host of reasons why firm dates are not committed to – funding, procurement challenges, supplier challenges. None are availing.

Paras 209 - 2011

200. eThekwini's envisaged timelines are simply not acceptable. It undertakes to get the repair works done within a vaguely open-ended "a couple of years", and that it would, even without the floods, have taken 25 years "to upgrade the sanitation infrastructure", a timeline which is now thrown off course due to the floods without any indication of how long is now envisaged. The 25 year plan to upgrade infrastructure confirm the failure to maintain adequately the infrastructure, even prior to the floods.

Paras 211 - 216

201. eThekwini has put up another version of the Action Plan to that which was considered in the supplementary founding affidavit. The Action Plan was revised due to "concerns regarding the expediency with which the repairs were to be undertaken". That means that eThekwini was taking too long – one of the very complaints the Applicant raises in these proceedings.

202. eThekwini says the current plan is "currently under review" and will be revised again. Clearly eThekwini is content to have no formalised commitment and is happy to instead by guided by a shifting set of goalposts, which avoids scrutiny and discernible timeframes.

203. But this Action Plan, with its ever shifting goals, is not one which has not been created with any transparency. It has never even been presented to committee, Exco or the Municipal Council.

Ad paras 217 - 218

204. I dispute that there has been "success of these ongoing repairs" or "significant improvement of the water quality". The situation as it was at Durban in December

2023 is a recent example. And had there been such a significant improvement, eThekwini would have put up proper evidence thereof, including the last few months' test results and Ecoli levels. It cannot put up that evidence, no doubt, because of the truth. As I pointed out earlier with reliance on Talbot's reporting:

205. As at 26 February 2024, Point Beach and South Beach has dangerous levels of E.coli (I attached the reading previously as "**RA3(1)"**), as at 19 February 2024, Point, uShaka, South Beach, Battery Beach and Country Club Beach had dangerous levels of E.coli (I attached this as "**RA3(2)"**); and as at 12 February 2024, Northern Works, King Fisher Canoe Club and Riverside had dangerous levels of E.coli (I attached this as "**RA3(3)"**).

206. It is also plainly wrong and disingenuous to say that tourism has "improved" (a statement made without any evidence in support thereof, and again the vagaries of the word "improved" are notable). The tourism bodies do not believe that is so – their statements in the media are to the opposite effect. So too are the objective facts, Which I have referenced above.

207. The Applicant has called for a section 139 intervention into eThekwini over the sewerage crisis. I accordingly dispute that the Applicant's councillors and council members approved of eThekwini's unlawful approach to the crisis.

208. eThekwini has a R66bn budget. The breakdown of that budget does not prioritise water and sanitation funding. This is often why the Applicant's councilors votes against or abstained (the budget is not balanced).

209. The Applicant believes that the ongoing water crisis in eThekwini warrants immediate attention. They have called for a full parliamentary inquiry by the Portfolio Committee for Water and Sanitation. This inquiry aims to thoroughly investigate the escalating crisis in the municipality and hold relevant authorities accountable.

Ad paras 223 - 230

210. eThekwini appears to rely on the "War Room" as being "cooperative governance measures which are currently underway", as a means to deflect and protect itself from scrutiny.

211. Cooperative duties are owed as between organs of state, they are not a standard of deference shown to organs of state purporting to co-operate with one another. In any event, as I have said, eThekwini and the DWS are embroiled in litigation under Case Number D12738/22 because of eThekwini's various statutory breaches, which suggests that one organ of state – eThekwini – is not cooperating and has not complied.

Ad paras 231

212. eThekwini has provided *ad seriatim* responses to the founding and supplementary affidavits. These are largely repetitious of what is already contained in the affidavit and are dealt with above. I do not traverse each of these and will, for present purposes, only deal with those paragraphs warranting further consideration. I deny any response in eThekwini's affidavit which is inconsistent with the founding, supplementary or this affidavit.

Ad para 241

213. eThekwini disputes that the closure of beaches has crippled the economy, and instead blames the 2021 riots for doing so, and the damage caused by the floods. It seeks to escape any blame for this. I dispute this. I have referred above to what has been said by the tourism industry.

Ad para 242

214. eThekwini also disputes that there is any evidence of health-related incidents arising from the E.coli levels at the beaches. This from a litigant who simultaneously claims that it has repeatedly monitored beaches and closed them on account of

high E.coli levels. The Applicant shall refer this Court to the duties on organs of state to plead properly and not to resort to risible denials.

215. Aside from its own conduct and pleadings about the obvious need to close beaches where E.coli levels are too high, eThekwini cannot seriously contend that high E.coli levels are not a danger to the public. The World Health Organization has published a document titled “Guidelines for safe recreational water environments”. I attach the covering page and those pages applicable to faecal pollution and water quality as “**RA21**”. In para 4.2 it confirms the health effects associated with faeceal pollution, and the examples of pathogens, and the associated diseases, which arise from exposure to such water. These diseases include gastroenteritis, and dysentery, diarrhea, vomiting, and hepatitis. The report calls this link “biologically plausible”.

Ad paras 255 and 276

216. I note eThekwini’s concession that the disputes with EDTEA remain unresolved. EDTEA does not appear to have any participation in the “War Room”.

Ad para 267

217. I note that the DWS and eThekwini are pending the litigation and conducting “cooperative governance interventions”. This means that eThekwini is escaping the scrutiny of the Court in those proceedings and its statutory non-compliance is not being pursued, all while eThekwini seeks to rely on DSW’s “intimate involvement in the remedial process” to divert attention about eThekwini’s constitutional failures in these proceedings.

Ad paras 279 – 281; 295- 297

218. In these paragraphs, eThekwini attempts to sweep its non-compliance under the rug. It contends that the “issues raised by EDTEA” have become moot (without saying why or providing any evidence to the effect that EDTEA agrees). Had EDTEA written or agreed that the issues were resolved and that eThekwini was no

longer in violation of the law and its directives, then eThekwini would have provided that evidence clearly to this Court – it tellingly has not.

219. eThekwini further claims that the remedial work is "historical" (without saying that it is now complete, or providing any evidence to support the bald averment) and states that 90% of it has "now been resolved" (without saying what has been resolved and what has not, or providing any evidence to support the bald averment, including by EDTEA). It further alleges that there are no criminal charges currently proffered against eThekwini – again without any evidence to confirm so. It also states that some directives were issued at the time of the infrastructure damage, and the directives could not be dealt with expeditiously because of funding. It says the complaints "have been resolved", again without a jot of supporting evidence.

220. This approach too is irrational, because – even if eThekwini had demonstrated compliance with the directives in question, which it has not – it has failed to recognise the continuing need for and threat posed by extreme weather events, contrary to its own internal policies. Floods will happen again, and eThekwini will again be caught off-guards, to the prejudice of the people of eThekwini.

221. The modus operandi of eThekwini is clear: as explained in the founding affidavit, eThekwini kept the public, Exco and the Applicant in the dark about its unlawful conduct, for just long enough to be able to contend that the matter is moot by the time it is before a court on full papers, and after eThekwini frustrates the litigation through its foot-dragging.

222. eThekwini's allegations are cryptic in the extreme and have been framed so as to provide little to no information to this Court or the Applicant. None of the "reasons" relied on by eThekwini excuse compliance with the EDTEA directives. There can be no issue of mootness, only of compliance or non-compliance. Nowhere does eThekwini allege it complied with the directives or provide evidence that it has done so. This vague suggestion neither alleged nor demonstrates compliance and fails to even create a factual dispute as to the issue of breach of the EDTEA directives. Had eThekwini had any evidence itself or from EDTEA to confirm that the directives have been complied with, when that compliance

happened, and that EDTEA considers the complaints "resolved", then that evidence would have been put up. It has not been. In any event, even had the directives since been resolved, it does not remedy what was the non-compliance at the time, by virtue of having failed to resolve the problem when called upon to do so by the environmental authority. The unlawfulness does not erase itself because of alleged subsequent compliance and eThekwini's reasoning is contending that it does reveals that it has learned nothing from the directives.

Ad paras 283 - 285

223. This bald denial does not raise a genuine dispute of fact. There can be no suggestion that there is any factual dispute "which needs to be resolved" in the light of the bald denial of eThekwini in these paragraphs.

Ad paras 306 - 317

224. I note eThekwini's concession that discharge of wastewater sewerage into the ocean is permissible "where there is a need for an emergency discharge".

225. I dispute what eThekwini has alleged regarding combined sewerage outflow. While it is a recognised practice, eThekwini's repeated spillages are not an example of combined sewerage outflow. Combined sewerage outflow occurs in urban areas where a single sewer system handles both stormwater runoff (from rain) and wastewater* (from homes, businesses). This is because during heavy rainfall, the capacity of the sewer system can be exceeded. To prevent flooding, excess water (a mixture of stormwater and untreated wastewater) is discharged directly into nearby water bodies (rivers, lakes).

226. That is not what is happening in eThekwini. This is clear from the constant E.coli in the beach water, not only in times of rain. The E.coli is a recurring feature of breakdown, not a consequence of the weather conditions.

227. eThekwini recognizes that it cannot allow such outflow without “warning members of the public”, which does not occur (the only public recordal is when the beach is closed, as a result of downstream transmission).

228. That eThekwini believes this can lawfully continue shows why the Action Plan is fatally defective: it does not even try remedy the immediate unlawfulness, and confirms the need to grant urgent relief.

229. Instead, eThekwini should be expanding the capacity of water treatment works, such as the Hazelmere Water Treatment Works, can help meet the growing demand, or implementing a waste Water Quality Failure Response Plan which is crucial for managing effluent quality at wastewater treatment works. Such a plan is essential for Green Drop certification and should be part of a Waste Water Risk Abatement Plan.[5]

Ad paras 325 – 327

230. eThekwini has baldly denied breach of the statutory provisions.

Ad paras 332 - 334

231. eThekwini self-servingly suggests that the complaint raised is “now moot”, because more than 11 months has passed and because of the Action Plan. eThekwini has sought disingenuously to rely on its own failure to comply with the order of the court to deliver this affidavit, to excuse its unlawful conduct which is the subject of the application. Illegality and statutory breaches do not become “moot” unless they have been complied with (which is impossible, because compliance was timebound).

232. Section 31L(4) of NEMA provides that a person who received a compliance notice must comply with that notice within the time period stated in the notice. Accordingly there can be no escaping accountability on the basis of mootness,

[5] Wastewater treatment. https://www.wrc.org.za/wp-content/uploads/mdocs/TB%20inspection%20of%20wastewater%20treatment%20works.pdf.

even if the non-compliance has subsequently been resolved (a fact of which there is no evidence).

Ad para 335

233. I dispute that the answering affidavit demonstrates that eThekwini has not been apathetic and remiss. It confirms precisely that. It confirms that eThekwini is ongoingly constitutionally delinquent.

Ad para 347

234. eThekwini's attempt to side-step the obvious irrationality and fatal deficiencies in its Action Plan set out by the Applicant in the supplementary affidavit in these proceedings is on full display.

235. eThekwini contends that the defects in the Action Plan are "now moot" because the "Action Plan … has evolved". This is precisely why eThekwini favours an "evolving" Action Plan – so it can avoid accountability and detection of its non-compliance and so it can raise mootness to shield itself from accountability.

Ad paras 349 - 351

236. eThekwini's reliance on the Action Plan to excuse its non-compliance is unavailing.

Ad paras 361 – 362; 367

237. I dispute that the "only reason that the water and sanitation infrastructure form the subject of this application is because it currently falls within the cross hairs of the media", as alleged. The suggestion that this matter is concerned with electioneering is misplaced.

238. Rather, this topic is the subject of these proceedings and the subject of media and public outrage for the same reasons: flagrant, unapologetic non-compliance with the law by an organ of state which is well-resourced but nonetheless hopelessly ineffective in service delivery, all the while violating the rights of the public which it is meant to serve.

239. I dispute that the Applicant should "propose a solution". As I have explained, the application is about upholding the law. The Applicant has approached the court to ask it to exercise its supervisory jurisdiction to ensure that the law is observed, as it should be by eThekwini. That is a constitutional solution that is reflected in analogous court judgements in this division and others to which attention will be drawn at the hearing. There can be no doubt that rights enshrined in the Bills of Rights have been infringed and are continuing to be infringed, calling for this Court to consider how best to remedy that violation.

240. The details of how best to resolve the issues facing the Municipality can and should best to determined based on obtaining input on the proposed Action Plan, and/or alongside reports from the special master appointed by the Court. This would best foster trust and transparency, and recognise the dignity of citizens who are invested in the project. For inexplicable reasons, eThekwini is opposed to this, and opposed to having the court oversee its compliance with the Action Plan. It fails to explain why. It is, after all, eThekwini's own Action Plan. And should it be unable to honour commitments in the Action Plan, it can and should explain why, under oath, to this Court.

Ad paras 365-372

241. eThekwini is also resistant to the idea of building accountability measures into the Action Plan. Its resistance to this is also unexplained. Accountability is not only achieved through assistance of the CIIU and the SIU. And accountability does not amount to a "witch-hunt" – a regrettable term from a litigant that has repeatedly failed to play open cards with the public and this Court about the crisis and how it plans to resolve it.

242. I dispute that monitoring, compliance and enforcement are “internal to the Municipality”. This appears to be a suggestion that eThekwini will police itself in its compliance with the Action Plan. I dispute this and it is plainly meritless, and eThekwini’s track record of non-compliance and flouting of the law means that it simply cannot be taken seriously when it suggests that its own internal mechanisms are a substitute for accountable and transparent oversight demanded by the Constitution itself.

243. eThekwini says that the Action Plan was “not intended for Court litigation purposes”. Yet it is put up by eThekwini in litigation, as a basis for opposition to application against it. Yet when it is asked to implement that Action Plan, eThekwini distances itself from any reliance on the plan. eThekwini cannot approbate and reprobate: can the Action Plan be relied on in these proceedings? And if it can, it is intended for court purposes. And this Court can and should ensure eThekwini keeps to its commitments therein.

244. If indeed the Action Plan was for “intergovernmental and cooperative governance approaches”, then eThekwini has misused the Action Plan and waived any special treatment of the Action Plan for that purpose and relied on it in this litigation as a plan of action which it intends to undertake.

<u>Ad paras 381 – 383; para 425 - 431</u>

245. eThekwini recognizes that vandalism is an ongoing problem and disputes that it has been apathetic to it. eThekwini fails to provide a frank outline of its security measures. It says that it spends “vast amount of money on security” without saying what it guards and at what cost to it, or with any supporting evidence to confirm as much, or where such costing, timelines and plans appear in the Action Plan itself. This is fatal to the rationality of the plan, and its believeability.

246. I have dealt with this above. Vandalism measures should be part of the “coordinated response” in the Action Plan. This is not requiring eThekwini to “deal with problems in the future” or “resolve hypothetical problems” Vandalism is

identified by eThekwini as one of the main drivers of blockages and flooding. Not dealing with in it the Action Plan is irrational and self-defeating.

Ad paras 437 - 447

247. It is admitted by eThekwini in these paragraphs that it is operating with expired licences. However, according to eThekwini, it may operate contrary to the law because it is too big to fail: it says there "cannot be a situation where the waste water treatment works are closed whilst the application process is finalized".

248. eThekwini contends that "it has been agreed between the water authorities and the Regulator that the waste water treatment works will continue to operate until the licenses (sic) have been issued", and this is done "to avoid litigation to compel other State-run departments from fast-tracking the application process".

249. eThekwini has colluded with other organs of state to exempt eThekwini from the law. eThekwini glibly suggest that "disquiet must be raised with [the relevant authorities]" and that "the relevant authorities have taken no legal action or issued any directives against eThekwini". This confirms that eThekwini is operating in breach of the law and the declaratory relief must be granted against it.

250. It is clear that multiple applications have been made, many of which having been pending for months or years. Those applications are constructively refused – yet eThekwini and the DSW continue to act as if the law does not exist.

251. This too justifies the relief sought by the Applicant – including in relation to ensuring that eThekwini (through the oversight of the appointed Master) reports to this Court on the steps taken to bring eThekwini's conduct within the law, including by obtaining the lawfully-required licences to operate the waste water treatment works. eThekwini's contention that it has reached an agreement with the relevant regulator to act outside of the law confirms why such relief is called for and must be granted: eThekwini has no intention of observing the law unless the Court tells it to.

Ad para 458

252. I dispute that COGAT's disaster proclamation obviated the need for eThekwini to comply with its legal obligations in terms of NEMA. The suggestion is astounding, to say the least.

CONCLUSION FOR THE LATE FILING OF THIS AFFIDAVIT

253. In terms of the Court Directive of this Court annexed as "**RA1**", this affidavit was due to be filed on 23 February 2024. It is delivered 5 court days late, due to the voluminous nature of eThekwini's answering affidavit and the need to obtain instructions and responses to the multitude of excuses thrown up by eThekwini to the litigation (excuses that have clearly percolated and now been raised after literally months and months of failing to file on time).

254. A letter was addressed to eThekwini's attorneys of record, advising them of this and that a condonation prayer would be contained in this affidavit, to explain the minor delay. A copy of that letter is attached as "**RA22**".

255. There is no prejudice to the timetable in place in terms of the directive, The Applicant is scheduled to deliver heads of argument on 8 March 2024, which deadline it anticipates honouring.

256. I accordingly request condonation for the late filing of this affidavit.

WHEREFORE the Applicant prays for the relief as set out in the further amended Notice of Motion.

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DEPONENT

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

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COMMISSIONER OF OATHS