

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION.

Case No. 16732/2008

In the matter between :

THE MEC FOR TRANSPORT-KZN

Applicant

and

SHEPHISI DLAMINI AND 49 OTHERS

First to Fiftieth
Respondents

AB AHLALI BASEMJONDOLO
MOVEMENT SA

Fifty-First Respondent

eTHEKWINI MUNICIPALITY

Fifty-Second Respondent

FIRST TO FIFTIETH RESPONDENTS' ANSWERING AFFIDAVIT.

I, the undersigned, **BUZANI MAVIS CELE**, do hereby make oath and say :

1.

I am an adult female presently residing in the Siyanda Informal Settlement in Newlands East, KwaZulu-Natal. I live in shack number 56382 together with my husband and five children who are between the ages of 9 and 18 years.

2.

I am the twenty-third respondent in this application.

3.

The contents hereof are within my own personal knowledge and belief, save where the context indicates otherwise and are true and correct.

4.

Submissions of a legal nature are made based on the advice of my legal representatives.

THE RESPONDENTS:

5.

This affidavit is deposed to on behalf of myself and each of the respondents who appear on the list annexed hereto marked “A”.

6.

The 2nd, 3rd, 13th, 19th, 22nd, 30th, 42nd, 43rd, 49th and 50th respondents cited in the notice of motion (together with their families) could not be located. I assume that each of these respondents has moved out of Siyanda, either to a house on the Khulula property (details of which will be more fully described below), have moved to the transit camps, or have simply left their houses. As far as I am aware the shacks in which these respondents previously resided have now been demolished.

7.

I shall refer to the respondents appearing in annexure “A” on whose behalf this affidavit is prepared as “the respondents”.

8.

In addition to the respondents listed in annexure “A” there are other families living in shacks in Siyanda who have not been cited in the applicant’s eviction

application, nor have they been served with the notices referred to therein. I estimate that there are approximately ten such families, many of whom have been living in Siyanda since the late 1990's. I do not know why the applicant does not seek to evict them from their shacks which are also all within the Siyanda informal settlement.

9.

Certainly the applicant will be unable to resume construction of their road until such time as eviction proceedings against those additional families have been instituted by the applicant and brought to conclusion. The fact that the applicant has its facts wrong is indicative of the perfunctory and careless manner in which they have conducted their limited investigations into this matter. In addition to the omission of the aforesaid families, the applicant has failed to state the shack numbers of the respondents in these papers, the number of family members and dependants residing with the cited respondents and in many instances has stated incorrectly the ID numbers of the respondents. I am advised that the shack numbers and the number and identity of dependants are all material information which ought to be before this court in considering the relief sought in the application.

10.

Finally, I am advised that as construction cannot resume until the applicant has included the balance of families presently residing in Siyanda in this application there is no urgency to the present form of relief sought. Even if the above Honourable Court were to hand down Judgment in favour of the applicant ordering the present respondents to be evicted from the premises, it would be a **brutum fulmen**, as the applicant would still be unable to clear the shack settlement for construction. The families who have not been cited own shacks throughout the settlement and are not in any discrete portion of the property as would allow for construction to commence on the cleared portion.

11.

In the short time available to the respondents to prepare affidavits, there has been insufficient time to prepare confirmatory affidavits on behalf of the balance of the respondents. Should it be possible, we will attempt to obtain confirmatory affidavits from each of the other respondents prior to the hearing of this application.

**THE AGREEMENT TO RELOCATE THE RESPONDENTS TO THE
KHULULA PROPERTY :**

12.

All of the respondents have refused to be relocated to the transit camp referred to in the founding affidavits on the grounds of an agreement concluded between the Department of Transport (KwaZulu-Natal), through their duly appointed agent and ourselves in terms of which we would be relocated to brick houses in a development known as Khulula (hereinafter referred to as "the Khulula property").

13.

As far as I can recall, the respondents first met with the consultants appointed by the Department of Transport, being **Linda Masinga & Associates** on 24 April 2005. A copy of the notice calling us to that meeting is annexed hereto marked **“B”**.

14.

As I recall we met with **Linda Masinga** and **Nandi Mandela**. They informed us

that the Department intended to construct the Main Road 577, Corovoca in KwaDabeka through our community, which we were advised was in fact a road reserve. As a consequence, we were advised that all the Siyanda respondents would need to vacate the area.

15.

At that stage they requested that we move to RDP houses at kwaNgoqokazi which is some 45 kilometres from Siyanda. As none of the respondents could afford to live so far away (it being literally impossible for us to pay to travel to our places of employment) we explained our predicament to the representatives. They agreed to see if they could find us alternative accommodation.

16.

The respondents met with the representatives again on 31 July 2005. It was on this occasion that we were informed that houses would be provided for each of the respondents on the Khulula property. The houses would be brick houses and, we were advised, even better than RDP houses. A copy of the notice by **Linda Masinga & Associates** calling us to that meeting is annexed hereto marked “C”.

17.

In addition to the respondents herein (who number some 40 families) there were approximately 520 other families who formed part of this general relocation. It was agreed by the Department, in conjunction with the fifty-second respondent that of the 560 Siyanda respondents, 100 families would be moved to Mount Moriah, 247 families would be relocated to Ntuzuma C and the balance of 313 residents (40 of whom are the respondents herein) would be accommodated in brick houses on the Khulula property.

18.

The agreement that we would move to houses on the Khulula property was concluded orally between representatives of the Department of Transport, **alternatively** its appointed consultant or agent, **Linda Masinga & Associates** and representatives of the respondents. A portion of the agreement was recorded in writing, being the register of Siyanda residents which was taken at the time the agreement was concluded. This register recorded the names of each of the families in Siyanda and the houses to which they would be relocated, either in Mount Moriah, Ntuzuma C or Khulula.

19.

A copy of that list, to which I shall refer to as “the original register”, together with a list of persons to whom houses have been allocated, were requested from representatives of **Linda Masinga & Associates** and the fifty-second respondent at a meeting held on Thursday 15 January 2009. Both undertook to provide those lists to our legal representatives by Friday morning, 16 January 2009, as we were being called upon to file our affidavits by no later than Tuesday 20 January 2009.

The original register was only given to my attorney of record on Monday the 19th of January 2009 and the other list has still not been delivered.

20.

I annex hereto marked “**D**” a copy of the original register delivered to my attorneys by the applicant’s attorney. As is evident from a consideration thereof, all of the respondents, save for the 44th respondent, Mr Mdlalose are recorded on the register as being relocated to Khulula. As I understand the list (which was prepared by either the Department’s consultant’s or the fifty-second respondent) the seventh column headed “Area to be relocated to” records the area to which the family would be relocated. Where that area is blank, it signifies Khulula.

21.

At the time that the respondents were informed that we would be moving to the Khulula property, which is just a few hundred metres from Siyanda, we were informed that the Khulula property was earmarked exclusively for Siyanda respondents. It is only very recently, during the course of discussions with representatives of the fifty-second respondent that we have been informed that only a portion of the Khulula property, being exactly 313 houses, were allocated by the eThekweni Municipality to the Siyanda respondents. The balance of the Khulula property was to be developed for other competing land claimants, the identity and need of whom are presently unknown to me.

22.

Even on the assumption that only 313 houses were to be allocated to the Siyanda respondents, based on the original register each of the respondents would be accommodated in houses on the Khulula property.

23.

It was certainly the intention of the Department of Transport to ensure that each of the respondents who were being forced to vacate in order to accommodate the road, would be successfully relocated to brick houses. Given that we were to be allocated a permanent brick houses which was only a few hundred meters from Siyanda, the respondents accepted the proposed relocation on the understanding that the construction of the MR 577 was inevitable. I am advised and verily believe that in these circumstances, a valid and binding agreement was concluded between the Department of Transport and the respondents.

24.

Since the agreement was concluded, the 100 Siyanda residents allocated to Mount Moriah have been successfully relocated and the 247 residents allocated to Ntuzuma C have likewise moved off Siyanda and into their new brick homes.

25.

As far as I am aware, on vacation by each of these residents, their shacks were demolished to allow for incremental construction of the proposed road.

26.

The construction of the road itself has continued since inception in approximately 2004 as and when residents vacated.

27.

As regards the balance of 313 Siyanda residents allocated to the Khulula project, I understand that houses have, since 2006 houses have begun to be erected on the Khulula property for our relocation.

28.

At the time of the original register, each of the respondents was given a number and a card identifying them as a resident for whom alternative accommodation at one of the three sites would be eventually given. Some of the respondents were given numbers and cards earlier in approximately 1999 when they were promised a house in the event of a road construction. It was however in 2005 that it was confirmed that this house would be in Siyanda.

29.

As the houses on the Khulula property were built, the remaining 313 Siyanda respondents were gradually relocated from Siyanda to their allocated houses on the Khulula property. As with the earlier relocations, the shacks belonging to relocated respondents were demolished by the fifty-second respondent to allow for further road construction.

30.

I presently am not in possession of the list prepared by the fifty-second respondent which records the names of the families who actually took occupation of the 313 Khulula houses. The understanding in terms of the agreement was always that those 313 houses were built specifically for the remaining 313 Siyanda residents recorded on the register.

31.

Notwithstanding our binding agreement, on 6 December 2008, and without any warning by the Department of Transport or the fifty-second respondent, the respondents were served with a notice by the Sheriff of the above Honourable Court, which is annexure "F" to the founding affidavit. The notice directed the respondents to vacate their houses by Tuesday 9 December 2008 at 16h00 and to

move to a transit camp on Richmond Farm.

32.

This transit camp is referred to on page 18 of the notice at sub-paragraphs (e) and (f) as "temporal transit houses" and "temporal houses". It is not correct to say that the temporal houses were situated at Siyanda or Ntuzuma. The transit camps are actually in Richmond Farm, which is approximately 1,5 kilometres from Siyanda.

33.

It is also incorrect to refer to these structures as "houses". As is evident from the photographs annexed to the founding affidavit marked annexure "D", the temporal "houses" are in fact masonite blocks, which are approximately 4 x 5 metres, being a total of 20m² in size. The units are divided into 2 halves each of which is 10 m². They are not houses, but resemble containers, as one would see on a ship, save that they are tiny.

34.

I am advised that the national standard throughout the country for all government subsidized houses is a minimum of 30m². The units in the transit camp are two thirds of the size of government houses. Many of the respondents' families have 6 or 7 members and many of our children are grown up. It would be physically impossible for the respondents' families to move into such tiny units.

35.

Compared to our present houses in Siyanda, and more importantly, compared to the double storey houses which we have been allocated on the Khulula property, the 20m² masonite units in the transit camps are tiny, cramped and baking hot in summer and freezing in winter. The respondents presently live, at the very least, in 1-roomed houses in Siyanda and at most, 4 to 5-roomed houses. Our houses are comfortable and have been built to accommodate our needs and requirements as far as possible with the resources available to us. Many of the respondents also have gardens and communal areas which are not present in the transit camp.

36.

At the hearing of this application we will request the above Honourable Court to attend an **inspection-in-loco**, both of our present houses in Siyanda, the proposed

transit camp on the Richmond Farm and the houses originally allocated for us on the Khulula property to allow the above Honourable Court to see for itself the varying standards of accommodation represented by these three communities.

37.

The notice served on us by the Sheriff made no mention of our original relocation to the Khulula property and gave no explanation as to why the respondents were no longer being relocated to those brick houses, but being forced to move into the transit camps.

38.

Moreover, since the original agreement in terms of which we agreed to move to the Khulula property, we have never been properly consulted by representatives of the Department of Transport and the fifty-second respondent regarding a proposed move to a transit camps, albeit apparently temporary relocation. It was only during September or October 2008 that we were informed that the Khulula property was full and we would have to go to a transit camp.

39.

Had they consulted with us, we would have explained, at the very least, the following :

- (a) The transit camps are cold in winter and hot in summer, which render them uninhabitable.
- (b) The transit camp accommodation is cramped and tiny, much tinier than our present accommodation.
- (c) The individual container-type structures on the transit camps are arranged on top of each other, which means that respondents are forced to live cheek by jowl.
- (d) The transit camps are unhygienic and ablution facilities are shared.
- (e) Transport to central locations is far more difficult from the transit camps than from Siyanda or the Khulula project.
- (f) Many of the transit camps were already accommodated by

unlawful occupants who had threatened members of the Siyanda community, rendering us terrified to step near the transit camps.

- (g) We feared that once we had been moved to the transit camps, we would simply be left there.

40.

It is of fundamental importance to all the members of Siyanda, as it is for all homeless people in South Africa, to be given a permanent site on which they may settle and in future seek to upgrade and develop according to their needs and requirements. Being moved to transit camps and being forced to wait for the allocation of alternative land and the erection of proposed houses will probably years. We all fear that once we have been moved to the transit camps we will fall off the radar as the Department of Transport will have achieved their aim, being to clear the way to build their new road.

41.

In the Western Cape communities moved to the Happy Valley transit camp have remained there for 12 years despite being assured that the camp was temporary. More recently members of the Delft community were likewise moved to transit camps without any hope of ultimately being relocated to permanent sites. We

had hoped to obtain a report regarding the poor conditions which are generally found in transit camps but in the limited time available, we have been unable to do so. With the leave of the above Honourable Court, we hope to be able to put up such a report before the hearing of this application.

42.

Notwithstanding the condition and the social problems attendant on transit camps, in this instance each of the respondents herein (save for the 44th respondent) was given an undertaking by the Department of Transport that should they move from Siyanda, they would be relocated to houses on the Khulula property and not to transit camps.

43.

The houses on the Khulula property are double-storied brick houses with 4 rooms. They are more comfortable than RDP houses and we were always advised represented compensated for being forced to leave the Siyanda settlement.

BREACH OF THE RELOCATION AGREEMENT:

44.

Despite the agreement with the Department of Transport, none of the respondents have been allocated houses on Khulula but instead are being forced into transit camps. We are advised by representatives of the fifty-second respondent and the Department of Transport that the 313 houses on the Khulula property have now been occupied and there is no other alternative accommodation for the respondents.

45.

From the investigations which we have been able to undertake, we have learnt that many of the 313 houses on the Khulula property have been occupied by outsiders to the Siyanda settlement. I do not know how this came to pass. I would have thought that the allocation of each of the Khulula houses and the handing over of keys to the property would have been done in accordance with the original register of Siyanda respondents to whom those houses were specifically allocated. It appears that that exercise was not done with sufficient care, as the respondents herein were not allocated those houses.

46.

We raised the fact that our houses had been given to outsiders with the applicant's consultants during one of our meetings towards the end of last year. It was agreed by the Consultants that some of the houses had been mis-allocated and they undertook to conduct an investigation to determine how many had been incorrectly handed over. I think that it was Nandi Mandela who undertook to investigate the matter and revert to us in one month. When she did revert to us, she confirmed that it appeared that there were mis-allocations but we had no choice but to move the transit camps to allow the road to be built.

47.

Once the fifty-second respondent delivers a copy of the list of families who occupy the 313 houses in Khulula we will at that stage be in a position to compare the two lists and identify the families to whom those houses were incorrectly allocated.

48.

That mistake is, with respect to the Department's consultants not the problem of

the respondents, but an error which either state department needs to remedy. I am advised that the error by the Department of Transport constitutes a breach of their agreement with the respondents. The respondents do not accept that breach and ask the applicant to comply with its obligations as set forth in the agreement. To the extent that it may be necessary, an application will be brought simultaneously with the applicant's one for an order of specific performance by the applicant.

49.

While we understand the inevitability of the construction of the MR 577, we refuse to be forced into transit camps for an indefinite period while the person responsible investigates the mis-allocation of houses and brings about their eviction. Living in the transit camps for a finite period in the knowledge that by a specific date we will be let into our Khulula homes may be more tolerable, but the members of the Department of Transport and the fifth-second respondent have refused to commit themselves to any time period.

50.

I respectfully submit that had the representatives of the Department of Transport and the fifty-second respondent entered into meaningful negotiations and

engagement with the respondents prior to launching these proceedings, the mis-allocation of Khulula houses would have been identified and cleared up, rendering the present application unnecessary. We have done everything possible to make our own investigations regarding the mis-allocation of houses, but have been met with threats and violent aggression by those families to whom houses have been mis-allocated. We are now too afraid to conduct further investigations in this regard.

51.

The fact that the applicant and the fifty-second respondent refused to negotiate with us and neglected their legal obligation to do so, is the only reason why this application is brought on an urgent basis. Had they got their house in order and allocated the houses according to the original register, or conducted investigations to clarify the mis-allocation of houses, this situation would not have arisen.

52.

In the circumstances, I respectfully submit that the purported urgency of this application is self-created.

53.

The deponent to the founding affidavit states that the applicant is losing some R65 000,00 per day as a result of the delay in the construction of the MR 577. Nowhere is this alleged figure explained by reference to an agreement with the road constructors or any document whatsoever. Indeed, the amount is simply inserted into the affidavit without any indication of the person to whom such moneys will be paid, the cause of the alleged damages, when such damages would have arisen, whether such amount is negotiable, whether such amounts have already been paid and to whom and precise details of what portion of the road are causing such proposed damages.

54.

In the circumstances, I respectfully submit that the alleged per day cost to the applicant is without substance or foundation. This is all the more so for the reasons which I have stated above, that the relief sought herein, in the absence of citing the other Siyanda residents, will in any event be a **brutum fulmen**.

55.

Finally, as regards the urgency of this application, I draw to the above Honourable Court's attention the fact that the First Order Prayed granted by the Honourable Madam Justice Bolton on 19 December 2008, was granted in the absence of and without service to the first to fifty-first respondents herein.

56.

At this stage, the applicant was well aware that the fifty-first respondent was assisting the first to fiftieth respondents and was in possession of the details of the fifty first respondent and was equally aware of the details of the first to fiftieth respondents. No reason is set forth as to how it came to pass that the First Order Prayed was granted in this fashion.

57.

The Notice of Motion and the founding affidavit were served on the respondents on 19 December 2008, informing us to appear before the above Honourable Court on 9 January 2009. In terms of page 12 of the Notice of Motion, it was on 9 January 2009 that the applicant would seek to obtain an Order authorising the

implementation of the directions set forth in annexure "X" to the Notice of Motion in accordance with the provisions of Section 4 (2) and Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (hereinafter referred to as "PIE").

58.

I do not understand, and nor do my legal representatives, this irregular state of proceedings. It is furthermore not explained in the founding affidavit save in paragraph 42(c) where an order of condonation is sought.

59.

As a result of being served with these notices on 19 December 2008, the respondents have been forced to obtain advice over the Christmas period and to prepare these affidavits under extreme pressure. The above Honourable Court will appreciate that there are 50 individual families who constitute the respondents in this application and, with the resources available to us, we have been unable, in the time given to us, to gather sufficient information regarding their individual needs and requirements as ought to be taken into account by the above Honourable Court in considering an application brought in terms of PIE.

60.

Again, in my respectful submission, a duty rests on the applicant as an organ of State as defined in PIE, to itself investigate and compile a report on the needs of the individual families sought to be evicted prior to instituting application proceedings in terms of PIE. The fact that the applicant has failed to do so, should not cause the respondents to be prejudiced by being given insufficient time to prepare their affidavits.

61.

In this regard, I respectfully request the above Honourable Court to condone and to allow the respondents to supplement this answering affidavit, should they wish to in due course, with a further affidavit or affidavits prior to the hearing of this application, setting forth the details and needs of each of the respondents herein.

62.

I shall now deal with the substance of the founding affidavit of **Willie Steve Mkasi**, which is found at pages 29 to 88 of the indexed papers.

63.

AD PARAGRAPHS 1 AND 2 :

I have no personal knowledge of the position of the deponent or the location of his offices.

64.

In the absence of a Resolution on behalf of the applicant, I deny that the deponent is duly authorised to depose to the affidavit on behalf of the applicant, or to institute these proceedings.

65.

AD PARAGRAPH 3 :

I deny that the deponent has personal knowledge of the material facts contained in his founding affidavit. These facts have, however, been confirmed, in part, in the confirmatory affidavits of **Linda Henry Masinga** and **Nandi Mandela**.

66.

AD PARAGRAPH 4 (a) :

The contents hereof are admitted.

67.

AD PARAGRAPH 4 (b) :

While I accept that strictly speaking the applicant has not been delegated with a duty to provide houses for any person, as an organ of State as defined in PIE, it is obliged to comply with all the provisions of PIE and the case law emanating from PIE by, **inter alia**, appointing an appropriate organ of State to effect re-allocations where necessary, by overseeing such re-allocations, by ensuring that negotiations and engagement with the communities take place and by fulfilling each of the requirements set forth in Section 6 of PIE in bringing applications for eviction.

68.

AD PARAGRAPH 4 (c) :

The contents hereof are noted.

69.

AD PARAGRAPH 5 :

It is correct that the first to fiftieth respondents all presently reside in the Siyanda Informal Settlement. Most of the respondents moved to Siyanda in approximately 1995. We do not have alternative accommodation and in the absence of assistance by the State, we took it upon ourselves to move onto this vacant property and erect houses.

70.

It is correct that our houses prevent the construction of the MR 577 being built on the road reserve.

71.

AD PARAGRAPH 6 :

The contents hereof are noted. This affidavit is deposed to on behalf of the respondents listed in annexure "A" hereto.

72.

AD PARAGRAPH 7 :

It is correct that the fifty-first respondent is the organisation known as **Abahlali Basemjondolo**. The fifty-first respondent is a non profit organisation which began in 2005. It consists of shack dwellers throughout the country and its leadership is elected from its membership. The aim of the organisation is to advance and protect the interests of shack dwellers.

73.

In this case, the fifty first respondent, who I shall hereinafter refer to as "**Abahlali**", is assisting the first to fiftieth respondents by acting as a representative and by informing us of the options available to us, both from a practical point of view in relation to alternative accommodation and from a legal view in relation to the provisions of PIE.

74.

AD PARAGRAPH 8 :

The contents hereof are admitted.

75.

Given that the fifty-second respondent has been practically involved in this relocation for some years and has intimate knowledge of the allocation of houses, the availability of alternative accommodation and the implementation of the relocation, I respectfully submit that this application cannot be heard without the input by the fifty-second respondent. This is all the more so, given the obligations of the fifty-second respondent in applications brought in terms of PIE.

76.

To date, no affidavits have been prepared by or on behalf of the fifty-second respondent.

77.

AD PARAGRAPH 9 (a) AND (c) :

The contents of these two sub-paragraphs appear to deal with the same substance.

The applicant appears to be seeking an Order that we be evicted from our present structures and moved to temporal transit camps. This order does not however appear on the Notice of Motion.

78.

AD PARAGRAPH 9 (b) :

At no stage has any member of the fifty-first respondent threatened or interfered with the contractors of professionals dealing with the construction of the road, or the relocation of the respondents. Given that such threats or action has never taken place and given the paucity of facts in support of such an Order, I deny that this Order is necessary. It is also not set forth in the Notice of Motion.

79.

As the fifty-first respondent has no intention of conducting any of the acts mentioned herein, we do not oppose this Order being granted. However, we vigorously deny that it has any factual foundation.

80.

AD PARAGRAPH 9 (d) :

The contents hereof are noted. As with the other “prayers” this does not appear in the Notice of Motion.

81.

AD PARAGRAPHS 10 TO 13 :

The contents hereof are outside of my personal knowledge and I simply note what is stated herein by the deponent.

82.

AD PARAGRAPH 14 :

The 560 families referred to herein are those to which I have already referred in the first part of this affidavit.

83.

AD PARAGRAPHS 15 AND 16 :

The contents hereof are noted.

84.

AD PARAGRAPH 17 :

Save to deny that the applicant has consulted with the respondents, the contents hereof are noted. While I admit that various meetings have been held between representatives of the Department of Transport consultants, **Linda Masinga & Associates** and members of our local community, none of these meetings constituted "consulting". Rather, we were given instructions and directions about where we would be moved and when. None of the representatives have allowed us sufficient opportunity to represent our needs and requirements, or to put forward proposals for our re-allocation. I annex hereto marked "E" and "F" a copy of the minutes of a meeting held on 11 February 2007 at the VN Naik School for the Deaf in Newlands East and a report which I think has been prepared by the fifty-second respondent. As is evident from those documents none of the concerns of the Siyanda residents were considered in any meaningful way.

85.

There were other meetings which took place during 2008. Most of these meetings were to discuss problems with the houses in Khulula. Originally we were promised a double storey house per family but during 2008 as the houses filled up, we were told that two families would have to share one house. We had many discussions about this but the consultants were not prepared to budge.

86.

The Department's lack of meaningful engagement is most acute in relation to the run-up to the decision to move us to the transit camps where absolutely no consultation has taken place at all. As referred to above, we were simply told that the houses in Khulula were full and we had no choice but to move to the transit camps.

87.

AD PARAGRAPH 18 (a) :

I note the photographs annexed to the founding affidavit, annexure "C". The black and white photocopies annexed to our copy of the Notice of Motion are indiscernible. As indicated above, a request will be made by the above Honourable Court to conduct an **inspection-in-loco** at which time each of the various houses may be seen with the naked eye.

88.

I deny that the houses on the Khulula property could not accommodate all the families affected by the Phase 2 construction. As set out above, all of the 560

families were allocated at house at one or other of the developments. 313 of the Khulula houses were allocated to the remaining 313 Siyanda families.

89.

AD PARAGRAPH 18 (b) :

I have no knowledge of the water leaks referred to in the photographs annexed to the founding affidavit as annexure "C". Every once in a while various problems will occur in any informal settlement. We do the best we can to make our community comfortable, clean, hygienic and safe. I deny any implication that the present Siyanda community is a slum or an unlivable environment. On the contrary, we, as respondents of the Siyanda settlement, would far rather remain in our own built houses than move to the transit camps.

90.

AD PARAGRAPH 18 (c) :

I understand that the applicant has erected the transit camps to provide alternative accommodation in order to finish its road construction. The fact that it was forced to erect these camps was however only due to its representatives failing to allocate the brick houses in Khulula to the original Siyanda respondents to whom

those houses were promised. It is not our fault that this error took place or that we have not been given the houses which we agreed to.

91.

I note that the deponent states that the delays in the road construction are being caused **primarily** by the presence of the respondents in the road reserve. The deponent does not indicate the other reasons for the delay in construction and it is accordingly impossible to appreciate the extent to which we are in fact hampering further construction.

92.

I note the photographs at annexure "D" to the founding affidavit. These photographs, like the earlier ones, annexure "C", are indiscernible and certainly do not give any indication of the nature of the transit camps. I look forward to the conduct of the **inspection-in-loco** in order for the above Honourable Court to understand the kinds of accommodation which the Department of Transport is attempting to force us into.

93.

AD PARAGRAPH 19 (a) :

I have no knowledge of the contents hereof, but simply note them.

94.

AD PARAGRAPH 19 (b) :

It is correct that **Linda Masinga & Associates** did, to the best of my knowledge, compile a register of persons in Siyanda who would be re-allocated. It is this register which is annexed hereto marked “**D**”.

95.

I am surprised that that register was not annexed to the founding affidavit, as it records precisely to whom alternative houses at the Khulula property were promised. As stated above, we are yet to receive a copy of the list or persons to whom houses in Khulula have actually be allocated.

96.

AD PARAGRAPH 19 (c) :

While I accept that the consultants conducted shack counts and head counts, I deny that comprehension consultations were performed. Again, no documentary evidence has been put up in support of these consultations and no information is

contained in the affidavit regarding, **inter alia**, the circumstances of the first to fiftieth respondents, their income sources, if any, their dependents and other persons residing with them in their houses, their access to alternative accommodation, the length of time that they have been residing in Siyanda, whether they are households headed by women (or households headed by children) and who of the respondents may be regarded as members of society who are particularly vulnerable. Had the consultants conducted such an investigation they would have found that at least half of the respondents' families are headed by women and most of them are too large to fit into the units in the transit camps.

97.

I deny that the relocation has been successful in relation to the Khulula property. Had comprehensive consultations in fact been performed and had the exercise of allocating the houses on the Khulula property been properly conducted, the areas which have caused this application to be launched might not have occurred.

98.

AD PARAGRAPH 19 (d) :

I have no knowledge of the process followed for the other phases of the relocation.

99.

AD PARAGRAPH 20 (a) :

As far as I am aware, the construction of the MR 577 commenced in 2004. I have no personal knowledge of which occupants were relocated and note the balance contained in this paragraph.

100.

AD PARAGRAPH 20 (b) :

The contents hereof are noted. I accept that we are living in an area which obstructs further construction of the road, but deny that our presence "poses danger to our lives". The Department of Transport may not construct the road, or bulldoze our houses until a PIE application has been instituted. Our community is perfectly safe in its present position and, as far as I am aware, none of the construction has caused any damage to any person or property in the Siyanda

community to date.

101.

AD PARAGRAPHS 20 (c) AND (d) :

I have no knowledge of the contents hereof which, in any event, are irrelevant to this application.

102.

AD PARAGRAPH 21 :

The contents hereof have already been dealt with above.

103.

AD PARAGRAPHS 22 & 23 :

While I accept that the applicant sought to demolish the Siyanda shacks as soon as families were relocated, I do not understand that this has taken place in every instance. I say this as I understand that many of the families who are occupying

our houses on the Khulula property incorrectly, did so by moving into the vacated shacks in Siyanda and holding themselves out as original Siyanda respondents. In doing so, and as a result of the eThekweni Municipality, **alternatively Linda Masinga & Associates** failing to keep proper records of the allocation of houses, these outsiders have been moved into houses allocated for us.

104.

As regards ablution facilities, the transit camp in Richmond Farm has just two containers which function as shared ablution blocks. One block is allocated to women and the other to men. The blocks have taps, basins and showers.

105.

Based on an average of 6 family members, the total number of people who the applicant is seeking to relocate to the transit camps is 240 (being the 40 respondents x 6 family members). I do not know how the applicant expects the respondents and their families to share these facilities.

106.

In Siyanda each family has its own toilet. In the absence of assistance from the fifty-second respondent, each of these toilets have been built by the community members. They comprise long drops located in outbuildings separate from the houses. Chemicals are purchased by the respondents and used to keep the toilets, which have proper toilet seats, clean and hygienic.

107.

In addition to the toilets, the respondents have two well located standpipes from which water is collected. The respondents heat the water in their shacks and are able to bath privately in their own shacks.

108.

Compared to the tiny communal units proposed by the applicant in the transit camps, the respondents would far rather remain in Siyanda where they have their own ablution facilities which are private and dignified.

109.

Given our meagre incomes and our relatively basic facilities, should better

facilities be given to us, we would jump at the opportunity. The fact of the matter is that the transit camps referred to in this application do not represent such an opportunity.

110.

AD PARAGRAPH 24 :

The contents hereof are denied. At no stage has **Abahlali** ever sought to disrupt construction or threaten workers on site to resist the relocation to the transit camps. The only actions taken by Abahlali in this matter were peaceful demonstrations, the issuing of press statements and the delivery of a memorandum to the applicant herein and a letter to the State Attorney.

111.

AD PARAGRAPH 25 :

The contents hereof are correct. We were threatened with violence by those who invaded the transit camps to such an extent that notwithstanding the eviction proceedings by the Department of Transport, we are still fearful of the consequences of moving onto the property.

112.

AD PARAGRAPH 26 :

I have no personal knowledge of whether the applicant successfully brought eviction proceedings against the persons referred to herein under Case No. 15838/2008. Nor do I know whether such persons have vacated the transit camps. All of the respondents are still fearful of reprisals by the persons alleged to have been evicted. I do not see how any organ of State can expect us to be relocated to any alternative accommodation on fear of being attacked by former respondents.

113.

I have no idea who the notices referred to herein were served on.

114.

AD PARAGRAPH 27 :

It is correct that approximately 16 families have moved to the transit camps. I have no knowledge who these families are, or whether they too were promised houses on the Khulula property.

115.

It is also correct that all of the respondents being the respondents in this application have refused to move to the transit camps for the reasons which I have already set out above. I deny that the consultants pleaded with us or that we were hostile.

116.

To the extent that any animosity prevailed, it was as a consequence of the applicant's and the fifty-second respondent's failure to consult with us prior to ordering us to move to transit camps. Given their lack of concern for us, we were understandably not willing to move without our circumstances being taken into account.

117.

Again, I deny that **Abahlali** has ever threatened any contractors and that they left the site was their own prerogative. Had any of the representatives been amenable to engaging with us, we would have openly welcomed such suggestion and put our suggestions and requirements on the table. No such invitation was ever made.

118.

I deny that any negotiations took place on 12 December 2008.

119.

It is, in any event, unrealistic to have expected the road reserve to be free from occupation by 12 January 2009, as this application will take much longer to finalise.

120.

AD PARAGRAPH 28 :

It is correct that **Abahlali** prepared the letter which is annexed to the founding affidavit marked annexure "H". I draw the above Honourable Court's attention to page 2 of annexure "H" where **Abahlali** expressly invites the applicant to negotiate with the respondents. I confirm the contents of that letter which expressed the sentiments of the respondents and our lack of trust in promises made by the Department which have, as is evident from what is stated therein and above in this affidavit, consistently been broken. The Department of Transport did not take up the invitation to negotiate but have preferred to come to court in

these proceedings. Further argument with regard to their duty to negotiate meaningfully will be given at the hearing of this application.

121.

AD PARAGRAPH 29 :

I deny that the allegations contained in the letter are false. The original register which has been annexed to this affidavit marked “D” clearly shows that houses on the Khulula property must have been given to people other than the original Siyanda respondents (including the respondents herein). Whether this was done with fraudulent intentions or by innocent error, is neither here nor there. The fact remains that the applicant is in breach of its agreement with us, the houses which we agreed to be relocated to having not been made available to us, but given to outsiders.

122.

While the applicant alleges that they are temporary in nature, no indications have been given of the period in which we will be forced to remain in those transit camps while alternative land is located. By any realistic estimation, it will be

years before the fifty-second respondent is able to locate alternative vacant land and build houses for the respondents. In any event, by virtue of our agreement with the Department of Transport, we are entitled to move onto the Khulula property and not into transit camps.

123.

AD PARAGRAPH 30 :

For all the reasons stated above, I deny the contents hereof. The transit camps proposed by the Department of Transport are much smaller than our present houses, are further away from public transport and I deny that there is sufficient space to plant gardens such as those presently found in Siyanda, or to run businesses from our houses which many of the respondents do from their homes in Siyanda. In any event, what is the point of planting gardens if the respondents do not know how long they will remain in the transit camps.

124.

I deny that there will be minimal inconvenience to the respondents herein. At present the respondents are able to catch a bus from Siyanda at a cost of R6,00 and a taxi for R7,00. There is no bus from the transit camp and the taxi fare is R8,00. While this does not seem significant to some, for the respondents it really

is.

125.

AD PARAGRAPH 31 :

We accept that the construction of the road is in the public interest and we have always acknowledged that we will inevitably need to move as a consequence of the road. That the applicant has incurred the costs in bringing this application is due to its own errors in failing to relocate us in accordance with our original agreement. I deny that our conduct has been unreasonable, given the condition of the transit camps as opposed to our original promise.

126.

AD PARAGRAPH 32 :

I have already dealt with the bulk of the contents hereof. I deny that our demand for permanent houses is irrational, unreasonable or misplaced. If anything, given the express agreement with the Department of Transport, our refusal to move to the transit camps is completely justified. Moreover, had the Department of

Transport or the eThekweni Municipality, at the very least, given us time frames in which we would be expected to endure the transit camps, we would have been willing to relocate to them pending the provision of brick houses in Khulula.

127.

AD PARAGRAPH 33 :

As stated above, no details are given as to the alleged penalty in the amount of R65 000,00 which the Department of Transport purports to be incurring every day. In the absence of such information, I deny that the above Honourable Court should take this into account.

128.

AD PARAGRAPH 34 :

I deny that the history of our original occupation of the property is relevant to this application. The only reason we moved on to the property was out of desperation. I am quite sure that had we approached the eThekweni Municipality at the time, it would not have given us consent. Even had the eThekweni Municipality consented to our settlement, we would still be forced to relocate on construction of the road. The fact that the eThekweni Municipality and the

Department of Transport have not sought our eviction prior to now, indicates their acceptance of our settlement on the road reserve pending the construction of any proposed road.

129.

AD PARAGRAPH 35 :

I have already dealt with sub-paragraphs (i), (ii) and (iii).

130.

I deny that we have no basis in law to refuse to move to the alternative accommodation provided to us. We have a binding agreement with the Department of Transport to relocate to houses in the Khulula property and, in terms of the provisions of PIE, we are entitled to alternative accommodation. The transit camps do not constitute alternative accommodation as envisaged by PIE.

131.

AD PARAGRAPH 36 :

It is respectfully submitted that our refusal to move as a consequence of the breach of our agreement by the Department of Transport, is not incurring any further costs by the Department of Transport. The Department of Transport would always have had to incur the costs of consultants to conduct the relocation and building contractors to build the road.

132.

Without details of the alleged penalties, I deny that they are correct, or may be taken into account in this application. I deny that this application is the only remedy available to the applicant. The applicant, as an organ of State, **alternatively** with the assistance of the eThekweni Municipality, is obliged to consult meaningfully with the respondents prior to evicting them. I am advised that this has been given recognition in recent cases in the Constitutional Court. We have never been given an opportunity to make proposals, or discuss moving to the transit camps and in the absence of this negotiation, I submit that this application is entirely premature.

133.

I also deny that our demands are unreasonable, given the agreement with the

Department of Transport that we move to the Khulula property.

134.

AD PARAGRAPH 38 :

I deny that the present situation in Siyanda is volatile. We have never sought to obstruct the relocation **per se**. It was only when we were being forced into transit camps without any consultation that we refused to move. In terms of the provisions of PIE, we are entitled to remain in occupation of our houses until such time as the above Honourable Court has determined this application.

135.

AD PARAGRAPH 39 :

I deny that the conduct of the respondents is unlawful. On the contrary, we have always been prepared to move to the houses allocated to us on the Khulula property. It is the applicant who is seeking to evict us without meaningful consultations and in breach of its express agreement with us, who has acted unlawfully.

136.

AD PARAGRAPH 40 (a) :

The contents hereof are denied for all the reasons already stated above. We welcome proper consultations with the Department of Transport and we have always been prepared to relocate.

137.

AD PARAGRAPH 40 (b) :

The contents hereof are also vigorously denied. The deponent to the founding affidavit has failed to cite any specific incidents of threats or opposition and I am certainly not aware of any danger whatsoever to the persons tasked with relocating the respondents.

138.

AD PARAGRAPH 40 (c) :

I deny that the applicant will suffer irreparable harm as no foundation has been laid for the alleged penalties being incurred by it. It is the respondents who will suffer irreparable harm if our present homes are demolished and we are forced to move into transit camps for an indefinite period. Because the units are so small and so close together, transit camps are breeding grounds for domestic violence, poor hygiene, HIV transmission and assaults and are totally unsuitable for

permanent habitation by any community. In the absence of a real undertaking that our accommodation there will be temporary, our community will be left to degenerate in these transit camps.

139.

The hardship which will be experienced by each of the respondents and their families, which total some 240 people, is a kind of hardship which cannot be compared to financial loss. That people will be forced to live in such undignified, unsightly and inhabitable camps as a result of an error conducted by the applicant's consultants, cannot be justified.

140.

AD PARAGRAPH 40 (d) :

I am advised and verily believe that the applicant is not entitled to evict us in the absence of a Court Order and without the procedures set forth in PIE being followed. Accordingly, any suggestion or attempt by the applicant or the South African Police Service to remove us is irrelevant.

141.

I deny that there are any threats or imminent danger to any of the persons referred to in this paragraph. By the applicant's own admission, construction cannot take place while houses lie in the pathway of the proposed road. This is the reason for the delay in construction. It has nothing to do with the attitude of those residing in Siyanda. Should the above Honourable Court grant an Order that we be evicted, we will have no choice but to move and construction may resume.

142.

I again reiterate that the applicant does and has always had an alternative remedy to bringing a PIE application in the form of meaningful consultations with the respondents to implement the agreed relocation to Khulula **alternatively** to discuss an alternative relocation. They have failed and refused to engage in that alternative remedy.

143.

AD PARAGRAPH 41 :

As stated above, it appears that the applicant has already obtained the First Order Prayed without notice to the respondents. In the circumstances, I do not

comprehend what is being stated in paragraph 41 (a) hereof.

144.

The question of service has, to an extent, been resolved as attorneys **Shanta Reddy & Associates** of 108 Helen Joseph Road, Glenwood, Durban, are now acting as our attorneys of record. Furthermore, I am advised that service of the Orders in this application are governed by the provisions of PIE and the applicant is bound to follow such procedures.

145.

AD PARAGRAPH 42 (a) :

I have already dealt with the question of urgency of this matter. It makes no sense to state that construction will resume on 12 January 2009 as without an Order of the above Honourable Court brought after the procedures set forth in PIE have been duly performed, having been granted.

146.

Given that the urgency in this application is self-created and, in any event, only at

best for the applicant, a form of commercial urgency, I deny that the matter need be heard on an urgent basis, or that the respondents should be compelled to prepare affidavits eliciting important and material information for consideration by the above Honourable Court with undue haste. This is all the more evident from the timing of the launching of this application and the vast number of respondents in this matter.

147.

AD PARAGRAPH 42 (b) :

I am advised that in terms of the decision in **Ubunye Co-op Housing (Assoc Inc under section 21) v Joyce N Mbele 2005 JDR 1055 (N)**, case No 3754/2005, 22 September 2005, the respondents are entitled to the time limits set forth herein. These time limits have not been complied with in this instance and further argument will be led at the hearing of this application in this regard.

148.

In any event, I am advised that as this matter is now opposed by the respondents, the hearing of the opposed application will be dealt with in the ordinary course by placing the matter on the Opposed Roll. Any attempt by the applicant to place

the respondents on unreasonable terms to file supplementary affidavits or to hear the matter on an opposed basis, which will prejudice preparation for the matter, will be opposed by the respondents.

149.

AD PARAGRAPH 42 (c) :

I am advised that no case has been made out for an application for condonation referred to in this paragraph. Moreover, no prayer for condonation has been included either in the Notice of Motion, the First Order Prayed or the Notice in terms of Section 4 (2) and (5) of the Act. In the circumstances, to the extent that condonation is sought by the applicant herein, it is opposed by the respondents.

150.

AD PARAGRAPH 42 (d) :

I deny that the applicant has taken our interests into account in launching these proceedings when it chose to. While I understand that the applicant intends to finalise its road as soon as possible, to say that launching an application on the eve of the Christmas break will assist the respondents in consulting with legal representatives, is laughable.

151.

AD PARAGRAPH 42 (e) :

I deny that this matter is "semi-urgent" for all the reasons already stated above.

AD CONFIRMATORY AFFIDAVITS:

152.

To the extent that the facts contained in the founding affidavit are confirmed by Linda Masinga and Nandi Mandela, they are denied as dealt with above.

153.

In the circumstances, I pray that the above Honourable Court dismiss the application brought by the applicant, with costs.

.....

I CERTIFY THAT the Deponent has acknowledged that he/she knows and understands the contents of this Affidavit which was signed and sworn to before me at
on this day of 2009 under compliance with the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended).

.....
COMMISSIONER OF OATHS.

FULL NAME

ADDRESS

AREA

CAPACITY