IN THE HIGH COURT OF SOUTH AFRICA
(KWAZULU-NATAL LOCAL DIVISION, DURBAN)

CASE NO: 8432/16

In the matter between:

LOUIS NATHAN LANGER	Applicant
And	
KWADUKUZA MUNICIPALITY	First Respondent
REGISTRAR OF DEEDS	Second Respondent
MINISTER OF PUBLIC WORKS	Third Respondent

FOUNDING AFFIDAVIT

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I, the undersigned

LOUIS NATHAN LANGER

do hereby take the oath and state:

1. I am an adult male pensioner, identity number: 3604295049080, residing at Rocky Park Old-Age Home, Stanger, KwaZulu-Natal. I attach a copy of my identity document marked **"LL1".** I am the applicant in this matter.

2. The facts contained herein are, unless otherwise stated or indicated by the context, within my own personal knowledge and to the best of my belief both true and correct. Where I make submissions of law I do so on the basis of advice received from my lawyers.

I. INTRODUCTION

3. This is an application to review and set aside the first respondent's ("**the Municipality's**") decision to expropriate my property (described as Rem 87 (of 57) of the Farm Chakas Kraal No. 865, Registration Division FU, Province of KwaZulu-Natal) for a trifling amount, without my consent and in the absence of a court order. This expropriation was contrary to the prescripts of the legislation governing the expropriation, as well as the Constitution, and falls to be set aside.

4. This dispute raises matters of profound constitutional significance pertaining to various constitutional rights, including the right to property (section 25), the right of access to adequate housing (section 26), the right to equality (section 9), the right to a fair public hearing (section 34) and the rule of law (section 1).

5. The property is the means by which I derive the income that supports my family and me. I rent the rooms in the buildings on the property. It is the only property that I own.

6. In 2013, the Municipality published various notices in which it offered to pay R19,030 for my property (which is 0.5160 hectares in extent). This amount was manifestly unjust and inequitable. I expressly objected to the expropriation on the basis that the amount offered was inadequate. I did so repeatedly, in writing and in a meeting with the Municipality. In addition, I obtained and provided an independent valuation of the property to the Municipality, which stated that the market value of the property was R230 000 at the time. The Municipality did not respond to the valuation and, in spite of my express objections, proceeded to cause the property to the transferred into its name.

7. After the property had been transferred, I procured the assistance of attorneys. In response to my attorney's continued objections to the expropriation and the compensation therefor, the Municipality stated that while it had expropriated my entire property, the compensation it had offered was only in respect of the vacant land on the property. The Municipality stated that it would later return the land on which the buildings are situated. It has not done so.

8. The Municipality's attempt to expropriate my property was unlawful and unconstitutional in the following respects:

   8.1. First, the expropriation was effected without my express consent and in the absence of a court order. This is unconstitutional.

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8.1.1. Section 25(2) of the Constitution provides that expropriation may only be expropriated *"subject to compensation, the amount of which and the time and manner of which have either been agreed by those affected of decided or approved by a court."* (emphasis added)

8.1.2. To the extent that the Municipality has relied upon section 10(5)(a) of the Expropriation Act 63 of 1975 ("the Expropriation Act"), which provides that the owner shall be "*deemed*" to have accepted an offer of compensation made to him by the Municipality if he fails to make an application to a court for the determination of the compensation within a specified time period, I submit the section does not apply to me. And, if it does, the section is inconsistent with sections 25(2)(a), 9, 26 and 34 of the Constitution. As such, it is invalid. I seek a declaratory order to this effect.

8.2. Second, the mandatory procedures and requirements set out in the relevant expropriation legislation were not followed.

8.2.1. Personal service of the expropriation notices was not effected and the notices were not published once a week for two consecutive weeks in an English and Afrikaans newspaper circulating in the area in which the property in question is situated. In addition, I was not given notice of the obligation to approach the court to challenge the compensation offered for the expropriation. The Municipality also failed to first negotiate

the sale of the property with me before it proceeded to expropriate the property.

8.2.2. In addition, the Municipality has admitted that its offer of compensation did not correspond to the land which it purported to expropriate. Its offer pertained only to the vacant portion of land, but it caused the entire plot to be transferred into its name. Therefore, the purported expropriation was not carried out in accordance with the provisions of the relevant expropriation legislation. Any attempt by the Municipality to register that portion of the property in its name is therefore null and void.

8.3. Third, the Municipality has not demonstrated that the expropriation of the property was for a public purpose or in the public interest (as is required by section 25(2) of the Constitution). It has simply claimed that this is the case, without providing proof thereof.

8.4. Fourth, the compensation offered was not just and equitable and was not calculated by taking into account all relevant factors, including those listed in section 25(3) of the Constitution.

9. Given that the expropriation was based on the application of an unconstitutional legislative provision (section 10(5)(a) of the Act) and was not carried out in accordance with the relevant statutory provisions and the Constitution, the expropriation was unlawful and invalid. It must be set aside by this Court and its consequences must be undone – in particular, the property must be re-registered in my name.

10. Further, because the expropriation was not carried out as per the provisions of the Expropriation Act, ownership of the property did not pass to the State (in terms of section 8(1) of the Expropriation Act). As a result, this application is also a claim under the *rei vindicatio* to have my property restored to me by rectifying the records at the Deeds Registry to reflect me as the owner of the property.

11. *In the alternative*, the Municipality made an express public promise to me that it would provide me with a title deed in respect of the portion of the property with buildings on it. This promise is enforceable and, as a result, I seek an order directing the Municipality to fulfil its promise and cause the property to be returned to me.

12. In the circumstances, I seek the following relief:

    12.1. An order declaring that section 10(5)(a) of the Expropriation Act is unconstitutional. I seek further ancillary relief in relation to this declaration;

    12.2. An order reviewing and setting aside the Municipality's decision to expropriate my property;

    12.3. An order directing the Registrar of Deeds to correct the Deeds Register to reflect that I am the true owner of the property.

    12.4. *In the alternative*, I seek an order reviewing and setting aside the Municipality's decision to expropriate the portion of the property upon which the buildings are situated. I also seek an order directing the

Registrar of Deeds to correct the Deeds Register to reflect that I am the true owner of the remainder portion of the property with the buildings situated on it.

12.5. *In the further alternative,* I seek an order directing the Municipality to return the portion of the property with buildings on it to me, and an order directing the Registrar of deeds to transfer that portion of the property into my name.

13. The remainder of this affidavit is structured as follows:

13.1. In **Part II**, I list the parties in this matter;

13.2. In **Part III**, I set out the factual background to this matter, including the history and acquisition of the property, the Municipality's attempts to expropriate the property and its subsequent eviction application;

13.3. In **Part IV**, I set out the constitutional challenge to section 10(5)(a) of the Expropriation Act;

13.4. In **Part V**, I set out the grounds of review in respect of the Municipality's decision to expropriate the property in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");

13.5. In **Part VI**, *in the alternative*, I set out the grounds of review in terms of the principle of legality;

13.6. In **Part VII**, I set out the legal basis for the relief sought against the Registrar of Deeds; and

13.7. In **Part VIII**, *in the further alternative*, I set out the basis for my claim enforcing the Municipality's public promise to return a portion of my land to me;

13.8. In **Part VII,** I set out the relief I seek in this application; and

13.9. In **Part VIII,** I address the issue of costs.

II. THE PARTIES

14. I am an adult male pensioner and the rightful owner of the property described as Rem 87 (of 57) of the Farm Chakas Kraal No. 865, Registration Division FU, Province of KwaZulu-Natal ("the property"). The first respondent, the Municipality, has unlawfully attempted to expropriate the property.

15. The first respondent is the **KWA DUKUZA MUNICIPALITY**, a municipality duly established as a local authority in terms of section 12 of the Local Government: Municipal Systems Act 117 of 1998. The municipality's main office is situated at 14 Albert Luthuli, KwaDukuza.

16. The second respondent, the **REGISTRAR OF DEEDS**, is duly appointed in terms of Section 2 of the Deeds Registries Act No. 47 of 1937 as amended. The Registrar is, in terms of section 3 of the Deeds Registries Act, responsible for and empowered to register deeds of transfer of land, and to execute and register certificates to titles of land. He is also authorised in terms of section 3 to discharge all such duties as by law may or are to be discharged by a registrar of deeds or as are necessary to give effect to the provisions of this Act. The Registrar of Deeds' offices are situated at 300 Pietermaritz Street, Pietermaritzburg, KwaZulu Natal.

17. The third respondent is the **MINISTER OF PUBLIC WORKS** ("the Minister"), served care of the State Attorney: 6th Floor, MetLife Building, 391 Anton Lembede Street, Durban. The Minister is cited as the executive member responsible for the administration of the Expropriation Act, section 10(5)(a) of which I assert is inconsistent with the Constitution. He is also cited as the representative of the Government of the Republic of South Africa.

III. FACTUAL BACKGROUND

i) The history and the acquisition of the property

18. I was born and grew up on the property together with my siblings and my parents. My brother's name was Charles Oscar Langer. He passed away on the 11 February 2016. My sisters are Margarie Dorothy Langer, Sheila Langer and Virginia Langer. All of my sisters are still alive.

19. Around 1943, my father, Lewis Langer, purchased the property for residential use. He resided on the property from about 1943 to 1973. My father was white and my mother was black. My siblings and I were not eligible to obtain the property from my father through inheritance or donation due to the discriminatory laws at the time. My father wished to donate the property to me, but was prevented by law from doing so. I therefore purchased the property from my father in 1967. I also paid my siblings amounts equal to the value of their shares. The property was then transferred to me. I attach a copy of the title deed annexed hereto as **"LL2".**

20. After purchasing the property, I applied for authority to change the land use from residential to residential and business. The application was approved on

or about 1989. A business license was issued to me by the first respondent. I opened a small restaurant and a fruit and vegetable stall on the property. I attach a copy of my business licence, marked **"LL3".**

21. Between 1990 and 1995, I got into financial difficulties and had to close my businesses and stopped deriving an income from them. My wife and I moved away from the property in 1974 and moved to Durban for work convenience. Even though we had moved to Durban, someone was always resident on the property and my wife and I would visit the property regularly. It remained our family home. My wife then moved to an old age home run by the Municipality. She did not wish to go back to the property.

22. I moved back to the property. However, I later followed my wife to the old age home as a result of loneliness. I left six (6) tenants on the property. Some of the tenants have been in occupation on the property for more than twenty (20) years.

23. My wife died in 2006. I remained in the old age home. I am currently occupying the room that was allocated to my wife by the Municipality. I still maintain a room on the property where some of my belongings are kept, and my intention is to go back to the property permanently.

ii) Income from the property

24. I am a pensioner and I receive an old age pension in the sum of R1600 per month. In order to supplement my old age grant, I receive rental money from the tenants that are occupying and using the property.

25. There is a shop on the premises that is currently vacant. I intend to make money by selling groceries from the shop. I receive R1000 per month from the tenants who use the property for residential purposes.

26. I use my income for :

27.1 Personal groceries – R500 per month;

27.2 Groceries for my daughter (Sibongile) and my grandchildren – R1000 per month;

27.3 My telephone account – R150 per month;

27.4 Domestic helper – R300 per month;

27.5 Petrol – R1500 per month;

27.6 Lights – R250 per month;

27.7 Water – R50 per month;

27.8 Sewage – R890 per month; and

27.9 Old Age Home Rental – R130 per month.

27. My expenses exceed my income. I receive some assistance from my children to make up the outstanding amount. However, my children also have limited means.

28. I have nine (9) children. Their names are:

28.1 Ingrid Pillay;

28.2 Shane Langer;

28.3 Cassius Langer;

28.4 Lucelle Goldstone;

28.5 Juanita Langer;

28.6 Lauretta Jasson;

28.7 Rhoma Paton;

28.8 Sibongile Dlamini; and

28.9 Jackie Langer

29. All of my children have reached majority status. All of them have children of their own. Most of them are independent. I financially support Sibongile Dlamini and her six (6) children.

30. I spend all of my income in paying the abovementioned expenses. Without the income that I am receiving from the tenants, I would not be able to meet these needs. The rental income I receive from the property is therefore of primary importance to me and my family.

iii) The attempt to expropriate the property

31. During June 2012, I noticed an expropriation notice published in two local English publications – the Mercury and the Daily News. My property was listed as one of the properties that were going to be expropriated. The notice was published by the Municipality.

32. The amount of compensation offered for the property in the notices was R19 030 (nineteen thousand and thirty rand). My property is 0.5160 hectares in extent. This amount offered is far less than the property is worth. I did not want to have my property expropriated at all, let alone for such a small amount of money.

33. I filed an objection to the expropriation. On 6 March 2013, I wrote a letter to the Municipality regarding my objections and reasons for my objections against the expropriation of the property. Unfortunately, I can no longer locate a copy of this letter. My main objection was the amount of compensation.

34. The Municipality did not respond in writing to this letter. Rather, I was invited to a meeting on 20 April 2013 with the Municipality. At this meeting, I raised my objections again. I received no further correspondence or notifications after this meeting until July 2013.

35. During July 2013, I received a letter from the Municipality stating that I am "*at liberty to obtain another valuation from a registered qualified valuator.*" Unfortunately, I am also unable to locate a copy of this letter.

36. On 15 August 2013, and before I could obtain the services of a professional valuer, another notice of expropriation was published in the Mercury newspaper. Again, my property was listed and I filed another objection.

37. I decided to take up the invitation from the Municipality to obtain another valuation of the property. I accordingly approached the valuations firm Mills Fitchet. On 6 May 2014, I received a valuation certificate from Mr. Renier Grobler, a professional valuer. In the same month, I submitted the valuation

certificate to the Municipality. The certificate stated the market value of the property was R230 000 (two hundred and thirty thousand rand) as at 6 May 2014. I attach a copy of the certificate marked **"LL4".** Unfortunately the Municipality did not respond as to whether the amount of R230 000 was acceptable or not.

38. Indeed, the Municipality sent me no further counter-offers of compensation nor did it send me any notification that the expropriation was going to take place on the basis of the originally offered compensation unless I approached a court to challenge the decision.

39. Some time after I raised my objections about the compensation (in 2016), I discovered that the property had been registered in the name of the Municipality. At no point during the expropriation process had I accepted (or collected) the compensation offered to me. In other words, I had not agreed to the amount of compensation (as well as the time and manner of payment). Nor had the amount of compensation been decided or approved by the court. From the very beginning, I disputed the amount offered.

40. The property was registered in the name of the first respondent on 19 November 2014. I attach a copy of the deed of transfer, marked **"LL5"**. When I later found out that the property had been registered in the Municipality's name, I was surprised as I was still expecting the Municipality to respond to my objection regarding the compensation offered.

41. In any event, given my lack of consent to the compensation offered in respect of the property, the lack of a court order determining what was just and equitable compensation, and the Municipality's failure to adhere to the

mandatory prescripts of the governing legislation, the property was not lawfully expropriated and ownership of the property did not pass to the Municipality. I remain the owner of the property, despite registration in the name of the Municipality.

42. I have never stopped trying to engage the Municipality regarding its attempt to expropriate and take ownership of my property. All of my attempts have fallen on deaf ears. I have written letters. I have visited the offices of the Municipality. I have also visited the offices of the attorney's firm, Sham & Meer.

43. Having received no response, I decided to approach the Legal Resources Centre for assistance. As a result, on 27 June 2016, my attorneys of record addressed a letter to the Municipality and the Member of the Executive Committee of Co-operative Governance and Traditional Affairs in KwaZulu-Natal. In the letter, my attorneys challenged the expropriation process that was followed as well as the compensation that was offered to me. A copy of the letter is attached, marked **"LL6"**.

44. On the 11 July 2016, my attorneys addressed another letter to the Municipality and the Member of the Executive Committee of Co-operative Governance and Traditional Affairs in KwaZulu-Natal requesting a response to the letter dated 27 June 2016. The copy of the letter is attached, marked **"LL7"**.

45. On 14 July 2016, my attorneys received a letter from the Municipality stating that the correct processes for the expropriation were followed. In the letter, the Municipality also stated that the compensation it offered was based on the vacant land on the property only and that it would return the portion of the

property with the buildings on it. The Municipality promised that that my family and I would not have to move out of the property. The land where my home and the other buildings are situated would be transferred back to me. The copy of the letter is attached, marked **"LL8"**.

46. On the 25 July 2016, my attorneys received a letter from the Executive Committee of Co-operative Governance and Traditional Affairs in KwaZulu-Natal stating that the correct expropriation processes were followed by the Municipality. It was also stated that "*neither the municipality nor the MEC can reverse the process.*" A copy of the letter is attached, marked **"LL9"**. Attached to this letter were two provincial government gazettes for KwaZulu-Natal that the Municipality relied on as valid expropriation notices. The first, dated 4 April 2013, is attached as **"LL10"** and the second, dated 29 August 2013, is attached as **"LL11"**.

47. On 30 August 2016, my attorneys addressed a letter to the Municipality advising it that I had not agreed to the compensation offered by the Municipality and, therefore, it must refer the issue of the determination of the amount of the compensation, in terms of s 25(2)(b) of the Constitution, to the High Court. This letter is attached, marked **"LL12"**.

48. Unfortunately, the Municipality did not respond to the letter dated 30 August 2016.

iv) Eviction application

49. On 20 October 2016, my attorneys received a letter from Shepstone & Wylie Attorneys stating that they have been instructed by the Municipality to bring an

application for eviction against me. A copy of the letter is attached, marked **"LL13"**. This application was launched despite the fact that the Municipality had stated that it only intended to expropriate the vacant land and that it would present me with a title deed for the portion of the land with the buildings on it. A copy of the application is attached as **"LL14"**.

50. I was surprised to receive the eviction application because I was still waiting for the Municipality's response to the letters that I had addressed to it (regarding the compensation offered in relation to the house and the referral of the matter to court).

51. My attorneys served Rule 35(12) and 35(14) notices on the Municipality, seeking various documents that were referred to in the eviction papers and that related to the decision-making process and the Municipality's compliance with the relevant legal requirements for the expropriation. The Municipality did not respond to the notices.

52. In November 2016, I was forced to launch an application to compel the respondent to comply with the Rule 35(12) and (14) notices. I attach a copy of this application to compel as **"LL15"**.

53. That same month, and possibly in response to the application to compel, the Municipality withdrew the eviction application.

54. Now that the eviction application has been withdrawn I am in a vulnerable position, where the Municipality may evict me at any time and my security of tenure is compromised. I also have no legal rights over my property because it has been incorrectly registered into the name of the Municipality. This

precarious position has breached my right to housing under section 26 of the Constitution. I therefore seek to use this application to vindicate my ownership rights over the property through the re-registration of the property in my name.

55. Having set out the background to the purported expropriation, I address the constitutional challenge to section 10(5)(a) of the Expropriation Act.

IV. CONSTITUTIONAL CHALLENGE

56. Section 10 of the Expropriation Act provides as follows:

> "(1) The Minister may in the notice of expropriation offer the owner concerned an amount of compensation for the property.
>
> (2) If no compensation was in the expropriation notice offered for the property in question and the owner concerned fails to furnish any relevant information in terms of section 9 (1), the Minister shall within a reasonable period offer him an amount as compensation for such property.
>
> (3) .....
>
> (4) If an owner has in terms of section 9(1) indicated what amount is claimed by him as compensation and has furnished the relevant information in terms of section 9 and the Minister is not prepared to pay that amount as compensation, the Minister shall within a reasonable period offer him an amount as compensation and indicate how much of that amount represents each of the respective amounts contemplated in section 12 (1) (a) (i) and (ii) or (b) and furnish full particulars as to how such amounts are made up.
>
> (5) (a) Unless the Minister and the owner have agreed otherwise the latter shall be deemed to have accepted an offer made to him by the Minister in terms of subsection (1), (2) or (4) if he fails to make an application to a court referred to in section 14(1), for the determination of the compensation, before the date determined by the Minister by written notice addressed to him.
>
> (b) A notice in terms of paragraph (a) shall be addressed to the owner concerned not later than eight months prior to the date contemplated therein, and the Minister shall not later than 60 days

before such date by written notice direct the attention of such owner to the firstmentioned notice.

(6) A claim for compensation in terms of section 9(1) and an offer of compensation in terms of subsection (1), (2) or (4) shall remain in force until it is replaced, either before or after the institution of proceedings contemplated in section 14(1), by another claim or an offer in terms of subsection (1), (2) or (4), according as to which subsection is applicable, or until the compensation has been determined by the court, unless the Minister and the owner have agreed otherwise.

(7) The Minister may from time to time ask for reasonable particulars regarding the owner's claim for compensation, and the owner may from time to time ask for reasonable particulars regarding the Minister's offer of compensation, and particulars so asked for shall be furnished within a reasonable time.

(8) If the Minister or the owner fails to comply with a request in terms of subsection (7), the court may, on application, issue an order directing him to comply therewith." (Emphasis added)

57. Notably, section 10(5) provides that if an owner fails to apply to court for the determination of compensation before a particular date, he shall be *deemed* to have consented to the Municipality's offer of compensation. This is inconsistent with the Constitution in a number of respects.

58. First, it is inconsistent with section 25(2) of the Constitution.

58.1. Section 25(2) stipulates that property may only be expropriated in circumstances where consent has been given by those affected or the court has intervened and granted an order. It does not contemplate *deemed* consent.

58.2. Insofar as section 10(5) of the Act provides for the expropriation of property in cases where there is *deemed* consent, rather than *actual* consent, it is inconsistent with the Constitution. The facts of my case

illustrate this inconsistency. I repeatedly objected to the notices of expropriation and offers made by the Municipality. I not aware that I was required to refer the matter to a court (nor did I have the financial resources to do so). As a consequence, in spite of my clear and unambiguous objections, I was deemed to have consented to the expropriation of my property for the compensation offered by the Municipality. This cannot constitute agreement by the affected parties, as contemplated by section 25(2) of the Constitution.

58.3. The wording of section 10(5) is such that reading the section consistently with the Constitution is not possible without undue strain on its language. Accordingly, section 10(5) limits the ability of property-owners to exercise their right to object to the compensation offered for expropriation.

59. Second, section 10(5) contravenes the right to equality (section 9 of the Constitution).

59.1. In terms of section 10(5), the State need only make the offer of compensation. If the owner refuses the offer, he or she bears the burden of referring the matter to court. If the owner fails to do so in the stipulated time, he or she will be deemed to have consented to the offer. This shifts burden of making application to court from the State (with its extensive resources and capacity) to the individual owner.

59.2. This places an unfair burden on the property owner and has a disproportionate impact on certain classes of property owners:

59.2.1. For owners like me, who do not have any legal knowledge and so could not launch legal proceedings as contemplated in section 14 of the Expropriation Act, and who do not have the means to pay for attorneys to do so, this effectively precludes their right to receive just and equitable compensation or to consent or object to such compensation, which is a right guaranteed under section 25 of the Constitution.

59.2.2. Not every person will be able to receive pro bono legal assistance and particularly not in the timeframes contemplated in section 10(5). Or they may live in remote rural areas where travelling to a place where a pro bono attorneys firm is located is again prohibitively expensive or otherwise impractical – especially if that owner is elderly or has some other disability.

59.2.3. I was not aware of the deeming provision in section 10(5) and was not notified that I had to go to court to challenge the compensation. As a consequence, I did not know that I had to get attorneys involved. As it happened, when I did manage to get pro bono legal assistance, the property had already been transferred into the Municipality's name. However, even if I had been advised in a notice that I had to apply to court within a specified time, I would not have known how to go about doing that and would not have had the means to pay for an attorney to do so.

59.2.4. In this manner, section 10(5) differentiates and unfairly discriminates between property owners who have sufficient resources and knowledge to refer the dispute over compensation to court and those who do not. Given the history of this country and Apartheid's discriminatory laws and policies, the majority of vulnerable land-owners are black. As a consequence, section 10(5) unfairly discriminates against landowners on the basis of their race.

59.3. Therefore, section 10(5)(a) is inconsistent with section 9 of the Constitution and is invalid.

60. Third, section 10(5) implicates section 26 of the Constitution, the right to access to adequate housing.

60.1. I am advised that the courts have found that section 26 is not only implicated in eviction applications, but also when a person is deprived of their ownership of immovable property that serves as a primary residence.

60.2. Accordingly, whenever a home owner's property is to be expropriated, and the owner objects to the compensation offered, the Court should oversee the determination of just and equitable compensation – such compensation should not simply be "deemed" to be agreed upon if the home owner does not approach the courts. Particularly if the homeowner does not have the means to do so. For that reason, section 10(5) as it stands breaches section 26 of the Constitution and should be declared invalid.

61. Finally, section 10(5) unjustifiably limits the right of property owners of access to courts and a fair public hearing (section 34 of the Constitution).

61.1. I am advised that the Constitutional Court has repeatedly held that there must be judicial oversight where a party seeks to seize control of the property of another person. Such a constraint on property may only be exercised after recourse to a court of law.

61.2. Section 10(5)(a) permits the expropriation of property without the consent of the owner and without recourse to a court of law. As such, it allows for self-help by the State. This violates property owners' constitutional to access to court and to have their dispute decided by an independent tribunal.

62. The above limitation of sections 9, 25, 26 and 34 of the Constitution is not reasonable and justifiable in terms of section 36 of the Constitution.

63. An appropriate remedy under the circumstances would be to strike out subsection (5) in its entirety and to have the legislature customise a new provision which adequately takes into consideration all categories of landowners that could not meaningfully exercise their consent rights under section 25(2) under the current deeming provision.

64. While the Legislature is reformulating section 10(5) to meet the requirements of sections 9, 25, 26 and 34 of the Constitution, I propose that the declaration of invalidity be suspended for a period of two years, during which period, the Court implements an interim regime that protects the rights of land owners. Should the Legislature fail to address the invalidity within that two-year period,

the interim regime will automatically amend subsection (5). The question of remedy is addressed more fully below.

V. REVIEW OF EXPROPRIATION

65. I am advised that the Municipality's decision to expropriate the property is administrative action and is subject to review under the Promotion of Administrative Justice Act 3 of 2000 **("PAJA")**. This is because the decision is of an administrative nature, has direct, external legal effect and has adversely affected my rights.

66. In this section of the affidavit, I set out the grounds on which I contend that the Municipality's decision ought to be reviewed and set aside.

67. The expropriation of the property falls to be reviewed and set aside on the following grounds:

67.1. First, the Municipality did not obtain my consent and expropriated the property in the face of my express objection thereto, without a court order, in contravention of my constitutional rights under section 25(2). This action was therefore unconstitutional and unlawful (section 6(2)(i) of PAJA);

67.2. Second, the Municipality failed to meet the compulsory requirements for a valid expropriation as set out in the Expropriation Act, the Local Authorities Ordinance 25 of 1974 ("the Local Authorities Ordinance") and the Housing Act 107 of 1997 ("the Housing Act"). Accordingly, the Municipality failed to comply with mandatory and material procedures or conditions as prescribed by an empowering provision (section

6(2)(b) of PAJA) and the expropriation was also, as a result, procedurally unfair (section 6(c) of PAJA);

67.3. Third, the Municipality failed to show that the expropriation of the property was for a public purpose or in the public interest, as is required by section 25(2)(a) of the Constitution. As such, its action is reviewable on the ground that it was unconstitutional and unlawful (section 6(2)(i) of PAJA);

67.4. Fourth, the compensation offered by the Municipality was not just and equitable. The Constitution requires that property may *only* be expropriated subject to compensation, the time and manner of payment of which *must* be just and equitable (sections 25(2) and (3)). This action was therefore unconstitutional and unlawful (section 6(2)(i) of PAJA).

68. Before proceeding to elaborate on the grounds of review, it is necessary to seek this Court's condonation for the delay in bringing these proceedings.

i) Condonation

69. Section 7 of PAJA provides that proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the person concerned became aware of the action.

70. I first became aware of the Municipality's intention to expropriate my property in 2012. At that stage, and as an unrepresented person with no legal training and no resources to engage attorneys, I did what I could to register my objections to this conduct by attempting to engage the Municipality through

writing letters to it and then eventually by visiting the offices of the Municipality's attorneys.

71. It was only in 2016 that I engaged the assistance of the Legal Resources Centre, which, in July 2016, began engaging with the Municipality about the expropriation. During this period, I became aware that the property had been registered in the Municipality's name. The Legal Resources Centre did not resort to litigation immediately and first tried to resolve the matter through an exchange of correspondence, as set out above.

72. During this exchange, the Legal Resources Centre explained that the expropriation was unlawful and also that the compensation offered was wholly inappropriate for the property and was accordingly not just and equitable.

73. However, the Municipality then failed to respond to the Legal Resources Centre's last letter and instead launched an eviction application. This, in circumstances where, on 14 July 2016, the Municipality wrote to me to expressly disavow any interest it may have in the portion of the land with the buildings on it. It stated that—

> *"The compensation is based on vacant land only. The building/s on Mr Langer's property has not been valued. It is the intention of the Municipality, once the land has been surveyed and the Township Register opened etc., to return all buildings on the property (together with a yard around each) to the owner/those entitled thereto. If Mr Langer has a home on the property, he and his family will not have to move out and he will, in due course, receive a Title Deed for the plot on which his home is erected."*

74. In response to the eviction application, I intended to launch a formal counter-application. However, I could not adequately do so without the relevant documents – which I had requested under Rule 35(12) and (14) from the Municipality. It refused to provide the documents, necessitating an application to compel. The Municipality then withdrew the eviction application in July 2017.

75. However, the Municipality has never honoured its promise to return the property with the buildings on it to me and the entire property remains registered in the name of the Municipality. I am unable to exercise any of my rights of ownership until this is rectified.

76. I am unable to afford private attorneys. As a consequence, in the month after the eviction application was withdrawn, I requested that the Legal Resources Centre take action against the Municipality and challenge the expropriation of the land. The delay in bringing these proceedings is on account of the following:

76.1. In order to formulate this application, it was necessary to gather specific information. The Municipality had failed to provide the requested in the Rule 35(12) and (14) notices, including the full pages of the advertisements that were allegedly placed in the Mercury newspaper and the Bugle. Despite attempts to find copies of these notices, I was unable to do so.

76.2. In addition, I was asked to find the correspondence sent to me by the Municipality, a copy of my letter of objection and all other relevant documents. Despite a diligent search, I was unable to find most of

these documents. There were a number of delays as I attempted to find them at different locations and asked my family members (including my daughter) to join the search.

76.3. Further, the Legal Resources Centre is a non-profit law clinic with limited resources and staff. I was told that that the additional delays incurred in the finalisation of the application were on account of their limited capacity to deal with my matter, given the extreme case-loads of the attorneys and in-house counsel. The reasons for the internal delays in the LRC are set out in the supporting affidavit of Thabiso Mbhense, which is filed together with this affidavit. I emphasize that these delays are due to no fault of my own. I pursued my matter diligently and took all steps available to me.

77. In light of the fact that I was unrepresented when the property was transferred into the Municipality's name and that the Legal Resources Centre had limited capacity to assist me, and given the Municipality's evasive, inconsistent and unfair conduct, I request that this Court condone the late filing of this review application so that I can vindicate my constitutional rights.

ii) Grounds of review

Expropriation without consent

Failure to provide a valid offer of compensation

78. The Municipality did not obtain my consent for the compensation it offered for the property. It expropriated the property in the face of my express objection

thereto, without a court order, in contravention of my constitutional rights under section 25.

79. According to section 25(1) and (2) of the Constitution, the state is not permitted to deprive a private property owner of his or her property without compensation. Section 25(2)(b) provides that the amount, time and manner of payment of compensation has to either be agreed upon by those affected or decided by a court. Section 25(3) provides that the amount of compensation and the time and manner of payment must be just and equitable. In the absence of agreement between the parties as to what is just and equitable, the court will have to intervene and make a decision. In determining the compensation, the court has to apply the "*just and equitable*" test, taking into account the factors listed in section 25(3)(a) – (e) of the Constitution.

80. Section 14(1) of the Expropriation Act provides that, in the absence of agreement between the parties about the compensation to be paid for the expropriated property, "any party concerned" may apply to the High Court to determine just and equitable compensation for the property. Any party could include the state entity expropriating the property.

81. However, the section is qualified by section 10(5) which provides that unless an *owner* makes application to court under section 14(1) he or she will be deemed to have accepted the offer of compensation made by the Municipality under subsection (1), (2) or (4).

81.1. Subsection (1) provides for the Municipality to make its offer of compensation in its notice of expropriation.

81.2. Subsection (2) provides for the Municipality to make its offer of compensation after the notice of expropriation was published.

81.3. Subsection (4) provides that if an owner has objected to the Municipality's original offer, and has furnished the Municipality with information as to the value of the property, and the Municipality is not prepared to pay that amount, the Municipality shall within a reasonable period offer another amount as compensation. In other words, the Municipality must make a revised offer.

82. As I have explained above, the Municipality ought to have proceeded with the procedure set out in subsection (4) because I unequivocally and frequently objected to the original proposed compensation. I also furnished the Municipality with a valuation of the property, at its invitation.

83. Given that the Municipality failed to make any "revised" proposal for compensation under (4), and also failed to provide me with any notice advising that I must apply to court by a particular date to challenge its offer, the requirement that I approach the court to challenge its offer never arose.

84. Accordingly, the deeming provision in section 10(5), which provides that an owner is deemed to have consented to the Municipality's offer of compensation if he does not approach the court, did not come into effect. The property was therefore expropriated without any valid offer of compensation and certainly without my consent to that compensation.

85. As a result, the action was unconstitutional and unlawful and the expropriation falls to be reviewed and set aside under section 6(2)(i) of PAJA.

Alternatively, section 10(5) is invalid

86. In the alternative, if the Court finds for some reason that the deeming provision in section 10(5) does apply in this case, then this Court ought to find that this subsection is inconsistent with section 25 of the Constitution and is, therefore, invalid. As a consequence, the expropriation (which was based on the application of section 10(5)) falls to be reviewed and set aside on the ground that it is unlawful and unconstitutional.

Failure to comply with material mandatory procedures

87. The Expropriation Act sets out the process that must be followed when expropriating a property. The prescribed steps set out in the Act are mandatory and strict compliance is required. This is evident from section 5 of the Expropriation Act, which provides that "*if a local authority has the power to expropriate property or to take the right to use property temporarily, such power may only be exercised, mutatis mutandis in accordance with the provisions of this Act.*"

88. The Local Authorities Ordinance is the legislation empowering the Municipality to expropriate property in accordance with the Expropriation Act. Accordingly, the Municipality is also required to comply with this legislation.

89. Further, the expropriation notice (annexure **LL10**) provides that the expropriation was carried out in terms of the Housing Act. The Municipality must therefore also comply with this legislation.

Service of notice of expropriation

90. Section 7(3) of the Expropriation Act provides that *"..... the minister shall cause the notice of expropriation and all notices and documents in connection therewith to be served by causing the original or a true copy therefore to be delivered or tendered or sent by registered post to the person in question."* I submit that this specifies that the notice *must* be served to the owner.

91. Section 7(5) provides *"if whereabouts of the owner..... is not readily ascertainable"* the Minister *"shall, instead of or in addition to causing a notice or document or notices or documents to be published in accordance with subsection (3), caused to be published once in the Gazette and once a week during two consecutive weeks in an Afrikaans and in an English newspaper circulating in the area in which the property in question is or is situated an appropriate notice complying with the provisions of subsection (2) or containing the other document in question."*

92. Subsections 7(3) and 7(5) show that the service of the notice of expropriation to the owner is crucial. It must be served on the owner. If the owner cannot be found, only then may the notice be published in the newspapers and in the Government Gazette. And, in that case, the Municipality will have to ensure that it is published twice in consecutive weeks.

93. The Municipality has failed to comply with subsections 7(3) and 7(5) in that:

93.1. There was no notice sent by registered post or delivered to me. No one attempted to serve the notice on my tenants, who occupy the property. Confirmatory affidavits by the tenants occupying the premises at the

time are attached hereto marked **"LL16".** Had my tenants received the notice, they would have delivered it to me. Therefore, there is no basis to claim that I could not be found.

93.2. Furthermore, the Municipality failed to publish once a week on two consecutive weeks in an Afrikaans and in an English newspaper circulating in the area of Stanger. In its letter dated 14 July 2016, the Municipality states that "*the notice was published in the Gazette and Mercury on the 15 August 2013 and in the Bugle on the 6 September 2013.*" The Bugle is a magazine and not a newspaper. The notice was not published in an Afrikaans newspaper. As stated above, I did see a notice in June 2012 in two local English newspapers (the Mercury and the Daily News) about the proposed expropriation. However, if those were the only two sets of notices then they would not have been published for two consecutive weeks.

94. As such, the Municipality failed to comply with subsections 7(3) and 7(5). This contravenes section 5 of the Expropriation Act. I submit that the mandatory processes of the expropriation were not followed. As such, the expropriation of the property falls to be reviewed and set aside under section 6(2)(b) of PAJA.

95. Not only does the Expropriation Act require personal service of the notice of expropriation on the owner of the property when his whereabouts are ascertainable, but section 190(3)(b)(i) of the Local Authorities Ordinance has a similar requirement. This requirement is not qualified and provides no alternatives to serving the notice on the owner. Section 190 provides:

95.1. A decision to expropriate property shall not be valid except under authority of a resolution passed by the majority of the total number of councillors for the borough.

95.2. Where the council has taken such a decision, it shall cause a notice to be served on the owner of the immovable property concerned containing a description sufficiently clear to identify such immovable property. The notice should also advise the owner that any objections he may have to the proposed expropriation may be lodged with the town clerk within 30 days of service of the notice.

95.3. When that period for objection has expired the council shall transmit to the Administrator the objections lodged by the owner together with comments thereon and a certificate by the town clerk stating that all these notice requirements have been complied with.

95.4. The Council must then obtain the Administrator's approval of the proposed expropriation. Only *then* may the council proceed to expropriate the land.

96. The Municipality failed to serve any notice on me regarding a resolution of the council – if such resolution exists. I was accordingly not informed of my right to lodge objections with the town clerk within a particular time. In addition, it does not appear that the objections I ultimately did register with the Municipality were transmitted to the Administrator or that his or her approval was sought or obtained, in the light of my objections.

97. The Municipality has therefore failed to fulfil mandatory procedural requirements under the Local Authorities Ordinance, which render the expropriation invalid. It falls to be reviewed and set aside under section 6(2)(b) of PAJA.

Failure to give proper notice regarding compensation

98. In addition, section 10(1) of the Expropriation Act provides that the Municipality may in its notice of expropriation offer the owner an amount of compensation for the property. Section 9(1) provides that an owner must within 60 days of the notice of expropriation, deliver to the Municipality a notice stating whether or not he accepts the compensation and if he does not accept it, what amount of compensation he would accept and how that amount is made up.

99. Being an ordinary person without legal training, I was not aware that I had to comply with all the technical requirements of section 9(1). However, I did lodge an objection to the expropriation and, in particular, noted that I did not accept the proposed compensation as it was too low. In response, the Municipality invited me to get another valuation of the property.

100. On 4 May 2014, I did get an alternative valuation of the property, in the amount of R230 000 and sent this to the Municipality. This was, however, ignored.

101. Section 10(4) of the Expropriation Act provides that if an owner has in terms of section 9(1) indicated what amount is claimed by him as compensation and the Municipality is not prepared to pay that amount, *"the Municipality shall*

within a reasonable period offer him an amount as compensation". The Municipality never provided such a counter offer.

102. Importantly, section 10(5)(a) provides that unless the Municipality and the owner had agreed otherwise, the owner shall be deemed to have accepted an offer made to him by the Municipality, if he fails to make an application to a court referred to in section 14(1), for the determination of the compensation, *"before the date determined by the Municipality by written notice addressed to him".*

103. Section 10(5)(b) provides that this notice from the Municipality must be addressed to the owner not later than eight months prior to the deadline date for the application to court and the Municipality shall not later than 60 days before such deadline, by written notice, direct the attention of such owner to the first-mentioned notice.

104. In summary, as the Constitutional Court has explained, the Expropriation Act contemplates the following process:

104.1. If an owner does not accept an amount of compensation offered, he must send a notice to the Municipality that he does not accept the compensation offered and propose another amount;

104.2. If the Municipality is not prepared to pay that amount, it must deliver a notice within a reasonable period with a *"revised amount of compensation".*

104.3. Then, if no final agreement is reached between the parties on the amount of compensation, the Municipality must give notice to the

owner to make application to court before a certain date, failing which the owner shall be deemed to have accepted the revised offer made by the Municipality.

104.4. The Municipality must send a second notice within 60 days of the deadline to make application to court, alerting the owner to the first notice.

105. The Municipality invited me to send a valuation of the property. It did not wait for me to do so and instead, shortly thereafter, proceeded to publish another notice of expropriation. This led to another objection and then a meeting with the Municipality which was not fruitful. Following this, I sent the Municipality a valuation of the property.

106. The Municipality failed to:

106.1. Send me any kind of acknowledgement of this counter-proposal;

106.2. Send me a "revised amount of compensation";

106.3. Send me *any* notice alerting me that I had to go to court to challenge the compensation or giving me an eight-month deadline in which to approach the court;

106.4. Send me any second follow-up notice, within 60 days of the aforesaid deadline, warning me about the first notice.

107. The Expropriation Act evidently places great importance on providing an owner with sufficient notice to be able to challenge an expropriation where the compensation is not just and equitable. These notice provisions are material

and essential to the expropriation process. The Municipality has failed to comply with these provisions and the expropriation accordingly falls to be reviewed and set aside under section 6(2)(b) of PAJA.

108. Furthermore, these notice provisions are key to ensuring that the expropriation is procedurally fair. The Municipality simply proceeded to perfect the expropriation of the property and cause it to be transferred into its name, without giving me any notice that I was supposed to go to court by a particular date in order to challenge the proposed compensation. It now seeks to rely on section 10(5) to claim that I am *deemed* to have agreed to the compensation, in circumstances where I was not given the opportunity to challenge it and where I consistently communicated my objections to the Municipality. The action is accordingly also procedurally unfair and falls to be reviewed under section 6(2)(c) of PAJA.

Invalid offer of compensation – mis-identified object of expropriation

109. In the expropriation notice that the Municipality published in the government gazette, it identified the property to be expropriated as Rem 87 (of 57), of The Farm Chakas Kraal No. 865 Registration Division FU, Province of Kwa-Zulu Natal, being 0.5160 hectares in extent. This is the description of my entire property.

110. The expropriation notice then offered compensation, inclusive of solatium, for this *entire* property, in the amount of R19 030. As set out above, I repeatedly and vehemently objected to this compensation as it was completely out of proportion to the value of the property.

111. Then, on 19 November 2014, the *entire* property – as it was reflected in the notice of expropriation – was transferred into the name of the Municipality.

112. Only some time after all of this had occurred, did the Municipality admit, in a letter dated 14 July 2016 (**LL8**), that the compensation it had offered in the notice of expropriation was not even in respect of the entire property, as the notice – as well as the subsequent transfer – had indicated. Instead it stated that *"The compensation [was] based on the vacant land only. The building/s on Mr Langer's property has not been valued."*

113. The Municipality's only offer of compensation for the expropriation was invalid. The expropriation was in respect of the entire land, but the offer of compensation only pertained to a portion thereof. The Expropriation Act and the Constitution do not contemplate the offering of only partial compensation – particularly when such partial compensation is not indicated in the notice of expropriation and where the whole property is ultimately transferred.

114. The Expropriation Act makes it compulsory for the Municipality to make an offer of compensation. Section 10 provides that this could either be done in the notice of expropriation *or* within a reasonable period thereafter. However, in either case, the offer *must* pertain to the property expropriated. In this case there has been a mismatch between the compensation offered and the land sought to be expropriated.

115. Section 25(2) of the Constitution provides that expropriation can *only* occur when it is subject to compensation for that property. Nowhere in section 25 is the state empowered to expropriate an entire property and only offer compensation in respect of some portion of it. This also flies in the face of the

spirit and purpose of section 25 because it would allow the state to simply take all the property it wants for as small a compensation as it wishes, and then leaves it up to the state's largess to determine whether to transfer back portions of the property it no longer wants. This deprives the landowner of any recourse or rights over his or her property and without any concomitant compensation.

116. In addition, the Local Authorities Ordinance does not permit this manner of expropriation. Section 190(1) of the Ordinance provides that the council may expropriate immovable property—

> *"provided that, where the council requires a portion only of immovable property and has expropriated or proposes to expropriate such portion, and is of the opinion that the remainder of such property would be of such extent or inconvenient shape as to prevent the owner from putting it to any beneficial use or to make its continued retention by the owner undesirable, it may either simultaneously with or any time thereafter, expropriate the remainder of the property."* (emphasis added)

117. In this case, the Municipality only required the vacant portion of the property – as it states in its letter of 14 July 2016. If that is so, it was only empowered to expropriate that portion of the property. It was not open to the Municipality to expropriate the whole property, because the Ordinance provides that it may only do so if the remainder portion would be of no use to the owner. But clearly that was not the case here because the remainder portion contained all the buildings on the land.

118. The Ordinance certainly does not empower the Municipality to expropriate the whole property, but offer compensation only for the portion which it actually intends to use, and then re-transfer the remainder of the property back to the owner whenever it felt like it (and possibly never). Even if the Municipality were empowered under this section to take the whole property, when it only desires a portion thereof, it is still required to offer just and equitable compensation for the whole property.

119. Even if the Municipality were permitted to offer compensation for only a portion of a property, with the intent to re-transfer a portion of the property back to the owner – which is denied – it would be imperative in such circumstances to ensure that the question of compensation and the terms of the retransfer all be agreed to or determined by a court *before* the Municipality purports to perfect the expropriation and cause the property to be transferred into its name. This is to ensure that the rights of the owner are safeguarded should the state seek to take more property than it is compensating the owner for. If the question of compensation under such circumstances has not been resolved and in fact has been clearly opposed by the land owner, then the expropriation is invalid and must be set aside, together with its consequences.

120. The Municipality's expropriation was accordingly unlawful as it failed to follow the mandatory requirements of section 10 of the Expropriation Act and section 25 of the Constitution, and therefore falls to be reviewed and set aside under section 6(2)(b) and 6(2)(i) of PAJA.

Failure to negotiate prior to expropriation

121. The Municipality's purported expropriation was carried out in terms of section 9(3)(a) of the Housing Act. This is evident from the notice of expropriation, published in the provincial gazette on 4 April 2013 (**LL10**).

122. This section provides that a Municipality may expropriate land required for a housing development if:

122.1. It is unable to purchase the land on reasonable terms through negotiation with the owner thereof;

122.2. It has obtained permission of the MEC to expropriate such land before the notice of expropriation is published in the Government Gazette; *and*

122.3. Such notice is published within 6 months of the MEC's approval.

123. It is therefore a mandatory and material requirement of an expropriation in terms of section 9(3)(a) of the Housing Act that the Municipality first attempt to purchase the land on reasonable terms through negotiation with the owner. The Municipality never attempted to approach me to negotiate the purchase of the land at all. I am also not aware of whether it obtained the permission of the MEC and then published the notice within 6 months of that date.

124. The Municipality's expropriation was accordingly unlawful as it failed to follow the mandatory requirements of section 9(3) of the Housing Act, and therefore falls to be reviewed and set aside under section 6(2)(b) and 6(2)(i) of PAJA.

Failure to prove that the expropriation is in the public interest

125. Section 25(2)(a) of the Constitution stipulates that property may only be expropriated for a public purpose or in the public interest. The Municipality has failed to show that the expropriation of my property satisfies this requirement. In this respect, the following is relevant:

125.1. In its letter dated 14 July 2016 (**LL8**), the Municipality states that my property was expropriated along with other properties for the Etete Phase 4 Housing Project. It notes that "*This project is in line with the governments housing policy to provide houses to the indigent and those who do not have housing.*" The letter gives no further detail about the housing project. This constitutes inadequate proof to show that the project is in the public interest. The Municipality is under an obligation to provide details of the project and the project plans, to clearly establish that it serves the public interest.

125.2. Moreover, the Municipality made clear (in the same letter) that it does not require the land on which the buildings are situated for the housing project. Therefore, even on its own version, the expropriation of that portion of land was not for a public purpose and does not serve the public interest.

126. In the circumstances, the expropriation of my property does not satisfy the requirements of section 25(2)(a) of the Constitutional. Therefore, it falls to be reviewed and set aside on the basis of section 6(2)(i) of PAJA.

Failure to offer just and equitable compensation

127. The compensation that the Municipality offered in respect of the property was not just and equitable. The expropriation was accordingly inconsistent with section 25(3) of the Constitution and therefore invalid.

128. Section 25(3) provides that the amount of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

128.1. the current use of the property;

128.2. the history of the acquisition and use of the property;

128.3. the market value of the property;

128.4. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

128.5. the purpose of the expropriation.

129. I furnished the Municipality with a valuation of the property, at its invitation. The property was valued at R230 000. While the market value of a property is not the only factor to take into account, it is certainly a good indicator of what compensation would be just and equitable. The Municipality's offer in its notice of expropriation was for R19 030, being one-twelfth of the property's market value. In response to receiving the property valuation, the Municipality failed to make any appropriate revised offer. Compensation at one-twelfth the market value is clearly not just and equitable.

130. In addition, none of the factors listed in section 25(3), above, provide any reason to justify such a substantial deviation from the market value. In fact, quite the opposite is true:

130.1. First, the current use of the property. There are buildings situated on the property. I am renting out rooms in the building to tenants. As is explained above, I get an income of R1000 per month as rental. I use this money to supplement my old age grant and to support various members of my family. The Municipality did not take this into account when determining the amount of compensation for the property.

130.2. Second, the history of the acquisition of the property. I bought the property from my father. I am the second generation owner of the property and I planned to pass it down to my children and to their children. I suffered hardship before the property was transferred to me from my father's name. I have explained above that my father was white and my mother was black. The property could not be donated to me by my father because of the past racially-discriminatory laws. As a consequence, I had no option but to buy it from my father.

130.3. Third, the state did not subsidise or invest in the acquisition of the property or the beneficial capital improvement of the property.

131. In its letter of 14 July 2016 (**LL8**), the Municipality explained that, in fact, the compensation it had offered was really only in respect of the vacant land in the property and that *"The building/s on Mr Langer's property has not been valued."* The Municipality has therefore itself admitted that its compensation

was by definition not just and equitable because it was not in respect of the land it actually expropriated. It was only in respect of some portion thereof.

132. It is therefore clear that the compensation offered was not just and equitable. The Constitution provides that expropriation may only occur subject to just and equitable compensation. Accordingly, the compensation is clearly inconsistent with section 25 of the Constitution and is invalid. The expropriation therefore falls to be reviewed and set aside under section 6(2)(i) of PAJA.

VI. IN THE ALTERNATIVE, REVIEW UNDER THE PRINCIPLE OF LEGALITY

133. I am advised that the Municipality's decision to expropriate the property was administrative action and therefore reviewable under PAJA. However, if for any reason this Court is of the view that the expropriation was not administrative action, then its decision nevertheless falls to be reviewed and set aside under the principle of legality.

i) Condonation

134. If this review is to be considered a review under the principle of legality then I am advised that the 180 day timeline within which to bring a review application does not apply. Instead, the review must be brought within a reasonable time, failing which the Court may grant condonation for bringing the review after such a reasonable time has elapsed.

135. For the reasons I have set out above under my request for condonation for the PAJA review, I also seek condonation for the late filing of the review under the principle of legality. I submit that given my personal circumstances, and my

interactions with the Municipality in this matter, the Court would be justified in granting my request for condonation.

ii) The expropriation was unlawful

136. The foundation of the principle of legality is that all exercises of public power must be lawful and in conformity with the Constitution. If they are not, they are invalid, and the Court has the power to set them aside.

137. In this case, the grounds of review set out above, all speak to the failure of the Municipality to follow the mandatory legal prescripts of the Expropriation Act, the Local Authorities Ordinance and the Housing Act, or to expropriate the property in terms of the mandatory requirements of section 25 of the Constitution. All of these grounds of review are therefore also clearly breaches of the principle of legality because the Municipality has failed to exercise its power in a manner which is lawful. As a result, its actions are invalid and fall to be reviewed and set aside.

VII. REI VINDICATIO AND RELIEF AGAINST THE REGISTRAR OF DEEDS

138. Section 8 of the Expropriation Act determines when ownership passes to the state pursuant to the expropriation of property. It provides that ownership vests in the state "*on the date of expropriation*".

139. Section 7 of the Expropriation Act provides that the notice of expropriation must include the date of expropriation.

140. The Municipality has published three expropriation notices in respect of Farm Chakas Kraal in the KwaZulu-Natal provincial gazette, according to its own

correspondence, and my attorney's search of the provincial government gazettes (see the Municipality's letter of 14 July 2016 (**LL8**), as well as the Department of Governance and Traditional Affairs' letter of 24 July 2016 (**LL9**)).

141. The first notice was published on 4 April 2013, it is attached as annexure **LL10**. In this notice, my property is listed as one of the properties expropriated. The date of expropriation is stated as 1 March 2013. Accordingly, the date of expropriation pre-dates the notice of expropriation. This notice cannot be considered a valid notice of expropriation for the following reasons:

141.1. Section 7 of the Expropriation Act provides for *"notification that property is to be expropriated"* (emphasis added) not property that has already been expropriated. The date of expropriation cannot predate the notice.

141.2. If an expropriation notice is given only after the expropriation has occurred, this would deprive owners of making any representations to the Municipality as to why the expropriation should not take place for any valid legal reason. It would accordingly be procedurally unfair and unlawful.

141.3. Section 190 of the Local Authorities Ordinance contemplates objections being filed to the proposed expropriation after an owner receives notice of the expropriation. The Ordinance provides that – in the face of such objections – the property may only be expropriated if the Administrator has considered the objections plus

the comments of the council thereon and then approves the expropriation. Accordingly, it cannot possibly be valid to notify an owner of an expropriation *after* the land has already been expropriated.

141.4. The Municipality continued to communicate with me and engage in meetings about my objections to the expropriation long after March 2013 and so clearly it did not consider this to be the date of expropriation.

142. The next expropriation notice in the provincial gazette in respect of Farm Chakas Kraal was published on 15 August 2013. A copy of this notice is attached as **"LL17"**. My property is listed as one of the expropriated properties. The date of expropriation stated in this notice is 16 August 2013. Once again, for the same reasons the April 2013 notice is invalid, this notice cannot be a valid notice of expropriation if it provides only one day's notice. It afforded objectors no time to actually object or meaningfully engage the Municipality. In addition, as set out above, the Municipality continued to engage with me and invited me to come for a meeting after this date, regarding my objections to the expropriation. This is completely inconsistent with an expropriation date that has already passed. What this notice also shows is that the Municipality did not consider the 4 April 2013 notice, or it expropriation date of 1 March 2013, to be valid. Certainly, in its application to evict me from the premises it relied on 16 August 2013 as the date from which it was entitled to take possession of the property (**LL14**).

143. The next expropriation notice in the provincial gazette in respect of Farm Chakas Kraal was published on 29 August 2013. A copy of this notice is attached as **LL11**. The notice provides that the date of expropriation is 30 August 2013. However, despite the Municipality relying on this notice in its correspondence to me, the 29 August 2013 notice did not list my property as one of the expropriated properties.

144. Because there were no valid notices of expropriation in terms of section 7 of the Expropriation Act read with section 190 of the Local Authorities Ordinance, the grounds of review in respect of the Municipality's failure to observe mandatory procedural requirements is intensified. The expropriation took place without proper government gazette notice and falls to be set aside in terms of section 6(2)(b) of PAJA.

145. In the alternative, and to the extent that this Court finds that the expropriation notice of 15 August 2013 was valid, then the expropriation date was 16 August 2013. As stated above, section 8 of the Expropriation Act provides that ownership of the property vests in the Municipality on this date.

146. However, it is important to note that section 8 of the Expropriation Act provides that the ownership will pass on the expropriation date only in respect of property expropriated *"in terms of the provisions of this Act"*. Accordingly, any attempt to expropriate property that has not been carried out properly in accordance with the requirements of the Expropriation Act does not fall under section 8. In other words, if the provisions of the Expropriation Act are not adhered to, then ownership does not pass on the expropriation date. Ownership of the property does not vest in the Municipality.

147. For the reasons set out above in the grounds of review and in this section regarding the invalid expropriation notice, it is evident that the Municipality did not expropriate the property in accordance with the provisions of the Expropriation Act. As a result, ownership never vested with the state on 16 August 2013 or any other date.

148. I therefore remain the owner of the property. It was erroneously transferred into the Municipality's name but ownership never vested in the Municipality. Accordingly, this application is – in effect – an application to vindicate my property from the Municipality.

149. The Municipality claims that it is entitled to take possession of the property (see the eviction application, **LL14**) and remains the registered owner of the property (see the deed of transfer, **LL5**). This means the Municipality has deprived me of my rights as owner of the property. The Registrar of Deeds should accordingly be directed to re-register the property in my name as soon as possible so that my rights of ownership over the property are vindicated.

150. In addition, the purported expropriation was entirely invalid for the reasons set out in this application. It falls to be set aside because it was unlawful, procedurally unfair and inconsistent with the Constitution. I am advised that if a court declares an action invalid, it is void *ab initio* and everything done in consequence of the invalid action is likewise invalid. Because the expropriation was invalid, ownership never passed to the Municipality and the Registrar's transfer of the property to the Municipality is accordingly also invalid and falls to be rectified. This may be achieved by an order directing the Registrar to retransfer the property to me.

LL

VIII. ENFORCEMENT OF A PUBLIC PROMISE

151. In the alternative to the review relief sought in this application, I seek to enforce the promise that the Municipality made to me regarding the retransfer of a portion of the property.

152. I am advised that the Municipality's promise to me in its letter of 14 July 2016 (**LL8**) that it would return the portion of the property with all the buildings on it to me, together with a yard around each building, and that it would provide me with a title deed for this property, is a public promise, akin to a promise to pay.

153. The promise stated as follow:

> *"It is the intention of the Municipality, once the land has been surveyed and the Township Register opened etc., to return all buildings on the property (together with a yard around each) to the owner/those entitled thereto. If Mr Langer has a home on the property, he and his family will not have to move out and he will, in due course, receive a Title Deed for the plot on which his home is erected."*

154. This promise was enforceable as soon as the land had been surveyed and the Township Register opened. I do not know whether these things have taken place, but there is an implied obligation on the Municipality not to unreasonably delay in this regard as my rights under section 25 and 26 of the Constitution are at stake. Having made this promise two and a half years ago, it stands to reason that the promise is enforceable by now.

155. The Municipality's promise created a legal obligation unilaterally enforceable at my instance, as the intended beneficiary of the promise. The Municipality's

failure to fulfil this promise by launching an eviction application and also by failing to ever deliver a title deed in respect of the relevant portion of my property, constitutes a retroactive termination of a benefit the Municipality had already afforded me. This will not be fair no matter what process the Municipality followed (and incidentally it followed no process whatsoever).

156. The constitutional principles of reliance, accountability and rationality, as bolstered by my right to have my property compensated subject to just and equitable compensation and my right to housing under section 26 of the Constitution, require the Municipality to honour this promise. The Municipality's failure to do so and its reckless disregard for my rights and interests in doing do, renders the failure to deliver a title deed to me unlawful, invalid and subject to review. The failure to provide me with a title deed is an administrative act which has a direct external legal effect.

157. On this basis, I submit that the Municipality's failure to take a decision to transfer the relevant portion of the property back to be falls to be reviewed and set aside in terms of section 6(2)(d) of PAJA, as the decision was materially influenced by an error of law.

158. Alternatively, the Municipality created a legitimate expectation that I would receive the relevant title deed, and was therefore obliged under the doctrine of substantive legitimate expectation to do so.

IX. RELIEF SOUGHT

51. In light of the above, I seek the following relief in this application. An order:

51.1 Declaring section 10(5) of the Expropriation Act to be inconsistent with the Constitution and invalid;

51.2 Suspending that declaration of invalidity for a period of two years in order to afford the Legislature an opportunity to rectify the invalidity;

51.3 Directing that, pending the Legislature's amendment of section 10(5), the following words be read into section10(5) as subsection (c):

> *"An owner of immovable property shall not be deemed to have accepted an offer made to him by the Minister in terms of subsection (1), (2) or (4) if he or she has clearly objected to the offer of compensation within a reasonable time from receiving the notice of expropriation. In the event that the owner has not been deemed to have consented to the offer made to him, the Minister must approach the court under section 14(1) of the Act to determine the just and equitable compensation for that property."*

51.4 That this interim regime be declared applicable to me and the Municipality's purported expropriation of the property;

51.5 In the event that the Legislature fails to rectify the invalidity within two years, the interim regime set out in the above paragraph will be read into section 10(5) with final effect;

51.6 Reviewing and setting aside the Municipality's expropriation of the property, in terms of PAJA, alternatively the principle of legality;

51.7 Directing the Registrar of Deeds to register the property into my name within a period of three months from the granting of this order; and

51.8 Directing the Municipality to pay costs of this application.

52. In the alternative, I seek the following relief. An order:

52.1 Reviewing and setting aside the Municipality's expropriation of the portion of the property that is not vacant land;

52.2 Directing the Municipality, within 6 weeks from the date of this order, to send its land surveyor to visit the property and demarcate the portion of the property with the buildings on it and a reasonable yard space around those properties;

52.3 Directing the Registrar, within 12 weeks from the date of this order, to subdivide the land and transfer into my name that portion of the land that has been demarcated by the land surveyor; and

52.4 Directing the Municipality to pay the costs of this application.

53. In the further alternative, I seek the following relief. An order:

53.1 Compelling the Municipality to comply with its express public promise to me, made on 14 July 2016, that it will provide me with a title deed for the plot on which the buildings on the property are situated, together with a reasonable yard space around each building;

53.2 Alternatively, reviewing and setting aside the Municipality's failure to deliver the title deed for the abovementioned plot;

53.3 Directing the Municipality, within 6 weeks from the date of this order, to send its land surveyor to visit the property and demarcate the portion with the buildings on it and a reasonable yard space around those properties;

53.4 Directing the Registrar, within 12 weeks from the date of this order, to subdivide the land and transfer into my name that portion of the land that has been demarcated by the land surveyor; and

53.5 Directing the Municipality to pay the costs of this application.

X. COSTS

54. The general rule in litigation is that costs follow the result. If I am successful, I pray that this court applies that rule. However, if I am unsuccessful, I pray that each party should bear its own costs. I am bringing this case in order to enforce my constitutional rights. I submit that I should not have to pay the State's costs if I am unsuccessful.

L. N. Langer

LOUIS NATHAN LANGER

The Deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to before me at Durban on this the 28 day of May **2019** the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.

COMMISSIONER OF OATHS

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