



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. <b>YES</b>

**07 JULY 2022**  
DATE

SIGNATURE

Case No.: **17711/2020**

In the matter between:

**SOCIAL HOUSING REGULATORY AUTHORITY**

Applicant

And

**TBGI HOLDINGS (PTY) LTD**

First Respondent

**SOWETO POWER STATION MALL (PTY) LTD**

Second Respondent

**CIVCON HOLDINGS (PTY) LTD**

Third Respondent

**MEC FOR DEPARTMENT OF HUMAN  
SETTLEMENTS, GAUTENG PROVINCE**

Fourth Respondent

**THE CITY OF JOHANNESBURG  
PROPERTY COMPANY SOC LTD**

Fifth Respondent

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## JUDGEMENT

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### MATSEMELA AJ

[1] This is an opposed application for self-review of the decision of the Applicant to conclude a Consolidated Capital Grant (“**CCGA**”) agreement between itself and the First Respondent. The Applicant brings this application on the basis of the principle of legality.

[2] The Applicant seeks an order that:

2.1 The decision to award grant funding to the First Respondent and enter into the CCGA, out of which funds were disbursed to the First Respondent, be declared unlawful and set aside.

2.2 This Court to exercise its just and equitable relief under section 172(1)(b) of the Constitution and order that the First, Second and Third Respondents reimburse the Applicant for the amounts paid to them consequent on the conclusion of this unlawful agreement.<sup>1</sup>

### FACTUAL BACKGROUND

[3] The First Respondent which had been hitherto a conditionally accredited social housing institution in terms of the Social Housing Act, Act No. 16 Of 2008 (“the SHA”),<sup>2</sup> applied for grant funding towards the development of social housing unit in respect of a property in Soweto.<sup>3</sup>

[4] Pursuant to deliberations and evaluation of the First Respondent’s application for grant funding in terms of the Applicant’s Investment Policy<sup>4</sup>, the said application was

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<sup>1</sup> See Notice of Motion page 2 para 2

<sup>2</sup> See its certificate of notice thereof at annexure SHRA5, at page 68.

<sup>3</sup> Founding Affidavit, para 13, page 10.

<sup>4</sup> See annexure SHR4, at page 44.

successful.<sup>5</sup> Following the said successful of the application, award of the grant funding, and during 22February 2018, the Applicant and First Respondent concluded a Consolidated Capital Grant Agreement (“CCGA”)<sup>6</sup> for the development and construction of 507 social housing units at the value of R134 835 129.00<sup>7</sup> on some erven in Soweto.

4.1 The material terms of the said CCGA were the conditions precedent contained in clause 4. Relevant to this Agreement which provided that:

*“4.1. The provisions of this Agreement are subject to the fulfilment, to the SHRA’s satisfaction, by the Grant Recipient, or the waiver by the SHRA in writing, of the Conditions Precedent (CP) set out in section 3.6 below.”*<sup>8</sup>

*4.4. If the Conditions Precedent are not fulfilled, or waived within sixty Business days of the Signature Date, or the extended date(s) as contemplated in clause 3.3. above, the provisions of this Agreement shall not come into effect and the contract will become null and void. In such event, the Grant Recipient shall not have any claim against the SHRA.*

*4.6.13. the Grant Recipient submits proof of unconditional and irrevocable real rights to the land, whether title deeds, sale agreement, land availability agreement, lease agreement or any other document evidencing real right to the Land, or unconditional and irrevocable right to develop the Land for the purposes of the Project to the satisfaction of the SHRA, copies of which shall be annexed as Annexure A13”.*<sup>9</sup>

[5] In line with the draw down provisions of the CCGA, an amount of about R26 963 865.65 was advanced to the First Respondent by the Applicant.<sup>10</sup>

[6] It was then and after the facts brought to the Applicant’s attention, that the decision made to award the grant funding to the First Respondent was unlawful and contrary to the Regulations on the basis that the First Respondent did not meet certain criteria for the successful granting of the grant funding.<sup>11</sup>

<sup>5</sup> See the minutes of the Applicant’s Technical Evaluations Committee (“TEC”) dated 5 September 2017, annexure SHRA6, at page 71.

<sup>6</sup> See annexure SHRA7, page 79 being the said CCGA.

<sup>7</sup> Founding Affidavit, para 32 and the conditions contained therein.

<sup>8</sup> It is intended to read section 4.6 which does contain the said Conditions Precedent.

<sup>9</sup> See Founding Affidavit, para 33 – 34, and annexure SHRA 7 being the said CCGA, at page 79.

<sup>10</sup> Founding Affidavit, *ibid*, para 43, page 20

<sup>11</sup> Founding Affidavit, *ibid*, para 13, page 10.

## FACTS RELATING TO THE VALIDITY OF THE CCGA

[7] The First Respondent appears to have been part of the Second and Third Respondents by virtue, in the main, of having one common director who interchangeably used or presided on the board of the three entities in the name of Mark Brown. On 11 November 2011 the Second Respondent entered into a lease agreement with the Fifth Respondent, to wit Johannesburg Property Company (“JPC”) in terms of which the Second Respondent leased from the Fifth Respondent erven 31, 36 and 41 Orlando eKhaya (“the erven”), on which it undertook to develop same in accordance with the Site Plans approved by the JPC. This lease was for 30 years.<sup>12</sup>

[8] During 2015 the Second Respondent sought and was granted permission and/or approval to develop student accommodation in the erven from the JPC.<sup>13</sup> On 16 January 2017, the Second and First Respondents concluded a sublease agreement in terms of which the Second Respondent subleased to the First Respondent erven 31 and 36 eKhaya Orlando, Soweto. These are two of the erven leased to the Second Respondent by the Fifth Respondent. It further transferred development rights it had on the said erven to the First Respondent.<sup>14</sup>

[9] The Applicant had suspicions relating to the status of the lease of the affected erven which led to some preliminary investigations and which investigations revealed that the Fifth Respondent did not have a lease agreement with the First Respondent but with the Second Respondent and that the said lease concluded with the Second Respondent terminated on 12 August 2017.<sup>15</sup>

[10] The findings made therein prompted the Applicant to engage the services of Ligwa Advisory Services to conduct a forensic financial audit of the First

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<sup>12</sup> Founding Affidavit, at para 39, page 18.

<sup>13</sup> Ibid, para 41, page 19 and annexure SHRA8, at page 140.

<sup>14</sup> Ibid, para 42, page 19 and annexure SHRA9 at page 142.

<sup>15</sup> Founding Affidavit, paras 44 – 46, page 20, and annexures SHRA10 and SHRA11, at pages 152 and 153.

Respondent.<sup>16</sup> Ligwa produced an Audit Report which, inter alia, disclosed the fact that of the R26 million paid to it, the First Respondent paid an amount of R25 186 086 to the Second Respondent in respect to a historic debt incurred by the Second Respondent prior to the incorporation of the First Respondent and the conclusion of the CCGA<sup>17</sup>.

[11] In essence, the Audit Report revealed that:

11.1. A notarial sub-lease agreement submitted by the First Respondent to the Applicant was neither endorsed nor lodged with the Registrar of Deeds in terms of the Deeds Registration Act, Act 47 of 1937;<sup>18</sup>

11.2. The sub-lease agreement was concluded with a private entity despite the Regulations clearly providing that the lessor should be a public entity;<sup>19</sup>

11.3. That the Second Respondent required a written prior consent from the JPC to Sub-lease the property and this request was never sought and never granted;<sup>20</sup>

11.4. The main lease agreement between the Second and Fifth Respondents had by 12 August 2017 been terminated, a date that is prior to the Applicant's approval of the CCGA on 28 September 2017<sup>21</sup>

11.5. At the time of the conclusion of the CCGA, the Second Respondent did not have the land required for the development of social housing units for which funding was intended to be used;<sup>22</sup> and

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<sup>16</sup> Ibid, para 47, page 20 and annexure SHRA12 being an engagement letter, at page 155 and SHRA13 being the Audit Report.

<sup>17</sup> Ibid, para 48, page 21.

<sup>18</sup> Ibid, para 52.1.1. page 22

<sup>19</sup> Founding Affidavit para 52.1.2, page 22.

<sup>20</sup> Founding Affidavit, paras 52.2.1 and 52.2.2, and page 23.

<sup>21</sup> Founding Affidavit, supra, para 52.2.2

<sup>22</sup> Ibid, para 52.3.1, at page 23.

11.6. The Second Respondent failed to inform the Applicant of these material facts thus leading to an unlawful decision being taken by the Applicant.<sup>23</sup>

### **POINTS IN LIMINE**

[12] The First Respondent has raised the following points *in limine* in its answering affidavit.<sup>24</sup>

(a) It contends that the conduct of the Applicant in approving its application was in accordance with the law.<sup>25</sup> It contends that it met the Conditions Precedent of the CCGA and submitted a lease with the Second Respondent in respect of eKhaya Orlando, Soweto.<sup>26</sup>

(b) It denies that the Second Respondent did not have consent to sub-lease to the First Respondent in respect of development of accommodation and relies on annexure **SHRA8** as proof of consent it received from the JPC for development of Accommodation.<sup>27</sup>

(c) The Respondents deny that the Regulations require notarised sub-lease.<sup>28</sup>

(d) The Respondents allege that the Applicant has no authority to act in the Application.

### **FACTS RELATING TO POINTS *IN LIMINE***

[13] The Applicant is a public entity as defined in Schedule 3A of the Public Finance Management Act 29 of 1999 and established in terms of section 7 of the Social Housing Act whose primary goal is the provision of affordable, state subsidised rental social housing targeted at low to medium income groups.

[14] In fulfilment of this objective, the Applicant provides grant funding for the development and construction of social housing units to accredited social housing

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<sup>23</sup> Ibid, para 52.3.2.

<sup>24</sup> Pages 550 to 557.

<sup>25</sup> Answering Affidavit, para 57, page 559; paras 69, 71, 73 at pages 561 and 562

<sup>26</sup> Answering Affidavit, para 50, 78, at pages 558 and 563.

<sup>27</sup> Answering Affidavit, supra, para 82.1, page 563.

<sup>28</sup> Ibid, para 94, page 565.

institutions to uphold the constitutional injunction under section 26(1) read with section 26(2) of the Constitution of the Republic.

[15] The First Respondent applied for grant funding towards the development of such social housing units. The funding application was made in respect of property situated in Soweto to wit eKhaya, Orlando, Soweto. The funding application was successful (“the Approval”).

[16] As pointed out above it was brought to light that the decision of the Applicant was, in fact, unlawful in that the First Respondent did not meet certain criteria for the successful grant funding, as laid down in Regulation 19 of the Social Housing Regulations promulgated under section 19 of the Social Housing Act (“SHRA Regulations”). It is apparent that in approving the CCGA, the Applicant violated the law and the regulations in that there was no way that it could have accepted the sub-lease documents submitted by the First Respondent as evidence.

[17] The Applicant brings this application as one of self-review in line with its duties as an organ of state, and in the interests of transparency and accountability and it approached this Court to seek relief to this effect. Therefore, the decision of the Applicant to approve grant funding to the First Respondent, stands to be declared unlawful and invalid.

[18] As a result of the Approval, the Applicant proceeded to take certain subsequent acts. Those acts were taken on the presumption that the Approval was lawful and valid, and they depend on the legality of the Approval for their own validity. Because this presumption is incorrect, it is my view that the Applicant's subsequent acts must also be declared invalid as well.

### **CONDONATION OF THE APPLICATION FOR SELF-REVIEW**

[19] It is trite law that an application for self-review brought on the basis of legality must be instituted expeditiously and without unreasonable delay.<sup>29</sup>

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<sup>29</sup> See the two constitutional cases of *Tasima*, and *Gijima v SITA*. We will deal therewith herein below.

[20] The Applicant on becoming aware that there may have been an irregularity in the process leading to the approval of the grant funding to the First Respondent and noncompliance with conditions of the CCGA, made independent enquiries with the Fifth Respondent as to the status of the development lease agreement it had with the First Respondent.<sup>30</sup>

[21] The Applicant received a response from the Fifth Respondent advising that the development lease agreement entered between the latter and the Second Respondent had been terminated on 12 August 2017 long before the CCGA was concluded on 22 February 2018.<sup>31</sup>

[22] It was after this that the Applicant exercised its powers in terms of section 12 of the Social Housing Act and appointed Ligwa Advisory Services to conduct a forensic financial audit on its behalf into the affairs and conduct of the First Respondent, on 3 December 2018.

[23] It is common cause that Ligwa presented its report to the Applicant during September 2019 and that the Applicant considered the report through subjecting it to its internal processes and approached counsel for legal advice before instituting these proceedings.<sup>32</sup>

## THE LAW

[24] The Supreme Court of Appeal has recently had occasion to reconsider and pronounce on the test for unreasonable delay in respect of legality reviews.<sup>33</sup> It held as follows:

*“A legality review, unlike a PAJA review, does not have to be brought within a fixed period. However, whilst the 180-day bar set by s7(1) of PAJA ...does not apply, in both, the yardstick remains reasonableness. It is a long-standing rule that a legality*

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<sup>30</sup> Founding Affidavit, para 59, page 25.

<sup>31</sup> Ibid, para 60, page 25.

<sup>32</sup> Ibid, paras 61 – 62, page 25-26.

<sup>33</sup> *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122; 2020 JDR 2106 (SCA) paras 18 – 20.

*review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to either overlook the delay or refuse a review application in the face of an undue delay.*

*The test for assessing undue delay in the bringing of a legality review application is: first, it must be determined whether the delay is unreasonable or undue (this is a factual inquiry upon which a value judgment is made, having regard to the circumstances of the matter; and, second, if the delay is unreasonable, whether the court's discretion should nevertheless be exercised to overlook the delay and entertain the application."*

[25] Therefore this court has to make factual finding as to whether there was delay on the part of the Applicant in bringing this application and secondly, whether such delay (if found to exist) was unreasonable in the circumstances of this matter.

[26] In another decision of the Supreme Court of Appeal<sup>34</sup>, the Court pronounced itself in regard to the enquiry to be undertaken where it is found that the delay has been unreasonable. The Court held as follows:

*"Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a "factual, multi-factor and context-sensitive" enquiry in which a range of factors - the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised".*<sup>35</sup>

[27] I am satisfied that the Applicant has taken this Honourable Court into its confidence in regard to the steps it took once information came to light about possible irregularities in the award of funding to the First Respondent in terms of the CCGA. Furthermore, the Applicant has conducted itself in good faith in investigating the irregularities, obtaining legal advice and instituting these proceedings for the review of the decisions and the subsequent acts.<sup>36</sup>

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<sup>34</sup> *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] All SA 397 (SCA) para 30.

<sup>35</sup> *Ibid* para 30.

<sup>36</sup> Founding Affidavit, para 65, page 26.

[28] The length of the delay and the reasons for it have been fully explained. This Court further takes judicial notice of the incidence of the global Covid-19 pandemic which caused the President of the Republic to declare a national state of disaster in terms of the Disaster Management Act and the attendant practice directives issued by the Chief Justice which had placed a moratorium on the institution of new applications for some time at the start of the second quarter of 2020.

[29] In *Department of Transport and Others v Tasima (Pty) Ltd* (“Tasima I”)<sup>37</sup>, the Constitutional Court has held that in determining the interrelationship between the delay and the prejudice to be suffered by the parties, it is also a factor to be borne in mind that where prejudice is found to exist, the courts may rely on their powers in terms of section 172(1)(b) to ameliorate the prejudice.

[30] In *Buffalo City*<sup>38</sup>, it was held that the nature of the impugned decision is relevant to the decision to overlook the delay and that this requires a consideration of the merits of the legal challenge against the decision.

[31] In *Gijima*,<sup>39</sup> it was held that that where the unlawfulness of the impugned decision is clear and undisputed, the impugned decision must be set aside. In other words, even where there might be no basis for a court to overlook the delay, a court may nevertheless be compelled to declare the impugned decision unlawful because section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.

[32] It is my view that that there was no unreasonable or undue delay in the institution of these proceedings in view of the full explanation proffered and the reasons for the delay.

## **DISPUTE RESOLUTION CLAUSE**

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<sup>37</sup> [2016] ZACC 39; 2017 (2) SA 622 (CC) para 170.

<sup>38</sup> *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 55.

<sup>39</sup> *State Information Technology Agency SOC Ltd v Gijima Holdings* [2017] ZACC 40; 2018 (2) SA 23 (CC) para

[33] The First Respondent, in its application for grant funding from the Applicant, concealed or failed to disclose that it was not in a position to ensure compliance with the provisions of the regulations and misrepresented that it held rights to land albeit the sub-lease agreement was not concluded with an entity within the public sector but the Second Respondent who is a private party.<sup>40</sup>

[34] The Supreme Court of Appeal has had occasion to revisit the principles which find application in respect of the survival of a dispute resolution clause where the conclusion of the agreement was induced by fraudulent misrepresentation.<sup>41</sup> The Court held that a dispute resolution clause does not survive termination of contract induced by fraud.<sup>42</sup>

[35] In *North East Finance*<sup>43</sup>, the Court held that a dispute resolution clause could not survive in the face of allegations of fraud by one party, even though it expressly included the referral to alternative dispute resolution any question as to the enforceability of the contract in question.<sup>44</sup>

[36] In *Bowditch*<sup>45</sup>, it was held that a person who has been induced to contract by the material and fraudulent misrepresentation of the other party may either stand by the contract or claim a rescission thereof. In *Scriven Bros*<sup>46</sup>, it was suggested that where the dispute between the parties is as to whether the contract which contains the dispute resolution clause has ever been entered into at all, that issue cannot be subject to the dispute resolution clause.

[37] Therefore it is my view that *in casu*, the dispute resolution clause contained in the CCGA does not avail to the First Respondent in this application because the approval of the grant funding and the conclusion of the CCGA, were induced by fraud.

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<sup>40</sup> Founding Affidavit, para 38 – 42 read with Replying Affidavit, para 64.

<sup>41</sup> *Namasethu Electrical (Pty) Ltd v City of Cape Town and Another* [2020] ZASCA 74.

<sup>42</sup> *Ibid*, para 30.

<sup>43</sup> *46 North East Finance (Pty) Ltd v Standard Bank of South Africa* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 26 – 30.

<sup>44</sup> *47 Ibid*.

<sup>45</sup> *48 Bowditch v Peel and Magill* 1921 AD 561 para 572.

<sup>46</sup> *49 Scriven Bros v Rhodesian Hides & Produce Co Ltd and Others* 1943 AD 393.

[38] Furthermore, it would not be sufficient for the Applicant to content itself with a termination of the CCGA when in its conclusion thereof, there was an exercise of public power without the consideration of all the facts before it and outside the powers conferred on it.

[39] In *Khumalo*<sup>47</sup>, it was held that state functionaries are enjoined to uphold and protect the rule of law through seeking the redress of their unlawful decisions because it is the duty of a state functionary to rectify unlawfulness.

[40] Therefore it would not have been sufficient for the Applicant to terminate the CCGA. It had to seek the review and set aside of its unlawful decisions, as it has done.

[41] It is my view that in self-review, an applicant is not required to first terminate the contract forming part of the impugned decision, where it was induced by fraud, in order for the dispute resolution clause contained therein not to operate against it because the dispute between the parties is as to whether the contract which contains the dispute resolution clause has ever been entered into.

#### **AUTHORITY OF THE DEPONENT TO INSTITUTE PROCEEDINGS ON BEHALF OF THE SHRA**

[42] The Respondents allege that Mr Gallocher states that he is duly authorised to represent the Applicant in the application by virtue of his position. He provides no Council resolution to this effect.<sup>48</sup>

#### **LEGAL PRINCIPLES**

[43] Rule 7 of the Uniform Rules of Court provides that:

*"7 Power of Attorney*

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<sup>47</sup> *Khumalo and Another v MEC for Education, Kwa-Zulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC).

<sup>48</sup> Answering Affidavit para 15

*(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, where after such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."*

[44] It is accepted as law that Rule 7 is the appropriate remedy to utilise when authority is challenged by a party. Rule 7(1) is the procedure a party may follow if it disputes the authority of anyone to act on behalf of a party. It is also the law that Rule 7(1) query can be invoked at any time before judgment. The Applicant invoked it before the review application could heard.

[45] Rule 7(1) Notice requires the court to be satisfied that the party whose authority is disputed is authorised to act. The application in terms of Rule 7(1) can be made in court so long as rule is activated before judgment.

[46] Rule 7(1) requires a broad interpretation having regard to the purpose of the rule. The fact that it refers to the attorneys who must provide the Power of Attorney, does not detract from the fact that even the person instructing the said attorney must be authorised to do so, especially when acting for another person. The idea is to avoid the client refuting the representatives' claim that he or she authorised them.

[47] In the unanimous decision of *ANC Umvoti Council Caucus v Umvoti Municipality*<sup>49</sup>, full bench observed that: *"The Legislature intended the authority of "anyone" who claimed to be acting on behalf of another in initiating proceedings and not only attorneys, to be dealt under Rule 7(1)."*

[48] Rule 7(1) requires a broad interpretation having regard to the purpose of the rule. The purpose of the rule is, on one hand to avoid overburdening the pleadings unnecessarily with correspondence between the parties and power of attorney on

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<sup>49</sup> 53 *ANC Umvoti Council Caucus v Umvoti Municipality* 2010 (3) SA 31 (KZP) para 13-29. See also *Eskom v Soweto City Council* 1992 (2) SA 703 (WLD) at 705 E-706 C and *Ganes and Another v Telecom* above

the other hand. It provides a safeguard to prevent a person who is cited from repudiating the process or denying his or her authority for issuing the process.

[49] In the matter of *Royal Bafokeng Nation v Minister of Land Affairs and 15 others*,<sup>50</sup> the court listed the following principles to be applicable where the authority of a person to act is in dispute:

49.1 An artificial legal person is obliged to provide that it is authorised to initiate the litigation in question;

49.2 Any challenge should be mounted in terms of Rule 7 (1);

49.3 Rule 7 can be invoked at any time before judgement; and

49.4 While it is a practical rule which mostly turns out to be compliance with a procedural formality, it can in some cases, impact substantially on the rights of litigants.

49.5 The remedy for a person who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in rule 7(1).<sup>51</sup>

[50] The view of Gorven J, that Rule 7 is the appropriate remedy to utilise when authority is challenged by a party has been stated by Flemming DJP in *Eskom v Soweto City Council* at 705E-H:<sup>52</sup>

*“The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. . . .*

*The developed view, adopted in Court Rule 7(1), is that the risk is adequately*

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<sup>50</sup> 54 (2013) NWHC 999.

<sup>51</sup> *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199, para 14.

<sup>52</sup> 1992 (2) SA 703 (W); Also see *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) for a detailed review of the Rule and the relevant case law.

*managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants especially certain financial institutions."*

[51] The SCA in *Unlawful Occupier of the School Site v City of Johannesburg*<sup>53</sup> highlighted the importance of the Eskom judgment, especially the fact that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of an applicant is provided for in Rule 7(1). Brand JA succinctly stated it as follows: The *ratio decidendi* appears from the following dicta (at 705D-H): *"The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. . . The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring that application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's authority should be proved, the Rule maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1)."*

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<sup>53</sup> [2005] All SA 108 (SCA).

61.1 And (at 706B-D):

*'If then applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.'*

[52] In *Eskom v Soweto City Council*<sup>54</sup> the Court stated:

*"If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant ... As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See rule 7(1). Courts should honour that approach."*

[53] This decision was cited with approval in *Ganes and Another v Telecom Namibia Ltd.*<sup>55</sup>

[54] In *South African Allied Workers' Union v De Klerk* 1990 (3) SA 425 (ECD) at 436F/J- 437B the Court stated:

*"The power of attorney contemplated by Rule 7(1) is a power to take certain formal procedural steps, namely to issue process and to sign Court documentation such as a summons or notice of motion on behalf of a litigant. ... Rule 7(1) is, in essence, merely a means of achieving production of the ordinary power of attorney in order to establish the authority of an attorney to act for his client. It may be called for simply by notice and without an evidentiary challenge to such authority. Moreover, the authority of a litigant's attorney to represent him is not a fact which need be alleged in pleadings or established at a trial ..."*

[55] The Respondents were entitled to challenge the authority of the Applicant's deponent to act for the Applicant herein. Once the challenge was put forth it was

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<sup>54</sup> 1992 (2) SA 703 (WLD) at 705F.

<sup>55</sup> 2004 (3) SA 615 (SCA) at 624I-625A. See also *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 at 206 G-H.

then for the First Respondent to use the correct tool that being Rule 7 of the Uniform Rules of Court. The Applicant would have had to satisfy the Court that the deponent concerned did have the requisite authority so to act.<sup>56</sup>

[56] Accordingly, the Respondents' challenge in this regard falls to be dismissed.

### **DIRECT AND SUBSTANTIAL INTEREST OF THE FIRST THREE RESPONDENTS**

[57] In *Snyders and Others*<sup>57</sup>, it was held that a person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. If so, such a person should be joined in the proceedings.

[58] The Court proceeded to observe that if the person is not joined in circumstances in which their rights or interests will be prejudicially affected by the ultimate judgment which may result from the proceedings, then that would mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard.<sup>58</sup>

[59] This legality self-review has been brought to declare unlawful and set aside the CCGA concluded between the Applicant and the First Respondent and recover the monies paid to the First Respondent and in turn, the First Respondent paid to the Second and Third Respondents.

[60] Therefore, I am of the view that the Second and Third Respondents have a direct and substantial interest in the outcome of these proceedings and as such, it is proper that they have been joined to these proceedings.

### **SHRA STATUTORY AND REGULATORY FRAMEWORK**

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<sup>56</sup> *Gainsford and Others NNO v Hiab AB* 2000 (3) SA 635 (WLD) at 640A.

<sup>57</sup> *Snyders and Others v De Jager* [2016] ZACC 54; 2017 (5) BCLR 604 (CC) para 9 ("the joinder judgment").

<sup>58</sup> *Ibid.*

[61] By its very nature, the magnitude of the relief sought herein, various sections of the Constitution<sup>59</sup> must be traversed in order to contextualise the Applicant's source of authority for its action herein. Sections 1 and 2 of the Constitution commence with recognition of the supremacy of Constitution and states that;

*"[T]his Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled"*, as well as stating the rule of law as one of its founding values.

[62] The Constitution then affirms certain specific rights found in the Bill of Rights. It proclaims in section 26 thereof that: *"26 Housing: Everyone has the right to have access to adequate housing. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."*

#### **THE SOCIAL HOUSING ACT, 16 OF 2008**

[63] In complying with the above dictate, the Legislature enacted the Social Housing Act, Act 16 of 2008 ("SHA"). In its pre-amble, it proclaims its aims as:

- 63.1. To establish and promote a sustainable housing environment;
- 63.2. To define the functions of national, provincial and local governments in respect of social housing;
- 63.3. To provide for the establishment of the Social Housing Regulatory Authority in order to regulate all social housing institutions obtaining or having obtained public funds;
- 63.4. To allow for the undertaking of approved projects by other delivery agents with the benefit of public money;
- 63.5. To give statutory recognition to social housing institutions; and
- 63.6. To provide for matters connected therewith.

[64] It further proclaims that in terms of section 2(1)(a) of the Housing Act, (Act No, 107 of 1997), National, provincial and local spheres of government must give priority to the needs of the poor in respect of housing development.

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<sup>59</sup> Constitution of the Republic of South Africa Act, Act 108 of 1996.

[65] Further, all three spheres of government must, in terms of section 2(1)(e)(iii) of the Housing Act, promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination of slums and slum conditions.

[66] The SHA also recognises that there is a need for social housing to be regulated and that there is a dire need for affordable rental housing for low to medium income household which can access rental housing in the open market.

[67] The Act defines various critical concepts herein. Section 1 defines “*approved project*” as a social housing project in a restructuring zone approved by a provincial government pursuant to an application for capital grant funding to undertake the acquisition, development, conversion or upgrading of building housing.”

[68] “*Social Housing*” is defined as “*a rental or co-operative housing option for low to medium income households at a level of scale and built from which requires institutionalised management and which is provided by social housing institutions or other delivery agents in approved projects in designed restructuring zones with the benefit of public funding as contemplated in this Act.*”

[69] Section 2 of the SHA gives clarity to the principles that apply to social housing and those are to be applied in giving priority to the needs of low- and medium-income households in respect of social housing development. The national, provincial and local spheres of government must, *inter alia*,

(a) ensure their respective housing programs are responsive to local housing demands, and special priority must be given the needs of women, children, child-headed households, persons with disabilities and the elderly;

(b) support the economic development of low to medium income communities by providing housing close to jobs, markets and transport and by stimulating job opportunities to emerging entrepreneurs in the housing services and construction industries; and

(c) afford residents the necessary dignity and privacy by providing the residents with a clean, healthy and safe environment.<sup>60</sup>

[70] Chapter 3 of the Act in section 7 thereof establishes the Applicant. It provides that: *“7. (1) There is hereby established a juristic person to be known as the Social Housing Regulatory Authority.*

*(2) The Public Finance Management Act, applies to the Social Housing Regulatory Authority.*

*(3) The Social Housing Regulatory Authority is accountable to the Minister and Parliament.”*

[71] Among its functions, the Applicant must, subject to the provisions of the SHA, provide financial assistance to social housing institutions through grants to service providers accredited by the Regulatory Authority to enable them to develop institutional capacity, gain accreditation as social housing institutions, and to submit viable project applications.<sup>61</sup> It must also enter into suitable agreements with social housing institutions and other delivery agents for the protection of the government’s investment in social housing.<sup>62</sup>

[72] Section 12 of the Act provides extensive powers of the Applicant to intervene where evidence of maladministration is evident including the power to appoint, where possible forensic auditors, and to approach the High Court for relevant relief pursuant to the findings of a forensic audit report.

[73] Section 19 provides the Minister after consultation with Parliament to establish regulations prescribing, inter alia, a code of conduct, the investment criteria and the qualifying criteria for social housing institutions;<sup>63</sup> and may make regulations in respect of the provisions of the agreements between the Regulatory Authority and other service delivery agents.<sup>64</sup>

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<sup>60</sup> Section 2.

<sup>61</sup> See section 11(3)(a).

<sup>62</sup> Section 11(3)(d).

<sup>63</sup> Section 19(1)(a)(ii)

<sup>64</sup> Section 19(1)(b)(i).

[74] The Regulations were enacted to provide for *inter alia* accreditation of institutions that carries or intends to carry out business of social housing, with the powers to stipulate reasonable conditions it may deem appropriate in the circumstances in order to ensure compliance with the Act, these regulations and the rules.<sup>65</sup>

[75] Article 18 in Chapter 5 of the Regulations deals with Investment Criteria of the Applicant. It considers a number of areas that the Applicant must have regard to when investing in a social housing project. Those covers fields like;

- (a) land and services criteria, as specified in regulation 19;
- (b) housing design criteria as specified in regulation 20;
- (c) marketing arrangement criteria, specified in regulation 21; and
- (d) end-user agreement, specified in regulation 22.

[76] Regulation 19 specifically deals with land and services criteria. It provides as follows:

*“19. (1) In order to comply with the land and service criteria, the social housing institution responsible for the housing stock during development must—*  
*(a) be the registered owner of the land to be utilized for development or have a minimum lease period of 30 years of the land with the public sector...”*

[77] As indicated herein above, in order for a social housing institution (“SHI”) to be eligible to apply for grant funding from the Applicant, the relevant SHI must have obtained either conditional or full accreditation as an SHI from the SHRA.

[78] Conditional accreditation, on the one hand, would entitle an SHI to operate as such under prescribed conditions set out in a conditional compliance notice pending the fulfilment of outstanding accreditation requirements for a period not exceeding two years from the date of conditional accreditation.

[79] Full accreditation, on the other, means the relevant SHI would have complied with all of the Applicant’s prescribed accreditation requirements, criteria and

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<sup>65</sup> Regulation 2(1) and (4).

standards which would empower the relevant SHI to operate for a period not exceeding five years before applying for renewal of accreditation.<sup>66</sup>

[80] The Applicant has an investment policy which sets out the process of application for an SHI, as discussed, if an entity seeks accreditation from the Applicant.

[81] It further sets out the process for the evaluation, consideration and approval of an application from an SHI for project accreditation from the Applicant for grant funding, with which compliance is mandatory.

[82] The Applicant's investment policy is the Social Housing Investment Plan contemplated in section 11(2) of the Social Housing Act. It is subject to the PFMA and approval by the executive authority, under whose terms the approval, allocation and administration of capital grants is made.

[83] In terms of Regulation 18 read with Regulation 19 of the SHRA Regulations, the Applicant may invest in SHI's against set land and service criteria which mean the SHI being either the registered owner of the land to be used for development or having a minimum lease period of 30 years of the land to be used for development, with the public sector.

[84] In order for an SHI to obtain project accreditation for the approval and allocation of capital grant funding for the development of a social housing project, its application for project application serves before the SHRA Technical Evaluation Committee ("TEC") which considers the application in terms of chapter 5 of the SHRA Regulations.<sup>67</sup>

[85] The First Respondent, at the time of its application for grant funding in 2017, had obtained conditional accreditation subject to the prescribed accreditation requirements set out in the conditional compliance notice issued to it on 11 May 2017 with compliance therein to be attained by 31 October 2017.<sup>68</sup>

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<sup>66</sup> Founding Affidavit, para 24, page 14.

<sup>67</sup> Founding Affidavit, para 26, page 15.

<sup>68</sup> Ibid, para 25, page 15.

[86] The minutes of this meeting show that the cost of the land on which the social housing project of the First Respondent was to be developed aroused serious discussion and so too was the legal structure of the First Respondent.<sup>69</sup>

[87] In terms of clause 4.4.3 of the Applicant's Investment Policy, the evaluation report and recommendations of the TEC are to be tabled before the Investment Committee of the Applicant's Council at the instance of the Applicant's Company Secretary.

[88] The Investment Committee of the Applicant's Council convened to deliberate on and consider the TEC evaluation report and the attendant recommendation for approval in respect of the First Respondent and resolved to recommend the approval of the First Respondent's application to the SHRA Council.<sup>70</sup>

[89] In terms of clause 4.4.5 of the Applicant's Investment Policy, the Applicant's Council must, by way of resolution, approve or reject applications based on the report and recommendation of its Investment Committee.

[90] The Applicant's Council convened a special council meeting, on 28 September 2017. It resolved to approve the development and construction of 507 social housing units in respect of the First Respondent at R134 835 129.00 subject to conditions which included the sudden and drastic reduction in the cost of land from R84 Million to R50 Million.<sup>71</sup>

[91] The Applicant and the First Respondent entered into and concluded the CCGA on 22 February 2018 and clause 4.5.13 contained a condition precedent which provided that:

*"... the Grant Recipient submits proof of unconditional and irrevocable real rights to the Land, where title deeds, sale agreements, land availability agreement, lease agreement or any other document evidencing a real right to the Land, or*

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<sup>69</sup> Ibid, para 27, page 15.

<sup>70</sup> Ibid, para 30, page 16.

<sup>71</sup> Founding Affidavit, op. cit., para 32, page 16.

*unconditional and irrevocable right to develop the Land for the purposes of the SHRA, copies of which shall to [sic] be annexed as annexure "A13".*

[92] In seeking access to the above grant and with its attempt at meeting the requirement for land and service criteria, the First Respondent provided the Applicant's TEC with a document purporting to be a sub-lease between itself and the Second Respondent, a private company.

[93] In terms of the said document, the First Respondent was to be a sub-lessee to the Second Respondent who is the sub-lessor. The main lease agreement is between the Fifth Respondent a metropolitan municipality and the Second Respondent.

[94] In submitting this document, the First Respondent represented or misrepresented to the Applicant that it has a lease for over 30 years on which it could develop the social housing project in terms of which it was awarded the CCG.

[95] The main lease Agreement also had difficulties in that by the time the Applicant awarded the First Respondent the CCG, the said lease agreement between the Second and Fifth Respondents had come to an end.<sup>72</sup> And this information was never disclosed to the Applicant.

[96] Furthermore, the main lease agreement was in respect of three erven that the Fifth Respondent had ceded over to the Second Respondent for commercial development, in terms of the agreed Site Development Plans (SDPs) between the parties. Instead of complying with the agreement with the Fifth Respondent, the Second Respondent subleased two of the three erven to the First Respondent for the purposes of the planned social housing project with the Applicant in plain contradiction to the SDPs.

[97] The Fifth Respondent appears to have repeatedly refused to allow the Second Respondent to incorporate social housing into their approved and agreed SDPs with

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<sup>72</sup> See Founding Affidavit, Ligwa Forensic Report etc., at page 171.

the serious consequences to the Applicant and the First Respondent's social housing project.

[98] Accordingly, the Applicant contends that the criteria was not met because the sub-lease submitted as proof of right to land was not compliant with Regulation 19 which requires it to be entered into between a social housing institution ("SHI"), such as the First Respondent, and the public sector.

[99] The First Respondent entered into a sub-lease agreement with the Second Respondent because the latter had concluded a lease agreement with the Fifth Respondent. The agreement was not between the First Respondent and the Fifth Respondent thus, the First Respondent did not have a lease agreement with the public sector. It is even more concerning that the said lease had been terminated five months before the CCGA was concluded, a fact the Applicant ought to have known prior to approving the CCGA.

[100] In the paragraphs 76-78 of the Replying Affidavit, the Applicant asserted that the criteria were not met because the sub-lease submitted as proof of right to land was not compliant with Regulation 19 which requires it to be entered into between a social housing institution ("SHI"), such as the First Respondent, and the public sector.

[101] The Applicant asserted that the Fifth Respondent has, on more than one occasions, rejected the Respondents' proposal to include Social Housing on the even forming the main Lease Agreement between itself and the Second Respondent. And this land, is the very same land that was sub-leased to the First Respondent for the purposes of developing the Social Housing project for which the CCGA was concluded and funded.

[102] All these concerns resulted in the Applicant engaging the services of a Forensic Auditor whose report<sup>73</sup> confirmed many of the above complaints. From the report of Ligwa Forensic Report, it is evident that the Applicant should not have approved and awarded the CCG to the First Respondent. These are the reasons and instances that the Applicant ought to have been attuned to:

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<sup>73</sup> See annexure SHRA 13, page 171.

102.1. The findings which the Applicant ought to have known prior to approving the Consolidated Capital Grant Agreement (“CCGA”), and which were peculiarly within his own (or the Respondents’ own) knowledge. Those include the fact that the lease Agreement between the Fifth Respondent and the Second Respondent, and which it used as evidence that it had real rights to the land in question, had been cancelled five months prior to the conclusion of the CCGA; or was a subject of a cancellation dispute before an Arbitrator.<sup>74</sup>

102.2. Furthermore, the Applicant accepts the findings of the forensic investigators that it violated the Regulation 19 of the Regulations of the SHA in that:

102.2.1. It should not have accepted that the sub-lease agreement between the First and Second Respondents was and could have met the Conditions Precedent set out in the CCGA;

102.2.2. That the said sub-lease was not notarised and therefore not providing the comfort that the Applicant required in the Condition Precedent;

102.2.3. That the forensic investigators pointed to the fact that same was not even signed and stamped;

102.2.4. That the said sub-lease was actually for the development of the Social Housing Project by the Second Respondent and not the First Respondent;

102.2.5. That the Fifth Respondent which owned the land in issue, a substantial portion of which had been sub-leased to the First Respondent for the Social Housing project in terms of the CCGA, had, on more than once, asserted its rejection of the Respondents’ SDPs that included Social Housing development;

102.2.6. That the said lease had been terminated five months prior to the CCGA being awarded to the First Respondent;

102.2.7. That the sub-lessor on the contract to which it was to become a sub-lessee, the sub-lessor thereof was not a Public Sector Institution but a private company; and

103.2.8. That under those irregular and unlawful circumstances the resultant payment of R26 million to the First Respondent was therefore irregular and unlawful.<sup>75</sup>

[103] I am of the view that these, are the material irregularities that the Applicant should not have missed, when it awarded the CCG to the First Respondent.

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<sup>74</sup> See Replying Affidavit, para 11, page 585.

<sup>75</sup> Replying Affidavit, para 12, page 585.

## LEGAL FRAME WORK FOR SELF-REVIEW

[104] In general, the basic relevant principles in regard to self-review may be summarised as follows:

104.1 It is central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law and that the common-law principles of ultra vires remain under the new constitutional order.<sup>76</sup>

104.2 The principle of legality is applicable to all exercises of public power. It requires that all exercises of public power be, at a minimum, lawful and rational. The Supremacy of the Constitution and the guarantees in the Bill of Rights require that in upholding the rule of law, regard should not just be had to the strict terms of regulatory provisions but to the values underlying the Bill of Rights.<sup>77</sup>

104.3 The exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution and invalid. The principle of legality is the means by which an organ of state may seek the review of its own decision. Under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power because it is empowered to make any order that is just and equitable and this power is constrained only by considerations of justice and equity.<sup>78</sup>

104.4 A decision based on a material and established mistake of fact is reviewable. The holder of the power must act in good faith and must not have misconstrued the power conferred nor may the power be exercised arbitrarily or irrationally. The requirement of rationality is an incident of legality and encompasses considerations of procedural fairness, the duty to give reasons and to take into account relevant material in reaching a final decision.<sup>79</sup>

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<sup>76</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 58 – 59.

<sup>77</sup> *Khumalo*, fn 47 above.

<sup>78</sup> See *State Information Information v Gijima* (CCT254/16) [2017] ZACC 40 at para 53

<sup>79</sup> *Airports Company South Africa v Tswelokgotso Trading Enterprises* CC 2019 (1) SA 204 (GJ) paras 6 - 12.

[105] All these authorities derive their source against the backdrop of the Constitution. It is worth noting that the Constitutional Court restated that South Africa is a constitutional democracy with the Constitution being the supreme law of the country, with any law inconsistent therewith being unconstitutional. The Court stated that “[t]he commitment of supremacy of the Constitution and the rule of law means that the exercise of public power is now subject to constitutional control. The exercise of public power must comply with the Constitution, which is the supreme law and the doctrine of legality which is part of our law.”<sup>80</sup>

[106] In linking the points made above to the Constitution, the doctrine of legality was explained as follows: “The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive “are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.” In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.”<sup>81</sup>

[107] The above principle enunciated in *Pharmaceutical’s* case was reaffirmed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,<sup>82</sup> (SARFU III) where the Constitutional Court outlined different ways in which the exercise of public power is regulated by the Constitution. One of the constitutional controls referred to is that flowing from *the doctrine of legality*.<sup>83</sup>

[108] Although *Fedsure*<sup>84</sup> was decided under the interim Constitution, the decision is applicable to the exercise of public power under the 1996 Constitution, which in

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<sup>80</sup> Affordable Medicines, supra, at paras [48] – [49]

<sup>81</sup> See *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241 (CC) at para [20]; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458 (CC)) at para 58.

<sup>82</sup> 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

<sup>83</sup> Ibid, at para [148].

<sup>84</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458 (CC))

specific terms now declares that the rule of law is one of the foundational values of the Constitution.<sup>85</sup>

[109] Ngcobo J (as he then was) held that –

*“[t]he exercise of all legislative power is subject to at least two constitutional constraints. The first is that there must be a rational connection between the legislation and the achievement of a legitimate government purpose. The idea of constitutional state presupposes a system whose operation can be rationally tested. Thus, when Parliament enacts legislation that differentiates between groups and individuals, it is required to act in a rational manner.”*<sup>86</sup>

[110] The Constitutional Court amplified the test thus: *“[I]t is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given; otherwise, they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass the constitutional scrutiny the exercise of the public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution.”*<sup>87</sup>

[111] Furthermore, the Constitutional Court restated that South Africa is a constitutional democracy with the Constitution being the supreme law of the country, with any law inconsistent therewith being unconstitutional. The Court stated that *“[t]he commitment of supremacy of the Constitution and the rule of law means that the exercise of public power is now subject to constitutional control. The exercise of public power must comply with the Constitution, which is the supreme law and the doctrine of legality which is part of our law.”*<sup>88</sup>

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<sup>85</sup> Section 1(c) of the 1996 Constitution.

<sup>86</sup> *Affordable Medicines Trusts v Minister of Health* (CCT 24/04) [2005] ZACC 247, at para 74-79; See also *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) BCLR 489) at para [19]; *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759) at para [25].

<sup>87</sup> See *Pharmaceutical Manufacturers Association: in Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para [85].

<sup>88</sup> *Affordable Medicines*, *supra*, at paras [48] – [49].

[112] The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law.

[113] The words of caution were sounded by the court previously in *Bredenkamp & others v Standard Bank of South Africa Ltd.*<sup>89</sup> After analysing the judgments of the Constitutional Court in *Barkhuizen v Napier*<sup>90</sup>, Harms DP says the following in para 39: '*A constitutional principle that tends to be overlooked, when generalized resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.*'

[114] This principle was reinforced in *Potgieter v Potgieter NO*<sup>91</sup> where Brand JA, after referring to *Bredenkamp* and other cases decided along these lines in this court, says the following in paragraph 34:

*'[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller & others v Jordaan 1956 (1) SA 483 (A)* at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.'*

[115] The decision to approve and award the grant funding to the First Respondent is reviewable on the following grounds:

115.1 First, the decision was (a) based upon a material error of fact; alternatively (b) *ultra vires*; alternatively (c) arbitrary and irrational, in that:

115.1.1 During the project accreditation process it had been accepted that the land on which the 507 social housing units were to be built had been purchased and there was proof of a title deed and or a sale agreement. Instead of a title deed and or a sale agreement, a notarial sub-lease agreement was submitted and it was neither

<sup>89</sup> [2010] ZASCA 75 (SCA); 2010 (4) SA 468 (SCA).

<sup>90</sup> 2007 (5) SA 323 (CC).

<sup>91</sup> [2011] ZASCA 181; 2012 (1) SA 637 (SCA).

endorsed nor lodged with the Registrar of Deeds in terms of the Deeds Registration Act 47 of 1937.

115.1.2 Consequently, the decision to approve the grant funding to the First Respondent did not comply with Regulation 19(1)(a) which provides that the social housing institution concerned must either “*be the owner of the land to be utilised for development or have a minimum lease period of 30 years of the land with the public sector*”. The First Respondent was not the owner of the land, the sub-lease of the land which it proffered was not a lease agreement with a public sector entity, but with a private company and furthermore, the sub-lease agreement was not for a period of 30 (thirty) years.

115.2 Second, the decision was (a) based upon a material error of fact; alternatively (b) *ultra vires*, in that:

115.2.1 The Second Respondent had entered into the main lease agreement with the Fifth Respondent, an entity of the City of Johannesburg Metropolitan Municipality, which provided for prior consent for subletting to be sought from the lessor.

115.2.2 This prior consent for sub-letting was never sought and the development lease agreement between the Second Respondent and the Fifth Respondent was terminated on 12 August 2017 prior to the SHRA Council approval of TBGI SHI application for grant funding on 28 September 2017

115.3 Third, the decision was (a) based upon a material error of fact; alternatively (b) *ultra vires*, in that:

115.3.1 At the time of the conclusion of the CCGA between the First Respondent and the Applicant, the First Respondent did not have the land required for the development of social housing units for which the funding was intended to be used; and

115.3.2 The First Respondent failed to inform the Applicant of such facts, and the Applicant made the decision on the flawed assumption that the First Respondent did indeed have the land, which it lacked.

[116] At the time of the conclusion of the CCGA between the First Respondent and Applicant the First Respondent failed to inform the Applicant of such facts, and the Applicant made the decision on the flawed assumption that it was within its province to do so.

[117] Accordingly it is my view that the Applicant has made out a case for the review of the decision on the grounds set out above.

## REMEDY

[118] In terms of section 172(1)(b) of the Constitution, this Court has a discretion in regard to the nature of the remedy that it orders which remedy must be appropriate, just and equitable. The Constitutional Court upheld the view that:

*‘Constitutionally-mandated remedies must be afforded for violations of the Constitution. This means providing effective relief for infringements of constitutional rights. Relief must also spring from breaches of the Constitution generally. There can therefore be no doubt that upholding the High Court orders by enforcing the transfer management provisions of the original contract is open to this Court. Not only has Tasima made commercial decisions on the basis of the High Court orders, but doing so would also vindicate the high esteem the Constitution gives to the orders themselves.’*<sup>92</sup> [Footnotes omitted]

[119] The Constitutional Court further said:

*“In crafting an appropriate remedy, even where a range of court orders have been violated, the interests of the public must remain paramount. This extends beyond considerations of the immediate consequences of invalidity. As Allpay II expresses, primacy of the public interest in procurement matters “must also be taken into account when the rights, responsibilities, and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range.”* [Footnotes omitted]

[120] The Applicant is an Organ of State charged with one of the most important duty of the Constitution to wit, provision of adequate housing. SHA was enacted to give the above constitutional mandate effect.

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<sup>92</sup> Tasima, para [200].

[121] In misleading the Applicant, the Respondents were able to achieve the unlawful in that the Applicant was led into approving the use of substantial amount of public money in a project that is essentially still born. We have demonstrated that a material criteria of the CCG was not met, and cannot be met. The First Respondent does not have land and/or a lease that complies with the Regulation 19.

[122] As matters stands, the main lease agreement between the Second and Fifth Respondents is under threat with the parties thereto locked in an arbitration. In the event that the Fifth Respondent succeeds, the lease would have been validly terminated. That immediately, spells trouble for the First Respondent and the Applicant's project. The First Respondent will not meet the investment criteria on land and services.

[123] Even if the arbitration decision goes against the Fifth Respondent, the sub-lease is contrary to the requirements of the CCGA and does not offer the security required by the Applicant.

[124] Most importantly, the Fifth Respondent has previously rejected any plans to include social housing on its land which is earmarked for commercial development and student accommodation. Accordingly, the Applicant and First Respondent's social housing project is doomed.

[125] We contended that the First Respondent ought to have disclosed these material facts to the Applicant so that an informed decision could be taken. Its failure to do so, resulted in the Applicant violating the SHA and Regulations thereof.

[126] This Honourable Court has the power to set aside and should set aside, the decision of the Applicant's Council to award grant funding to the First Respondent and conclude the CCGA with the First Respondent and should order the repayment of money advanced to the First Respondent in terms of the CCGA. The Applicant respectfully submits that this Court should grant such relief.

[127] We submit that the overarching consideration is the interests of justice. In the present application, we submit that, in addition to above, the relief would be appropriate for the following reasons:

- a) First, the First Respondent misrepresented to SHRA that it, either owned the land to be developed or had a valid sub-lease on the land in question which complied with the Social Housing Regulations. There was dishonesty or fraud in the First Respondent's representations or conduct to the Applicant and considerations of turpitude would arise.
- b) Second, the First Respondent proceeded with its project application for grant funding despite the termination of the development lease agreement between the Fifth Respondent and the Second Respondent, of which the First Respondent was aware, which placed the performance of its obligations in terms of the CCG agreement with SHRA beyond the realm of possibility.
- c) This would render the CCGA void *ab initio* and have the result of a restoration of the *status quo ante* which would necessitate the repayment of all sums disbursed to TBGI in terms of the CCG agreement.

[128] On condonation of the delay in bringing this application, the applicant also demonstrated that by virtue of the public interest of this matter, the amount of money involved herein, and the constitutional rights that are implicated herein, this Court is empowered by the Constitutional Court, (Tasima case) to grant and/or overlook any condonation sought herein.

[129] Khampepe J in *Tasima*, held that *"In Khumalo, this Court emphasised that an important consideration in assessing whether a delay should be overlooked is the nature of the decision. This was said to require, "analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge". [Footnotes omitted]*

[130] Further, the above Apex Court at paragraph 170 considered the incidence of prejudice and came to a conclusion that where such is too severe for the Organ of State, such must be taken into account. I am of the view that the Applicant stand to suffer great prejudice should this application not be granted.

[131] Having said that I therefore make the following order

**ORDER:-**

1. The application by the applicant for condonation of the application for self-review is granted.
2. All points *in limine* raised by the Respondents are dismissed.
3. The application for self-review of the decision of the Applicant to conclude CCGA agreement between itself and the First Respondent is granted.
4. The decision to award grant funding to the First Respondent and enter into the CCGA, out of which funds were disbursed to the First Respondent, is hereby declared unlawful and set aside.
5. The First, Second and Third Respondents are jointly and severally one paying the other to be absolved liable to reimburse Applicant an amount of R26 963 865.65 paid to the First Respondent on the conclusion of unlawful CCGA agreement.
6. The First, Second and Third Respondents are jointly and severally to pay the costs of application for self-review and such costs to include costs of two counsel.

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**MOLEFE MATSEMELA**

**Acting Judge of the South Gauteng Local Division**

Date of hearing: 2 MAY 2022

Date of judgment: 05 JULY 2022

For the Applicant

Adv TJ Machaba SC

With him

Adv IC Mokoena

Instructed by

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For the First, Second and Third

Respondents

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