THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 522/2021 & 523/2021

In the matter between:

MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	**FIRST APPELANT**
PREMIER OF THE WESTERN CAPE PROVINCE	**SECOND APPELLANT**
THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	**THIRD APPELANT**
MINISTER OF HUMAN SETTLEMENTS: WESTERN CAPE	**FOURTH APPELANT**
CITY OF CAPE TOWN	**FIFTH APPELANT**

and

THOZAMA ANGELA ADONISI	**FIRST RESPONDENT**
PHUMZA NTUTELA	**SECOND RESPONDENT**
SHARONE DANIELS	**THIRD RESPONDENT**
SELINA LA HAINE	**FOURTH RESPONDENT**
RECLAIM THE CITY	**FIFTH RESPONDENT**
TRUSTEES OF NDIFUNA UKWAZI TRUST	**SIXTH RESPONDENT**

and in the matter between:

PREMIER OF THE WESTERN CAPE PROVINCE	**FIRST APPELANT**
MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	**SECOND APPELANT**
CITY OF CAPE TOWN	**THIRD PPELLANT**

and

MINISTER OF HUMAN SETTLEMENTS	**FIRST RESPONDENT**
NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS	**SECOND RESPONDENT**
SOCIAL HOUSING REGULATORY AUTHORITY	**THIRD RESPONDENT**

Neutral citation: *Minister for Transport and Public Works: Western Cape & others v Adonisi and Others* (522/2021 & 523/2021) [2024] ZASCA 47 (12 April 2024)

Coram: DAMBUZA AP, ZONDI, SCHIPPERS and MOLEFE JJA, UNTERHALTER AJJA

Heard: 20 February 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 12 April 2024.

Summary: Constitutional Law: principle of constitutional subsidiarity whether the respondents, in asserting their right of access to land and adequate housing, could rely directly on ss 25 and 26 of the Constitution – whether the Housing Act 107 of 1997 and the Social Housing Act 16 of 2008 giving effect to the

constitutional right of access to adequate housing obliges the state to provide social housing at a specified location (Central Cape Town).

Regulations issued in terms of the Western Cape Land Administration Act 6 of 1998 (WCLAA) – whether regulation 4(6) and the proviso in regulation 4(1) are unconstitutional – whether conclusion of a conditional contract of sale of land owned by the provincial government prior to the notice and comment process is unlawful.

Government Immovable Asset Management Act 19 of 2007 (GIAMA) – whether the Western Cape Provincial Government may sell provincial government property in the absence of a custodian asset management plan or user asset management plan prescribed in s 13 of the Act.

Intergovernmental Relations Framework Act 13 of 2005 (IGRFA) – whether the Western Cape Provincial Government has an obligation to inform and consult the National Minister of the Department of Human Settlement of an intention to dispose of provincial land.

Designation of restructuring zones in terms of ss 3, 4 and 5 of the Social Housing Act – whether Sea Point was designated as a restructuring zone in terms of a notice issued by the National Minister of the Department of Human Settlements – principles applicable to interpretation of legal documents restated.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble and Samela JJ, sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the high court in Case No 7908/2017 is set aside and replaced with the following order:

'The application is dismissed with no order as to costs.'

3 The order of the high court in Case No 12327/2017 is set aside and replaced with the following:

'The application is dismissed with no order as to costs.'

JUDGMENT

Dambuza AP (Zondi, Schippers and Molefe JJA and Unterhalter AJJA concurring)

Introduction

[1] At the heart of this appeal is a decision by the third appellant, the Provincial Government of the Western Cape (the Province) to sell to the Phyllis Jowell Jewish Day School (NPC) (the Day School)[1] two properties, namely, Erf 1675, an unregistered portion of Erf 1424 Sea Point, and the remainder of Erf 1424 Sea Point (collectively referred to as the Tafelberg property). The respondents in this appeal brought two applications in the Western Cape Division of the High Court contesting the sale on the basis that it occurred in

[1] The school was the third respondent in the first application before the high court. It did not participate in the appeal in this court.

circumstances where the Province and the fifth appellant,[2] the City of Cape Town (the City) had failed, over a protracted period, to comply with their obligation to 'reverse apartheid special design' and to provide social housing in the centre of Cape Town. The two applications were heard together. The Western Cape Division of the High Court (the high court, Gamble J, with Samela J concurring), granted the order sought in each of the two applications. The main effect of the orders was to declare the sale unlawful and to set it aside. Leave to appeal was granted by the high court in part, and this court granted leave in respect of the remaining issues on appeal.[3] This appeal relates to the orders made in both applications.

The facts

The history of the property

[2] The Tafelberg property is located at 355 Main Road, in Sea Point, Cape Town. It measures 1,7054 hectares (ha) in extent. It is registered in the name of the Province. Its long history is set out in full in the judgment of the high court. In brief, in 1899 a girls' school was established on the property. Almost a century later, the girls' school was converted into a co-educational public school. At some stage, the school building was used as a remedial school. A block of flats known as Wynyard Mansions was built on a portion of the property and was managed by the Western Cape Provincial Department of Transport and Public Works (Department of Transport). In 2010, the remedial school was closed down.

[3] After the last group of scholars were transferred elsewhere, the Province started a process of determining the most suitable use of the property. The tenants of Wynyard Mansions were given notice to vacate the property.

[2] Third appellant in the second appeal.

[3] In respect of the first order, the high court granted the Province and the departments leave to appeal against orders 1 to 6, and 10 to 12. It also granted the City leave to appeal against orders 1 to 6 and 12.

Following a lengthy process of provincial inter-governmental discussions and procurement, in January 2016 the property was sold to the Day School for R135 million. It is this sale that was challenged in two court applications launched in the high court.

The process that preceded the sale

[4] When the school was closed in 2010, the Provincial Department of Transport was the custodian of the Tafelberg property, as provided in s 1 of the Government Immovable Asset Management Act, 19 of 2007 (GIAMA).[4] The Western Cape Department of Education made use of the school premises, and the Provincial Department of Human Settlements made use of Wynyard Mansions.[5] The latter continued to use the property until 30 May 2014, when the last tenant was evicted from the Wynyard Mansions.

[5] From 2011, the Provincial Department of Human Settlements initiated an investigation into the feasibility of social housing on certain land within the City, including the Tafelberg Property, in line with the 'Cape Town Central City Regeneration Programme Strategic Framework' (the Regeneration Programme) and the Western Cape Property Development Process, adopted by the Province in September and October 2010 respectively. The essence of the Regeneration Programme is captured in the following extract from its executive summary:

'The Western Cape Provincial Government aims through the Cape Town Central Regeneration Programme (CT-CCRP) to:

- Unlock Cape Town's potential to become a city that provides the needs of all its citizens as one of the world's greatest cities of the world;
- Leverage private sector investment, capacity and expertise;

[4] Under s 1 read with s 4 of GIAMA a 'custodian' is a national or provincial department, as managed by the National Minister, the Minister for Land reform, a Premier of a province, or an MEC of a province duly delegated by the Minister.

[5] Under s 1 of GIAMA a 'user' is defined as 'a national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives and includes a custodian in relation to an immovable asset that it occupies or intends to occupy, represented by the Minister of such national department, Premier of a province or MEC of such provincial department, so designated by the premier of that province'.

- Refurbish and achieve savings in the operation and maintenance of the properties; and
- Generate an income stream to finance provincial property development and maintenance.

Not only will this generate economic activity and create jobs and opportunities for empowerment, provide access to the cities resources, facilitate social cohesion and well-being and enable environmental sustainability and energy efficiency.

. . .

The CC-CCRP will achieve the following Strategic objectives:

- Mobilise new investments in the central city;
- Ensure that all significant components of the business premises are affordable for small and micro enterprises;
- Achieve densification by developing a percentage of residential stock for affordable housing;
- Provide access to green and vibrant public spaces within walking distance of residential buildings;
- Develop exemplary social facilities for all age groups and cultural persuasions;
- Reinforce the vision of trans-oriented development; and
- Develop a fibre optic backbone for the central city.'

[6] Whilst the Regeneration Programme was in progress, the Provincial Department of Transport began implementing a 'High Level Scoping' exercise that it had designed for the purpose of establishing development potential on the Tafelberg property. On 26 February 2013 this department invited the other provincial departments to make written representations as to whether they required the Tafelberg property for infrastructure purposes to further government objectives. In a written response, dated 13 March 2013, Mr Tshangana, the Manager, Property Planning in the Provincial Department of Human Settlements, advised that his department was of the view that both erven 1424 and 1625 were needed for development of 'integrated and sustainable human settlements', more specifically, social housing for persons in the income bracket of R1 500 to R7 500.

[7] In a comprehensive response Mr Tshangana expressed his department's response as follows:

'[T]he Tafelberg school property is well suited for residential use, Social Housing in particular. It is well serviced by public transport and engineering services. It is recognised that careful thought and design are required for an appropriate use and response to the existing school buildings, which enjoy heritage protection and cannot be demolished or altered. The opportunity for the development of some retail and commercial uses in the Main Road frontage should be exploited as it has the potential to provide cross subsidization for Social Housing. Refurbishment must also be considered for the conversion of the existing school buildings, potentially to community facilities.'

[8] The first appellant, the Member of Executive Council for the Department of Transport did not agree. In a meeting attended by the MECs of the departments, on 15 May 2013, the MEC for Transport made it clear that the Tafelberg property would not be considered for social housing. During March 2014, the Tafelberg property was one of four properties in respect of which the Department of Transport invited expressions of interest for development. The invitation was contained in a 50-page document titled 'Expression of Interest: Property Development Opportunities in the Cape Town Central Regeneration Programme'. The other properties included in the invitation were: the Alex Street Complex, the Helen Bowden Nurses' Home Site, and the 'Top Yard'. In respect of the Tafelberg property, the Department of Transport envisaged a mixed use development which would include a residential component.

[9] In January 2015, the Province resolved to finance an anticipated shortfall in a project initiated by the Department of Transport to establish a 'public private partnership' (PPP) to relocate the head office of the Department of Education from the Golden Acre/Grand Parade area in the City's Central Business District (CBD) to the Provincial Office Precinct, in order to reduce

rental costs. The idea was to raise funds by selling provincial properties. At the time, no decision had yet been taken on the submission made by the Human Settlements Department regarding the proposed sale of the Tafelberg Property. In March 2015, the Province resolved to sell the Tafelberg property to fund the shortfall anticipated with the Provincial Department of Education office park development.

[10] The first respondent, Ms Adonisi, the sixth respondent, Ndifuna Ukwazi, and the Social Justice Coalition (SJC) objected to the sale of the Tafelberg property as part of the Regeneration Programme. Their objections were dismissed by the Department of Transport. So were proposals by other objectors that the MEC of this Department should first consult with the local and national government before making the decision to sell the Tafelberg property. Similarly, a proposal by a Social Housing Institution,[6] Communicare, that a project consisting of a social housing and market related rental housing should be implemented found no favour with the Provincial Department of Transport.

[11] Following the decision to sell the Tafelberg Property, the Department of Transport had it valued. It obtained a valuation of R107,3 million. The Department then invited bids from prospective purchasers, stipulating that only offers above the market value would be considered. The tender document provided that the scoring system would be 90:10 for price as against Broad-based Black Economic Empowerment (BBEE). Of the five offers received only two were above the market valuation. The scoring resulted in the Day School winning the tender for the sale price of R135 million. On 3 July 2015, the Department of Transport recommended Provincial Property Committee (PPC),

[6] In terms of s 1 of the Social Housing Act a social housing Institution is an institution accredited or provisionally accredited under the Social Housing Act, and carries or intends to carry on the business of providing rental or co-operative housing options for low to medium income households (excluding immediate individual ownership and a contract as defined as defined under the Alienation of Land Act, 1981 (Act No 68 of 1981), on an affordable basis, ensuring quality and maximum benefits for residents, and managing its housing stock over a long term.

that the property be sold to the Day School. The Provincial Cabinet approved the proposal as provided in Reg 4(5) of the regulations promulgated in terms of the Western Cape Land Administration Act 6 of 1998.

[12] The Department of Human Settlements was duly informed that a decision had been taken to dispose of the property in order to create an income stream for an Asset Reserve Fund that would be used for the construction and maintenance of social infrastructure. It agreed to withdraw its request to have the property made available for social housing, albeit grudgingly, highlighting that the property had been found to be suitable for human settlement development. Mr Thando Mguli, the Head of Department (HOD) of the Department of Human Settlements remarked that whereas his department had released hundreds of hectares of land under its custodianship for human settlement development, the Department of Transport had never released any land under its custodianship for that purpose. He expressed his frustration with what he considered to be an incorrect interpretation of s 5(1)*(a)* of GIAMA by the officials in the Department of Transport, to the effect that only 'surplus' land that is not needed for Provincial functions, may be made available for human settlement development.[7]

[13] On 11 November 2015, the Provincial Cabinet approved the sale, and on 20 November 2015 the MEC for Transport accepted and signed the offer made by the Day School. However, about six months later, the respondents launched the first application, challenging the lawfulness of the sale. They maintained, amongst other things, that there had been no compliance with the procedural and substantive requirements prescribed in s 3 of the WCLAA, in that the notice

[7] In terms of s 5(1)*(a)* of GIAMA one of the principles of management of government immovable assets is that an immovable asset must be used efficiently. It becomes surplus to a user if it does not support the user's service delivery objectives at an efficient level and if it cannot be upgraded to that level. In terms of s 5*(f)* of GIAMA when a custodian intends disposing of a government immovable asset he or she must consider whether that asset can be used by another user, or jointly by different users, in relation to other specified government objectives.

of the intended sale by the Provincial Premier was never published in an IsiXhosa newspaper, circulating within the Province, prior to the notice and comment process. This led to the court granting an order that the notice and comment process be re-opened. The Province invited comments from the public on whether it should resile from the sale.[8]

[14] The reopening of the notice and comment process led to numerous submissions. As a result, the Province resolved that work should be done on a financial model for development of social housing on the Tafelberg property. Thirty-seven comments were received in respect of the newly proposed financial model. On 22 March 2017 the Province published, on its website, a minute of its decision not to resile from the sale. The minute reads:

'CABINET DECISION IN RESPECT OF WHETHER TO RESILE OR NOT FROM THE SALE AGREEMENT PERTAINING TO THE TAFELBERG SITE

Department of Transport and Public Works

Department of Human Settlements

Department of the Premier

RESOLVED that –

1 Having taken into account the comments submitted out of the public participation process applied in this matter to date, along with the recommendation of the custodian, the legal advice received and the presentations by the various officials, the Cabinet considered the following factors to be material during the course of its deliberations on whether or not to resile from the Tafelberg sale agreement:

1.1 The current proposed and future initiatives being undertaken by the DOHS in relation to the progressive realization of the right to adequate housing by the citizens of the Western Cape, and specifically the pipeline of 40 000 affordable housing opportunities reported to the Cabinet by DOHS in this regard. In relation to social housing, specifically the pipeline includes 10 810 units at a cost of R1,2 billion over the next 10 years- in the metro and 14 008 units at a cost of R1.57 billion, in the non-metro area of the Western Cape.

[8] In terms of the sale agreement the Province had an option of resiling from the sale.

1.2 The Memorandum of Undertaking between DOHS and DOTPW, and the result thereof, i.e. the identification of 18 parcels of land by DOHS for human settlement purposes, including but not limited to land within the City of Cape Town.

1.3 The prior decisions of Cabinet on 22 March 2017 in relation to the proposed use and/or disposal of the Woodstock hospital site and the Helen Bowden Nurses Home site (both within the metro) as contained in the presentation by DOTPW in this regard. More specifically the request by Cabinet that any proposed disposal of the Woodstock hospital site (in whole or in part) be referred to Cabinet so as to enable it to ensure that affordable housing is best achieved on that site given its locality and size. Similarly with respect to Green Point Helen Bowden site, that any RFP that is developed contain within it the requirement for the maximum quantum of affordable housing as will make the development of the site viable.

1.4 The identified legal risks in a social housing development under the auspices of the Social Housing Act on this site currently, including, inter alia:

1.4.1 The legal advice received from senior counsel pertaining to the comment made by the Phyllis Jowel Jewish Day School, in relation to the definition of a “Restructuring Zone” in the Social Housing Act, read with the National Minister’s designations and the City’s currently identified Restructuring Zones. Counsel’s advice is that the Tafelberg site does not currently fall within such a Zone as defined, rendering the availability of the restructuring capital grant unavailable to any social housing institution for a project on that site currently. All social housing proposals received to date as part of the public participation process presume a restructuring capital grant is available. Cabinet notes that the National Minister may be approached to amend the Restructuring Zone designations but, as of 22 March 2017, counsel’s advice is that Sea Point does not fall within such a designated area.

1.4.2 That the current income bands and associated grants applicable to social housing projects are in the process of amendment. Such amendments have not, to date come into operation. Necessary legislative amendments, to enable any social housing project in Sea Point or Green Point to benefit from a restructuring Capital grant and increased income bands are required and probable but as of date this cabinet decision, neither of the necessary suite of amendments is in operation.

1.5 While Cabinet accepts that social housing is notionally an option on any piece of land owned by the Western Cape Government, in addition to what has been set out above, the value of the land which has been achieved in this sale, the high construction costs acknowledged in the public participation process, the acknowledgment out of the public participation process that extensive cross-subsidisation is required to render the project

financially feasible and the inherent land use restrictions which apply to this site, including, inter alia, heritage and zoning requirements, render this specific site sub-optimal for social housing.

1.6 The loss of injection of revenue of R135 million earned for other infrastructure required for the provincial government, in a climate of fiscal austerity and under a direct instruction from National Treasury to optimize the use of its assets for inter, alia, revenue raising measures.

RESOLVED further that –

2 Accepting that –

- A rational approach to a policy-laden decision of this nature, encompasses a basket of legal and policy considerations;
- The expertise and comment of the administration are necessary;
- Cabinet is entitled to accord its interpretation of the facts and the law to the matter at hand, subject to no fraud, corruption or mala fides being in evidence,

The Cabinet is of the view that a holistic approach to the utilization of provincial assets and the methods by which the Western Cape Government is pursuing its legislative obligations and policies in that regard, is preferable to an ad hoc site-by-site determination, i.e. of trying to achieve all its objectives on every site. The recommendation in this regard, by the custodian, that an integrated angle approach be adopted is one which is rational and accepted.

RESOLVED further that –

Cabinet is accordingly of the view that a decision to uphold the contract of sale is rational, prudent and appropriate, and accordingly decides not to resile from the current contract of sale concluded with the Phyllis Jowell Jewish Day School.'

It is this decision that lies at the centre of the dispute between the parties to this appeal.

[15] On 30 March 2017, the National Minister of the Department of Human Settlements wrote to the Province advising that she intended to 'pursue the development of social housing on the Tafelberg property'. She invoked s 41 of the Intergovernmental Relations Framework Act 13 of 2005 (IGRFA) advising that a dispute had arisen as a result of the sale of the property. She warned that she would be referring the dispute for inter-governmental dispute resolution.

The Premier denied that there was a dispute between the National Department of Human Settlements and the Province. She asserted that IGRFA found no application in the circumstances, but indicated her willingness for engagement to take place between members of the respective offices about the sale.

[16] In the ensuing correspondence, the National Minister insisted that she would be referring for resolution four aspects of an intergovernmental dispute for resolution. These related to whether, in concluding the sale, the Province: (a) complied with the s 5 of GIAMA; (b) disregarded its obligation to provide social housing in terms of the Social Housing Act (c) provided rational reasons for its decision not to resile from the sale, taking into account the constitutional and legislative requirements to provide social housing; and (d) whether the property fell within a restructuring zone; and if not, whether it was 'rational' for the Province not to approach the National Minister for a designation declaring it to be a restructuring zone.

[17] In addition to maintaining that there was no merit in the alleged disputes, the Premier argued that the Province was *functus officio* in relation to the sale, and that IGRFA was not applicable to the sale, particularly as a private entity was involved.

The high court applications

The first application

[18] In the first application (High Court Case no 7908/17), the first respondent, Ms Thozama Angela Adonisi (Ms Adonisi) and five other applicants (the second to sixth respondents in this appeal), sought an order declaring that the Province and the City, had failed to comply with their obligations under the Constitution and the legislation enacted to give effect to

their rights of access to land and adequate housing. The Provincial Minister of the Department Transport was cited as the official responsible under the WCLAA and GIAMA, for disposal of land owned by the government.

[19] When the first high court application was launched, the first to fourth respondents[9] were residents of various suburbs, in and around the City. Ms Adonis resided in a basement of a block of flats in Sea Point. She sat on the leadership committee of the Sea Point Chapter of the fifth respondent, 'Reclaim the City', a voluntary organisation with about 3000 'working class' members within the City. Reclaim The City was instrumental in launching the first application in the high court.[10] The second respondent, Ms Phumza Ntutela, lived in Nyanga Township, about 25km from Sea Point. The third respondent Ms Sharone Daniels lived in Ocean View and worked in the City. The fourth respondent Ms Selina La Hane resided in Sandrift, Milnerton. The trustees for the time being of Ndifuna Ukwazi Trust, were the sixth applicant.

[20] The application was brought on substantially the same basis on which the Ms Adonisi and Ndifuna Ukwazi had objected to the sale during the notice and comment process - that when deciding to sell the Tafelberg property to a private entity, the Day School, the Province failed to take into consideration various constitutional and legislative imperatives, to take reasonable measures to enable black and coloured working class residents of the City, to access land and housing within the CBD of the City and its surrounds, on an equitable basis. The respondents contended that the availability of the Tafelberg property for sale presented the Provincial Government, as an entity charged with the task of urgently re-engineering spatial inequality in the Province and the City, with an opportunity to improve the availability of affordable housing within the City.

[9] Ms Adonisi, Ms Ntutela, Ms Daniels, and Ms Hane.
[10] Hence the reference in the high court judgment to the first application as the RTC application.

[21] The respondents argued that the conception and implementation of the urban regeneration objective of the City was skewed. They maintained that since the late 1990's, buildings in the City centre had been renovated and new buildings had been constructed to provide residential accommodation to households with income brackets in the top 20% of income earners in the City. In addition, gentrification of areas such as the BO-Kaap, Woodstock and Salt River had resulted in rental properties which accommodated the poor and working class people being sold to property developers, who converted them into residential accommodation unaffordable for the poor and low income earners. As a result, people who could least afford the cost of transport were forced to move further to the outskirts of the city. All of this resulted in increased demand, and a corresponding increase in the price of acquiring land for social housing. They contended that because the State cannot acquire land at market related prices it must use the pockets of land that it still owns in and around the CBD to provide social housing.

[22] More specifically, with regard to residents who live and work in Sea Point, the respondents maintained that instead of considering the Tafelberg property for social housing, the Province gave priority to purely financial considerations. They sought orders to the effect that that the Province, the MECs for the Departments of Public Transport, and Human Settlements had failed to meet their Constitutional and statutory obligations; and that they be ordered to comply with such obligations, and report to the court the steps taken to comply; and that the decisions taken to sell the Tafelberg property be reviewed and set aside.

[23] The Province denied that it had acted in breach of its constitutional and statutory duties in selling the property. It contended that it was doing its best

with the limited resources at its disposal to provide affordable housing generally and social housing in particular. It acknowledged, however, that spatial apartheid is far from being redressed in Cape Town, but highlighted that an appropriate balance had to be struck between delivery of spatially-integrated housing, on the one hand, and ensuring delivery in respect of other constitutional imperatives, on the other hand. In the answering affidavit, the Head of the Provincial Department of Transport, Ms Jacqueline Gooch, explained the budgetary constraints under which the Province was operating, particularly following the 2015 public servants wage agreements, the reduction in the provincial equitable share revenue allocation in the 2016/17 financial year, and the instruction from the Deputy Minister of Finance that MECs should reprioritize their budgets.

[24] The Province also emphasised that the 2014 Western Cape Provincial Spatial Development Framework (provincial SDF) showed a considered commitment to ensure spatial integration. However, that notwithstanding, spatial integration could not be effected in respect of every available property in central Cape Town.

[25] The City asserted that as far back as 1996 it had acknowledged the historical legacy of under-development, deprivation, and it designed its own spatial development framework, the City's Spatial Development Framework of 2012 (City SDF). That framework is also aimed at increasing affordable housing that is located in close proximity to the City's economic opportunities, the City argued.[11]

The second application

[11] City SDF at 77.

[26] In the second application (high court case no 12327/17), which was launched two months after the first application, the National Minister of the Department of Human Settlements together with the Social Housing Regulatory Authority (SHRA) sought an order that the decision to sell the Tafelberg property be reviewed and set aside. The application was brought on the basis that the Provincial Government had failed to comply with its obligation under IGRFA, to consult the two respondents about its intention to dispose of government land.

[27] The Province denied the existence of any constitutional and statutory obligation to consult the National Government when disposing of its property. However, it did respond to inquiries from the National Minister about the sale, until the lines of communication ended. The City also contended that the respondents were not entitled in law to demand social housing in central Cape Town or a specific location. Both the Province and City contended that, the respondents should assert the obligations owed to them under the social housing legal framework comprising the Housing Act, the Social Housing Act and the Spatial Land Use Management Act 16 of 2013 (SPLUMA).

The high court orders

[28] The orders granted by the high court in the two applications are lengthy. However, it is necessary to set them out in full for a clear appreciation of the issues that arise in this appeal. The order in the first application reads as follows:

'1. That it is declared that the fourth and sixth respondents have the following obligations in terms of the Constitution of the Republic, 1996:

(i) Under s 25(1) the said respondents are obliged to take reasonable and other measures, within their available resources, to foster conditions which enable citizens to gain access to land on an equitable basis;

(ii) Under s 26(2) the said respondents are obliged to take reasonable and other legislative measures, within their available sources, to achieve the progressive realization of the right of the citizens to have adequate housing as contemplated in s 26(1) of the Constitution.

2. It is declared that the fourth and the sixth respondents have failed to comply with their respective obligations under the legislation enacted to give effect to the said rights, namely, the Housing Act 107 of 1997 and the Social Housing Act, 16 of 2008, and have accordingly breached their respective duties under the Constitution.

3. It is declared that in so failing to comply with their obligations as aforesaid, the fourth and sixth respondents have failed to take adequate steps to redress spatial apartheid in central Cape Town (the boundaries of which were in 2017 as depicted on the map annexed hereto marked "A");

4. The fourth and sixth respondents are directed to comply with their constitutional and statutory obligations as set out in paras 1 to 3 above.

5. The fourth and sixth respondents are directed to jointly file a comprehensive report under oath, by 31 May 2021, stating what steps they have taken to comply with their constitutional and statutory obligations as set out above, what future steps they will take in that regard and when such future steps will be taken. Without derogating from the generality of the aforegoing, the fourth and sixth respondents are specifically directed to:

(i) consult with all departments of State and organs necessary to discharge their duty in so reporting to the court; and

(ii) include in their report their respective policies and integration thereof in regard to the provision of social housing as contemplated in the Social Housing Act within the area of central Cape Town as depicted on annexure "A" hereto.

6. The applicants are granted leave to file an affidavit (or affidavits) responding to the reports filed by the fourth and sixth respondents in terms of paragraph 5 above within one month of them having been served on their attorneys of record.

7. The November 2015 decision of the Premier of the Western Cape Province, acting together with other members of the Provincial Cabinet to sell Erf 1675, an unregistered portion of Erf 1424 Sea Point, and the remainder of Erf 1424 Sea Point (hereinafter collectively referred to as "the Tafelberg Property") to the third respondent, together with the deed of sale in respect of the Tafelberg Property entered into between the third and sixth respondents is hereby reviewed and set aside.

8. The 22 March 2017 decision of the Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, not to resile from the contract of sale concluded with the third respondent is hereby reviewed and set aside.

9. It is declared that Sea Point falls within the restructuring zone '"CBD and surrounds Salt River, Woodstock and Observatory)"' as contemplated in sub-regulation 6.1 of the Provincial Restructuring Zone Regulations published under General Notice 848 in Government Gazette 34788 of 2 December 2011.

10. It is declared that Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations made under section 10 of the Western Cape Land Administration Act, 6 of 1998 by Provincial Notice No 595 published in Provincial Gazette No. 5296 on 16 October 1988 (hereinafter referred to as "the Regulations") are unconstitutional and invalid.'

11. It is declared that the disposal of the Tafelberg Property in accordance with Regulation (4(6), and the proviso in Regulation 4(1), of the Regulations is unlawful. This declaration shall operate prospectively and will not affect any rights which have accrued to any party as at the date of this judgment.

12. The applicants' costs of suit (which are to include the costs of two counsel where employed), are to be borne by the fourth and sixth respondents, jointly and severally.

13. Save as aforesaid, each party is to bear its own costs of suit in relation to this application'.

[29] In the second application the high court granted the following order:

'1. It is declared that the failure of the Western Cape Provincial Government (hereinafter "the Province") to inform the National Government (represented by the first and second applicants herein) of its intention to dispose of Erf 1675, an unregistered portion of Erf 1424 Sea Point, and the remainder of Erf 1424 Sea Point (hereinafter collectively referred to as "the Tafelberg Property") and to consult and engage with National Government (represented as aforesaid) in this regard, constitutes a contravention of the Province's obligations in terms of Chapter 3 of the Constitution, and the Intergovernmental Relations Framework Act, 13 of 2005

2. The November 2015 Decision of the Premier of the Western Cape Province, acting together with other members of the Provincial Cabinet, to sell the Tafelberg Property to the fifth respondent, together with the deed of sale in respect of the Tafelberg Property entered into between the first and fifth respondents are hereby reviewed and set aside.

3. The 22 March 2017 decision of the Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, not to resile from the contract of sale concluded in respect of the Tafelberg Property with the fifth respondent is hereby set aside.

4. It is hereby declared that the deed of sale between the Province and the fifth respondent in respect of the Tafelberg Property is void, of no force and effect and is hereby set aside.

5. It is declared that Regulation 4(6) and the Proviso in Regulation 4(1), of the Regulations made under section 10 of the Western Cape Land and Administration Act, 6 of 1998 by Provincial Notice No. 595 published in Government Gazette No 5296 on 16 October 1998, are unconstitutional and invalid. This declaration shall operate prospectively and will not affect any rights which have accrued to any party as at the date of this judgment.

6. The first and third applicants' costs of suit (which are to include the costs of two counsel where employed) are to be borne by the first respondent.

7. Save as aforesaid, each party is to bear its own costs of suit in relation this application.'

[30] Subsequent to the granting of the court orders, the sale of the property (which had already been set aside by the court), was cancelled, at the instance of the Day School. The parties are in agreement, and I agree, that although the sale was cancelled the issues pertaining to the provision social housing and the role of the different spheres of government are very important and require clarification. They are of considerable public interest.

The appeal

Constitutional subsidiarity

[31] The appellants accept that they bear the responsibilities set out in para 1 of the first order. They assert, however that their responsibilities flow from the Housing Act and the Social Housing Act, these being the statutes enacted to give effect from the rights and obligations that are provided for in ss 25 and 26 of the Constitution. They contest the rest of the first order and the whole of the

second order. The high court traversed the guiding principles relevant to interpretation of socio-economic rights, set out in the judgments of the Constitutional Court, including *Mazibuko,*[12] *Grootboom,*[13] and *TAC.*[14] It discussed the established principles of legislative interpretation – that courts must promote the spirit, purport and objects of the Bill of Rights as required under the s 39(2) of the Constitution, [15] and accord to statutory provisions a contextual, purposive meaning which is consistent with these objectives.

[32] It is necessary, first, to highlight that the principle of constitutional subsidiarity is part of our Constitutional framework. The foundational norms of the Constitution are expressed in general terms. Where legislative and other measures have been enacted to realise the rights and obligations in the Constitution, the foundational norms espoused in the Constitution should find expression in such legislative measures. By way of example, the preamble to SPLUMA recognises that many people in South Africa continue to live and work in places defined and influenced by past spatial planning, land use laws, and practices, which were based on racial inequality, segregation, and unsustainable settlement patterns. It provides that it is the obligation of the State to realise the constitutional imperatives in ss 24, 25, 26, and 27(1) of the Constitution. Section 12(1) of SPLUMA imposes an obligation on the national, provincial and local governments to prepare spatial development frameworks. The statute, rather than the Constitution, is therefore the direct source of the rights and obligations relating to preparation of spatial development frameworks. It is to its statutory provisions that litigants must look in asserting their rights and the obligations owed to them.

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[12] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at 87-88.
[13] *Government of the Republic of South Africa and Others v Grootboom and others* 2001 (1) SA 46.
[14] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).
[15] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC).

[33] In *My Vote Counts*,[16] Cameron J (writing for the minority) re-affirmed the principle of constitutional subsidiarity as follows:

'[52] The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law - to which one must look first.

[53] These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.

[54] Over the past 10 years, this Court has often affirmed this. It has done so in a range of cases. First, in cases involving social and economic rights, which the Bill of Rights obliges the state to take reasonable legislative and other measures, within its available resources, to progressively realise, the Court has emphasised the need for litigants to premise their claims on, or challenge, legislation Parliament has enacted. In Mazibuko, the right to have access to sufficient water guaranteed by section 27(1)(b) was in issue. The applicant sought a declaration that a local authority's water policy was unreasonable. But it did so without challenging a regulation, issued in terms of the Water Services Act, that specified a minimum standard for basic water supply services. This, the Court said, raised "the difficult question of the principle of constitutional subsidiarity". O'Regan J, on behalf of the Court, pointed out that the Court had repeatedly held "that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution". The litigant could not invoke the constitutional entitlement to access to water without attacking the regulation and, if necessary, the statute.'

[34] The majority agreed. At paragraph 160 of the judgment Judges Khampepe, Madlanga, Nkabinde and Acting Judge Theron said:

'The minority judgment correctly identifies the "inter-related reasons from which the notion of subsidiarity springs". First, allowing a litigant to rely directly on a fundamental right

[16] *My Vote Counts NPC v Speaker of the National Assembly and Others* 2015 (12) BCLR 1407 (CC). Although the Court was split as to whether the statute in question gave effect to the rights in question all the judges agreed that the principle remains part of our law.

contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, "would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation". Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, "allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of 'two parallel systems of law".'[17]

[35] To realise the rights in s 26 of the Constitution the legislature enacted the Housing Act, the Social Housing Act and SPLUMA. The preamble to the Housing Act acknowledges the right, under s 26(1) of the Constitution to have access to adequate housing, and the obligation on the State to take reasonable legislative and other measures, within its available resources, to give effect to this right. The Act then sets out, as its objectives, the establishment and promotion of a sustainable social housing environment, the definition of the functions of national, provincial and local governments, and the establishment of the Social Housing Regulatory Authority.

[36] Part 1 of the Act sets out the general principles which all spheres of government must take into account when implementing the objectives of the Act. These include giving priority to the needs of the poor, consulting meaningfully with individuals and communities affected by housing development, ensuring that housing developments provide a wide choice of housing and tenure options, are economically affordable and sustainable, are based on integrated development planning, and are administered in a transparent manner. Specific 'roles and responsibilities' of the national, provincial and local governments are set out in Parts 2, 3, and 4, of the Act. The Social Housing Act

[17] See also *Clutchco (Pty) Ltd v Davis* [2005] 2 All SA 225; [2005] ZASCA 16; 2005 (3) SA 486) (SCA); *NAPTOSA and others v Minister of Education, Western Cape and others* 2001 (4) BCLR 388; [2000] ZAWCHC 9; 2001 (2) SA 112, and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 62.

is formulated similarly, with the roles and responsibilities of the different spheres of government, and those of other role players set out in ss 3, 4, 5, and 6 of that Act.[18] Evidently, a comprehensive statutory regime is in place as implementation of the constitutional rights under s 26 of the Constitution is in progress. It is upon that statutory regime, rather than the Constitution, that the source of any right or obligation sought to be enforced must be located.

The obligation to provide social housing in central Cape Town

[37] Recently, in *City of Cape Town v Commando and Others*[19] this Court considered whether the State has an obligation to provide emergency residential accommodation at a specific location, as an extension of the obligation to provide access to adequate housing entrenched in s 26 of the Constitution. Occupiers of properties within the City, including Woodstock and Salt River, had asserted that the City's housing programme was deficient in that it did not provide for access to emergency housing and accommodation in the immediate inner city and surrounds in order to meet their urgent emergency housing needs. The high court had ordered the City to make emergency housing *in the inner city*. Ironically, in that case the high court 'suggested'[20] that City's implementation of its housing programme in the inner City gave undue preference to social housing at the expense of its constitutional obligation to provide emergency housing.

[38] This Court emphasised that it is within the domain of the executive to determine how public resources are drawn upon and re-ordered. It held that:

'Having failed to identify the source of the constitutional duty in the Constitution or the Housing Act, the occupiers resorted to relying on s 26 of the Constitution in general terms.

[18] Other role players include the National Housing Finance Corporation, and the Social Housing Regulatory Authority, which bears the responsibility of promoting awareness of social housing and advising the Department of Human Settlements in its development of policy for the social housing sector, amongst other things.
[19] *City of Cape Town v Commando and Others* [2023] ZASCA 7.
[20] See para 59 of the judgment of this Court.

However the principle of subsidiary prohibits direct reliance on the Constitution where specific and detailed legislation giving effect to a right sought to be enforced has been passed'.[21]

[39] More importantly, it also held that:

'For this contention [that the State has an obligation to provide emergency residential accommodation at a specified location] to withstand scrutiny, a source of the duty had to be identified. The legislative measures and programmes taken by the government giving effect to s 26 of the Constitution do not impose a duty on it to provide temporary emergency accommodation *at a specific locality.* Nor have line of cases since *Grootboom* interpreted the duties flowing from s 26 to oblige the government to provide emergency housing at a specific location. In fact the opposite is suggested. In *Thubelitsha* Ngcobo J observed that 'the Constitution does not guarantee a person a right to housing at government expense *at a locality of his or her choice.* Locality is determined by a number of factors including availability of land. However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment'.[22] (emphasis supplied) (footnotes omitted)

[40] In this case too, the respondents did not plead, and the high court did not identify, any statutory provision that requires the provision of social housing at a specified location. Apart from relying on provisions of ss 25 and 26 of the Constitution, the respondents placed reliance, generally, on obligations created in the Housing Act and Social Housing Act. The high court accepted that the two pieces of legislation, together with SPLUMA, are components of the legislative framework enacted to give effects to the rights created in the Constitution. It went to great lengths to describe the racial and class aligned patterns of segregated residential settlement and socio economic exclusion in the landscape of the City that still derive from apartheid. It highlighted the plight of the poor and working class, and black majority that live on the

[21] At para 56.
[22] At para 53.

periphery of the City, far from places of employment, and in overcrowded conditions, with hardly any amenities and services, while the predominantly white middle class residents are located in well-located areas with access to 'excellent' amenities, services and employment opportunities.

[41] That historical context does find expression in s 2 of the Housing Act, which sets out the relevant factors for determination of the extent of the right of access to adequate housing. The country's history of racial inequality, segregation and unsustainable settlement patterns are acknowledged. So are the obligations on the state to respect, protect, promote and fulfil the social, economic and environmental rights of everyone, and to strive to meet the basic needs of previously disadvantaged communities.

[42] The specific roles and responsibilities of provincial governments are listed in s 4 of the Social Housing Act as to:

'*(a)* ensure fairness, equity and compliance with national and provincial social housing norms and standards;

(b) ensure the protection of consumers by creating awareness of consumer's rights and obligations;

(c) facilitate sustainability and growth in the social housing sector;

(d) mediate in cases of conflict between a social housing institution or other delivery agent and a municipality, if required;

(e) submit proposed restructuring zones to the Minister;

(f) monitor social housing projects to ascertain that relevant prescripts, norms and standard are being complied with;

(g) approve, allocate and administer capital grants, in the manner contemplated in the social housing investment plan, in approved projects;

(h) ensure that the process contemplated in paragraph *(g)* is conducted efficiently;

(i) administer the social housing programme, and may for this purpose approve-

(i) any projects in respect thereof; and

(ii) the financing thereof out of money paid into the accredited bank account of the province as contemplated in section 18(3); and

(j) develop the capacity of municipalities to fulfill the roles and responsibilities contemplated in section 5'.

In s 7 of the Housing Act similar roles and responsibilities are referred to as functions of the Province.[23]

[43] Under s 5 of the Social Housing Act, municipalities have an obligation –

'where there is a demand for social housing within its municipal area, [to] . . . take all reasonable and necessary steps, within the national and provincial legislative, regulatory and policy framework-

(a) to facilitate social housing delivery in its area of jurisdiction;

(b) to encourage the development of new social housing stock and the upgrading of existing stock or the conversion of existing non-residential stock

(c) to provide access-

(i) to land and buildings for social housing development in designated structured zones;

(ii) for social housing institutions to acquire municipal rental stock;

(iii) to municipal infrastructure and services for approved projects in designated restructuring zones; and

(d) to the extent permitted under the Local Government: Municipal Finance Management Act, 2003 (Act 53 of 2003),

(i) (initiate and motivate the identification of restructuring zones; and

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[23] Under the Social Housing Act the functions of provincial governments are set out in s 7 as follows:

(1) Every provincial government through its MEC, must, after consultation with the provincial organisations representing municipalities as contemplated in s163 (a) of the Constitution, do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national policy.

(2) For the purpose of subsection (1) every provincial government must, through its MEC-

(a) determine provincial policy in respect of housing development;

(b) promote the adoption of provincial legislation to ensure effective housing delivery;

(c) take all reasonable and necessary steps to support and strengthen the capacities of municipalities to effectively exercise their powers and perform their duties in respect of housing development;

(d) when a municipality cannot or does not perform a duty imposed by this Act, intervene by taking any appropriate steps in accordance with section 139 of the Constitution to ensure the performance of such duty; and

(e) prepare and maintain a multi-year plan in respect of the execution in the province of every national housing programme and every provincial housing programme, which is consistent with national housing policy and section 3 (2) (b), in accordance with the guidelines that the Minister approves for the financing of such a plan with money from the Fund.

Other functions listed under this section relate to the MEC.

(ii) enter into performance agreements with social housing institutions'.

The functions of municipalities under the Housing Act are listed in s 9.[24]

[44] The Province and the City cannot be allowed to shun the obligation to consider racial, social, economic, and physical integration, and the location of the residents' places of employment, when implementing social housing programmes. The respondents had to demonstrate that the Province and the City had failed to consider the s 2 obligations (under both or either of the Housing Act and the Social Housing Act) in performing one or more of the roles and responsibilities or functions specified in relevant legislation.

[45] In relation to the Province the respondents acknowledged that the provincial Spatial Design Framework addresses the relationship between planning for future land use and affordable housing strategies. In that framework the Province admits, amongst other things, that:

'Exclusionary land markets mitigate against spatial integration of socio-economic groups and limit affordable housing to well-located land. At the same time, government sits on well-located under-utilised land buildings. . .' .

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[24] Section 9 of the Social Housing Act stated:

'**Functions of municipalities.** -(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable steps within the framework of national and provincial housing legislation and policy to-

(a) ensure that-

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

(iii) services in respect of water, sanitation, electricity, roads storm-water drainage and transport are provided in a manner which is economically efficient;

(b) set housing delivery goals in respect of its area of jurisdiction;

(c) identify and designate land for housing development;

(d) create and maintain a public environment conducive to housing development which is financially and socially viable;

(e) promote the resolution of conflicts arising in the development process;

(f) initiate, plan co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and

(h) plan and manage land use and development'.

They also acknowledged the shortage of state-owned land that can be used for affordable housing, especially social housing, in the CBD. The respondents also refer to the City's acknowledgment, in its 2017/2018 Built Environment Performance Plan, that the availability of and development of affordable rental accommodation in central areas of the city must play a key role in the future development of the City and that no site that meets that meets the criteria for providing affordable housing should be excluded from being realised as an opportunity to reverse the legacy of apartheid by providing affordable housing to lower income families.

[46] The City admits that its housing delivery strategy was *initially* focused on delivering as many houses as possible. This resulted in the implementation of social housing programmes on the periphery of the city where land is cheaper, with the unintended consequence of entrenching the old apartheid spatial patterns. The pipeline programme is a plan of action or a strategy for housing delivery, and in that sense a government policy. It was an adjustment from the regeneration programme. However, the Province and the City had to also consider the higher cost of housing delivery in the inner City. The Province explained that the driving factors include the cost of land, the economies of scale in respect of building costs because of land availability, and the high cost of rates and taxes in the inner City. These were relevant factors in their decision-making-process.

[47] The high court made no reference, in its judgment, to the evidence relating to the social housing pipeline programme. This factor was listed prominently as one of the considerations that led to the decision not to resile from the sale. The respondents contended that 'the single most important – and damning – aspect of the context which should be taken into account is the complete failure to deliver affordable housing in central Cape Town'. They

argued that neither the Province, nor the City could claim to have completed a single affordable housing programme in central Cape Town in the 24 year period between the end of apartheid and the finalization of their answering affidavits in 2018'. However, there was evidence of a number of social housing projects in the City which yielded 2 168 social housing units at a cost of R686 489 804. By March 2017, the number of social housing units in the metropolitan pipeline programme was 10 810. In addition, as at 25 April 2018, the total number of houses planned for the Cape Metropole was 11 007, with an additional 3 844 units under discussion. The appellants describe the social housing pipeline as 'a working document, which is updated as projects progress in terms of readiness planning'.

[48] The reasons for the decision not to resile from the sale of the Tafelberg property included consideration of the planned development on the Helen Bowden site (10 hectares), as part of the Somerset Precinct development, in close proximity to the V&A Waterfront, the natural amenities, the Cape Town Stadium and the CBD. Social housing would constitute 20 percent of the Helen Bowden site development. The Provincial Department of Transport had already applied for rezoning, consolidation and subdivision of several erven in Green Point, 'approximately two kilometres north-west of the CBD'. In addition the Province had approved disposal of 12 erven to the City at a price of R5,1 million (a price below the market value of R9 million) for provision of social housing.

[49] The other projects listed as part of the social pipeline project included the Woodstock Hospital site development, in which provision had been made for a minimum of 700 social housing units. The respondents did not give much consideration to the appellants' evidence relating to the social housing pipeline. However this factual context cannot be ignored. Their case was built around the

unacceptability of the Regeneration programme and an alleged total disregard by the Province and the City of their constitutional obligations. Against the detailed evidence tendered by the appellants on ongoing provision of social housing within the City, I do not agree with the submission made on behalf of the respondents that the arguments made by the Province was without context. The evidence of the appellants' policy formulation and implementation disproved the allegations that they had no coherent housing delivery strategy, and that the Province remained intent on not providing any social housing in the CBD.

[50] Much was made of the denial by the Province and the City of any obligation resting on them to 'reverse apartheid spatial design'. I do not think this issue requires extensive consideration. The history of the spatial design in urban and rural spaces of this country is well known. And, despite this denial, the Province and the City acknowledged that spatial apartheid is far from redress in the City. In their respective Spatial Design Frameworks they acknowledged their responsibility to achieve equitable spatial integration.[25] The real questions are (1) whether the Province and City had an obligation to provide social housing at a specified location - central Cape Town, and (2) whether they failed to meet this obligation. As apparent from the roles and responsibilities, and functions of the provincial and local governments set out above, there is no such obligation. Apart from the roles and responsibilities set out in the Housing Act and Social Housing Act, the Province and the City were obliged to apply the general principles applicable to the Housing Act and the Social Housing Act[26]. This legal framework entails no obligation to provide social housing in a specific location. Social legislation of this kind, by its very nature, must give a broad measure of optionality to the Province and the City as to how to achieve the general principles the legislation lays down. To interpret

[25] See paras 43 and 44 above.
[26] Section 2 of Social Housing Act.

the legislation otherwise would render it incapable of practical implementation because the courts would become the arbiters of detailed implementation, an outcome we should be careful to avoid.

[51] As demonstrated the Province and the City have put in place policies that are consistent with the principles applicable to social housing under the relevant statutory framework. In addition, they are in the process of implementing social housing in their areas of jurisdiction, particularly through the pipeline programme. To this extent the Province was recognised by the national government in 2013 and 2015 as the leading province for delivery of social housing.[27] Furthermore, in 2016 and 2017 the Province wrote to the national Department of Public Works requesting that 29 national government properties identified in various areas, including Bellville, Constantia, and Somerset West, be released for social housing development. Their letters went unanswered. Consequently, the contention that the Province and the City have, in general, not met their constitutional obligations regarding social housing delivery finds no support in the evidence.

Failure to comply with the provisions of GIAMA

[52] The high court concluded that the disposal of the property was unlawful because the Province did not take the requisite steps to procure the status of the land as surplus under GIAMA, before disposing of it as provided in s 5 of GIAMA. Furthermore, both the Province, as the custodian of the property, and the departments of Transport and Human Settlements, as users, did not have asset management plans when the property was sold. The context is this: GIAMA provides the framework for the management of immovable assets held or used by national and/or provincial governments.[28] The Act sets out the

[27] This award has since been discontinued.
[28] See preamble to GIAMA.

management roles of the two spheres of government in relation to immovable assets owned by these spheres of government.

[53] In terms of s 4(1) of GIAMA national and provincial government departments are custodians and users of immovable assets that vest in them. The national government Ministers perform a 'caretaker' role as custodians of immovable assets that vest in the national government (except where specific custodial functions are assigned to other Ministers by specific legislation). Premiers of provinces or MECs designated by Premiers are in a similar position with regard to immovable assets that vest in provincial government. Section 1 defines a 'custodian' as the:

'national or provincial department referred to in section 4 represented by the Minister of such national department, Premier of a Province or MEC of provincial department, so designated by the Premier of that Province'.

A 'user' is the:

'national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives and includes a custodian in relation to an immovable asset that it occupies or intends to occupy, represented by the Minister of such national department, Premier of the province or MEC of such provincial department, so designated by the Premier of that province'.

[54] Section 4(2)*(b)*(ii) of GIAMA provides that custodians acquire, manage, and dispose of immovable assets as prescribed in s 13. Section 13(1) provides that the accounting officer of a custodian must compile asset management plans for all immovable assets for which the custodian is responsible. Asset management plans become part of the strategic plan of a custodian.[29] In terms of s 7 asset management plans must consist of:

'*(a)* a portfolio strategy and management plan;

(b) a management plan for each moveable asset throughout its life cycle;

[29] Section 9 of GIAMA.

(c) a performance assessment of the immovable asset;

(c) subject to section 13(1)*(d)*(*iii*), a condition assessment of the immovable asset;

(d) the maintenance activities required and the total and true cost of the maintenance activities identified; and

(e) a *disposal strategy* and management plan'. (emphasis supplied)

[55] The high court reasoned that the Province did not purport to act in terms of either a custodian or user asset management plan, when taking the decision to dispose of the Tafelberg property in 2010. Nor was there an internal policy document by which the province 'might have been guided' in its thinking. It was of the view that if there had been a user asset management plan at the time of the initial decision, the Province 'might' have dealt differently with the use of the whole site by each of the different users.

[56] It is not clear from the record why the details of the intended disposal of the Tafelberg property, first as part of the regeneration programme, and later as part of the development of the four identified properties within the city, did not constitute an acceptable asset management strategy that fulfilled the purpose of s 7 of GIAMA. In any event, Ms Gooch explained, on behalf of the Province, that the requirements of GIAMA in relation to asset management plans were being implemented incrementally by all organs of state under the guidance of the GIAMA Implementation Technical Committee which was co-ordinated by the National Department of Public Works, with concurrence of National Treasury. It was not yet completed in 2010.

[57] It was not in dispute that the Province and the relevant provincial departments had no custodian or user asset management plans in place at the time of the initial decision to dispose of the property. Furthermore, although

there were assets management plans when the Province resolved not to resile from sale in 2017, the Tafelberg property was not included in them.

[58] It is important to understand that the source of the power of the Province to acquire and dispose of provincial immovable property is not GIAMA. This statute only regulates disposal of immovable assets, and requires asset disposal strategy as part of its asset management objective.

[59] The WCLAA is the legislation that was enacted for effective exercise of the powers concerning matters listed under Schedule 4 of the Constitution. Section 3(1) of the WCLAA empowers the Premier to 'dispose of provincial state land on such conditions as are deemed fit'. The procedure for doing so is prescribed under s 3(2) of WCLAA, which provides that:

'The Premier must publish in the Provincial Gazette in the three official languages of the province and in an Afrikaans, an English and an isiXhosa newspaper circulating in those respective languages, a notice of any proposed disposal in terms of subsection (1), calling upon interested parties to submit, within 21 days of the date of the notice, any representations which they wish to make regarding such proposed disposal . . .'.

Therefore, the source of power for acquisition and disposal of immovable property by the Province is the WCLAA.

[60] The provisions of GIAMA, on which the respondents rely, in contesting the decision to sell the Tafelberg property must be interpreted harmoniously with s 3 of the WCLAA which empowers provinces to dispose of State property. A sensible interpretation requires consideration of the fact that the Tafelberg property had not been in use since 2013, and from 2010 its disposal had been under consideration. It is in that context that its exclusion from the custodian and user asset management plans should be considered.

[61] The absence of a custodian management plan in 2010 must also be viewed within the context that GIAMA became effective on 30 April 2009. In addition, as stated, and as the preamble to GIAMA indicates, the legislation is primarily intended to introduce a uniform framework for management of government immovable assets. It is not the empowering legislation in respect of acquisition and disposal of immovable assets by provinces. It is in that context that the references in the Act to inclusion of immovable asset disposal strategy in the management plan must be viewed.

[62] With regard to the high court's view that under GIAMA and the WCLAA, the Province was required to inquire not only into whether the property could be of use to another department within the Province, but also at national government level, again the court did not identify any specific provision in the legislation as the source for this requirement. Neither did it identify a legislative provision in relation to its finding that the Province could consider disposal of the Tafelberg property only in exceptional circumstances, and even then, in order to meet compelling social needs.

[63] The procedure for disposal of immovable assets by the Province is provided in s 3(3) of the WCLAA. The Premier is required to cause copies of the notices of the impending disposal of provincial state land to be delivered to occupants of the land to be disposed of (if any), the chief executive officer of the local government of the area in which the land is situated, the Western Cape provincial directors of the National Departments of Land Affairs and Public Works, and the Western Cape provincial Director of the National Department of Agriculture, if the provincial state land is applied or intended to be applied for agricultural purposes. Except in so far as the first published notices of disposal were not published in an isiXhosa newspaper, it was not the respondents' case that the Province did not meet these requirements under s 3 of WCLAA.

Consequently, compliance with the prescribed manner of notification to the relevant national departments was not an issue between the parties.

[64] With regard to the respondents' contention that the sale of the property was inconsistent with the provisions of ss 5(1)*(f)* and 13(3) of GIAMA in that it was not surplus property, on the facts, the property became surplus to the Department of Education when the remedial school vacated it in 2010. The impending action, which was finalised in 2013, would have been known to the Department of Transport prior to its happening. The Province would have known that the tenants of Wynyard Mansions were in the process of vacating the property long before the last tenant left. As already stated, in terms of s 5 of GIAMA an immovable asset must be used efficiently. It becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level. In terms of s 5*(f)* of GIAMA, when contemplating the disposal of an asset, the custodian must consider whether it can be used:

'(*i)* by another user or jointly by different users;

(ii) in relation to social development initiatives of government; and

(iii) in relation to government's socio-economic objectives; including land reform, black economic empowerment, alleviation of poverty, job creation and redistribution of wealth'.[30]

As the facts outlined above show, the Department of Transport complied with the provisions of s 5*(f)*. The Provincial Department of Human Settlements later withdrew its objection to the disposal of the property.

Does Sea Point fall within a restructuring zone?

[65] The status of Sea Point became an issue because one of the aspects considered by the Province in its decision not to resile from the sale was that It was not a designated restructuring zone. This meant that no restructuring capital grant would be awarded in respect of a social housing development in Sea

[30] Section 5(1)*(f)*.

Point. The high court declared Sea Point to be a restructuring zone. In addition, it found that the Province should have approached the National Minister for either clarification of the designation of Sea Point as a restructuring zone, or to request that the area be designated as such.

[66] A 'restructuring zone' is defined in s 1 of the Social Housing Act as:

'. . . a geographic area that has been-

(a) identified by the municipality, with the concurrence of the provincial government, for purposes of social housing; and

(b) has been designated by the Minister in the *Gazette* for approved projects'.

[67] In order for a restructuring zone to be established, the municipality must identify the specific geographic area that it intends to have designated as such. The municipality then advises the provincial government under whose authority it falls accordingly, and if the Province concurs, it submits the details of the identified geographic area to the national Minister of the Department of Human Settlements.

[68] The high court considered two notices issued by the National Department of Human Settlements in respect of restructuring zones. Sea Point was not listed in either notice. The respondents contend that on a proper interpretation of the notices, Sea Point was designated as a restructuring area. The first, Notice No 848 of 2011, titled 'Provisional Restructuring Zones', was published in Government Gazette 34788 of 2 December 2011. It read:

'The Department of Human Settlements hereby publishes for public information the following restructuring zones in terms of the Social Housing Policy, the Guidelines and the Social Housing Act, 2008 (Act No. 16 of 2008)'.

[69] With respect to the City the five provisional restructuring zones established were:

(a) ‘CBD and surrounds (Salt River, Woodstock and Observatory)
(b) Southern Near (Claremont, Kenilworth and Rondebosch,
(c) Southern Central (Westlake - Steenberg)
(d) Northern Near (Milnerton)
(e) Northern Central (Belville, Bothasig, Goodwood and surrounds)’.

[70] The second notice (Notice No 900 of 2011) was a ‘Correction Notice’ published in Government Gazette No 38439 of 15 December 2011, to correct Notice 848. In the later notice the restructuring zones were listed as follows:

(a) ‘CBD and surrounds (Salt River, Woodstock and Observatory)
(b) Southern Near (Claremont, Kenilworth and Rondebosch,
(c) Southern Central (Westlake - Steenberg)
(d) Northern Near (Milnerton)
(e) Northern Central (Belville, Bothasig, Goodwood and surrounds)
(f) South Eastern (Somerset West, Strand, and Gordons Bay)
(g) (Southern (Strandfontein, Mitchells Plain, Mandalay and surrounds)
(h) Eastern (Brackenfell, Durbanville, Kraaifontein, and Kuils River)
(i) (Cape Flats (Athlone and surrounds (Pinelands to Ottery)
(j) Far South (Fishoek and Simonstown).’

[71] The contested geographic area is defined in both notices as ‘CBD and surrounds (Salt River, Woodstock and Observatory)’. Given that the second notice was a correction of the first one, it is to the corrective notice that I will direct my attention. The City maintains that it had always intended that all areas surrounding economic hubs, such as the CBD would be included in the specific hubs for purposes of designation of restructuring zones. The City would then enjoy the flexibility of identifying land in the surrounds, in respect of which to access restructuring capital grant funding. The specific reference to Salt River, Woodstock and Observatory was intended to be illustrative rather than

exclusive, the City argued. As a result, when the dispute arose in this case regarding the interpretation of the designation as set out in the Notices, the City informed the Province and National government that it intended to have the whole City designated as a restructuring zone.

[72] I do not agree with the argument by the Province that, because the notice was provisional or was published 'for public information' the designation was not effective. The notice expressly referred to the areas listed as 'restructuring zones'. It also provided that '[t]hese shall remain in force as designated areas until and unless re-designated . . .'. There is no evidence that the areas under consideration were re-designated during the period under consideration.

[73] On the other hand I do not agree that Sea Point was designated as a restructuring zone in terms of the notice. The respondents (Reclaim the City and Ndifuna Ukwazi) contend that given that Sea Point is situated approximately 5 kilometers from the city centre, it is therefore located within the "surrounds" in relation to the CBD. The reference to Woodstock, Observatory, and Salt River was merely intended to give examples of areas falling within the meaning of surrounds, they maintained. And because the purpose of the social housing policy is to house poor people, the restructuring zone of 'CBD and surrounds (Salt River, Woodstock and Observatory)'must be generously interpreted to include Sea Point.

[74] In interpreting the notice the high court first considered the dictionary meaning of 'surround' in the New Shorter Oxford Dictionary.[31] It considered that the meaning of the word includes 'the area or place around a place or thing; the vicinity, the surroundings, the environment . . .'. The court also considered the definition of 'environs', which is '[t]he district surrounding a place, an

[31] As the dictionary did not have a definition of 'surrounds'.

urban area'. It then applied these definitions to the geographical location of Sea Point as depicted on the map referred to in paragraph 3 of the first order and reasoned as follows:

'. . . if one were to look at a plan of the city centre, the Sea Point area in which the property is located is closer (distance wise, as the proverbial crow flies) to the CBD than, for example, Observatory. But one cannot access the Sea Point area directly from the city centre because of the geography presented by the mountain along Ocean View Drive, High Level Road or Main Road to reach Sea Point. So I suppose it might be argued that Sea Point cannot be regarded as a "surrounding suburb" in the same manner as Woodstock (which is the first suburb one encounters when travelling eastwards out of the city centre) because it is not contiguous to the CBD. But then neither is Observatory which is located beyond Salt River and University Estate, neither of which is contiguous to the city centre either.

On the other hand, the inner suburbs of BO-Kaap (also known as Schotschekloof and on the southern slopes of the Signal Hill), Gardens, Tamboerskloof, Oranjezicht, District Six, Vredehoek and Devils Peak (all of which nestle between the foothills of Table Mountain and the Southern side of the CBD) undoubtedly surround the City Centre – in fact, they are colloquially referred to as the City Bowl.'

[75] Having reached this 'conundrum' the high court went on to consider the evidence of Mr Pogiso Molapo, a manager in the Social Housing and Land Restitution unit within the City's Transport and Urban Development Authority. In the relevant part of his affidavit Mr Molapo explained that the words "'and surrounds" were used by the City to ensure that no area surrounding an economic hub, for example, the CBD, would be specifically excluded [from the restructuring zone]' . . . In other words, the City would have the flexibility to identify land for purposes of being able to apply for RCG funding in relation to development that falls into the 'surrounds' as identified above.

[76] The difficulty with the approach used by the high court is that it used Mr Molapo's evidence to shore up the inclusion of Sea Point as a designated restructuring area, when it was clear that such interpretation found no support in

the text of the notice. Such interpretation is impermissible. While it is true that the present state of our law on interpretation of legal documents is that context in which the document came into existence is always part of the interpretative process, there are limits to such use of extrinsic evidence. In *University of Johannesburg v Auckland Park Theological Seminary and Another (ATS),*[32] the Constitutional Court, while emphasizing that contextual evidence forms part of every interpretative exercise, also warned that the admission of such evidence is not limitless. At paragraph 68 Khampepe J said:

'Let me clarify that what I say here does not mean that extrinsic evidence is *always* admissible. It is true that a court's recourse to extrinsic evidence is not limitless because "interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses". It is also true that "to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible".[33] I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight'. (footnote references omitted)

It is instructive that, while compelling the consideration of contextual evidence in interpretation of all legal documents, in *ATS,* the Constitutional Court still affirmed the judgments of this court in *Novartis*,[34] *Endumeni*,[35] *KPMG*[36] and others.

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[32] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).
[33] Ibid.
[34] Ibid para 67; see also *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27.
[35] Ibid para 64; see also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 para 18.
[36] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para 39;

[77] In *Capitec Bank Holdings and Another v Coral Lagoon Investments* 194[37] (*Coral Lagoon Investments*) this court admitted extrinsic evidence relating to conduct of the parties but found that the conduct of one of the parties lent context that displaced the clear meaning to the clause of the contract under consideration, and the context of the structure of the agreement as a whole, and its proclaimed purpose. The Court held:

'The issue is this. Under the expansive approach to interpretation laid down in *Endumeni* extrinsic evidence is admissible *to understand the meaning of the words used in a contract.* Such evidence may be relevant to the context within which the contract was concluded and its purpose, and this is so whether or not the text of the contract ambiguous, either patently or latently. On the other hand, the parol evidence rule is an important principle that remains part of our law'.[38] (emphasis supplied)

Significantly, both the Constitutional Court in *ATS* and this court in *Coral Lagoon Holdings* maintained the crucial guiding principle articulated in *KPMG*, that, 'Interpretation is a matter of law and not of fact, accordingly, interpretation is a matter for the court and not for the witnesses (or, as said in common-law jurisprudence, it is not a jury question . . .). [39]

[78] I do not think that Mr Molapo's evidence of the City's intention should have been admitted. It is not evidence of context. And the attempt to disguise it as such by referring to social housing grants that were secured by the City in respect of undesignated suburbs does not assist the respondents. If the intention of the City had to be admitted, it could not trump the meaning of the clear language used in the notice, together with the legislative context and purpose.

[79] Consequently, the notices had to be interpreted as they were. Meaning had to be given to the words used, considered within the context in which the documents was generated, and its purpose. The high court's interpretation, in as

[37] In *Capitec Bank Holdings and Another v Coral Lagoon Investments* 194 [2021] ZASCA 99.
[38] At 38.
[39] At para 39.

far as it was based on its own analysis of the location of various suburbs within the City, is not permissible. On the language used in the notice, the CBD, together with identified geographical areas within the surrounds, were designated as a restructuring zone. The word 'surrounds' was restricted to the identified areas, 'Salt River, Woodstock and Observatory' in the brackets to identify with certainty, a geographic zone. Had this not been done the notices would not achieve the purpose of identifying with certainty, the specific geographical area *identified* and designated as a restructuring zone.

[80] The contention that Sea Point is included in the area designated as a restructuring zone in the notices does not find support in the words used in the notice. It does not account for all the words used in the notice, and the context and purpose served by the notice – to define a geographical area designated as a restructuring zone. It renders the notice vague. The 'preamble' to the notice put paid to this contention. It states that:

'In accordance with the resolutions:

1 of MEC

2 Of the MAYCO of the City of Cape Town

3 And endorsement by the National Department of Housing

The areas in the Table below are designated as within Provisional Restructuring zones as defined in the interim policy. All three parties in signing this part of the agreement acknowledge that *these areas are the only areas which can access available Social Rental Housing subsidy* in accordance with the interim social housing policy. These shall remain in force as Restructuring Zones until and unless all three parties sign re-designation of the areas or the social housing policy on Restructuring zones is superseded by other relevant legislation or policy'. (emphasis supplied)

Against the background that s 3(1)*(f)* of the Social Housing Act which prescribes that restructuring zones be *specifically provided for* in the municipality's integrated plan, restructuring zones must be clearly identified in the relevant Government Gazettes.

[81] The submission on behalf of the respondents, that the Province should have sought the advice of the National Minister for proper interpretation of the notice cannot be sustained. The Province was entitled to interpret the notice and make (decisions) accordingly. Consideration of legal advice was a reasonable step in that process. Any decision made by the Province based on the notice was an administrative decision. However, the conclusion that the error on the part of the Province in not approaching national government, rendered its decision reviewable under ss 6(2)*(d)* of PAJA, is unsustainable. So too is the finding that the conduct of the Province was *mala fide* in so far it did not seek clarification from the national Department of Human Settlements on the uncertainty about the status of Sea Point.

[82] This finding ignores the long history of correspondence between the Province and the National Minister, and the delays experienced by the Province with designation of restructuring zones. Extensive correspondence, dating as far back as 29 June 2010, had been addressed by the Provincial Department of Housing Settlements to its national counterpart, requesting designation of additional restructuring zones for the City. In most of this correspondence, the Province urged the national department to respond to correspondence on designation of restructuring zones. In correspondence that preceded the two notices, the Provincial Department had to remind its national counterpart that 'the current restructuring zones were only intended: no restructuring zones had actually been designated by the National Minister of Human Settlements.'

[83] Similar delays were experienced with amendments to limitations on the income bands of households that could be accommodated in a housing project. A maximum of 70 percent of the units in a project had to support households earning R3 501 to R7 500 per month. The low income bands meant that rental

income (which was limited to 33 percent of monthly household income) was not a large part of funding the housing project. The income bands were only increased in 2018 to include households earning between R1 500 to R5 000 per month (referred to as the 'primary market'). By that time the Social Housing Institutes had advised that the social housing projects were not financially viable without capital grant funding, which was dependent on designation of restructuring zones. They withdrew as delivery partners on their own land parcels in favour of private development initiatives which were financially viable.

[84] The Province referred to four projects where 1 512 units were lost from the pipeline. It demonstrated that the delays in the designation of restructuring zones and revision of the income bands had a significantly negative impact on the pipeline programme. Nevertheless, despite the impact of these delays, the Province and the City proceeded to with some of the social housing projects. Against this background, the suggestion that the Province and the City were dragging their feet is unfounded. So is the conclusion that the conduct of the Province was *mala fide* in its interactions with National Department or in failing to communicate with that Department.

[85] It must also be stressed that the issue whether Sea Point was a restructuring zone was one of many factors considered by the Province. As discussed, the Premier had considered the social housing units that had been constructed, and the housing projects that were in the pipeline programme. It also considered the social housing units that were to be part of the Helen Bowden Nurses home site, the social housing project that was part of the Woodstock Hospital development, the extensive cross-subsidisation that was required for development on the Tafelberg property to be sustainable, the loss of the capital injection of R135 million amidst the budget cuts implemented by

National Treasury, and the high construction costs of a social housing development on the Tafelberg property that was acknowledged during the notice and comment process.

The obligation on the Province to inform and consult National Government on the decision to dispose of the property.

[86] In the second application the Minister had argued that a dispute arose between her and the Premier on whether there was an obligation to consult her prior to making the decision to dispose of the property. The high court reasoned that:

'To the extent that the national minister may have been in a position to address the areas of concern or uncertainty raised by the Province on behalf of her Department, she could, and should, have been consulted by the Province. After all the injunction in the [Social Housing Act] required both the national Minister and the Province to act in the interests of the parties who were the subject of that Act, as contemplated under ss 5*(b)* and *(c)* of IGRFA, an act, as I have said which envisages comity rather than shunning the other aside. And, such an approach may have afforded an opportunity to resolve the conundrum I posed earlier – But why didn't you ask?'

[87] The court found that the failure by the Province to inform the national Minister of the Department of Human Settlements of its intention to sell the Tafelberg properties was a breach of Chapter 3 of the Constitution and the Intergovernmental Relations Framework Act (IGRFA). It held that:

'Section 41(1)*(g)* [of IRGFA] is concerned with the way power is exercised, not with whether or not a power exists. That is determined by the provisions of the Constitution. In the present case what is relevant is that the constitutional power to structure the public service vests in the national sphere of government'.

[88] It took the view that the 'dual competencies' in respect of housing granted by the Constitution to both the national and the provincial spheres of

government emphasises the necessity for co-operative governance as held in *Grootboom.* Therefore, once the Province communicated its decision not to cancel the contract the National Minister was entitled 'inquire' about the decision, given her statutory obligations under the s 2(1)*(i)*(iv) of the Social Housing Act and the broader umbrella of the Housing Act, including the duty to promote social, physical and economic integration of housing development into existing urban and inner city areas through the creation of quality living environments.

[89] At the hearing of the appeal, counsel for the National Minister clarified that it is not the Minister's stance that she must be consulted in respect of every disposal. Although the explanation reduces the scope of the dispute on this issue, it remains unclear which disposals, according to the Minister, she must be consulted on and where the source of the asserted obligation to consult lies. Section 4(1) of the WCLAA on which the National Minister seemed to also rely, is not a source of power for the alleged obligation to inform and consult. The section merely provides that:

The Premier must co-ordinate the provincial government's actions regarding the administration of provincial State land with the national and local spheres of government as contemplated in Chapter 3 of the Constitution and section 7 of the Constitution of the Western Cape'.

[90] In as far as the court located the source of the obligation to inform and consult in Chapter 3 of the Constitution, the two sections in that chapter provide for consultation between three spheres of government[40] and outline the principles for co-operative government and intergovernmental relations.[41] IGRFA is the legislation enacted to give effect to Chapter 3 s 41(2) of the Constitution.

[40] Section 40.
[41] Section 41.

[91] Subsections *5(b)* and *(c)* of IGRFA provide that-

'In conducting their affairs the national government, provincial governments and local governments must seek to achieve the object of this Act, including by-

(a) . . .

(b) Consulting other affected organs of the state *in accordance with formal procedures, as determined by any applicable legislation*, or accepted convention or as agreed with them or, in the absence of formal procedures, consulting them in a manner best suited to the circumstances, including by way of =

(i) Direct contact; or

(ii) Any relevant intergovernmental structures;

(c) Co-ordinating their actions when implementing policy or legislation affecting the material interests of other governments'. (emphasis supplied)

[92] The formal procedure determined for notification of affected organs of state in this instance is to be found in ss 3(2) and 3(3) of the WCLAA. It entails publication of the intended disposal of property in the Provincial Gazette and delivery of the notice of the intended disposal on occupants of the property and the provincial offices of the National Departments of Land Affairs and Public Works. It was not the respondents' case that these determined procedures were not complied with.[42]

[93] Even within the context of co-operative governance and the framework established in IGRFA, for the promotion and facilitation of intergovernmental relations, the status, powers and functions of the different spheres of government must be maintained. The preamble to IGRFA highlights co-operation and integration of actions in government and the necessity to establish a legislative framework applicable to all spheres of government, to ensure intergovernmental relations, in the spirit of the Constitution. Section 41 of the Constitution sets out the principles of co-operative government and

[42] See paras 53 and 56 above.

intergovernmental relations. In terms of s 41(1)*(g)* all spheres of government and organs of state within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional, or institutional integrity of government in another sphere. In any event, once the National Minister of Human Settlement conceded that there was no obligation to consult her on every proposed disposal her case caved in, as the issue had been pleaded as an across the board obligation to inform and consult.

Constitutionality of regulation 4(6) and the proviso to regulation 4(1)

[94] Regulation 4 (1) regulates the procedure of acquisition and disposal of provincial state land as follows:

'4(1) An offeror shall:

(a) Complete and sign a written offer, and

(b) Submit that offer to the Head of Component as a formal offer;

Provided that all offers of disposal shall contain a provision to the effect that the offeror acknowledges that –

(i) The Provincial Cabinet, after consulting the *Committee*, may, within 21 days of the receipt of written representations received pursuant to section 3(3) of the *Act*, or such longer period not exceeding 3 months as the Provincial Cabinet may determine in writing prior to the expiry of that 21 day period, resile from any contract resulting from the offer, and

(ii) In the event of the Provincial Government so resiling the *offeror* will have no right of recourse against the *Province* or any of its organs or functionaries, but if the *Province* intends to sell the land at a higher price than that specified in the formal offer within a period of three months from the date when it resiled, the *Province* must first offer to sell the land to the *offeror* at that price.' (Emphasis in original text)

[95] Ndifuna Ukwazi maintained the argument that the procedure provided for in these regulations is irreconcilable with a meaningful public participation that could influence the decision not to dispose of the property in the first place. Furthermore, the procedure favours commercial interests over constitutional

considerations. The respondents also maintained that there is an 'inconsistency' between the regulations and s 10 of WCLAA. This section empowers the Premier to:

'*(a)* … make regulations regarding the norms and standards, including procedures applicable to the acquisition, exchange, disposal and letting of provincial state land, the demolition of buildings on provincial state land, donations of provincial state land and the general space and cost norms applicable in the Provincial Administration: Western Cape, and

(b) … make any other regulations considered necessary or expedient for the achievement of the purpose or objectives of this Act'.

[96] The high court's decision on this issue was based on an interpretation of ss 3(2) of the WCLAA. The subsection provides that:

'The Minister must publish in the *Provincial Gazette* in the three official languages of the province and in an Afrikaans, an English, and an IsiXhosa newspaper circulating in the province in those respective languages, a notice of any *proposed disposal* in terms of subsection (1)[43] calling upon interested parties to submit, within 21 days of the date of the notice, any representations which they wish to make regarding such *proposed disposal*; provided that the aforegoing provision does not apply to any disposal concerning the leasing of provincial state land for a period not exceeding twelve months without an option to renew.'

[97] The high court correctly found that the words 'proposed disposal' in ss 3(2) envisaged an intention to conclude a written contract of sale. It also found, and I agree, that the subsection contemplated that the public would be afforded the opportunity to comment before a decision was finally taken. This is an essential requirement of both an administrative decision making process.[44] The high court then reasoned that the sale of the Tafelberg property did not allow for a fair opportunity to make representations; a fair procedure would allow for objections at an early stage of the process, 'providing a clean slate for the evaluation of competing views.

[43] Which empowers the province to dispose of provincial state land.
[44] Section 3 of the Promotion of Administrative Justice Act 3 of 2000.

[98] The inquiry into the constitutionality of the impugned regulations requires (an) interpretation of the regulations and a determination of whether they provide for meaningful public participation. As set out above, the impugned regulations govern the process that follows after a decision to dispose of provincial land. Regulation 4(1) provides for the making and acceptance of an offer to purchase the land. At first glance, and if Regulation 4(1) is viewed in isolation from the rest of the regulation, the offer and acceptance process may appear complete, final, and having an external effect.[45] However, the provisions of the Regulation 4 must be read and interpreted comprehensibly, and harmoniously.

[99] Regulation 4(6) provides that;

'If a written contract has been duly signed on behalf of the Province, that contract shall be a proposed disposal, or proposed acquisition and, in the case of proposed disposals, the *Minister* shall exercise the powers and comply with the duties conferred on the Premier by section 3(2), (3) and (4) of the Act'.

Importantly this portion of Regulation 4 is written in peremptory language. In providing that a signed written offer signed *shall be a proposed disposal* (or proposed acquisition) the sub-regulation renders the transaction incomplete. The transaction remains a proposed disposal until the Minister has complied with the requirements of s 3(2), (3), and (4) of the WCLAA - the notice and comment procedure.

[100] As to the nature of the notice and comment process, whilst the transaction remains a proposed disposal, ss 3(2), (3), and (4) of the WCLAA regulate that process as follows:

'The premier must, in addition to the notices to be published in terms of subsection (2), cause to be delivered to –

[45] See the definition of 'administrative action' in s 1 of PAJA.

(a) The occupants, if any, of the provincial state land to be disposed of;

(b) The chief executive officer of the local government for the area in which the provincial state land to be disposed of is situated;

(c) The Western Cape provincial directors of the National Department of Land Affairs and Public Works, and

(d) The Western Cape provincial director of the National Departments of Agriculture, if the provincial state land is applied or intended to be applied for agricultural purposes,

A copy of the notice referred to in subsection (1), and must advise those persons that they may, within 21 days of the receipt of such notice, make written representations regarding the proposed disposal.

(4) *(a)* The notices referred to in subsections (2) and (3) must include the following information regarding the provincial state land concerned:

(i) the full title deed description of such land, including the title deed number, the administrative district in which the provincial state land is situated and, if applicable, the nature of any right in or over such land;

(ii) the current zoning of such land, and

(iii) the actual current use of such land.'

(b) The notice referred to in paragraph *(a)* must include an office address at which full details concerning the provincial state land in question and the proposed disposal may be obtained'.

[101] These subsections of the WCLAA, read together with Regulation 4, mean that, while the Province solicits and considers written representations received, the transaction remains a proposal. It is only completed and becomes a disposal once the Province, after consideration of the representations as provided in Regulation 1*(b)*, makes a decision as to whether to resile from the proposed disposition of not.

[102] Our courts have approached the assessment of procedural fairness flexibly, on a case by case basis, taking into account the facts and circumstances peculiar to each case.[46] It is difficult to imagine a more fair and balanced

[46] *Janse Van Rensburg v Minister of Trade and Industry* 2000 11 BCLR 1235 (CC); 2001 (1) SA 29 (CC) para 24.

procedure in terms of which an intended disposal of State land can be conducted. Interested parties are afforded opportunity to comment on a comprehensive proposal, which includes not only the description of the property intended to be disposed of, but also the identity of the prospective purchaser, the value of the land, its current and intended use, the reasons why the offer has been accepted for further consideration, and the proposed purchase price, amongst other details. All this while government is able to execute its responsibilities in relation to the land efficiently, transparently, and cost effectively. The contention that the procedure is ultra vires and/or inconsistent with the requirements of s 4 of PAJA is unfounded.

[103] Having considered the above issues the appeal must succeed. In the result, the following order is made:

1 The appeal is upheld with no order as to costs.

2 The order of the high court in high court Case No7908/2017 is set aside and replaced with the following order:

‘The application is dismissed with no order as to costs.’

3 The order of the high court in Case No 12327/2017 is set aside and replaced with the following:

‘The application is dismissed with no order as to costs.’

_____

N DAMBUZA

ACTING PRESIDENT

Appearances

For the first to fourth appellants:	E Fagan SC with him K Pillay SC, A Du Toit and M Mokhoaetsi
Instructed by:	State Attorney, Cape Town State Attorney, Bloemfontein
For the fifth appellant:	N Bawa SC with him T Mayosi
Instructed by:	Riley Inc, Cape Town Webbers Attorneys, Bloemfontein
For the first and second respondents:	I Jamie SC with him T Masuku SC and L Stansfield
Instructed by:	State Attorney, Cape Town State Attorney, Bloemfontein
For the third respondent:	S Budlender SC with him E Webber
Instructed by:	MF Jassat Dhlamini Inc, Johannesburg Symington De Kok Inc, Bloemfontein.
For the fourth to sixth respondents:	P Hathorn SC with him C De Villiers,
Instructed by:	Ndifuna Ukwazi Law Centre, Cape Town Phatshoane Henney, Bloemfontein.