IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: **7908/17**

In the matter between:

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| **THOZAMA ANGELA ADONISI** | First Applicant |
| **PHUMZA NTUTLEA** | Second Applicant |
| **SHARONE DANIELS** | Third Applicant |
| **SELINA LA HANE** | Fourth Applicant |
| **RECLAIM THE CITY** | Fifth Applicant |
| **TRUSTEES OF THE NDIFUNA UKWAZI TRUST** | Sixth Applicant |

and

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| **MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE** | First Respondent |
| **PREMIER OF THE WESTERN CAPE PROVINCE** | Second Respondent |
| **THE PHYLLIS JOWELL JEWISH DAY SCHOOL (NPC)** | Third Respondent |
| **CITY OF CAPE TOWN** | Fourth Respondent |
| **MINISTER OF HUMAN SETTLEMENTS** | Fifth Respondent |
| **THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE** | Sixth Respondent |
| **MINISTER OF PUBLIC WORKS** | Seventh Respondent |
| **MINISTER OF HUMAN SETTLEMENTS: WESTERN CAPE** | Eighth Respondent |
| **SOCIAL HOUSING REGULATORY AUTHORITY** | Ninth Respondent |
| **MINISTER OF RURAL DEVELOPMENT & LAND REFORM** | Tenth Respondent |
| **MINISTER OF FINANCE** | Eleventh Respondent |
| **GARY FISHER** | Twelfth Respondent |

Case No: **12327/17**

In the matter between:

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| **MINISTER OF HUMAN SETTLEMENTS** | First Applicant |
| **NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS** | Second Applicant |
| **SOCIAL HOUSING REGULATORY AUTHORITY** | Third Applicant |
| and | |
| **PREMIER OF THE WESTERN CAPE PROVINCE** | First Respondent |
| **MEC FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE PROVINCE** | Second Respondent |
| **MEC FOR HUMAN SETTLEMENTS: WESTERN CAPE PROVINCE** | Third Respondent |
| **CITY OF CAPE TOWN** | Fourth Respondent |
| **THE PHYLLIS JOWELL JEWISH DAY SCHOOL (NPC)** | Fifth Respondent |
| **TRUSTEES OF THE NDIFUNA UKWAZI TRUST** | Sixth Respondent |

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## FOURTH RESPONDENT'S HEADS OF ARGUMENT

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## A. INTRODUCTION

1. As the issues are intertwined, the aforementioned applications are being heard together. We deal with the respective applications in turn. At the outset we point out that in both applications the applicants at material times do not distinguish between the actions, omissions and decisions of the Fourth Respondent (*"the City"*) and their provincial counterparts and seek to complain as if both had been party to the decisions to sell the Tafelberg properties.[1] The City had no meaningful say in this decision. The relief sought against the City is limited to the following:

1.1. In Case No. 7908/17 ("*the Adonisi application*") which primarily relates to the sale of the Tafelberg land -

1.1.1. is a declarator that the City failed to comply with its obligations in terms of sections 25(5)[2], 26(1)[3] and 26(2)[4] of the Constitution and the legislation enacted to give effect to these rights[5] in essence, by failing to redress spatial apartheid within the boundaries of the area defined in Annexure "A"[6] as central Cape Town (referred to as *"the applicants' central Cape Town"*);

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[1] The properties have been described by other parties and it is not repeated herein.
[2] Section 25(5) – The State must take all reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
[3] Section 26(1) – Everyone has the right to access to adequate housing.
[4] Section 26(2) – The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
[5] Notice of motion: Record Vol 1, p. 2, para 2; Amended notice of motion: Record Vol 3, p. 802 para 2.
[6] Annexure A: "Applicant's definition of central Cape Town" Record Vol 3, p. 812.

1.1.2. is a mandamus directing the City to comply with its constitutional and statutory obligations as declared by this Court; and

1.1.3. a supervisory interdict directing the City to file reports under oath within three months, stating what future steps the City will take to comply with its constitutional duty and when such steps will be taken.[7]

1.2. In Case No. 12327/2017 (*"the IGRFA application"*) the Minister of Human Settlements (*"the Minister"*) persists in seeking an order that the City engages with the Department of Human Settlement (DHS) in an intergovernmental dispute resolution process as envisaged by Chapter 3 of the Constitution and as regulated by the Intergovernmental Relations Framework Act 13 of 2005 ("*IGRFA*").[6]

2. The City in answering the complaint of the applicants in the **Adonisi** application submits that:

2.1. There is no specific statutory or constitutional obligation on the City to provide access to a specific type of housing in a specific area, being the applicants' central Cape Town, which is the effect of the declaratory relief being sought;

2.2. The applicants are not entitled to the declaratory relief sought; and

[7] Amended notice of motion: Record Vol 3, p.802 – 803 paras 2 - 4.

2.3. The City's obligations are being progressively realised within its available means and resources in compliance with its obligations under section 26 of the Constitution to the entire metropolitan City.

3. As far as the **IGFRA** application is concerned there was never a basis to seek any relief against the City. It was misconceived from inception. This was so self-evident in that no dispute had been declared and no case for any relief was made out in the founding papers at all. The City, in the spirit of co-operative governance, apprised the Minister hereof and invited withdrawal. The City did so before answering papers were prepared, but despite doing so, there was a refusal to withdraw. Thereafter, in the replying affidavit and heads of argument the Minister admits that there is no need for relief against the City – but there never was.[8] In having persisted with the application the Minister has infringed the very principles of co-operative governance and intergovernmental relations as set out in section 41(1)(h) of the Constitution, which is being relied upon.[9] The application against the City is an abuse of process and for this reason the City seeks costs in this application on a punitive scale.

## B. THE ADONISI APPLICATION

### (a) Background

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[8] Minster of Human Settlements heads of argument: p. 27 paras 78 – 79; Minister of Human Settlements replying affidavit p.206 para 138.

[9] "*(h) co-operate with one another in mutual trust and good faith by-*
*(i) fostering friendly relations;*
*(ii) assisting and supporting one another;*
*(iii) informing one another of, and consulting one another on, matters of common interest;*
*(iv) co-ordinating their actions and legislation with one another;*
*(v) adhering to agreed procedures; and*
*(vi) avoiding legal proceedings against one another*."

4. The declaratory relief is premised on allegations that the City failed to comply with its constitutional and statutory obligations to redress "*spatial apartheid*"[10] within the applicants' central Cape Town.[11] In effect what the applicants seek is that this Court evaluates the social housing – being one component of the City's housing obligations - only with reference to the applicants' central Cape Town and issue a declarator with reference to the manner or extent to which the City has met its obligations in terms of providing access to social housing in that limited area and premised on a sliver of the right and find unconstitutionality.

5. In this regard the applicants have created a central Cape Town with their own boundaries with reference to the highways using, inter alia, the Koeberg Interchange and the Black River Interchange as boundaries. These are notional boundaries and a subjective choice with no regard to the City and its planning. The relief sought is limited to the applicants' construction of central Cape Town and this Court is being asked to order declaratory relief that the City has failed in its obligations in terms of sections 25(5), 26(1) and 26(2) of the Constitution by having not redressed spatial apartheid only within the boundaries of the CBD; Gardens; Schotscheskloof; Bo-Kaap; Foreshore; Zonnebloem; Vredehoek; Tamboerskloof; Oranjezicht; Devil's Peak Estate; Woodstock; Salt River; Observatory; University Estate; Walmer Estate; Green Point; Mouille

[10] A concept created by the litigants not premised on any precise legislative obligation binding the City to this concept is referred to repeatedly as a legal basis to advance the claim that the City has failed in a constitutional and legislative obligation to redress "spatial apartheid" exclusively in the central CBD.

Point; Three Anchor Bay; Sea Point; De Waterkant; V&A Waterfront; Fresnaye; and Bantry Bay.

6. This relief is sought without any regard to the broader obligations which rest on the City in relation to its area of jurisdiction in its entirety in relation to providing access to housing but also without regard to other pressing basic or socio-economic rights which the City has to fulfil.[12]

7. Moreover, the applicants do so even though they recognise that the effect of decades of the apartheid government policies amounted to a systematic deprivation of access to urban land and residential accommodation and exclusion from residences in what was designated as "*white areas*", with spatial segregation across the City. In seeking relief it does not limit it to previous *"white areas"* and does so with no regard to obligations vis-à-vis other areas and no appreciation for the intergovernmental difficulties and budgetary constraints which impede the ability of the City in the execution of its mandate to all areas; the City's housing obligations in relation to the entire metropolis of Cape Town; the City's exponential population growth of the past 20 years which has resulted in an increasing number of people in dire need of social housing and wanting to reside in the City (many of whom are not South African, a number of whom are refugees and are not recipients of social housing);[13] the constant challenge to meet the growing demand for housing generally; the limited land the City has at its own disposal coupled with the difficulties incurred with other government departments releasing land under their control for state

[12] Amended Notice of Motion: Record Vol 3 p. 812.
[13] FRAA: Record Vol 11, p. 4562, para 4; **Government of the Republic of South Africa v Grootboom** 2001 (1) SA 46 (CC) ("**Grootboom**") at para [57].

subsidised housing; the City's shrinking share of the national housing budget; the national policies in respect of which the City has been obliged to comply over several years; the City's growing obligation to provide for an ever-increasing demand for emergency housing and Temporary Relocation Areas (TRA's) which redirects budgets; and the City's obligations as set out in the **Grootboom** and other subsequent judgments.

8. They also seek this in isolation of other initiatives like the efforts of the National Government to re-write the National Housing Code[14] concentrating on the creation of "*integrated human settlements*", the adoption of the Breaking New ground policy ("*BNG*") by the National Government in 2004 and in complete disregard of the pressures on the City to deliver lots of housing.[15] The City is also obliged to comply with its obligations under various national legislation and policies in meeting social housing development. In this regard, between 2005 and 2013, pursuant to the Social Housing Act ("*SHA*")[16], saw the Social Housing Regulatory Authority ("*SHRA*") being established, the National Housing Code was updated,[17] Outcome 8 was also developed, the Spatial Planning and Land Use Management Act ("*SPLUMA*") came into force.[18] All of these, amongst others impacted on the City's social housing policy.

9. To meet obligations as set in national policies and to meet immediate and pressing needs, the City focused on identifying large tracts of land to either purchase or devolve via intergovernmental processes. But what has not

[14] Section 4 of the Housing Act 107 of 1997.
[15] **Grootboom** at paras 58 – 59.
[16] Housing Act 16 of 2008.
[17] The National Housing Code 2009.
[18] SPLUMA 16 of 2013.

happened is that National Government has not freely made its land available in areas which the City regards feasible for the provision of social housing. Thus, the largest and most cost-effective land on which to provide housing is located on the City's periphery and therefore developments mushroomed into informal settlements and/or where there was available land on which more people could be accommodated within the available budgets.

10. The City's approach for the most part in the past two decades (and in light of the Court's finding in the **Grootboom** case)[19] was to assist as many families and as possible in need of immediate housing and the associated services, which supplement housing. The Court in **Grootboom** required the City to comply with its obligation in terms of section 26(2) by devising and implementing within its available resources a comprehensive and coordinated programme to provide relief for those in desperate need.[20]

11. As a result, significant steps were taken by the City to improve the apartheid era townships which were appallingly under-serviced in all respects (whilst at the same time providing access to social housing for beneficiaries who had no access to housing). These upgrades included improving sanitation, water and electricity, transport, infrastructure (municipal services) and a myriad of other related services to the poorest communities in those areas.[21]

12. Pressures on the City are exacerbated by multiple land invasions or unlawful occupations of land – including privately owned land. This results in the

[19] **Grootboom** at paras [96] – [97].
[20] **Grootboom** at para [99].
[21] **Annexure LM4:** Record Vol 11, pp. 4885 – 4890.

increase of unplanned informal settlements which requires the City to provide, outside of its planned budget, the requisite municipal services to several informal settlements which were not included as part of its planning process – or budgeted for.[22]

13. However, inasmuch as it relates to privately owned land, the City is not allowed to upgrade land privately owned land as this is a benefit which accrues to the owner of the property and thus unlawful application of public monies. Thus it results in further evictions, obliging the City to find alternative emergency housing or spending funds in building transitional housing for those evicted unlawful occupiers, or even to purchase the privately owned land.[23] These are additional burdens to the City's financial obligation which it cannot reasonably cater for.

14. All the above have the effect of forcing social housing developments outside of the City's programme and on land which was not initially meant for housing nor in-line with its policies. This manner of social housing gets developed where the most possible units can be provided within the available budgets. This does not mean that the City does not want social housing developments closer to the CBD but must weigh up what obligations are to be met at which stage. What does it aim for: 100 people in the CBD or 10000 elsewhere?

15. The focus of providing, in terms of numbers, the highest possible number of low-cost housing opportunities to alleviate a growing number of families and

[22] **Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others** 2010 (3) SA 454 (CC).
[23] **Fischer v Unlawful Occupiers and Others 2018** (2) SA 228 (WCC).

housing shortages is a policy design and looks to the needs of the most vulnerable and desperate individuals. One that in fact the City is obliged to do otherwise it would be accused of failing to progressively realise the constitutional obligations of a very many of the most vulnerable members of society.

16. So despite the aforegoing the applicants carve out a complaint of a failure to comply with constitutional obligations premised on an unduly narrow interpretation of the right of access to housing – interpreted as a right to social housing and eradication of spatial apartheid in an area of choice - and the obligation on the State and the City, in particular, to implement spatial justice.[24] The City does not deny that part of apartheid was spatial divisions and that this apartheid construct should be eradicated. But this cannot happen overnight and is unlikely to happen as fast or as readily as it should. What the City objects to is the selection of a particularly constructed area for a specific dispensation in circumstances where no such right or entitlement exists and yet where the applicants seek this relief knowing that suitable land for affordable housing is scarce and expensive. Certainly, the City will develop housing – and social housing - where land is made available for it to do so, irrespective of where that land is.

17. Also, if this were the paradigm within which an organ of state would have to comply with constitutional obligations then every community would be at liberty to create a priority geographic area and find some cause for complaint with which to approach the courts to order that funding be redirected to comply with their identified socio-economic constitutional rights for that area. There would

[24] As set out in **Section 7 of the Spatial planning and Land Use Act 16 of 2013 (SPLUMA).**

be an expectation that the Court would then issue declaratory relief and monitor the compliance with corrective measures to eradicate the unconstitutionality complained of. Not only would this be precedent setting but the effect hereof would be a redirecting of funds available to meet court orders outside of the organ of State's planned projects for any given budgetary period.

18. The City could not function in this way or meet its pressing and primary obligations to the most vulnerable and needy members of society, were it ordered to meet only one particular groups' identified need within a pre-defined geographic area.

19. In the affidavits filed on behalf of the City the steps taken (and are taking) to meet obligations under section 26 of the Constitution, and the policies devised and implemented (and are developing) to meet all housing obligations is explained in detail. Noticeably, the applicants have not challenged or disputed the position that the City has set out as it pertains to the housing needs of its citizens. The City Manager's affidavit puts the City's tasks into context and details that which faces the City in its efforts to deal with the shortage of housing in the City.[25]

20. Particular reference is made to the City's Integrated Human Settlements Frameworks (IHSF).[26] This evidences that the City has, within the resources available taken reasonable measures as required by the Constitution and the legislative framework to fulfil the progressive right to access to adequate housing. These policies and steps are not static. They change from time to

[25] FRAA: Record Vol 11, pp. 4573-4575, paras 29 – 35.
[26] Annexures **LM3 & LM4:** Record Vol11, pp. 4812 – 4954.

time and project to project within available resources and depending on what needs have to be met most urgently.

21. It bears mentioning that the adoption of policies is preceded by a rigorous public participation process aimed at meeting key objectives in relation to housing.

22. Could it be done differently? Yes. Should certain steps that were taken not have been done? With hindsight perhaps. Could certain projects have been better done or differently done? Maybe. Should 50 people be housed in the inner City at the same cost as 500 elsewhere? Whose competing needs should take priority?

23. In relation to the aforegoing, we submit that none of the aforementioned are decisions for a court to take or to interfere with unless it is faced with the **Grootboom** scenario.

**(b) Declaratory relief**

24. Herbstein & Van Winsen extrapolates from decided cases factors courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include:

24.1. the existence or absence of a dispute;

24.2. the utility of the declaratory relief and whether, if granted, it will settle the question in issue between the parties;

24.3. whether a tangible and justifiable advantage in relation to the applicants' position appears to flow from the grant of the order sought;

24.4. considerations of public policy, justice and convenience;

24.5. the practical significance of the order; and

24.6. the availability of other remedies.[27]

25. Whilst it is so that section 38 of the Constitution provides that a court may grant appropriate relief, including a declaration of rights, it does not mean that an applicant is entitled to the declaratory relief sought in this case. This remains within the wide discretionary powers of the Court. to determine whether to grant declaratory relief.[28] In **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd**[29] the two-stage approach in considering whether or not to grant declaratory relief was confirmed:

25.1. the first is that the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation;

25.2. once the court is satisfied of the existence of such a condition, it will exercise a discretion either to refuse or grant the order sought.

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[27] See also **Minister of Finance v Oakbay Investments (Pty) Ltd and Others** 2018 (3) SA 515 (GP).
[28] **JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others** 1997 (3) SA 514 (CC); **Baleni and Others v Minister of Mineral Resources and Others** 2019 (2) SA 453 (GP) at para [30].
[29] 2005 (6) SA 205 (SCA) at para [18]; **Competition Commission v Hosken Consolidated Investments Ltd and Another** 2019 (3) SA 1 (CC) at paras [79]-[80].

26. Declaratory orders are also flexible as the court pointed out in **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others**:[30]

> *"[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances."*

27. Section 172(1) applies to a court "[w]hen deciding a constitutional matter". Where declaratory relief is sought, it is well recognised that on certain grounds the court may in its discretion decline to entertain the application on its merits.[31]

28. But even if this were not so, declaratory relief is not a given and as O'Regan J stated in **Metrorail**:

> "*Unlike under section 172(1)(a), the Courts are not obliged to grant a declaration of rights but may do so where they consider it to constitute appropriate relief. The principles developed at common law, and under the provisions of the* Supreme Court Act, will provide helpful guidance to consider whether such a declaratory order should be made, though of course the constitutional setting may at times require consideration of different or additional matters… *In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances."*[32] (Footnote omitted)

29. The requirements for issuing a declaratory order are settled law and non-contentious. What is contentious in this matter is whether a declaratory order ought to be granted.

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[30] 2005 (2) SA 359 (CC).
[31] **WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others** 2019 (2) SA 403 (WCC) at para [73].
[32] **Metrorail** at paras [106] – [107].

30. The applicants make it clear that they do not challenge the statutory or policy framework determined by the national government. Rather, they challenge the manner in which the constitutional and statutory obligations (as well as the policies formulated in terms of the applicable legislation) have been implemented. In doing so they do not, however, attack any specific policy adopted by the City, nor do they point to a lacuna in a specific policy.

31. The entire attack against the City is premised on an entitlement to access affordable *"well-located"* housing and interprets the right of access to housing in section 26 of the Constitution as including a choice as to where housing should be located and appear to pre-determine that some of the applicants before this court should be entitled to choose where they would be provided with access to affordable housing in the applicant's devised central Cape Town.

32. Despite the applicants having at great length set out the legislative framework together with the terms of section 26 of the Constitution, they are unable to point at any law or social policy that obligates the City to develop any particular area of the City or portions of land. It is therefore unclear how the applicants can apply for a declaratory order that City has failed in its obligation to undo spatial injustice in Central Cape Town.

33. Inasmuch as the right formulated by the applicant does not exist as a component of the rights entrenched in the Bill of Rights, the applicants are not entitled to the relief as formulated against the City.

34. The City explained its projects and approach to ensuring that the right of access to housing is progressively realised. It remains a daunting task. Appropriate relief in this matter is not declaratory relief against the City given the context of the dispute and all other relevant circumstances.

35. In the **Thusi**[33] matter Wallis J, as he was then, cited a passage from an article written by Justice Harms titled "Fashioning Remedies" where it was stated that:

> *"'The ideal remedy for an infringement of a social right is the structural interdict (injunction) or mandamus. However, these orders have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. Another aspect to take into account is the comity between the different arms of the State. Then there is the problem of sensible enforcement: the State must be able to comply with the order within the limits of its capabilities, financial or otherwise. Policies also change, as do requirements, and all this impacts on enforcement.*
> *These problems justify the use of declaratory orders. Declaratory relief declares what the constitutional standards are and what conduct would meet them. The remedy aims to clarify and not alter. Although the declaration does not regulate the future conduct of parties or clarify their legal position, it is supposed to have the psychological and symbolic effect that a mere finding in the course of a judgment does not.*
> *This means that declaratory orders tend to make a statement but make no real difference to the parties. It is convenient to declare that something done or not done by government was unconstitutional especially if it is impossible to find an answer or if the court order is likely to cross the boundary between the judicial field and the legislative or administrative. The fact that courts have to resort to such orders indicates the limits of judicial authority.'"*

36. The Courts, generally speaking, are hesitant to grant declaratory orders when determining socio-economic rights due to the policy laden nature of such decision and the principle of separation of powers. These will be considered below in the discussion relating to polycentricity and why declaratory orders or structural interdicts infringe the principles of separation of powers and, if the

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[33] **Thusi v Minister of Home Affairs and Another and 71 Others** 2011 (2) SA 561 (KZP) at para [56].

power is not properly checked, can lead to unintended consequences particularly for the State.

**(c) Non-interference with the City's obligations**

37. In dealing with the adjudication or justiciability of socio-economic rights, Currie and De Waal[34] write that one of the principal difficulties with socio-economic rights lie in their justiciability and to the extent to which they can and should be enforced by Courts. The authors continue and suggest that there are two strains of arguments against the judicial enforcement of socio-economic rights, namely the principle of separation of powers and the problem of polycentricity.[35] The authors note that the degree of polycentricity in socio-economic rights litigation is often high and they refer to the **Soobramoney**[36] case an example.

38. In **International Trade Administration Commission v SCAW South Africa (Pty) Ltd**[37] the International Trade Administration Commission recommended to the Minister of Trade and Industry that an anti-dumping duty which was in force should be terminated. The Constitutional Court set aside an interdict whereby ITAC and the Minister of Trade and Industry had been restrained from recommending the termination of such duty to the Minister of Finance and the latter had been interdicted from implementing the termination, pending the outcome of a review of ITAC's recommendation. The court expressed the view

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[34] I Currie and J De Waal (2013) **The Bill of Rights Handbook** 6th Edition. Juta at pages 565 – 566.
[35] Polycentricity, is the recognition by the Courts of the limits of adjudication. The limits are, as the authors put it, not a matter of constitutional principles but a matter of judicial capacity. *"Courts, typically resolve disputes between two parties, each of whom can represent its interests before the court… This type of winner takes-all resolution of a dispute is not suited to the resolution of what have been called polycentric issues. Polycentric tasks entail the co-ordination of mutually interacting variables: a change in one variable will produce a change in all others."*
[36] **Soobramoney v Minister of Health, KwaZulu-Natal** 1998 (1) SA 765 (CC) at para [28].
[37] 2012 (4) SA 618 (CC).

that the setting, amending or removal of anti-dumping duties in order to regulate exports and imports was a patently executive function that flowed from the power to formulate and give effect to international trade policy, which was a power which resided 'in the kraal' of the national executive authority. It held that, where the Constitution or legislation had entrusted specific powers and functions to a particular branch of government, courts should not usurp that power or function **by making a decision of their preference, as this would frustrate the balance of power implied in the doctrine of separation of powers, especially where the decision at issue was 'policy-laden or polycentric'.**[38] In addition, it held that, where the decision-making process was still incomplete and entailed considerations of national policy choices and specialist knowledge in regard to which a court was ill-suited, it should only intrude into the terrain of the executive in the clearest of cases and when irreparable harm was likely to ensue if interdictory relief was not granted.[39]

39. In **OUTA**[40] the Court held that decisions affecting the collecting and ordering of public resources inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order.

40. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**[41] O'Regan J, although considering a review application explains the deference a Court should pay to policy-laden decisions of administrative functionaries of the State.

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[38] Id at para [95].
[39] Id at para [101].
[40] **National Treasury v Opposition to Urban Tolling Alliance** 2012 (6) SA 223 (CC) (**OUTA)** at para [68].
[41] 2004 (4) SA 490 (CC) at para [46].

*"[46] … In explaining deference, he cited with approval Professor Hoexter's account as follows:*

*'[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate…'".*

41. Similarly, in the **TAC** case, the Court held[42]

*"that in dealing with such matters the courts are not institutionally equipped to make the wide ranging factual and political enquiries necessary for determining what the minimum core standards called for by the first and second amici should be…".*

42. Further the Court held:

"*Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequence for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation…"*[43]

43. The provision of access to housing is clearly a function being performed by the City. It is *"in progress"* and firstly, does not warrant declaratory relief and second, should not be interfered with, nor warrant, a supervisory order especially given the range of competing interests or considerations that require balancing and consideration.

44. Providing access to housing remains fluid. Policies change, policies get amended and revised and objectives shift depending on needs, budgets,

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[42] **Minister of Health and Others v Treatment Action Campaign and Others (No2)** 2002 (10) BCLR 1033 (TAC) at para [37].
[43] **TAC** at para [38].

resources and other demands. At the material time the City adopted a Transit-Orientated Development Strategic Framework ("*TOD*") which prescribed how new developments across the City would address the impact of apartheid spatial planning, inequality, urbanisation and the high cost of public transport, whilst also stimulating economic growth. To achieve these objectives transport, urban planning, public housing and environmental sustainability were placed under one authority, the Transport & Development Authority ("*the TDA*"). It was envisaged that it would assist the City in increasing on its delivery of social housing opportunities. Included in these initiatives is the provision of social housing closer to the City Centre. These developments are all in the process of various stages of development and progress would be subject to measuring the extent to which objectives are achieved.

45. The City's strategic planning and policies are ongoing, changing periodically and shift focus and its obligations to meet the needs of the City as and when they arise. Its current planning pre-dates the interim interdict application of 11 April 2016. To the extent that the applicants seek to infer that the City's approach relating to future developments for social housing, including the development of the Salt River / Woodstock precinct, (which falls within its definition of central Cape Town) has arisen as a result of the applicants' litigation and its interim interdict application, this is clearly not the case.

46. Undeniably, the City's approach to the social housing challenge has shifted with the introduction of the TOD – that is what policy changes do – and are likely to change again in future depending on needs at the time. It is for that reason that the City objects to the isolation of the applicants' central Cape Town, to the exclusion of everything else, for special consideration.

47. The applicants suggest that the TOD is purely a transport related initiative and does nothing to ameliorate the effect of apartheid on the City's citizens, yet that was not the intent of the City at the time it was devised. In fact the transit oriented development aimed at looking at the direct complaints of the applicants by looking at the current structure of the City's development and how to make access to work, education, recreational opportunities available to all citizens of the City as part of being an inclusive city, and not just those who have jobs in the CBD.

48. Unless other organs of state, in both the national and provincial sphere, assist the City by making land available, particularly in the central Cape Town, but also other well-located parcels of land all over the municipality available to social housing, the City will always be limited in what it can provide in the way of housing and progress in the applicants' central Cape Town will be limited but this cannot limit the City's development objectives and ability to provide housing elsewhere for those who are in dire need.

49. We are not suggesting that court can't grant relief or declaratory orders. Simply that to do so in this instance it would be trampling on the very terrain that they should not.

50. Where a court interferes it should carefully assess how and to what extent the relief sought would disrupt the executive or legislative functions by 'cutting' across or preventing the proper exercise of a power or duty, and it should only grant such an order when a 'proper and strong case' had been made out for the relief and only in the clearest of cases, where it was constitutionally appropriate.[44]

**(d) The scope and ambit of the right of access to adequate housing**

51. In this section we set out the basis on which we say the declaratory relief is not warranted because there is no infringement of the rights entrenched in the Constitution.

52. Section 26 provides:

> "(1) *Everyone has a right to have access to adequate housing.*
>
> *(2) The State must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right."*

53. It is now trite, as held in **Grootboom**, that sections 26(1) and 26(2) are related and must be read together. We deal with each of the three components of the right as entrenched in section 26(2) of the Constitution below.

54. The applicants base their relief against the City on the alleged failure to provide social housing in a comparatively, small parcel of land comprising a very small percentage of the 2487 square meters of land which makes up the City. This

[44] **OUTA** at paras [65]-[66].

narrow interpretation of the City's obligation to comply with section 26 and related legislation, cannot be a basis in which constitutional relief can be obtained.

55. The applicants seek to create a precedent for an order directing an organ of state where it should allocate its resources towards its social housing programme. The fallout from such relief would be catastrophic for the social housing agenda nationally, provincially and at local government. The applicants also fail to show why their right to social housing trumps or should be met before other more deserving citizens in the City as well.

56. In **Grootboom** the nature of the right is explained as follows:

> *[37]* ***The State's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person****.* ***Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads****. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live."* (own emphasis)

(i) **The State's obligation to take reasonable legislative and other measures**

57. As stated in **Grootboom** at para [**39**] in relation to municipalities:

> *"Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern*."

58. Reasonable legislative measures must allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available. As such, what is requested is a co-ordinated State housing programme determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution in terms of which each sphere of government is responsible for the implementation of particular parts of the programme.[45]

59. There are indeed policies in place:

59.1. The National Development Plan have been incorporated in all the City's planning since 2013;[46]

59.2. The spatial development framework ("*SDF*"),[47] is a spatial development document which encompasses all 8 districts in the City and provides an integrated view of the future development of the City. This SDF is reviewed every 5 years and incorporated the spatial justice principles;

59.3. The Built Environment Performance Plan ("*BEPP*")[48] is the document which articulates the City's investment rationale and is reviewed annually;

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[45] **Grootboom** at para [39].
[46] National Planning Commission (2012) was a countrywide programme looking at the transformation of spatial and geographic patterning rural and urban South Africa.
[47] Initially endorsed by Council on 31 March 2011 – FRAA: Record Vol11, pp.4595 – 4596, paras 105–110.
[48] FRAA: Record Vol 11, p.4597, paras 111 – 112.

59.4. The Integrated Human Settlements framework plan ("*IHSF*"),[49] which is the City's all-encompassing policy document containing references to these policies and is reviewed annually to cater for the dynamic nature of social housing[50]. Some of the key features of this document are the following:

59.4.1. The identification of different or mixed forms of housing opportunities and how social housing should be delivered incorporating community facilities and services;

59.4.2. the alignment of long-term housing strategies of the City committing R101 billion Rands over the next 20 years towards the implementation of seven housing programmes;[51]

59.4.3. These above will complement the spatial justice principles set out in the recent housing and planning legislation and policies at national, provincial and local government.

[49] FRAA: Record Vol 11, pp.4597 – 4601, paras 113 – 122.
[50] FRAA: Record Vol 11, p4599, para 115.
[51] FRAA: Record Vol 11, p.4601, para 120.

59.5. In addition, the City's use of the Urban Settlements Development Grant[52] which provides metro municipalities with funding for capital investments, reflects an annual spend on its programmes exceeding 90% consistently;[53]

59.6. Under the Transit Orientated Development Strategic Framework, ("*TOD*"), a variety of projects related to social housing were developed.[54]

(ii) **The State's obligation to achieve the progressive realisation of the right within available resources**

60. Progressive realisation of the right to access to adequate housing requires the State to take incremental steps towards achieving its objectives. It is premised on the notion that changes will not happen overnight. It sets no time limits nor prescribes targets. In **Grootboom**, the Court described this requirement as follows:

> "[*45] …It links subsections (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately… It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses."* (own emphasis)

[52] FRAA: Record Vol 11, p.4602, para 123.
[53] FRAA: Record Vol 11, p.4602, para 124.
[54] FRAA: Record Vol 11, pp.4603 – 4607, paras 126 – 140.

61. The Court, in **Grootboom** goes further and provides an explanation as to how the phrase should be interpreted which was *"….It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights*."[55]

62. The relief sought, by the applicants fails to consider the means available to the City to achieve the specific relief they seek. The decisions as to where social housing developments should be built are polycentric in nature taken in the broader context of all the City's obligations. The applicants do not challenge existing policies.

63. In this regard the courts do not interfere with polycentric decisions as done in **Soobramoney**[56] where it was confronted with the KwaZulu-Natal Department of Health's considerable budgetary, personnel and infrastructure constraints which led to the KwaZulu-Natal Department of Health deciding to make dialysis treatment available only to those parties who were candidates for kidney transplants. The money and personnel resources saved as a result of that decision were deployed elsewhere to fulfil other pressing needs. Currie and DeWaal wrote that "*if the Constitutional Court had decided that Mr Soobramoney (and others in his position) was entitled to dialysis treatment, the decision would affect not only the individual but also the complex web of mutually interacting resource allocations*."[57]

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[55] **Grootboom** at para [45].
[56] **Soobramoney** 1997 12 BCLR 1696 (CC) at para [28].
[57] Currie & DeWaal *supra* at pg 567.

64. Right must be balanced. They are not absolute. A Court cannot make or require unattainable and unrealistic compliance from the State. The obligation in respect of the time it takes the State to achieve the obligation and the reasonableness of the measures employed to achieve the end result are governed by the availability of resources. As Chaskalson P stated in **Soobramoney**:

> *"What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."*[58]

65. The City has explained its expenditure in respect of its housing budget and the further grant's it obtains from National government[59] to meet a number of obligations and housing projects. Funds are budgeted and allocated to the City's multitude of housing projects in fulfilment of its housing obligations.

66. The City has expended its available resources towards the housing projects it has planned in accordance with its policies to meet housing needs. To allow litigants to dictate the precise location of where housing is to be implemented and in which areas funds should be directed would be for the Courts to step into the shoes of the City in making those decisions.

(iii) **Reasonableness**

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[58] **Soobramoney *supra*** at para [11].
[59] FRAA: Record Vol 11, paras 141 – 158, pp.4607- 4613.

67. A court, when considering reasonableness in determining compliance with the obligation, will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.

68. As stated in **Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others**[60]

> "The measures must establish a coherent public-housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on s 26 in which it is argued that the state has failed to meet the positive obligations upon it by s 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering the reasonableness thereof will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."

69. We submit that as far as the City is concerned that there are reasonable and legislative measures in place.

70. In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the

[60] 2018 (6) SA 584 (GP) at para [38] et seq; **Grootboom** at para [41].

programme. Conditions do not remain static and therefore the programme will require continuous review. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes **a significant segment of society** cannot be said to be reasonable. This significant segment is not a contrived geographic area which is what the applicants seek to do.

**(e) CONCLUSION**

71. The applicants have failed to show a failure by the City to meet its obligations in terms of section 26 of the Constitution. The City has shown that its policies are reasonable and that the right to social housing throughout the municipality is being progressively realised. All potential recipients for social housing fall into the same vulnerable group on which the applicants rely. The number of completed projects and expenditure over the years speak for themselves. The order sought against the City, should be dismissed with an order of costs.

**C. THE IGRFA APPLICATION**

72. This matter relates to a lack of consultation with the First Applicant ("*the Minister*") regarding the disposal of the Tafelberg properties. The City does not own the Tafelberg properties. It has no say in the decision to sell the properties and no part in the actual sale.

73. It is no secret that the City's position has at all material times been that if the Tafelberg properties and any other property that is made available for social housing, the City would use such property for purposes of social housing.

There is thus actually no dispute between the City and the Minister which requires the invocation of the provisions as contemplated in Chapter 3 of the Constitution read with the Intergovernmental Relations Framework Act 13 of 2005 ("*IGRFA*").

74. The Minister relies on the obligation on the State or organs of state to carry out their duties of governance in the spirit of co-operative governance, but vis-à-vis the City has failed to do so.[61]

75. Prior to the launch of this application the City had not invoked the provisions of IGRFA, and no notice had been given of any such dispute on the part of the Minister prior to the institution of this application. In absence of the formal declaration this application was clearly premature even if the Minister perceived there to have been a dispute.

76. In a letter dated 30 March 2017 from the Minister to the City, the former indicated an intent to invoke section 5 of the IGRFA. This letter was sent to the wrong email address and the City did not receive it. There appears to not even have been a follow up or attempt to confirm that the email had been received. The Minister's legal representatives were apprised hereof in a letter dated 8 August 2017. In a letter dated 16 October 2017 the City informed the Minister again that it had not received the letter dated 30 March 2017 but would still be willing to engage in constructive discussions regarding the issues surrounding the City and social housing.[62] This was met with no reciprocation on the part

[61] Section 40 of the Constitution.
[62] Answering Affidavit of Lungelo Mbandazayo (Minister's Application): Record Vol 8 paras 16.2 – 17, pp. 19 – 21 and see the written correspondence to the Minister's legal team annexed as LM2A – LM4A: Record Vol 8 pp. 25 – 31.

of the office the Minister to in fact engage on these issued, despite the alleged stated intent and purpose for which the Minister brings this application. It was thus clearly apparent to the City that what the Minister was engaged in was litigation without any objective at the end of the day despite purporting to act pursuant to section 5 of IGRFA. This demonstrated the lack of a dispute and the lack of compliance with the proper procedures even if the Minister perceived there to have been a dispute with the City, the relief sought does not comply with section 45 of the IGRFA.[63]

77. In any event, given that there is no dispute in existence between the City and the Minister, there would have been no need to invoke the provisions of Chapter 4 of IGRFA dealing with the resolution of the dispute of intergovernmental disputes.

78. There is thus no basis for the relief sought against the City, however the Minister persists in this application against the City.[64]

79. It bears noting that in reply to the City,[65] the Minister concedes that there is no case made out against the City[66] and that in fact no dispute exists between the national Department and the City.

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[63] This section provides that: *"45(1) No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful."*

[64] Response to the City's answering affidavit: Record Vol 8 para 138, p.206.

[65] Replying affidavit: "Response to the City's answering affidavit": Record Vol 8, pp. 205 – 214

[66] Replying affidavit: "Response to the City's answering affidavit": Record Vol 8, para 138, p.206

80. By persisting with legal proceedings against the City the Minister has acted unconstitutionally in breach of her obligations under the IGFRA and the general principles set out in Chapter 3 of the Constitution.

81. For that reason, this application should be dismissed with costs, including the cost of two counsel on an attorney and own client scale. To have persisted with the litigation in the manner which the First Applicant has done in respect of the City, resulting in the City having to incur the costs of having to respond to the allegations in the founding papers and deal with the issues raised in heads of argument was entirely unnecessary and a waste of scarce resources.

**N BAWA SC**
**T MAYOSI**
**Chambers, Cape Town**
**23 September 2019**