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

CASE NO: 7908/2017
CASE NO.12327/2017

In the matter between:

THOZAMA ANGELA ADONISI	First Applicant
PHUMZA NTUTELA	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

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
THE MINISTER OF PUBLIC WORKS	Seventh Respondent

THE 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

AND IN

In the matter between:

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

FOURTH RESPONDENTS' HEADS OF ARGUMENT
IN THE APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

1. The City seeks leave to appeal from this Court's judgment and orders dated 31 August 2020 under both case number 7908/2017 ("'the Adonisi order"), more particularly paragraphs 1 to 6 and 12 thereof, and case number 12327/2017 ("the Human Settlement order") with reference to paragraph 7 thereof.

2. To avoid confusion and unnecessary prolixity, we shall refer to the parties as they are referred to in the papers and use abbreviations, evidence from the papers and Judgment.

3. With respect, and with reference to the Adonisi matter:

   3.1. First, there is a fundamental disjuncture between the reasoning in the Judgement and the Orders that the City failed to meet its constitutional obligations. The reasoning points to neither in material respects.

   3.2. Second, on the basis of the Plascon Evans rule, the evidence of the City's deponents should have prevailed. There is no indication in the Judgment that the evidence provided by the City was to be disbelieved. On the contrary their forthright detailed evidence was commended. Given the paucity of evidence in the applicants' founding papers as to the alleged failures on the part of the City, the conclusion reached in the Orders made against the City, appear to be premised almost exclusively on a paragraph in an annexure to the supplementary founding affidavit, being an interview with Mr. Herron conducted by an NGO called 'Ground Up' in October 2017.

3.3. Third, the relief granted by the Court, that the City together with the Province failed to comply with their respective obligations under the legislation enacted to give effect to the socio-economic rights, namely, the Housing Act, 107 of 1997 and the Social Housing Act, 16 of 2008, and have accordingly breached their respective obligations under the Constitution, in effect – whilst acknowledging those obligations, in making the orders it did largely ignore the City's other obligations under the Housing Act and the Grootboom judgment and the strides made by the City in its housing policies over the last 20 years in relation to social housing, despite agreeing with and accepting the accuracy of the evidence presented. Further, it contradicts the material conclusions reached elsewhere in the Judgment.

3.4. Fourth, the structural relief against the City was not called for. The City in its papers deals extensively with its past, current and future housing programmes and the implementation thereof, and the Court took no issue therewith, save to acknowledge that the fundamental difficulty the City faces is obtaining access to vacant land under the control of the National Government - Department of Human Settlements and Public Works – both of which were cited before this Court and yet are excluded from the structural interdict whose objective should be to accelerate housing development. Further, where a particular obligation or competency lies with the National government, their absence from any structural interdict has an inevitable consequence that were local and provincial authorities to embark on such process, that it would be doomed to failure, rendering any such order unenforceable.

3.5. Fifth, the City had a limited role in the proceedings and was not responsible for the excessive proliferation of paper to this Court - much of which as apparent from the Judgment was not relevant to the conclusions reached. More particularly, given the City's role (or lack thereof) in the sale of the Tafelberg land, and the fact that it had no powers in relation thereto as well as how it had conducted itself in the litigation, it should not in the circumstances have been held jointly and severally liable with the Province for the applicants' costs and for that reason leave is sought in respect of the Court's adverse finding in respect of the costs order against it.

4. In respect of the Human Settlements order, the City seeks to appeal the various factual findings of the Court, which underscored paragraph 7 of the order, and which resulted in this Court not concluding that the Minister or Human Settlement had improperly instituted legal proceedings against the City. In doing so, as this Court had done, that there was no relief sought against the City, and that the City was *"seemingly cited because of its potential interest in the application"*, when in fact relief was sought in the Notice of Motion, which relief was only abandoned during argument. Whilst the City accepts that cost orders lie within the discretion of the Court, the effect of the Court's cost order amounts to a stamp of imprimatur where an organ of state improperly and unlawfully dragged the City to Court under the guise of non-compliance with IGFRA. The effect of the Court's cost order is tantamount to it having condoned the steps of the Minister of Human Settlement, leaving the City vulnerable in future to other unlawful IGFRA complaints, with no risk of any costs. Undoubtedly reliance in this latter regard will be place on the judgment of a full bench of this Division in respect hereof.

5. These heads will be set out as follows:

5.1. The legal test for an application for leave to appeal;

5.2. The issues raised in this application for leave namely;

5.2.1. The obligations of the City;

5.2.2. The failure to apply weight to undisputed facts and/or evidence provided by the City; and whilst accepting the version of the applicants, including their definition of the CBD and surrounds in annexure A;

5.2.3. The failure to find that the City's policies/conduct were reasonable and even though the Judgment records[1] that the applicants' counsel argued that the challenge was in respect of the manner in which the constitutional and statutory obligations (as well as the policies formulated in terms of the applicable legislation) had been implemented by the Province and the City, this was not the case made out in the founding papers;

5.2.4. The structural interdict granted against the City and the Province; and

5.3. Clerical errors noted in the Judgement;

[1] Judgment at para [66].

5.4. The issue of costs in both the Adonisi and Human Settlement orders; and

5.5. Conclusion.

The test for leave to appeal

6. An applicant seeking leave to appeal must set out its grounds of appeal succinctly and in unambiguous terms in order to enable the Court and the respondent/s to assert the case the applicant seeks to make out and which the respondent/s has to meet in opposing the application for leave to appeal.[2]

7. The requirements for leave to appeal are set out in section 17(1) of the Superior Courts Act, which provides:

> *"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
> *(a) (i) the appeal would have a reasonable prospect of success; or*
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
> *(c) where the decision sought to be appealed does not dispose of all -the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

8. The test applied prior to the promulgation of the Superior Courts Act, was whether there were reasonable prospects that another Court may come to a different

[2] **Songono v Minister of Law and Order** 1996(4) S.A. 384 (E) at 395J to 386A; **Philip v Estate Agency Affairs Board** (39922/12) [2013) ZAGPPHC 276 (2 October 2013) para [31]; **Fuku v Mpoka** (A137/2013) [2013] ZAFSHC 152 (19 September 2013) para [5]; **Lewis NO and Others v Cooper NO and Another, Lewis v Soundprops** 236 **(Pty) Ltd and Others** (11292/08, 14889/08) [2009] ZAWCHC 51 (27 February 2009) para [2].

conclusion.[3] In S v Smith[4] Plasket AJA had the opportunity to consider what constitutes reasonable prospects of success and held as follows:

> *"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."* (Our emphasis)

9. Section 17 of the Superior Courts Act has changed the threshold to grant a party leave to appeal, to the extent that leave to appeal is now only granted in the circumstances set out therein. This is deduced from the word *'only'* used in that section.

10. The Supreme Court of Appeal has found that section 17 of the Superior Courts Act imposes a more stringent threshold compared to the provisions of the repealed Supreme Court Act 59 of 1959.[5]

11. In ***Acting National Director of Public Prosecutions and Others v Democratic Alliance in Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*** [2016],[6] the Court endorsed the notion of a higher

[3] **Commissioner of Inland Revenue v Tuck** 1989 (4) SA 888 (T).
[4] **S v Smith** 2012 (1) SACR 567 (SCA) 570 at para [7].
[5] **Notshokovu v S** [2016] ZASCA 112 at para 2.
[6] **Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others** (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at para 25.

threshold stating: *"The Superior Courts Act has raised the bar for granting leave to appeal."*

12. For reasons elaborated upon herein the City meets the cumulative requirements for leave to appeal and has strong prospects of success on appeal. In addition, the City is of the view that both orders meet the requirements of section 17(1)(a)(ii) of the Act given the precedent set by the orders and as such there are compelling reasons why leave to appeal should be granted. In this regard:

12.1. The case deals with various but important aspects of social housing policies and the obligations of national, provincial and local governments in respect thereof, more particularly the obligations which rest on the City to meet social housing obligations in an area as dictated to by the applicants, balanced with its obligations to meet housing obligations, more generally.

12.2. It is the first time that the issue has arisen that a constitutional right to social housing can be invoked in a particular geographic area and a Court has found that the failure to take adequate steps to redress spatial apartheid within contrived geographic boundaries have amounted to a failure to comply with obligations under the Housing Act, 107 of 1997 and the Social Housing Act, 16 of 2008, as well as constitutional obligations.[7]

12.3. Secondly, the definition of the concept of spatial apartheid and the allegation of a failure to undo the same by the City and Province in a

[7] Sections 25 (5) and 26(1) and (2) of the Constitution.

particular geographic area – as opposed to other geographic areas also suffering the effects of apartheid - to date appears to be a novel issue which has not been determined by the Courts.

13. As such, this matter is of national importance and will affect how members of the public enforce their socio-economic rights, particularly the right to adequate housing in light of this decision and the order may skew budgetary provisions to meet the obligations imposed by the Court order. It is also a matter of importance for the City and the many municipalities nationally in that it potentially will affect their social housing planning and policies, their finances and the future delivery of social housing in their municipal jurisdiction.

14. Over and above, this matter affects millions of South Africans and so there are compelling reasons why leave to appeal should be granted, should the Court find that there are no reasonable prospects of success on appeal.

The Adonisi Order

15. The City has raised a number of grounds of appeal to the Court's order in its notice of appeal and which grounds can be broadly categorized as follows:

15.1.1. The alleged failure by the City to comply with its obligations under national housing legislation and as a result its Constitutional obligations to its residents;

15.1.2. The failure, by the Court to give weight to facts and/or evidence provided by the City's deponents and conversely accepting the version of the

applicants, namely their unilateral definition of the CBD and surrounds in annexure A, without regard to the geographic area that the City uses for spatial planning;

15.1.3. The failure to find that the City's housing policies are reasonable and yet, not specifically identifying any aspect of its existing policies as being unreasonable;

15.1.4. The structural interdict granted against the City and

15.1.5. The costs order.

The City's failure to comply with its obligations

16. At the outset we point out that this application primarily related to the sale of the Tafelberg land. It is accepted that the City was neither responsible for its sale, nor complicit therein, and in fact at all material times had indicated that, if provided to the City, it would use it for social housing. The Judgment in fact only deals with the breach of constitutional obligations from paragraph 421 et seq – and then with reference to the City albeit that the legal principles are set out earlier in the judgment.

17. It is submitted that an applicant must in their founding affidavit set out sufficient facts to disclose a cause of action, and necessary to establish a *prima facie* case,[8] which facts should exist at the time of the initiation of the proceedings.[9] and the

[8] **Riddle v Riddle** 1956 (2) SA 739 (C) 748

[9] **Treasure Karoo Action Group and Another v Department of Mineral Resources and Others** [2018] 3 All SA 700 (GP) at paras 10-11.

facts must be primary facts and not merely secondary facts. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Secondary facts, in the absence of primary facts on which they are based, are nothing more than the deponent's own conclusions, or, as in this case, the personal views of Mr Herron as expressed in a Ground Up article[10] which is contained in an annexure to the supplementary affidavit, and on which the court extensively relied.[11]

18. The City pointed out that the applicants failed to make out a case on the papers for the relief they sought against the City. This was not challenged.

19. There is no quibble that the legacy of apartheid and spatial apartheid requires redress – but there appears to be an elevation that this be corrected in one area in preference of others and in relation to one kind of housing obligation in preference of others. Further, that this be redressed in relation to a specifically demarcated area unilaterally determined by the applicants, even though the Court at para [97] of the Judgment recognised the broad impact of spatial apartheid development and despite recognition of the huge housing gap prevalent in greater Cape Town – even outside the CBD. With the current order the Court has now determined whose housing rights will get preference.

20. At the heart of this application for leave to appeal is that the declaratory <u>order granted</u> by the Court premised on allegations that the City failed to comply with its obligations in terms of the Housing Act and the Social Housing Act (SHA)[12]

[10] Judgment at para 11.
[11] **Die Dros (Pty) Ltd v Telefon Beverages (Pty) Ltd** *[2003] 1 All SA* 164 (C) at para [28].
[12] In terms of the Housing Act 107 of 1997 and Social Housing Act 16 of 2008.

and as a result was in breach of sections 25(5), 26(1) and 26(2) of the Constitution,[13] is not borne out by its findings of fact and evaluation of the evidence in the Judgment with reference **to all the relevant circumstances** (as indicated in para [427]) or in the evidence as presented to this Court by the City, read with the applicants' founding papers.

21. The relief sought was granted premised on the following:

21.1. First, that the housing programmes implemented by the Province and the City since **the commencement of the constitutional era** have not been balanced and flexible, having made no provision for **a significant segment of society** to progressively realise the right to housing under s26 of the Constitution. That significant segment was **defined as that group of people in need of affordable housing (as opposed to RDP/BNG housing) in central Cape Town**;[14]

21.2. Second, a significant break-down in relations between the Province, on the one hand, and the City and the DHS on the other, as regards the provision of affordable housing in and around central Cape Town ('CBD and surrounds'); and

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[13] **25. Property**
(5) "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
26. Housing.
(1) Everyone has the 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.

[14] Judgement at para [429].

21.3. Third, that both the City and the Province had failed to discharge their respective obligations **to implement reasonable programmes by providing for access to land to enable the delivery of social housing by SHI's**.[15]

22. First, to reach the aforementioned conclusion would mean that this grouping simply identified as a "significant segment" has an entitlement to dictate where housing should be provided.

23. Second, that they can conjure up a specific demarcated geographic area with their own boundaries to do so and that there was an entitlement to such demands from the commencement of the constitutional era for social housing in their central Cape Town. In coming to this conclusion it would mean that it is acceptable to ignore the housing demands of those in the greater Cape Town area and the mix of policy measures put in place to meet the various housing obligations under section 25 of the Constitution read with the plethora of obligations under various national legislation.

24. Although the Court accepted as correct a general proposition that (at para [473]) an individual (or a group for that matter) did not have a right to demand that the State provide it with social housing in central Cape Town or its surrounds, its relief granted ultimately permits precisely that. Moreover, when having regard to measures that the City should have in place to progressively realise rights with

[15] Judgment at para [431].

reference to context, the Judgment relates these to the CBD and not to the applicants' central Cape Town (Judgment at para [479]).

25. Moreover, in concluding that the City did not have policies in place in relation to progressively realising the right to housing in the CBD, the applicants did not make out this case. The City did not concede that it had an obligation to have a specific policy regulating housing in the CBD or that it had no such policy in place. The City's policies in relation to housing do not exclude the CBD. The Court erred in relation to the admission with reference to the City in paragraph [479.8]. Moreover, this is contradicted in paragraph [476] by the Court's acceptance that its findings in relation to a lack of suitable policies did not apply to the City.

26. In this regard the Judgment broadly identifies the dicta in cases such as **Grootboom** and **Mazibuko** as the foundation for this argument in paragraph [436] – but neither of these cases is authority for the right to determine where and the nature of the housing to be provided (save in relation to emergency shelter in **Grootboom** which is not of application). Moreover, it is not authority for making a determination of constitutional obligation within a limited geographical area without regard to the City's overall housing obligations – for e.g. it cannot in focusing on the metro's needs entirely disregard other obligations as appears to be what the Judgment does [at para 438]. This appears to be accepted (at para [473]) , however, the Court then proceeds to find that the Province failed to meet the Mazibuko test – and specifically excludes the City from this conclusion (at para [476]) stating that:

> *"At the time this application was launched by RTC, there was no policy put in place by the Province to enable working people to access affordable*

> *housing under the SHA, whether in central Cape Town 'and surrounds' or elsewhere in the Metro.* ***I do not include the City in this part of the debate because, while it does attract obligations under the SHA, it does not have functional competence in regard to housing: that is the obligation of the national and provincial spheres of government."***

27. The Court correctly held that the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA") was relatively recent legislation and so the alleged failure to address what the applicants referred to as 'spatial apartheid' for the last 25 years cannot be correct in the absence of a clear factual basis at the time (set out by the applicants) and legislative provisions requiring the City to do so – but neither was before this Court.[16] Moreover, it was not the City's case that social housing was not an imperative or that there were no social initiatives pursued. On the contrary, the City accounted for its projects detailing the mix of housing from SHI, gap to BNG, informal, land availability etc. With respect, the Court's interpretation of the submissions leading to the conclusion that the City found itself between the rock and a hard place (Judgment at para [443])– was not an admission that social housing had fallen short (Judgment at para [444]) but that there was a balancing exercise required to meet competing needs with the City embarking on social housing projects (as elaborated upon in para [450]) where land was more readily and easily available to also meet local demands. In the Judgment the Court is making a determination outside of the policy framework as to which persons' housing demands should get preference.

28. The Court correctly engaged the City on its obligations in respect of the prevailing legislation and found that the most relevant national legislation only came into effect in 2015 and as such the obligations to deal with spatial justice under

[16] Judgement at para [444].

SPLUMA[17] and in-line with national legislation and policies, was admittedly a recent phenomenon form which an enforceable obligation could be construed.[18]

> "…*But SPLUMA is the very legislation that seeks to advance the breaking down of the barriers of apartheid spatial planning, and both the Province and the City are duty bound to implement it to the best of their abilities. While they may not have done so in the past, they are obliged to do so, both presently and in the future." (own emphasis).*[19]

29. At paragraph 445 of the judgement, the Court states that:

> "*In summary then, it is fair to say that the framework legislation is in place, at both provincial and municipal level, for consideration of a programme aimed at advancing social housing under the SHA, and that all spheres of government (including national government which owns vast tracts of land close to the CBD) need to shoulder responsibility therefor in advancing the rights of the poor under ss25 and 26 of the Constitution*." (own emphasis)

30. Paragraphs [442] to [445] of the Judgment which are the only four paragraphs of the Judgment that deals directly with the City's obligations does not point to any specific failure on the part of the City to comply with SPLUMA. The conclusion appears to be based on the conclusion that the City failed in its constitutional obligations under sections 25 and 26 of the Constitution. This conclusion is reached despite acknowledging that the bulk of the state-owned land in or near the inner city which is available for the development of affordable housing and, in particular, social housing projects, is not under the control of the City, but rather the national Government.

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[17] Act 16 of 2013.
[18] Judgment at paragraph [444].
[19] Judgment at paragraph [444].

31. In relation to the Court's finding that the City *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")* we submit that the other issue wherein the Court failed to have serious regard to, which could have potentially serious consequences in litigation against the City going forward, was the applicants' version of the CBD and Surrounds in annexure A.

31.1. Whilst the City does not take issue with the understanding of the CBD or the colloquial understanding of the inner City to be the CBD,[20] it does take issue with obligations imposed in relation to the applicants' definition of Central Cape Town, especially given that the Court was apprised that the City regarded the area surrounding the CBD to be more extensive than the applicants' Central Cape Town No issue was taken therewith.[21]

31.2. It is only by accepting the applicants' definition that the Court is able to disregard the social housing projects to which Mr Molapo refers in paragraph [451] of the Judgment.

31.3. The Court having agreed with the formulation of a version of the CBD and surrounds proposed by Dr Odendaal albeit that it was premised on her conclusion that the suburbs identified to be included in central Cape Town are areas which were previously designated as white only, except for Schotschekloof (Bo-Kaap). This was clearly wrong as was pointed out by the City in that in reality: parts of the Zonnebloem, south east of

[20] The Judgment appears to use CBD, inner City and Central Cape Town almost synonymously when it does not necessarily amount to a complete overlap.
[21] Judgment at para [342].

Chapel Street, and parts of Woodstock, Salt River, Walmer Estate and University Estate were also not designated as exclusively white-only areas. In fact, it is quite apparent that significant parts of Woodstock, Salt River and Walmer Estate did specifically not benefit from public investment. This evidence was entirely ignored and undermined the entire premise of Dr Odendaal's reasoning.

31.4. Further, Dr Odendaal regarded the M5 and N1 as both immutable infrastructural barriers with limited transport connections beyond them, which is neither real, nor regarded as such in the context of housing planning. For these obvious inaccuracies this contrived central Cape Town should have been rejected, contrary to what is recorded in the Judgment at para [518].

31.5. In light hereof the City argued that this contrived area was arbitrary. The City's objection to this contrived area was not because a social housing project existed in Maitland but because it reflected that the M3/N1 was an artificially contrived boundary especially with Voortrekker Road/Koeberg Road being easily traversed and providing ready access to the CBD, making it indistinguishable with other areas in the applicants' central Cape Town.

31.6. There is no rational reason for accepting the applicants' definition of central Cape Town – especially with regard to the Plascon Evans rule – which by implication excludes the areas which the City regards to be part

of this precinct for development purposes and which readily and easily allows for travel and public transport to the City – for example Maitland and Brooklyn.

31.7. Moreover, whilst the CBD may constitute an economic node, the remaining areas have not for planning purposes been amalgamated with the CBD and as such are not economic nodes meaning that the sole criteria of relevance is its proximity to an economic node of the CBD. This is akin to areas adjacent to Century City, Claremont and other economic nodes. To hence rely on this central Cape Town as the geographic measure for obligations is a misnomer and the City enjoys reasonable prospects of success in respect hereof on appeal, given that this Court, despite the aforementioned, having concluded that Annexure A was valid and relied on it, in imposing obligations on the City.[22]

32. Further, having accepted at para [101] that the City cannot afford to pay market related prices for the acquisition of land in the inner city, and the only meaningful way in which this shortage of land for social housing projects can be addressed by the State, is to make use of such pockets of state-owned land that exist in and around the CBD. Having accepted Mr Molapo's affidavit and explanation as detailed and thorough (and undisputed for that matter), the Court respectively erred in reaching the conclusion that the City failed in its obligations. This is

[22] Attached to this judgment as Annexure A is a map of the central Cape Town area produced by RTC's experts.

readily apparent given that the conclusions reached in paragraphs [480] et seq of the Judgment relates only to the Province and not the City.

33. It appears that the Judgment places reliance on an annexure to the supplementary affidavit - being an interview with Mr Brett Heron in which it is ignored that actually when asked *"why it had taken the City so long to take action in relation to well-located affordable housing"* with reference to projects being embarked upon in Salt River and Woodstock his initial response was that he was *"not sure"* and then proceeded to speculate as to such reasons speculating that the focus was on providing high numbers on the outskirts. This was recorded as being an echo of counsel's address (Judgment at para [464]). It is so that during argument the submission was made that national housing policies evolved from the RDP housing to the policies that exist today with the latter requiring bulk housing to be built relatively quickly to meet needs and backlogs and given demand for housing. However, the Judgment also records that on affidavit, Mr. Mbandazayo and Mr. Molapo have indicated that affordable housing had long been part of the City's housing agenda and that the former took issue with what Mr Herron had told the Ground up journalist there was no "about turn" as not being accurate (Judgment at para [466]). This is also borne out by the social housing projects to which Mr Molapo specifically referred.

34. The summarisation of precisely what Mr Herron indicated is, with respect, misconstrued in para [496] and his own speculation set out in an interview in an annexure to a supplementary affidavit is elevated to the high water mark for a conclusion that *"there were instances where City land could be utilised for affordable housing and that it really did not take much to achieve that situation,"*

is not borne out by the facts as he does not point to specific land in the applicants' central Cape Town for this alleged premise. This being the sole basis provided as justification for the interdictory relief against the City and for the "less than pronounced" constitutional infringement.

35. By concluding that the City changed course, the Court effectively rejected the evidence of the City manager, Mr Mbandazayo, that this was not so, preferring instead Herron's interview – and yet – the Judgment in every material respect accepts the undisputed evidence tendered by the City. This being the only basis for a conclusion under s 172(1)(a). If the City is correct that the Court erred in this regard, then the interdictory relief under s 172(1)(b) falls away.

36. Further in granting the declaratory relief against the City, the Judgment conflated the obligations of the province and City.

36.1. In terms of chapter 2 of SHA, the role and responsibilities of the City are set out in section 5, distinct from provincial government.

36.2. Chapter 4 of the Housing Act sets out the functions of the City in section 9 and likewise, they are distinct from the functions of the Province.

37. In both, there is no obligation on the City to specifically redress the concept of spatial apartheid.

38. It is thus not apparent, precisely which provisions of the legislation the City is said to contravene leading to an infringement of those Acts and a failure to meet its constitutional obligations. None are specifically identified in the founding papers

or referred to in the Judgment. No right emerges from the legislation in question to seek social or affordable housing in certain areas. Together with the Court's acceptance that land was at a premium in the CBD and that the City was hamstrung by red tape in obtaining the release of land from National or Provincial government, it is clear that there are reasonable prospects that another Court may reach a different conclusion to this Court as to a failure on the part of the City to meet its constitutional obligations within its available resources and with regard to the internal limitations in sections 25 and 26 of the Constitution and concluding that there was no rights infringement.

39. The dissonance between the Judgement and the order of Court is magnified further by the Court's different views on the policies of the Province and those of the City. There is no criticism levelled by the applicants or the Judgment in relation to the City's policies. This is in contrast to what is said about the province (at para [480]) and also by Counsel for the applicants who in argument submitted that he did not quibble with the City's account and explanation of its policies - based on the Mazibuko test on which reliance was placed that the City has discharged its obligations openly and transparently in accordance with its policies to address spatial injustice. He also did not take exception to the reasonableness of those policies. He specifically did not point to any shortcomings in the legislative / policy sphere.

40. In light of the aforegoing there are reasonable prospects that the City will enjoy success on appeal that:

40.1. It had not failed to meet or progressively realise obligations under the SHA and the Housing Act; and

40.2. To meet a non-existent or undefined legislative obligation or concept of spatial apartheid.

Failure to give weight to the City's evidence

41. The applicants, in the face of the answering and supplementary affidavits of the City, could not set out in reply, in what respects the City had failed to comply with the Housing and SHA Acts. The facts and historical background to the City's policies up until national legislation was enacted under SPLUMA reflected a clear intention by the City to comply with its constitutional obligations and the current housing legislation in place at the time.

42. Secondly, when pressed to define the concept of spatial apartheid and where it is found in South African Legislation, the applicants could not provide an answer. Therefore, the finding that the City failed to comply with a non-existent obligation cannot stand. The concept of spatial justice is described as follows, under section 7(a)(i) of SPLUMA:

*"7. **Development principles**. - The following principles apply to spatial planning, land development and land use management:*

(a) The principle of spatial justice, whereby—

(i) past spatial and other development imbalances must be redressed through improved access to and use of land…"

43. The evidence provided by the City's specialist, was telling in how limited the City's options are, with respect to access to land in and around the CBD and as such, largely relied on other State parties for its ability to comply with its obligations.

44. This evidence which is accepted by the Court is undisputed.

45. Furthermore, and in its answer to what social housing projects were underway in the City, the City provided a comprehensive list of social housing programs and projects underway in various economic nodes around the City. The Court was also appraised of social housing developments in Brooklyn and Maitland (and in Woodstock) which for all intents and purposes qualified as social housing in and around the CBD, but for the Court's preference to prefer the applicants' central Cape Town definition.

45.1. This evidence was not challenged, however the Court's order still found that the City had failed in complying with its obligations: [23]

"[496] It is true that there are instances where the City has attempted to break down spatial apartheid barriers fairly close to central Cape Town (e.g. Woodstock, Brooklyn and Maitland), but the City's inability to provide affordable housing in and around the CBD has largely not been of its own making: the evidence of Messrs Mbandazayo and Molapo, and the interview with Mr. Herron, suggests that the non-availability of suitable land at a fair price has been the City's Achilles heel…"

[23] Judgment at para [496].

45.2. The evidence referred to above was dealt with in full by the City from page (180, paragraph 450 of the judgement to page 189, paragraph 470) where the Court accepts the City's position regarding social housing and housing.

46. Therefore, the order of Court, is somewhat perplexing, in that the applicants, in so far as it related to their claim against the City, failed to place evidence contrary or challenging the accuracy of the above and accordingly, for this reason the City has good prospects of success on appeal.

Reasonableness of the City's housing policy.

47. The applicants, on the pleaded facts failed to set out a case that the City's policies are unreasonable and that they fell foul of the prevailing housing legislation or amounted to a breach of section 26 of the Constitution. On the contrary as already indicated they did not take issue with the policies.

48. The Court found that the group of individuals which the applicants referred to as people earning an income between R5 000.00 and R15 000.00 as the affected segment or group which was affected by the City's unreasonable housing policy.

> *"[429] Against that jurisprudential backdrop counsel for RTC advanced their argument in favour of the constitutional relief as follows. Firstly, it was argued that the housing programmes implemented by the Province and the City since the commencement of the constitutional era have not been balanced and flexible, having made no provision for a significant segment of society to progressively realise the right to housing under s26 of the Constitution. That significant segment was defined as that group of people in need of affordable housing (as opposed to RDP/BNG housing) in central Cape Town."* (own emphasis).

49. The distinguishing factor between these individuals and those in *Grootboom*,[24] is that these applicants seek affordable housing in a particular area whereas in *Grootboom* it was access to any adequate housing anywhere as long as this was implemented reasonably.

50. Even if making this argument the applicants could not point to any of the City's policies which failed the Grootboom reasonableness test and the Judgment does not identify any either.

51. Further, the Judgment detailed that the City's evidence was a clear and detailed explanation that met the *Mazibuko* requirements for reasonableness, when determining the actions of the City.

52. In spite of all the above, the Court still found that the City had failed to act reasonably when it came to its policies.

53. Notwithstanding that the reasoning in the Judgment does not conclude that the City breached its obligations at para [493] the Court seeks to impose a statutory interdict against the City. In doing so it is directed in para [493] that the Judgment provides guidance as to the City's obligations and presumably its failures – but in contrast the Judgment does not do so, instead it extricates the City from the findings made against the Province. This leaves the City bereft of ascertaining precisely the basis for it being subjected to interdictory relief given the Court's acceptance that the City had done what it could over the years only to be thwarted

[24] **Government of the RSA v Grootboom** 2000 11 BCLR 1169 (CC) par 35. "S 26 of the Constitution enshrines a right of access to "adequate" housing, not a right to continue living in the house of one's choice even though one cannot afford it.

by the provincial and national government (at para [494]) and the conclusion that the inability to provide affordable housing was not of its own making (at para [496]).

The structural interdict

54. The order directing that the City and the Province *"… 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"* is, with respect, misplaced.

55. The City went to lengths in explaining its housing programmes and the current and future developments which were underway in and around the City, namely that:

55.1. The National Development Plan have been incorporated in all the City's planning since 2013;

55.2. The spatial development framework ("SDF"), 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;

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

55.4. The Integrated Human Settlements framework plan ("IHSF"), which is the City's all-encompassing policy document containing references to these policies and is reviewed every five years.

56. All of the above programmes and others set out what the City has been doing and what it aims to achieve in its housing policy in the foreseeable future. Therefore the structural interdict seeking a report, after the City, as expressed by the Court, played open cards with it and gave it a detailed breakdown of the City's past, present and future housing programmes, is unnecessary and seeks to bind the City to a process that should in essence be undertaken by the other State Respondents, who control the available land not provided to the City.

57. However, as the order only seeks to bind the City and the Province and not the national government who actually controls the available land.

COSTS

58. The Court erred in holding the City jointly and severally liable with the Province for the costs in relation to the entire Adonisi application, when the City had no part or say in the sale of the Tafelberg property; had not opposed the declaratory relief in relation to the Regeneration Zone ("RZ") or that the Tafelberg property fell within the RZ; had indicated that if the Tafelberg land had been made available to the City it would have been used for social housing, and even though the City's involvement in the case consumed less than 10% of the Court's resources and even less of the paper and considerably less of the Judgment pertained to the City – the bulk of which met with the Court's approval.

HUMAN SETTLEMENTS MATTER

59. The only aspect of this judgement which the City seeks to appeal is that the finding of fact which led the Court to conclude that the City was only cited because of its potential interest in the dispute and that it responded to the National Minister's application even though no relief had been sought against it. In this regard the Court concluded that the City litigated at its own peril, when contrary to the Judgment, relief was sought against the City in the Notice of Motion.

60. This is also contradictory of para [376] of the Judgment where the Court stated as follows:

> ***"Thirdly, the National Minister seeks an order directing the Province and the City to engage with her and the DHS in a dispute resolution process, as contemplated under chapter 3 of the Constitution and as regulated by IGRFA.*** *The response to this from the Province is that the duty of engagement in such a process is only obligatory if the relief in the first two prayers is competent.*

61. Whilst recording the response from the Province, the judgment is silent on the response from the City and in so doing fails to have regard to section 41(3) of the Constitution[25] in relation to the application instituted by the national Minister against the City. The national Minister is not exempt from compliance, yet in the absence of any compliance with either the constitutional imperatives or what this Court recognised in paragraph [395] of the Judgment, Court proceedings to

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[25] Section 41(3) provides that *"an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."*

enforce IGFRA was instituted against the City. Whilst this appears to be acknowledged in the Judgment at para [395], this Court then goes on to conclude that there was no *lis* between the National Department and the City, speculating that the City was a party due to some interest, without reference to either paragraph [395] – and the fact that there was no overture from the national Minister that reached the City's Executive Mayor - or the national Minister's Notice of Motion to the effect that this Court was asked:

> *"to declare that there is an intergovernmental dispute between the National, Provincial and* ***Local Spheres of government*** *within the meaning of section 1 of IGRFA; and*
>
> *"Directs that the City, inter alia, engage with the National Minister in an intergovernmental dispute resolution process as envisaged by chapter 3 of the Constitution and regulated by IGRFA;"*

62. Having concluded that the Premier did not adequately take heed of obligations under Chapter 3 (at paras [413]-[417]), the Court should have concluded that the national Minister, similarly, in instituting court proceedings against the City, did precisely the same. As the Judgment currently reads, an inference could be drawn that as far as IGFRA requirements are concerned, a higher standard of compliance is imposed on the Province than on the national Minister vis-à-vis the City.

63. This is so as the aforementioned relief was sought by the National Minister, having failed to comply with the IGRFA requirements prior to launching the application and in light thereof compelling the City to come to court to oppose the erroneous relief sought therein.

64. In reaching the conclusion it did the Court failed to take into account the facts surrounding the City's attempts at engaging with the National Minister – which were simply ignored – and that it had even prior to the filing of the supplementary founding affidavit already tendered to consult with the National Minister. Despite this the relief sought was persisted with in the supplementary founding papers compelling the City to file answering papers.

65. In reaching the conclusion it did this Court essentially discounted the position of the City as set out in **paragraphs 16 to 31** of the answering affidavit of Lungelo Mbandazwayo, the City's Municipal Manager, read with **Annexures LM2A – LM4A**, in which it was made clear (and which was undisputed) that prior to the National Minister filing her supplementary founding affidavit - that the relief being sought against the City was misconceived and that, inter alia, the City was at all material times prepared to consult with the National Minister.

66. This abuse of the IGFRA process appeared to either have been ignored, or approved of by the Court given the conclusion that the City was litigating at its own peril justifying that it was *"just and fair that the City bear its own costs in that application"*,[26] rather than holding the National Minister to account for having improperly dragged the City to Court for relief that was unnecessary and eventually abandoned.

[26] Page 210 at paragraph 530 of the Judgement.

67. The City is of the view that in respect hereof another court would find that the City was, unwittingly and unfairly dragged into a dispute between the Province and National government.

Errors

68. The City seeks merely to point out that the order in respect of paragraph 1(i) of the Adonisi matter reflects an error and that it should instead refer to s 25(5) of the Constitution which states that: *" The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis;*

69. Secondly, the reference to the current City of Cape Town City Manager, Lungelo Mbandazayo as "the erstwhile City Manager" on page 39 paragraph [91] of the Adonisi judgement is incorrect. Mr Mbandazayo is the current City Manager and was in that position at the time of deposing to the affidavit on behalf of the City.

70. The abovementioned errors are not material to the City's application for leave, however, but if possible should be corrected in the judgment for purposes of accuracy.

Conclusion:

71. The City seeks leave to appeal in the above two matters in particular in the Adonisi order which, the City believes there are reasonable prospects of success. With reference to the City, whilst largely in agreement with the factual conclusions in the judgement, the order of Court is at dissonance with the judgment and as such

must be set aside in the respects set out above. Namely the orders against the City at paragraphs 1 – 6 and paragraph 12.

72. The appeal in the Human Settlements Matter, merely seeks to undo the costs order and given that this matter will be before the SCA in any event if leave is granted in the Adonisi matter, it won't be a case of simply a costs order. Moreover, this relief is not simply sought because of the costs but for the precedent it sets.

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10 November 2020