IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 522/2021 and 523/2021
WCHC Case Nos: 7908/2017 and 12327/17

In the matter between:

MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	First Appellant
PREMIER OF THE WESTERN CAPE PROVINCE	Second Appellant
THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	Third Appellant
MINISTER OF HUMAN SETTLEMENTS: WESTERN CAPE	Fourth Appellant
CITY OF CAPE TOWN	Fifth Appellant

and

THOZAMA ANGELA ADONISI	First Respondent
PHUMZA NTUTELA	Second Respondent
SHARONE DANIELS	Third Respondent
SELINA LA HANE	Fourth Respondent
RECLAIM THE CITY	Fifth Respondent
TRUSTEES OF NDIFUNA UKWAZI TRUST	Sixth Respondent

and

In the matter between:

PREMIER OF THE WESTERN CAPE PROVINCE	First Appellant
MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	Second Appellant
CITY OF CAPE TOWN	Third Appellant

and

MINISTER OF HUMAN SETTLEMENTS	First Respondent
NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS	Second Respondent
SOCIAL HOUSING REGULATORY AUTHORITY	Third Respondent

FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT
IN SCA CASE NO. 523/2021

Introduction

1. This is an appeal against the judgment and orders of the Western Cape High Court (*per* Gamble J, Samela J concurring) in respect of an application instituted, *inter alia*, by the Minister of Human Settlements ("the Minister" and "the Minister's application").[1]

[1] The Minister's application was heard together with the application instituted by Ndifuna Ukwazi Trust and others ("the NU application") against the First and Second Appellants ("the WCG") and the Third Appellant ("the City") whereafter the Court *a quo* handed down one judgment, but granted separate orders.

2. The issues for determination in the appeal, as outlined by the WCG[2], are the following:

2.1 whether the WCG is in breach of its obligation to provide social housing in "central Cape Town";

2.2 whether there should be a structural interdict against the WCG and the City in respect of social housing in Cape Town;

2.3 whether regulation 4(6) and the proviso in regulation 4(1) of the Western Cape Land Administration Regulations[3] ("the impugned regulations") are unconstitutional;

2.4 the effect of the Government Immovable Asset Management Act, No 19 of 2007 ("GIAMA") on the ability of national government and provincial governments to dispose of immovable property owned by them;

2.5 whether Sea Point falls within a restructuring zone; and

2.6 whether a provincial government is obliged to consult and engage with national government before disposing of a property belonging to the provincial government ("the IGFRA issue").

[2] WCG's heads of argument, para 5
[3] Promulgated under section 10 of the Western Cape Land Administration Act, No 6 of 1998 ("the WCLAA")

3. The last four of the abovementioned issues pertain to the Minister's application and they are addressed below. We address the IGFRA issue at the outset as it is the central issue in the Minister's application.

4. The sole issue in the City's appeal against the Minister relates to whether the Court a quo erred in ordering those parties to bear their own costs.

The obligation to consult in terms of the Intergovernmental Relations Framework Act 13 of 2005 ("IGRFA")

5. The Court *a quo* ordered, in paragraph 1 of the order in favour of the Minister, that the WCG had contravened its obligations in terms of Chapter 3 of the Constitution and IGRFA by failing to inform the national government of its intention to dispose of the Tafelberg properties, and to consult and engage with it in this regard before doing so.[4]

6. The WCG contends that, in so ordering, the Court *a quo* failed to identify the source of such duty on the WCG.[5]

7. There are, however, a number of sources of such duty.

8. First, there is section 41 of the Constitution, and especially section 41(h)(iv) thereof, which requires all spheres of government and all organs of state within each sphere to co-ordinate their actions and legislation with one another.

[4] Record 20/3847
[5] WCG's heads of argument, para 107

9. Secondly, section 5(c) of IGRFA reinforces this constitutional injunction by requiring the three spheres of government to seek to achieve the object of IGRFA, by, *inter alia:*

> *"co-ordinating their actions when implementing policy or legislation affecting the material interests of other governments;"*

10. As is explained hereunder, the disposal of the Tafelberg properties indisputably affected the material interests of the national government in relation to its policies and objectives of addressing the consequences of spatial apartheid.

11. Thirdly, the Western Cape has adopted a Provincial Constitution. In terms of section 4 thereof, such Provincial Constitution is the highest law in the Western Cape, subject only to the Constitution of South Africa, and the obligations imposed by it must be performed diligently and without delay.

12. Section 7 of the Western Cape Constitution requires, in express terms, compliance with the principles of co-operative government and intergovernmental relations set out in the Constitution in all the province's dealings with the national government, as well as with the other provincial governments, and the municipalities in the Western Cape.[6]

13. Fourth, the WCLAA, which the WCG contends is the principal statute governing the disposal of its property, provides in section 4 as follows:

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[6] Section 7(a)

> "4(1) *The Premier* ***must co-ordinate*** *the provincial government's actions regarding the administration of state land with the national and local spheres of government as contemplated in Chapter 3 of the Constitution and section 7 of the Constitution of the Western Cape.*
>
> (2) *The co-ordination referred to in subsection (1) will, among other things, be with a view to –*
>
> (a) ***realising the nation's commitment to land reform and the other reforms required to bring about equitable access to all South Africa's relevant natural resources****, and*
>
> (b) *rationalising the province's custody, administration and disposal of provincial state land."*
>
> (Emphasis supplied)

14. The WCG, in its heads of argument, does not deal with any of the above provisions. This is curious. In not doing so, it discloses a fundamental misunderstanding of its obligations in relation to other spheres of government when it disposes of provincial property.

15. This case concerns, primarily, the proper interpretation of the provisions of GIAMA and those of the WCLAA, and how these two Acts are to be applied in relation to each other. This is clearly a matter in which, as this case evidences, different spheres of government can have different views, and thus be in dispute.

16. In *National Gambling Board v Premier KwaZulu-Natal and Others*[7] the Constitutional Court held that a dispute about the interpretation of national and provincial legislation can constitute an intergovernmental dispute.[8]

17. In *Eskom Holdings SOC Limited v Resilient Properties (Pty) Limited and Others; Eskom Holdings SOC Limited v Sabie Chamber of Commerce and Tourism and Others; Thaba Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others*, this Court recently, with regard to the obligation on governments to engage with one another as required by section 41 of the Constitution, emphasised that the intergovernmental obligation was for all spheres to work together, and to integrate as far as possible their actions in the provision of services, the alleviation of poverty, and development of the people and the country.[9]

18. The Court went on make the following important observation:

> *"It is important to note that the s 41(2) obligation, to 'make every reasonable effort to settle the dispute', is already relevant before a dispute is declared a 'formal intergovernmental dispute'. Thus, in effect, organs of state are obliged at two (separate) stages of the process to resolve their disputes with each other, by means of whatever mechanism or procedure available to them in the circumstances, outside of the courts."*[10]

[7] 2002 (2) SA 715 (CC)
[8] At para [36]
[9] 2021(3) SA 47 (SCA) at para [63]
[10] At para [66]

19. In *Independent Electoral Commission v Langeberg Municipality*[11], the Constitutional Court said the following:

> *"All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 were designed in an effort to achieve this result."*[12]

20. And in *Grootboom*[13], the Constitutional Court said that:

> *"… the national sphere of government must accept responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's s26 obligations."*[14]

21. In the circumstances, the attitude adopted, and the reaction, by the WCG in response to the request[15] by National Treasury and the Minister that it engage

[11] 2001 (3) SA 925 (CC)
[12] At para [26]
[13] *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46
[14] At paras [39] to [40]
[15] Record 12/2172-2196

with them regarding the disposal of the Tafelberg properties is not only unfortunate but fundamentally misguided.

22. The Minister did not, as the Premier of the WCG demanded, have to justify her interest and concern regarding the disposal. She was not only entitled, but obliged, to do so.*”*[16]

23. The Minister clearly articulated the material interest of the national government in the disposal of the Tafelberg properties. Such interest furthermore arises from the involvement of the Social Housing Regulatory Authority (“the SHRA”), an agency within the national Department of Human Settlements, in evaluating the properties for social housing, as discussed in paragraph 32 below.

24. Finally, in this section, we deal with two assertions in the WCG’s heads of argument.

25. First, it is contended that an obligation to inform and consult with the Minister and her department would be at variance with the WCLAA provisions regarding disposal of property. [17] This is incorrect.[18]

26. Secondly, the contention is made that it would be inherently strange if the owner of land had to inform and consult with other spheres of government before it could dispose of its own property. The right to alienate property, so it is contended, is an important incident of ownership and property rights.[19]

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[16] Her position is set out in Annexure JG144, Record 12/2187 at para 5
[17] WCG’s heads of argument, para 113
[18] See section 4 of the WCLAA, quoted in paragraph 13 above
[19] WCG’s heads of argument, para 116

27. The above argument is inappropriate coming from a government, which is obliged to conduct its affairs in terms of Chapter 3 of the Constitution and the provisions of IGRFA, as also its own Provincial Constitution and the provisions of the WCLAA itself.

28. As aptly put by Froneman J, albeit in a concurring judgment concurred in by only one other Justice:

> "*The argument advanced on behalf of the respondent, Mr Scribante, proceeded from the premise that the initial departure point of the enquiry into the evaluation of the validity of any right that Ms Daniels may have, must be ownership of the farm. The main judgment clearly shows why this premise cannot be sustained. But it is a recurrent view of property and ownership that is often used to delay or avoid the consequences of constitutional values.*"[20]

29. In Port Elizabeth Municipality v Various Occupiers,[21] the Constitutional Court said that there is no hierarchical arrangement which privileges the rights of ownership over other rights and interests.

30. Accordingly, the Court *a quo* was correct in concluding that the WCG's failure to inform the national government or the City of its intention to dispose of the Tafelberg properties, its failure to consult with the national government or the

[20] Daniels v Scribante 2017 (4) SA 341 (CC) at para [133]
[21] 2005 (1) SA 217 (CC) at para [23]

City in this regard, or to co-ordinate its actions with other spheres of government, rendered the disposal decision unconstitutional and unlawful.

31. In making this submission, it must be clear what the Minister is saying and what she is not saying. She is <u>not</u> saying that in every disposal decision she must be consulted. However, in the circumstances of the Tafelberg properties, given government policy and the singular opportunity to redress effectively spatial apartheid in an area close to the city, the respective views of its own Department of Human Settlements[22], the City, and bodies such as NASHO and the SHRA, as also the fact that the site had previously been evaluated for social housing[23], it was required to do so in this case. This was not an ordinary disposal. This much is clear from the fact that the (belated) public participation process elicited more than 5000 submissions[24].

<u>Constitutionality of regulation 4(6) and the proviso in regulation 4(1)</u>

32. In the Minister's application, the applicants challenged the constitutionality of the impugned regulations on the basis that: (i) they are *ultra vires* the WCLAA; and (ii), they are inconsistent with section 33 of the Constitution.

<u>Ultra vires the WCLAA</u>

33. The Court *a quo*, in paragraph 5 of the order in the Minister's application, declared that the impugned regulations are unconstitutional and invalid.[25]

[22] Court *a quo* judgment, para [135], Record 20/3689; paras [141] to [143], Record 20/3690-3693
[23] Court *a quo* judgment, para [142], Record 20/3691
[24] Court *a quo* judgment, para [195], Record 20/3711
[25] Record 20/3848

34. Section 3(2) of the WCLAA prescribes the public participation process to be followed when the provincial government seeks to dispose of provincial state land.

35. Section 3(4) of the WCLAA details the information which the notice must contain in relation to the provincial state land proposed to be disposed of, in order to render meaningful any public participation.

36. In *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs*[26], which involved a challenge to immigration regulations on the basis of the Minister's non-compliance with the notice and comment procedure laid out in the enabling statute, the Constitutional Court said that it is a question of construction in each case whether a statute making provision for administrative action requires special procedures to be followed before the action is taken, and that, whether or not such provision is made, the administrative action must ordinarily be carried out consistently with PAJA.

37. Members of the public, and the categories of persons identified in section 3(3) of the WCLAA, are potentially impacted by a contract which has already been concluded. Importantly, the impugned regulations do not stipulate that public participation, and the resultant deliberation, is a condition of the contract concluded between the offeror and the WCG; the contract comes into being once it is accepted, on the terms of the offer, by the WCG.

[26] 2003 (5) SA 281 (CC) at para [59]

38. Furthermore, assuming that the WCG is persuaded by the (belated) public participation process that a provision or provisions of the already concluded contract should be revisited or renegotiated, the impugned regulations give it no power to do so. The WCG's choice is to stick with the contract in its entirety or to resile therefrom. This, in itself, demonstrates the unworkability, and procedural unfairness, of the WCG's interpretation.

39. A further important consideration is the content of the notice required in terms of section 3(4) of the WCLAA. These are the full title deed description, the current zoning, and the actual current use of the land. This, we submit, points to the fact that the legislature intended notice to be given of a proposed disposal before any contract has been entered into. Were this not the case, the section would have referred to the details of the contract, the price, etc.

40. The purpose of these provisions is clearly to ensure that members of the public are given an opportunity to engage and participate in the debate around whether a disposal should take place at all. It is well-established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that, in enacting the empowering provision, the legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it.[27]

41. Public comment and participation after the conclusion of a contract, even one from which the WCG has the option of resiling, renders it less likely that the public will have an impact on the decision ultimately taken by the WCG. The

[27] *National Director of Public Prosecutions v Mohamed NO and Others* 2003 (4) SA 1 (CC) at para [37]

public has a distinctly reduced prospect of convincing the WCG to reconsider its decision, not only to conclude the particular contract, but also the initial decision to dispose of the land at all, particularly in circumstances where the offeror has already been locked into a monetary offer.

42. The Court *a quo*, respectfully quite correctly, found that the impugned regulations effectively place a burden on a person seeking to participate in the public participation process, in that such person is required to persuade the decision-maker to reconsider and potentially go back on a decision which it has already taken and formalised[28], when the views of the public were not considered at the earlier planning stages, when the terms of the disposal were negotiated and considered.

43. Insofar as the impugned regulations contemplate a concluded agreement before the advertising requirements of section 3(2) of the WCLAA are triggered, same are contrary to the express language employed in the WCLAA, and are thus ultra vires.

Section 33 of the Constitution and PAJA

44. Although the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was promulgated after the WCLAA and the Regulations, section 4 of PAJA formulates the standard against which the constitutionality of the impugned regulations must be measured, as it gives content to the rights enshrined in section 33 of the Constitution.

[28] Court *a quo* judgment, para [253], Record 20/3736

45. Whilst the WCLAA does not prescribe a procedure for the making of regulations in terms of section 10, the Premier, whatever procedure he/she chooses, is under a duty to act fairly.[29]

46. The Constitutional Court has recognised[30] that the principal function of section 33 is to regulate conduct of the public administration and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice.

47. The WCG contends[31] that section 4 of PAJA does not apply to its decision to conclude a written contract for the disposal of land because: (i) it has no direct, external legal effect; (ii) it does not materially and adversely affect the rights of the public; and (iii), in the alternative to (i) and (ii), the impugned regulations are consistent with section 4(3) of PAJA and, in any event, provide for a fair but different procedure, as authorised by section 4(1)(d) of PAJA.

48. PAJA's definition of a decision explicitly includes a decision "made, proposed to be made, or required to be made, as the case may be …" under an empowering provision. An approach which insists that the right to challenge a decision on PAJA grounds is exercisable only upon the implementation of such decision (*in casu*, upon the WCG electing not to resile from the contract of sale)

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[29] *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA) at para [97] which dealt with the regulations promulgated under the Disaster Management Act 57 of 2002

[30] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [136]

[31] WCG's heads of argument, para 62

would be artificial and inimical to the constitutional right to fair administrative action.[32]

49. The WCG's contention that its decision to conclude a contract of disposal pursuant to section 3 of the WCLAA has no direct external legal effect is not sustainable in light of the above.

50. The argument that the decision does not, as a fact, materially and adversely affect public rights is also flawed. The Constitutional Court has, since this Court's judgment in *Grey's Marine,*[33] endorsed the test in this regard as being "the capacity of a decision to affect legal rights"[34].

51. As submitted above, the impugned regulations do not comply with the provisions of section 4(3) of PAJA in that they do not provide an opportunity for the members of the public whose rights are potentially impacted by a decision to dispose of provincial state land to make representations in that regard prior to the conclusion of a contract of sale.

52. Whilst an administrator may, in terms of section 4(1)(d) of PAJA, follow a different procedure to that prescribed in the empowering provision, such a procedure has to be fair.

[32] *Cf* *AfriForum and Another v University of the Free State* 2018 (2) SA 185 (CC) at para [32] where the Constitutional Court held that decisions which relate to the award of tenders adversely affect the rights of those who lost out and such decisions have a direct external legal effect even before the successful tenderer executes the contract.
[33] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA)
[34] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at para [30]

53. Whether the public must be granted a hearing and an opportunity to make representations prior to the first stage of a multi-staged process, to some extent, depends upon the nature of the decision, the expertise of the relevant functionaries, and the stage/s at which the weighing of the relevant considerations takes place.[35] For the reasons stated above, the circumstances of this case militate in favour of the WCG employing a notice and comment procedure prior to taking a decision to accept an offer for the land in question. This is so given the substantial public impact of the decision to dispose of the Tafelberg property, in the context of a growing need for racial integration and the provision of social housing opportunities in areas such as Sea Point, as well as the objects of the WCLAA, all of which were dealt with in the judgment of the Court *a quo*.[36]

The Government Immovable Asset Management Act, No. 19 of 2007 ("GIAMA")

54. The Court *a quo* found that the WCG did not comply with the requirements of GIAMA, *inter alia,* because there was neither a U-AMP or C-AMP in place, on the parts, respectively, of the Provincial Department of Housing ("PDHS") or the Provincial Department of Public Works ("PDPW"), and that, in any event, the property could only be sold in the open market, in terms of section 13(3) of GIAMA, if it was surplus as contemplated in terms of the Act.[37]

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[35] Hoexter and Penfold *Administrative Law in South Africa* 3rd ed p604
[36] Paragraphs [128] to [131] thereof; Record 20/3686-3688
[37] Court *a quo* judgment, at paras [292] and [298], Record 20/3750 and 3752-3753

55. The WCG attacks these findings on a myriad of bases. We deal with these hereunder.

56. This Court recently reaffirmed, with reference to _Natal Joint Municipal Pension Fund v Endumeni Municipality_[38], the principles relating to statutory interpretation, *viz* that "*the 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*"[39]

57. The Court went on to say the following:

> *"That the text, context and purpose of the legislation must be considered together when interpreting a statutory provision, has been affirmed in various decisions of the Constitutional Court."*[40]

58. The WCG's main argument is that the Court *a quo* misconstrued GIAMA as being the principal empowering legislation when it comes to the disposal of state land, whereas the legislation was principally intended to create a system for the management of assets within provincial and national governments. The power of the three spheres of government to dispose of property is conferred directly by the Constitution and other legislation.[41]

[38] 2012 (4) SA 593 (SCA) at para [18]
[39] _Pride Milling Co (Pty) Ltd v Bekker NO and Another_ 2022 (2) SA 410 (SCA) at para [9]
[40] *Ibid* and the authorities referred to at footnote 2 of the judgment
[41] WCG's heads of argument, para 68

59. The Court *a quo* further erred, so it is contended by the WCG, in finding that GIAMA had not been complied with inasmuch as there was no U-AMP in place at the time of the disposal.[42]

60. The WCG further contends that, on the undisputed evidence, the implementation of C-AMPS and U-AMPS is taking place on an incremental basis, and will not be completed for an uncertain number of years into the future.[43]

61. With specific reference to the provisions of GIAMA, the WCG contends that section 5(1)(f) is intended to create a mechanism internal to government designed to ensure that assets are not disposed of without the custodian giving careful consideration as to how that asset might be used internally, and to achieve the objectives described in sub-paragraphs (i) and (iii).[44]

62. Insofar as section 13(3) is concerned, the WCG contends that this provision does not mean that a provincial government may only dispose of immovable property if it is surplus. What GIAMA requires, so the WCG contends, is that before property which has become surplus to a user is disposed of to the world at large, the custodian must consider whether or not it can be used by another user department. Section 13(3), so it is contended, is not intended to create a limitation on the power of a provincial government to dispose of its property. It is instead an elucidation of the function of the custodian.[45]

[42] WCG's heads of argument, paras 64 and 65
[43] WCG's heads of argument, para 65 and 66
[44] WCG's heads of argument, para 85
[45] WCG's heads of argument, para 87

63. The WCG contends that the existence of U-AMPs and a C-AMP is not a requirement for the valid disposal of removal property, and relies in this regard, *inter alia*, on the date that such requirements came into operation in relation to national government, and contends that the ensuing moratorium on such disposals was plainly not the purpose of the legislation and that the result would not be sensible.[46]

64. Finally, and in the event that this Court considers a statutory interpretation issue to arise, it is contended that regard should be had to the manner in which those responsible for implementing GIAMA have treated the requirement that there be C-AMPs and U-AMPs, and that this tips the balance in favour of the interpretation contended for by the WCG.[47]

65. Properly construed, GIAMA clearly is not limited in its scope of operation to governing the internal workings of government. It is intended to impose <u>additional</u> obligations on national and provincial governments when they dispose of state land. This is clear from the following:

    65.1 The definition of "disposal" is any disposal contemplated in the State Land Disposal Act (Act No 48 of 1961) or a provincial land administration law.

    65.2 That the legislature, in enacting GIAMA, was fully aware of the existence, and requirements, of the various provincial land administration laws is

[46] WCG's heads of argument, para 90
[47] WCG's heads of argument, paras 92, 93 and 94

apparent from the aforesaid definition, as also the schedule to the Act which lists the various provincial land administration laws.

65.3 Accordingly, it is apparent that, in enacting GIAMA, the legislative intent was that <u>both</u> the provisions of GIAMA and those of the relevant provincial land administration laws, and the State Land Disposal Act where applicable, had to be complied with.

66. We point out that, despite the passing reference in footnote 82 of the WCG's heads of argument, to framework legislation which does not encroach on the functional or institutional integrity of the provincial sphere, the WCG has neither challenged GIAMA, or contended that it suffers from any constitutional infirmity. Thus the provisions of sections 146 to 150 of the Constitution are not relevant to the present interpretative exercise.

67. Section 5(1)(f) of GIAMA provides as follows:

> *"in relation to a disposal, the custodian must consider whether the immovable assets concerned can be used –*
>
> *(i) by another user or jointly by different users;*
>
> *(ii) in relation to social development initiatives of government; and*
>
> *(iii) in relation to government's socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth."*

68. This provision clearly requires government, in both the national and provincial spheres, to consider the matters referred to, not only in relation to their own sphere of government, but also in relation to initiatives and objectives of government in other spheres.

69. Put another way, neither the national or provincial governments are permitted to ignore the initiatives and objectives of another sphere of government. To do so would not only be contrary to section 5(1)(f) of GIAMA, but would also amount in this case, as we argue elsewhere in these heads of argument, to a breach of the requirements of Chapter 3 of the Constitution, section 7 of the Western Cape Constitution, and the express requirements of section 4 of the WCLAA.

70. Section 6(1)(a) and (b) of GIAMA impose upon a custodian and a user respectively the obligation to prepare an immovable asset management plan, referred to throughout this case as "a C-AMP" and as "U-AMPs".

71. In terms of sections 7 and 8, these plans must include, respectively, a disposal strategy and management plan (in the case of a C-AMP) and an immovable asset surrender plan (in the case of U-AMPs).

72. That a U-AMP is intended, in terms of GIAMA, to impose obligations on a user, in addition to those imposed by the WCLAA, is apparent from section 10.

73. It provides as follows:

> *"A user management asset management plan –*

(a) *is the principal immovable asset strategic planning instrument which guides and informs all immovable asset management decisions by the user;*

(b) *binds the user in the exercise of its executive authority, except to the extent of any inconsistency between a user immovable asset management plan and this Act or the immovable asset management guidelines published by the Minister under section 19, in which case this Act or those guidelines prevail."*

74. Finally, in respect of the contention that GIAMA, properly construed, imposes obligations on government which must be complied with before it can dispose of an immovable asset, we refer to the requirements of section 13(3).

75. It provides as follows:

"A custodian may dispose of a <u>surplus immovable asset</u> –

(a) *by the allocation of that immovable asset to another user; or*

(b) *subject to the State Land Disposal Act, 1961 (Act No. 48 of 1961), and any provincial land administration law, by the sale, lease, exchange or donation of that immovable asset or the surrender of a lease."*

(Emphasis supplied)

76. The definition of "surplus" in GIAMA refers to the fact that the immovable asset no longer supports the service delivery objectives of a user.

77. In turn, "user" is defined as "*a national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives ….*" (Emphasis supplied)

78. The contention by the WCG in its heads of argument that a provincial government is authorised by the Constitution and the applicable provincial law to dispose of its immovable property whether or not it is surplus, and that, properly construed, section 13(3) is not intended to create a limitation on the power of a provincial government to dispose of its property, but only requires that when an immovable asset no longer supports the service-delivery objectives of a user, the custodian may allocate it to another user or may dispose of it, is simply incorrect.

79. As appears from the emphasised words quoted in section 13(3) above, a custodian may only dispose of an immovable asset that is surplus to its requirements, as defined in GIAMA.

80. Once the determination has been made, in line with the relevant U-AMP and with the C-AMP, that an immovable asset is surplus, it may be disposed of in one of two ways:

80.1 either by the allocation of that immovable asset to another user; or

80.2 subject to the State Land Disposal Act, or the relevant provincial land administration law, to the world at large.

81. It follows from the above that, in the absence of the C-AMP and U-AMPs required by GIAMA, and in the absence of compliance with the other requirements of GIAMA, a government may not dispose of its immovable assets. This is a natural consequence of the provisions of the Act, properly construed.

82. The WCG contends, on various grounds, that this is an impractical and unreasonable reading of the Act, and does not result in a sensible interpretation. We disagree.

83. As to the argument that no government would be able to dispose of any immovable property until such time as a C-AMP and U-AMPs are in place, this is not so. Section 15 of GIAMA expressly permits the Minister, by notice in the *Gazette*, in respect of certain immovable assets or categories of immovable assets, to exempt any organ of state or part thereof from any provision of the Act for a period determined in the notice. There is, accordingly, a ready solution to the supposed predicament in which government would find itself were it not to have the requisite C-AMP and U-AMPs in place. There is, however, no indication in the record that the WCG ever applied for such an exemption.

84. As to the WCG's argument that the peremptory requirements of GIAMA in relation to C-AMPs and U-AMPs are being incrementally implemented, with the knowledge and concurrence of National Treasury and all the provincial treasuries, but will take time to bring into operation, thereby suggesting that this

is a legal basis to excuse non-compliance, this is a fundamentally unsound argument.

85. The Constitutional Court has described the requirement that government may only act within the powers lawfully conferred upon it, as a fundamental principle of the rule of law.[48]

86. In S v Mabena[49] this Court said the following as to compliance with legal provisions:

> *"The Constitution proclaims the existence of a state that is founded on the rule of law. Under such a regime legitimate state authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity. That is the cardinal tenet of the rule of law."*[50]

87. If GIAMA, properly construed, requires that there be a C-AMP and U-AMPs in place before a government may dispose of its immovable assets, then its attempt to do so without these being in place is simply a nullity.

88. The WCG further contends that the fact that sections 6 and 13 of GIAMA came into operation at its commencement is a clear indicator that the existence of C-

[48] *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1991 (1) SA 374 at para [56]
[49] 2007 (1) SACR 482 (SCA)
[50] at para [2]

AMPS and U-AMPS was not a requirement for a valid disposal. This argument too is without merit.

89. GIAMA was assented to on 22 November 2007 and commenced on 30 April 2009, when most of its provisions came into operation. However, sections 6 and 13 only came into operation in respect of provincial departments on 1 April 2019, 11 months later.

90. Section 9, dealing with the submission of C-AMPS to the relevant treasury, only came into effect on 1 April 2010 (national departments) and 1 April 2011 (provincial departments).

91. Thus, GIAMA only commenced some 17 months after being assented to. In the case of provincial governments, there was a further period of 11 months to make the necessary arrangements. There was a further 11 months and 23 months, respectively, for the submission of C-AMPS.

92. There was clearly sufficient time for governments to prepare for the requirements of GIAMA.

93. The WCG further contends, reliant on the judgment of this Court in *Commissioner, South African Revenue Service v Bosch and Another*[51] *("Bosch"),* that the fact that GIAMA has been consistently interpreted since its enactment by those responsible for its administration as not imposing as a legal requirement for a valid disposal of land the existence of "fully compliant" U-

[51] 2015 (2) SA 174 (SCA) at para [17]

AMPs and C-AMPS, should tilt the balance in favour of such interpretation. This argument is ill-conceived, for the following reasons:

93.1 First, ***Bosch*** sets two requirements for the principle to apply, *viz* that it must relate to a marginal question of interpretation, and it must have been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation.

93.2 The requirements for a C-AMP and U-AMPs to be in place for a valid disposal, and for the immovable asset to first to be determined as surplus, are not marginal questions of interpretation. They are plain, we respectfully submit, for the reasons set out above.

93.3 Second, GIAMA has been on the statute books only since 2009. In context, this, we submit, does not amount to a substantial period of time.

93.4 Third, it is apparent that the WCG's contention is not that a C-AMP and U-AMPs are not a requisite of GIAMA. It cannot sensibly so contend, as they quite clearly are. Instead, its contention is that "fully compliant" C-AMPs and U-AMPs cannot be expected at present, and thus disposals of land should be permitted to continue in the interim while the requirements of GIAMA are incrementally implemented.

93.5 For the reasons already dealt with above, this is impermissible and amounts to the deliberate ignoring of mandatory statutory requirements by those responsible for the administration of the law. This is fundamentally contrary to the rule of law, especially where, if

they were so minded, the relevant government or governments could have applied to the Minister for exemption from the requirements if they found them unduly onerous or impossible to comply with.

94. As pointed out in footnote 103 to the WCG's heads of argument, the Constitutional Court has in any event sounded a cautionary note as regards this approach in a constitutional democracy, as opposed to a system of legislative supremacy.

95. Finally, and with regard to the WCG's attempt to rely upon evidence of the Memorandum which accompanied the Bill that became GIAMA, on the same basis as in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*[52], the judgment relied on was that of a single judge, Mokgoro J, with which none of the other Justices concurred. The majority judgments were those of Didcott, J and Langa J. In any event, and as pointed out by du Plessis[53], Mokgoro J was careful to emphasise that reference to the speech by the Minister during the second reading of the Bill was referred to for the purpose of sketching the background to the impugned statutory provision, and was not intended to be utilised in the interpretation thereof.

96. For all of the above reasons, we respectfully submit that the Court *a quo*'s conclusion as to the proper interpretation and applicability of GIAMA was correct.

[52] 1996 (3) SA 617 (CC) at para [12] and footnote 18

[53] *Re-Interpretation of Statutes*, Lourens du Plessis, at page 268

Whether Sea Point falls within a restructuring zone

97. In the NU application, the Court *a quo* made a declaratory order to the effect that Sea Point falls within the restructuring zone "CBD and surrounds (Salt River, Woodstock and Observatory)" as contemplated in sub-regulation 6.1 of the Provincial Restructuring Zone Regulations published under General Notice 848 in Government Gazette 34788 of 2 December 2011.[54]

98. This finding was challenged on a number of bases by the WCG.

99. First, it is contended that, in so ordering, the Court *a quo* breached the constitutional principle of separation of powers because it usurped the role of the Minister, who was authorised in terms of section 3(1)(f) of the Social Housing Act, 16 of 2008 ('the Social Housing Act") to designate restructuring zones. The Court *a quo* had neither the expertise nor the constitutional authority to do so, so it is contended.[55]

100. But the Court *a quo* did no such thing. Upon a consideration of the facts and by the application of legal principle, the Court *a quo* issued a declaratory order as to whether Sea Point fell within the definition in the Gazette.

101. It was authorised to do so in terms of section 21(1)(c) of the Superior Courts Act, 10 of 2013.

[54] Court *a quo* judgment, para 9 of the order, Record 20/3846
[55] WCG's heads of argument, para 97

102. Under common law, the High Court did not have the jurisdiction to grant declaratory relief.[56] Such power was conferred upon the High Court by the provisions of section 102 of the General Law Amendment Act, 46 of 1935. Currently it is governed by section 21 of the Superior Courts Act.

103. The requirements in respect of the granting of a declaratory order are two-fold[57]:

a) The court must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation.

b) Once a court is so satisfied, it must consider whether or not the order should be granted.

104. It is submitted that the Court *a quo*, in granting the declaratory relief sought by both the NU respondents and the Minister, was not trenching upon the separation of powers principle, but was carrying out its judicial function as envisaged in the Superior Courts Act.

105. The WCG contends that the Court *a quo* did not consider "its principal argument", which was that section 3(1)(f) of the Social Housing Act requires the designation of a restructuring zone to be made by the Minister, with the result that a designation by her department cannot have legal effect. The WCG further contends that there was no evidence of a delegation.

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[56] *Geldenhuys and Neethling v Beuthin* 1918 AD 426
[57] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Limited* 2005 (6) SA 205 (SCA) at [213E-G]

106. This argument is however not open to the WCG to make.

107. The WCG did not challenge or review the gazetting of the restructuring zone, in the terms averted to above. Absent such a challenge, and on the authority of *Oudekraal*[58], the designation of the restructuring zone stands. The only issue that arises is its proper interpretation.

108. The Court *a quo*[59] considered the meaning of the word "surrounds" with reference to the Shorter Oxford English Dictionary. The WCG does not appear to take issue with this approach.

109. The Court *a quo*[60] further considered the geography of the City of Cape Town, which it is submitted constitute notorious facts of which a court is entitled to take account, and concluded that various areas not referred to in in the Gazette would constitute "the surrounds" of the CBD.

110. The Court *a quo* relied extensively on the affidavit by Mr Molapo, of the City's Directorate of Land and Forward Planning, as to the background and genesis of the gazetting of the restructuring zone at issue in this matter.

111. The Court *a quo* summarised Mr Molapo's affidavit in paragraph [341] of its judgment. The salient features of the summary, for present purposes, are the following:

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[58] *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2010 (1) SA 333 (SCA)
[59] Court *a quo* judgment, para [328], Record 20/3762
[60] Court *a quo* judgment, paras [329] to [330], Record 20/3762

111.1 "*34. At all material times the City (and other role players, including the Provincial Department of Housing …) regarded the 2011 notices as having legal efficacy and RCG funding was accessed from SHRA pursuant thereto. Prior to the dispute in relation to the Tafelberg site, no one had taken issue with this approach, and as far as the City was concerned, when the motivation for RZs had been done it was at all material times contemplated that as far as the CBD RZ was concerned it included – and was not necessarily limited to – Sea Point, Greenpoint, Oranjezicht, Vredehoek, District Six, Observatory, Salt River, Woodstock, Maitland, Walmer Estate and University Estate, even though a number of these areas were not specifically mentioned in the gazette."*[61]

111.2 *"35. It was also not contemplated by the City that these RZs would only be gazetted as "provisional RZs". It is apparent from the gazette that the RZs relate to areas so designated in all the major metropolitan areas [in South Africa]. The City has understood the initial RZs to have been promulgated as provisional in the sense that the City could then add further RZs, which it then did."*[62]

111.3 *"36 I cannot speak for the other parties but when SHRA allocated the funding in 2011 for the assessment of the viability of the Tafelberg site, it was consistent with, at the very least, my view at the time as a representative of the City and that of Catherine Stone, the*

[61] Record 20/3769 - 3770

[62] Record 20/3770

former director for Spatial Planning and Urban Design, that there was no difficulty in SHR (sic) *doing this, because the Tafelberg site formed part of the CBD RZ. This is consistent with the views which Ms August, from the Provincial DHS, relayed to the Premier. As far as I am aware, there was agreement that such study should be conducted."*[63]

112. It is submitted that this evidence, by way of background and to provide context, is compelling and is not answered by the WCG, as the Court *a quo* correctly found.[64]

113. The WCG, furthermore, does not explain why the very legal argument that it raises in footnote 103 of its heads of argument should not be utilised in support of Mr Molapo's contention as to what the general understanding was among the various spheres of government charged with the provision of social housing. It is submitted that, in this instance, such evidence does indeed tip the balance in favour of the construction of the Gazette, as contended for by both the City and the Minister.

114. Finally, and with regard to this part of the case, what is glaring is that the WCG made no attempt to clarify the position with the Minister, or indeed, to have Sea Point expressly declared as part of a restructuring zone, in order to advance

[63] Record 20/3770

[64] Court *a quo* judgment, para [342], Record 20/3771

government's common socio-economic objectives in relation to the provision of affordable housing in areas close to the CBD.[65]

115. As submitted in the section dealing with IGRFA, this amounted to a profound failure by the WCG to understand its constitutional obligations.

THE CITY'S APPEAL

116. In relation to the Minister's application, the Third Appellant ("*the City*") seeks to appeal the factual finding which led the Court *a quo* to conclude that the City was only cited because of its potential interest in the dispute and that it responded to the Minister's application even though no relief had been sought against it.[66] The City asserts that the Court *a quo*'s conclusion that it litigated at its own peril was factually incorrect.

117. It is indeed so that, when instituting the application, the Minister sought, *inter alia*, an order[67] directing the WCG and the City to engage with the Minister in an intergovernmental dispute resolution process as envisaged by Chapter 3 of the Constitution and regulated by IGRFA.

118. As such, the City contends that it had to oppose the relief sought against it.

119. The Minister's supporting affidavit, in addressing the abovementioned relief, makes it plain that such relief is based upon the express provisions of IGRFA, as read with section 3 of the Constitution. Quite plainly, the intergovernmental

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[65] Court *a quo* judgment, paras [358] and [359], Record 20/3777-3778
[66] The City's heads of argument, para 74
[67] Notice of motion para 4; Record 17/3151; amended notice of motion, Record 18/3325

dispute which is relevant to this matter affected all three spheres of government. The Minister, however, made no factual allegations against the City in the founding affidavit in relation to the intergovernmental dispute[68].

120. The City, in its answering affidavit to the Minister's application[69], acknowledged that the only relief sought against it is that set out in paragraph 4 of the notice of motion, in addition to an order as to costs, in the event that it opposed such relief. The City correctly asserted further that there were no averments directly made against the City by the Minister in the founding affidavit or the supplementary founding affidavit.[70]

121. The City's position vis-à-vis the Minister[71] is that it was not embroiled in any dispute with the Minister[72], and that it welcomed any request by the Minister and/or the WCG to engage in relation to social housing matters and making land available for such purpose. The City contended that the correspondence[73] from the Minister which purported to serve as the intergovernmental dispute declaration in fact did not reach it prior to the institution of the Minister's application.[74]

122. The Minister took no issue with any of the averments in the City's answering affidavit.[75]

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[68] Record 17/3190-3196
[69] Para 4, Record 19/3517
[70] Paras 11, 14; Record 19/3519
[71] Set out in its 10-page affidavit
[72] Para 20.2, Record 19/3523
[73] Record 19/3525
[74] Para 20.6, Record 19/3523
[75] Paras 137 to 166 of the Minister's replying affidavit, Record 19/3583-3592

123. Notwithstanding this stance, the City vigorously (and inconsistently) persisted with its opposition to the relief sought by the Minister. The City's position is that the Minister, given the City's abovementioned stance, should not have persisted in seeking the relief in paragraph 4 of the notice of motion. It is quite clear, however, that the IGRFA relief sought by the Minister had to include the City in order to be workable. As stated in the Minister's replying affidavit,[76] the relief sought "as against" the City flows from the declaratory order sought in paragraph 3 of the notice of motion, and the City undoubtedly has a material interest in the resolution of the intergovernmental dispute.

124. In the circumstances, the Court *a quo* did not misdirect itself in finding that there was in fact no *lis* between the City and the Minister[77], and that, where the former elected to oppose the IGRFA relief notwithstanding its tender to consult with the Minister (which tender was made after the proceedings had been instituted and affidavits had been filed), it did so at its own peril. It was therefore just that the City be liable for its own costs arising from the proceedings before the Court *a quo.*

125. It is trite that the issue of costs is one of judicial discretion. [78]

126. If there are factors which the trial Court, in the exercise of its discretion, can and legitimately does decide to take into account so as to make a costs order,

[76] Para 140, Record 19/3584

[77] This echoes the Minister's position, adopted in the replying affidavit, para 138, Record 19/3584

[78] In *Molteno Bros v SA Railways* 1936 AD 408 at [417], this Court held that it "*will not reverse the decision of a lower court as to costs unless it is quite clear that some important factor escaped the attention of the lower court or unless the discretion exercised has not been a judicial discretion*".

a Court on appeal is not entitled to interfere - even although it may or even probably would have given a different order.[79]

127. This Court will only interfere with the costs award if it concludes that the Court *a quo* exercised its discretionary power capriciously, or that it was moved by a wrong principle of law or an incorrect appreciation of the facts.[80]

128. There is no evident failure on the part of the Court *a quo* to exercise its discretion judicially when it comes to ordering the City to pay its own costs. The Court *a quo* did not fail to have regard to a material fact or legal principle in granting the order which it did.

129. If it is the City's position that it was at all times willing to engage with the Minister on the relevant issues, then it was not necessary for it to have participated in the Minister's application. The City, contrary to what it contends,[81] was not compelled to file its answering affidavit, particularly as it had no substantive objection to the granting of the relief sought as pertaining to it. It elected to do so. Its costs in doing so must therefore be for its own account.

130. The City contends[82] that, having concluded that the WCG did not comply with its obligations under Chapter 3 of the Constitution, the Court *a quo* should have concluded that the Minister, similarly, in instituting Court proceedings against the City, did precisely the same. This contention, however, takes the City's case no further. The evidence before the court a quo was that the Minister attempted

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[79] *Naylor v Jansen* 2007 (1) SA 16 (SCA) at [23E] to [24E]
[80] *Ferris and Another v First Rand Bank Ltd* 2014 (3) SA 39 (CC) paras [28] and [29]
[81] The City's heads of argument, para 79
[82] The City's heads of argument, para 77

to engage the City prior to launching its application. The Court *a quo's* order that the City bear its own costs was made on that factual basis.

131. Whilst it is correct that the Minister, during the hearing of the application, elected not to persist in seeking the relief in paragraphs 3 and 4 of the notice of motion, it did so on account of the fact that a review of the sale of the Tafelberg property would require the WCG to recommence the disposal process, if it was so minded, and a *mandamus*, which effectively obliged the WCG to enter into a dispute resolution process under IGRFA in relation to the intended sale of the property would, at that stage, have served no purpose.[83]

132. Lastly, the costs incurred by the City in opposing the relief sought in the Minister's application do not form a substantial portion of its costs when regard is had to the costs incurred by it in opposing the NU application, which constituted the vast majority of its argument and the affidavits and heads of argument filed by the City in this litigation. During the hearing of the applications, the City's submissions in respect of the Minister's application (which pertained to the costs argument only) were very succinct. The overwhelming focus of the City's opposition was in respect of the NU's application and, in particular, its claim for a structural interdict as against the City.

[83] Court *a quo* judgment, para [521] Record 20/3842

133. Moreover, the City's costs in opposing the Minister's application are likely to have been insubstantial when compared to the costs which the City has incurred, and is likely to incur, in pursuing this appeal until its conclusion.

Conclusion

134. For the reasons aforesaid, we respectfully submit that the appeals should be dismissed, and:

134.1 in the case of the WCG, that the costs of the appeal should be awarded to the Minister, including the cost of three counsel;

134.2 in the case of the City, that there be no order as to costs.

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28 April 2022